

**BRINGING DOWN THE HOUSE: GAMBLING, SPECULATION AND THE
MAKING OF THE SMALL INVESTOR IN COLONIAL INDIA, 1867-1943**

Baishakh Chakrabarti

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Supervisor of Dissertation

Projit Mukharji, Professor, History and Sociology of Science

Graduate Group Chairperson

Davesh Soneji, Associate Professor, South Asia Regional Studies

Dissertation Committee

Projit Mukharji, Professor, History and Sociology of Science

Daud Ali, Associate Professor, South Asia Regional Studies

Lisa Mitchell, Professor, South Asia Regional Studies

Mitra Sharafi, Evjue-Bascom Professor of Law and Legal Studies, University of Wisconsin-Madison

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ACKNOWLEDGMENT

The dissertation is the culmination of a serendipitous encounter in the archive. Years ago, in 2011, as students at CHS in the Jawaharlal Nehru University in Delhi, we were exposed to the National Archives of India and directed to write a seminar paper on the basis of our primary research. It was then that I found a file on ‘rain gambling’, practiced in Calcutta in 1897. Self contained and narratively rich, the file was the kernel around which almost 10 years of academic research began forming. Since then, it has been refined and reduced from its explosive and imaginative potential to a piece in a broader, albeit eclectic historical inquiry. This tempering was aided by a host of teachers, mentors, colleagues and friends who provided support, guidance, patience and succor in what now seems like an exhausting yet gratifying academic journey.

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drive replaced the panic of the last years of writing with unadulterated pleasure. I will miss my roommates as I move on to the next chapter in my life.

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ABSTRACT

BRINGING DOWN THE HOUSE: GAMBLING, SPECULATION AND THE MAKING OF THE SMALL INVESTOR IN COLONIAL INDIA, 1867-1943

Baishakh Chakrabarti

Projit Mukharji

My dissertation uses the history of gambling and speculation to narrate the growth of commodity exchanges and markets that emerged in colonial India during the early twentieth century and the clientele they attracted. My project intervenes in a number of major existing debates in the histories of law and governmentality, finance and political economy and ‘vernacular’ knowledge and networks of circulation in South Asia. Existing works in these fields have tended to depict state engagements with practices such as ‘commodity speculation’ and ‘gambling’ within a framework of ‘colonial governmentality’, ‘market rationality’ and the ‘legal standardization’ of market behavior. By closely following the anti-gaming laws of the late nineteenth and early twentieth centuries, this dissertation moves beyond the regulative ideals of colonial policing and interrogates the actual operations of colonial laws, their anxieties and the inconsistent categories they generated. In the process, I historicize the shifting definitions regarding native gambling, which passed through multiple regimes of legal classifications during this period. I show how the practice of gambling, which earlier corresponded to precise legal

definitions became undefined when commercial actors and native business communities became its major practitioners. Additionally, the project reveals the impact of extra-legal, normative discourses that transformed the once criminalized ‘petty gambler’ into the ‘useful’ ‘small investor’. While the histories of twentieth century Indian capitalism have focused largely on the contributions of large business houses and post-colonial state planning, my dissertation accounts for the tactics that helped liberate petty capital away from ‘savings’ and redirected them towards risky speculation. I do so by showing how the prognostic literature of astro-meteorological weather manuals that predicted the chances of rainfall, reoriented themselves to predict the future prices of commodities like cotton, jute and grain. In doing so, they were able to turn a section of working class gamblers off the ‘rain betting’ houses of Calcutta, Delhi and Bombay and onto options and derivative markets in commodities.

TABLE OF CONTENTS

ACKNOWLEDGMENT.....	iii
ABSTRACT.....	viii
Preface.....	xi
CHAPTER 1 Write, Define, Legislate: Producing the ‘Common Gaming House’	1
CHAPTER 2 Bringing down the House: In Pursuit of Practice	61
CHAPTER 3 Gaming contracts: Normative Strategies and the Making of a Discourse	131
CHAPTER 4 Commercial Contracts: The Pedagogy of Political Economy	209
CHAPTER 5 The Ignorant Student	275
CHAPTER 6 Conclusion	324
APPENDIX A: LEGISLATION.....	337
BIBLIOGRAPHY	349

Preface

Indian cricketers advertise everything. From soft drinks, clothes, cars, and real estate, they have moved onto mutual funds and online gaming leagues. Quite routinely on Indian television, Virat Kohli dances in the background of the ‘Mobile Premier League’, Harbajhan Singh popularizes ‘Rummy culture’ and Yuvraj Singh informs you of the money to be made on ‘Howzatt’. Simultaneously, Sachin Tendulkar and Mahendra Singh Dhoni urge a sluggish middle class to abandon their traditional savings in fixed deposits and redirect their capital towards more risky investments through systematic investment plans or SIPs. They encourage the young to abandon unregulated markets and appeal to a risk-averse generation to invest in mutual funds that promise higher returns along with higher risk. To that end, these advertisements end by directing their audience to a website called mutualfundssahihai.com, where they can access further literature and information in order to make an informed decision. The final seconds close with a breathless reading where the audience is informed that ‘mutual funds are subject to market risks’ and that they should ‘read the offer documents carefully before investing’.¹

These pedagogical advertisements cautiously encourage market speculation while gently exposing its potential pitfalls. Online rummy or other money-making fantasy games, however, carry no such caveat. Instead, their disclaimer loosely translates to ‘this game is subject to financial risk and can lead to addiction; please play responsibly and at your own

¹ <https://www.youtube.com/watch?v=A1PwW9CnFBg>

risk’.² They titillate their audience, exciting them with prospects of winning big with minimum effort. Money is to be made through play, not work, and so, no further research or reference is needed on part of the player. In essence, however, both sets of advertisements build towards a common goal - a familiar and overlapping cast of characters emphasize the needs and advantages of risk-taking to a hesitant class of petty capital. Discursively, risk functions on layered registers and acts through multiple technologies; at one moment it presents itself as an unadulterated instinct for play, at another, it is a sophisticated form of work. While both gambling and speculation engage these different aspects of risk, they are putatively differentiated in form and connotation. Accordingly, the disclaimer to ‘rummy play’ cautions its audience of both financial risk and that of addiction, a warning that goes surprisingly missing when it comes to market speculation. More than a legal distinction, it is the medicalized deployment of ‘addiction’ that erects a palpable boundary between a social activity (play) and a commercial practice (work) under the conditions of finance capitalism; after all, it’s a good thing to be ‘addicted’ to work.

This dissertation categorically asserts that the legal points of difference between gambling and speculation remained nebulous and undefined in the period under study. Though gambling had long carried the tag of being a wasteful and improvident activity, such connotations became particularly amplified when commodity, equity and stock speculation began attracting people from non-commercial and non-mercantile backgrounds to their markets in early twentieth century. Correspondingly, as the burgeoning leisure industry of

² <https://www.youtube.com/watch?v=RsHn0EPv1LA>

gaming expanded its footprint amongst the working class, the discursive contours of ‘work’ and ‘play’ also grew deeper. This distinction, however, was largely impressionistic since the legal definitions of gambling and speculation continued to result in a fair bit of slippage, showing only hints of clarity after an event or rupture. Let me provide a contemporary example of this. During the financial crash of 2007-08, where predatory lending and the collapse in the value of mortgage-backed securities effected a crash in global markets, analysts were quick to point out that the practices of certain bankers, especially that of the Lehman Brothers, was ‘nothing but gambling’. When did the switch occur; when did prudent and legitimate commerce turn to risky and illegitimate play? If the housing bubble had not burst as explosively as it did, would the actions of the bankers still be described as gambling? The answer to this neoteric Sorites paradox is still awaited.³

What the paradox does indicate, however, is the difficulty of differentiating between gambling and commercial speculation, both historically and as practice, through a legal definition alone. Rather, the implied differences in their putative representations draw on a plethora of extra-legal political, discursive, and normative technologies. This dissertation explicates these technologies by narrating the history of ‘criminalized’ gambling and ‘commercial’ speculation in the late nineteenth and early twentieth centuries in India. It does so by recounting the legal and discursive strategies that sequestered commodity

³ The Sorites paradox points to the problems encountered when quantifying vague predicates. It is typically illustrated through the example of a *heap* of sand, with the assumption that removing one grain of sand would not result in the transformation or destruction of the *heap*. The paradox proceeds to ask, given that removing one grain of sand does not change the character of the heap, how many times can one remove a grain before the heap can no longer be called a heap?

speculation from gambling, while also narrating the incompleteness of this process. I emphasize that this incompleteness did not stem from a failure in execution or by the resistance faced by the processes of economic standardization from unwieldy ‘pre-capitalist’ agents and institutions. Rather, I argue that the legal, political and commercial intentions to separate play from work, gambling from speculation, were only apparent and chimeric. In fact, the money of non-market actors and petty capitalists only entered the commodity exchanges of the early twentieth century when their agents harnessed familiar tropes and rationalities surrounding gambling and ‘play’ and moved them towards speculation on derivatives, which in turn, allowed such exchanges to expand.

My dissertation uses the history of gambling and commodity speculation to intervene in a number of major existing debates in the histories of law and governmentality, finance and political economy and ‘vernacular’ knowledge and networks of circulation in South Asia. Existing works in these fields have tended to depict state engagements with practices such as ‘commodity speculation’ and ‘gambling’ within a framework of colonial governmentality, market rationality and the legal standardization of market behavior.⁴

South Asian legal and economic histories have argued that the ‘modern’ colonial economy

⁴ See Ritu Birla, *Stages of Capital Law, Culture, and Market Governance in Late Colonial India*, New Delhi: Orient Blackswan 2011; “Jurisprudence of Emergence: Neoliberalism and the Public as Market in India”, *Journal of South Asian Studies*, 38:3, 466-480, DOI; “Failure via Schumpeter: Market Globality, Empire, and the Ends of Capitalism”, *Social Research*, Vol. 83, No. 3: Fall 2016, pp. 645-671; “Maine (and Weber) Against the Grain: Towards a Postcolonial Genealogy of the Corporate Person”, *Journal of Law and Society*, Volume 40, Number 1, March 2013, pp. 92-114; See also, Sudipto Sen, *Empire of Free Trade: The East India Company and the Making of the Colonial Marketplace*, Philadelphia: University of Pennsylvania Press, 1998; See also Anand A. Yang, *Bazaar India: markets, society, and the colonial state in Gangetic Bihar*, Berkeley: University of California Press, 1998; See also, Tirthankar Roy; Anand V. Swamy, *Law and the Economy in Colonial India*, Chicago: University of Chicago Press, 2017; See Tirthankar Roy, *A Business History of India: Enterprise and the Emergence of Capitalism from 1700*, Cambridge: Cambridge University Press, 2018.

was produced by the twin efforts of colonial legal intervention, which produced the economy as an object of governance, and nationalist critiques, which rendered India as a distinct, homogenous economic unit that suffered from colonial ‘drain’.⁵ Alongside ‘the economy’ such histories have also traced the constitution of a distinctly colonial ‘economic subject’ through the regulative bifurcation of ‘economy’ and ‘culture’.⁶ My project moves beyond these regulative ideals and interrogates the actual operations of colonial laws, their anxieties and the inconsistent categories they generated. In the process, I historicize the shifting definitions and policies regarding native gambling, which passed through multiple regimes of legal classifications in the late nineteenth and early twentieth centuries. I show how the practice of gambling, which earlier corresponded to precise legal definitions became undefined when commercial actors and native business communities became its major practitioners. While taking the practices of business communities like the Marwaris and Gujaratis as an entry point, I also aim to move past the established historiography on Indian capitalism that has largely focused on the contributions of major entrepreneurs, large business houses and post-colonial state planning. My dissertation accounts for the stated strategies and unstated tactics that helped liberate the petty capital of non-commercial subjects away from ‘savings’ and redirected them towards risky market investment. Crucially, the process led to the transformation of the once criminalized ‘petty gambler’ into the ‘useful’ ‘small speculator’ who served the needs of the commodity exchanges of the twentieth century. In demonstrating this claim, this dissertation differs from the body

⁵ Manu Goswami, *Producing India : From Colonial Economy to National Space*, Chicago, IL : University of Chicago Press, 2010.

⁶ Birla, *Stages of Capital*.

of historical scholarship that studies the evolution of commercial activity during the colonial period by focusing exclusively on the motivations and practices of established commercial agents and communities. Instead, I disclose the methods that made speculative markets both appealing and approachable to non-mercantile and non-commercial subjects as well.

As stated already, the difference between gambling and commodity speculation in the late nineteenth and early twentieth centuries were construed in the absence of a set legal definition that differentiated between the practices. This ambiguity signals the need to revise and rethink the relationship between law and economy as constituted by economic histories of South Asia. Such historiography has urged readers to understand the ‘key institutions’ of Indian commerce through both endogenous (caste norms and community networks) and exogenous (colonial legislation) factors.⁷ This endogenous realm of ‘symbolic capital’, one where caste and communal networks facilitated the privileged flow of capital for commercial actors, mutated its practices gradually and displayed a fair bit of resistance to the externality of colonial law. Nonetheless, it is generally acknowledged that colonialism and colonial law in particular, circumscribed native commerce, dividing it into the private sphere of culture and the public, ‘unmarked space of universal capital’.⁸ Such histories convincingly demonstrate how the colonial legal apparatus first labelled and then disembedded pre-capitalist economic practices from their autochthonous social structures

⁷ Tirthankar Roy, ‘Monsoon and the Market for Money in Late-colonial India’, Cambridge: Cambridge University Press, published on behalf of the Business History Conference, January 22, 2016, pp. 324-357.

⁸ Birla, *Stages of Capital*, p. 13.

and cultural processes.⁹ Ritu Birla, for example, sees the distinctions between illegitimate gambling and legitimate commercial speculation as the economic and cultural binaries effected by the work of colonial governmentality on native commercial practices.¹⁰ Birla situates Foucault in the colony to demonstrate how ‘the relation between the concept of economy as a model for governing and the economy as an object of governance’ emerged during the latter half of the nineteenth century.¹¹ As the objectified reality of the ‘colonial economy’ emerged, certain native commercial activities drawing on ‘symbolic capital’, were progressively demarcated and marked as ‘private’ or cultural matters. Rain gambling and other forms of native gaming were slotted accordingly. Birla resists interpreting ‘community’ and ‘culture’ as either political or discursive deployments *against* the regulative actions of the colonial state or colonial law. Instead, the sophistication in her framework allows for the logic of culture to be the product of the bifurcations effected by colonial power itself. While theoretically subtle and substantive, her narrative produces an unintended teleology, one where the histories of law and economy evolve in a parallel, albeit imperfect sequence. No matter how one cuts it, such readings cannot help but see colonial law as an agent that shepherds ‘the economy’, making it ‘modern’.

A central aim of this thesis, however, is to revise the relationship between legal apparatus that standardized and ‘modernized’ economic activity and the ‘pre-capitalist’ practices that were coded as social and cultural activities in the process. So, instead of outlining the

⁹ Karl Polyani, *The Great Transformation: the Political and Economic Origins of our Time*, Boston : Beacon Press, 2007.

¹⁰ Birla, *Stages of Capital*.

¹¹ Ibid, p. 21.

impact that agents of modernity—colonial law, political economy, contracts—had in regulating, categorizing and transforming ‘pre-capitalist’ socio-economic practices into a universally recognizable form of ‘commerce’, my dissertation exposes the manner in which ‘pre-capitalist’ practices and rationalities were intentionally preserved and operationalized by a discourse that claimed ‘modernization’ and standardization as its stated objective. Here, I take my cues from Jairus Banaji, who, over a series of publications has urged readers to revise their understanding of both capitalism and more distinctly, colonial-capitalism as a mode of production.¹² Through his comprehensive analysis of merchant financing through the ‘putting out system’, Banaji establishes how this putative mode of production and acquisition functioned uninterrupted even within developed and industrialized economies. Accordingly, Banaji sees ‘commercial capitalism’ as a distinct system and not as an ancillary to European industrialization and in doing so, he partly rejects a stadial teleology of capital. In his formulation, mercantile or commercial capital, organized through a putting-out system, should not be seen as the ‘pre-history’ of an industrial mode of production, nor as a ‘pre-capitalist’ form of appropriation.¹³ The argument appears even more forceful when read alongside Marxist and revisionist agrarian

¹² Jairus Banaji, *A Brief History of Commercial Capitalism*, Chicago: Haymarket Books, 2020; Jairus Banaji, *Theory as History : Essays on Modes of Production and Exploitation*, Chicago: Haymarket, 2011; “Merchant Capitalism”, in *The SAGE Handbook of Marxism*, ed. Beverly Skeggs, Sara R. Farris, Albert Toscano, Svenja Bromberg, London: Sage Publication, 2021; ‘Merchant Capitalism, Peasant Households and Industrial Accumulation: Integration of a Model.’ in *Journal of Agrarian Change*, Vol. 16, No. 3, July 2016, pp. 410-431.

¹³ Banaji, *Theory as History*. p. 3. Accordingly, ‘the widespread use of slaves in the early Middle Ages certainly implies a continuance of slavery as a form of exploitation but surely not the survival or persistence of slave mode of production, however, that is construed.’ So, ‘the historical forms of exploitation of labor (slavery, serfdom, wage labour is the usual trinity in most discussions; Marx ended to add ‘Asiatic production’) cannot be assimilated to the actual deployment of labor, as if these were interchangeable levels of theory. Since the latter is defined by immensely greater complexity, a conflation of these levels would mean endless confusion in terms of a strictly Marxist characterization.’

histories produced in the late eighties and early nineties in India that demonstrated the efficacy of the role of mercantile debt financing in the context of commercial agriculture.¹⁴ By putting the entirety of colonial-capitalist expropriation on trial, Banaji exposes how a modernizing discourse that appeared eager to parse systems and communities into non-coeval temporalities—pre-capital and capital—relied quite significantly on the former for building global commodity markets and the industries that relied on them in the first place. Similarly, I use the history of gambling to argue how a practice, which apparently fell outside the conventional narrative of capital, did not in fact impede its homogenizing logic; rather, ‘pre-capitalist’ and ‘cultural’ practices like gambling were central to the unfolding logic of the market, which instrumentalized its rationalities, even while claiming to overcome or regulate it. The thesis therefore asserts that practices deemed ‘pre-capitalist’, ‘cultural’ or ‘pre-modern’ are not to be found in the ‘waiting room of history’, rather they

¹⁴ David Hardiman, *Feeding the Baniya: Peasants and Usurers in Western India*, Delhi: Oxford University Press, 2000; Sugata Bose, *Agrarian Bengal: Economy, Social Structure and Politics, 1919-1947*, Cambridge: Cambridge University Press, 1986; B.B Chaudhuri, “Commercialization of Agriculture”, *IESHR*, March 1, 1970; B.B. Chaudhuri, “The Process of De-peasantization in Bengal and Bihar, 1885-1947”, *Indian Historical Review*, 21, 1(1975), pp. 105-65. 7 (1); 25-60; Omkar Goswami, *Industry, Trade and Peasant Society: The Jute Economy of Eastern India, 1900-1947*, Delhi: Oxford University Press 1991; Goswami, Agriculture in slump: the peasant economy of East and North Bengal in the 1930s, *Indian Economic & Social History Review*, v21 n3 (08/1984): 335-364; Partha Chatterjee, *Bengal, 1920-1947. Volume I; The Land Question*, Calcutta: Bagchi, 1984; Rajat Ray, “The Crisis of Bengal Agriculture, 1870-1927— the Dynamics of Immobility” *The Indian Economic & Social History Review*. 1973;10(3):244-279; *Credit, Markets and The Agrarian Economy of Colonial India*, Ed. Sugar Bose, Delhi: Oxford University Press, 1994; Neeladri Bhattacharya, “Lendors and Debtors: Punjab Countryside, 1880-1940, *Studies in History*, 1,2, n.s. (1985) Sage Publication, New Delhi; Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India*, Cambridge: Cambridge University Press, 1980; Neeladri Bhattacharya, *The Great Agrarian Conquest; The Colonial Reshaping of a Rural World*, Delhi: Permanent Black; Fahad Ahmed Bishara, *A Sea of Debt Law and Economic Life in the Western Indian Ocean, 1780-1950*, Cambridge: Cambridge University Press, 2017.

occupy the engine room that propels economic and commercial activities towards an undefined, and unclear ‘modernity’.¹⁵

Re-emplotting the ‘stages of capital’ involves revisiting the history of colonial legal codification as well. Radhika Singha notes with irony that following the revolt of 1857, when a chorus of British voices advocated for firm ‘paternalist executive’ rule in India, the Crown chose to embark on a manic spree of legislative codification.¹⁶ Statutory laws like the Public Gaming Act (1867) and the Indian Contracts Act (1872) also fell within this process. My thesis pays close attention to these two sets of legislation. The thesis is accordingly divided into two sections, the first dealing with prohibitory anti-gambling laws and the second that looks at the operative theories of contract, especially when read through the differences between illegal gaming and wagering contracts as opposed to legal ‘commercial’ contracts.

By looking at prohibitory and regulative laws like the Public Gaming Act (Act III of 1867 and subsequent anti-gaming laws) the first two chapters excavate the underlying assumptions and rationales that informed the writing of statutes in the first place, exposing, also, their illusions of omnipotence and the gaps in their prohibitory logic. Aligned closely to Homi Bhabha’s observations regarding colonial power itself, the dissertation exposes

¹⁵ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton : Princeton University Press, 2008; “Belatedness as Possibility: Subaltern Histories, Once Again”, in *The Indian Postcolonial : A Critical Reader*, ed. Rosinka Chaudhuri; Elleke Boehmer; New York : Routledge, 2011.

¹⁶ Radhika Singha, “Colonial Law and Infrastructural Power: Reconstructing Community, Locating the Female Subject”, *Studies in History*, 19, 1, n.s. 2003, New Delhi: Sage Publications.

how colonial law enjoyed both a phobic and phantasmic existence in the colony; it overestimated its regulative functions and routinely underestimated the generative powers of social practice.¹⁷ As a result, the legislative discussions surrounding the implementation of various anti-gambling laws were optimistic regarding their effectiveness while exhibiting paranoia regarding their cogency. The constant drafting and re-drafting of anti-gaming statutes exhibit the sanguine attitude of nineteenth century legislatures regarding the strength of ‘precision writing’, a practice that informed the early period of codification.¹⁸ The repeated amendments to anti-gaming laws also opens a window into the intentions and motivations of nineteenth century jurists and legislators and to belief they carried regarding the power of statutory definitions. Often depicted as a place ‘empty of law’, the colony remained an inviting beacon for British jurists from a Benthamite tradition to write statutory codes that were thought to be incompatible with the common law tradition in England.¹⁹ Yet, as shown through the example of the Public Gaming Act (1867), more than regulate and criminalize gambling, such prohibitory laws only encouraged the efflorescence of multifarious gaming activities. Paraphrasing Michel Foucault’s observations regarding the prohibitory injunctions placed on sexual discourse from the 17th century, which he read as an ‘incitement to discourse’, I term the operation of such regulative laws as an ‘incitement to capital’. Foucault’s unique reading of prohibition repositioned his understanding of power as something that was more productive

¹⁷ Homi K. Bhabha, *The Location of Culture*, New York: Routledge, 1994.

¹⁸ Shyamkrishna Balganesh, “Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint”, in *The American Journal of Comparative Law*, Winter, 2015, Vol. 63, No.1, pp. 33-76.

¹⁹ Elizabeth Kolsky, “Codification and the Rule of Colonial Difference”, *Law and History Review*, v23 n3 (20051001): 631-683, p. 652.

than it was repressive. He demonstrated this through his study of Victorian prudishness surrounding the 'moral discourse' of sex, which resulted in birthing multiple 'rational' studies and ways of talking about sex where, alongside pleasure, sexuality was constituted as an object of knowledge.²⁰ I have read prohibitory gaming laws in a similar manner. Looking past their stated objectives of both defining and regulating 'illegal' gambling, I see how the implementation of prohibitory anti-gaming laws led to the mutation and multiplication of various types of gaming and betting activities. For example, when 'rain gambling' (betting on the probability of rain on a given day) was banned in Bengal in 1897, it was replaced by newer and more sophisticated forms of betting that drew a greater pool of players and their capital into both gambling and commodity speculation.

The dissertation also reformulates the relation between state and economy, as well as the putative understanding of colonial governmentality, especially when it is seen as an index of and model for governance and self-regulation. To that end, I show how towards the second decade of the twentieth century, various provincial governments, wary of their regulative functions, gradually withdrew from defining and prosecuting commercial gambling. Instead, they preferred that such matters be handled by established members of the trade itself. The disruptions following the First World War had forced several European Managing Houses and export firms to withdraw from the inland commodity trade, a

²⁰ 'Rather than the uniform concern to hide sex, rather than a general prudishness of language, what distinguishes these last three centuries is the variety, the wide dispersion of devices that were invented for speaking about it...Rather than a massive censorship, beginning with the verbal proprieties imposed by the Age of Reason, what was involved was a regulated and polymorphous incitement to discourse.' Michel Foucault, *A History of Sexuality: Vol. 1 an Introduction*, New York: Pantheon Books, 1978. p. 34.

process that was aggrandized by the onset of the Great Depression.²¹ This was also the period when business communities like the Marwaris firmed their grip in the movement and exchange of commercial commodities like jute and cotton. As a result, several newly founded native associations like the East India Cotton Association came to establish a growing monopoly over the trade and its speculative exchange in commercially produced crops like cotton, jute and sugarcane. Subsequently, such Associations, headed by influential entrepreneurs, began setting the standards of ‘legitimate’ and ‘illegitimate’ commerce for the trade as whole. I employ a genealogical method of reconstruction, one that places weighted emphasis on the role of personal rivalries, competition and contingencies as prime movers in a historical process that, on the surface, appears to emanate from a place of the standardization of native commerce. Accordingly, I show how, from being an accusation leveled *against* native commerce, by the second decade of the twentieth century, both the discourse on gambling as well as anti-gaming laws had become a tool in the hands of native commercial agents to target intracommunity rivals.

The method compels me to rework some of the established ideas regarding the term ‘community’ as well, which remains both a foundational category and a conceptual tool for understanding Indian commercial histories.²² In the global narrative of capital, one where its liberation is seen through the emergence of the individuating logic of civil society

²¹ Omkar Goswami, ‘Then came the Marwaris: Some aspects of the Changes in the Pattern of Industrial Control in Eastern India’, in *The Indian Economic and Social History Review*, 22, 3(1985), Delhi: Sage.

²² Anne Hardgrove, *Community and Public Culture, the Marwaris in Calcutta, c.1897-1997*, New York: Columbia University Press, 2002; Birla, *Stages of Capital*; Malavika Kasturi, ‘All Gifting is Sacred’: The Sanatana Dharma Sabha Movement, the Reform of Dana and Civil Society in late Colonial India”, *The Indian Economic & Social History Review*, 2010;47(1):107-139, Tirthankar Roy, *A Business History of India*.

- the ‘arrangement of economic men’ collating to form a market society, community is often relegated to capital’s pre-history.²³ This has been signaled in a rich body of South Asian economic histories, which have pointed to the manner in which native capital was organized around communal institutions like caste and kin. Such studies point to the ways in which community behaved as an enabling entity, one that facilitated networks of credit and the circulation of capital. By focusing on the Marwaris in particular, my thesis complicates this notion of commercial ‘communities’ as a homogenous organizing principle. Instead, it searches for individual contracting members within the community, those who acted in self-interest and against its own members. In destabilizing the ascriptive myth of commercial communities, it also speaks against the endogamous/exogamous binary. It demonstrates how members from within coherent communities used the colonial legal apparatus to make internal interventions and, in the process, defined standards of legitimacy and illegitimacy in commercial practices. To that end, Mitra Sharafi demonstrates how the Parsis, a major commercial community of India, were highly litigious and much of Parsi personal law was the product of the community bringing suits against one another. She thus establishes how the Parsis experienced colonial law as a forum that resolved internal questions of community instead of as a manifestation of colonial rule that only acted *upon* communal practices.²⁴ Similarly, this thesis cautions against overdetermining colonial state/law and community as an oppositional binary. One of its aims is to underplay the role of an interventionist state that interfered with the

²³ Ritu Birla, ‘Jurisprudence of Emergence’, 467-472; Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories*, Princeton: Princeton University Press, p. 232.

²⁴ Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947*, New York: Cambridge University Press, 2016.

institutions and practices of indigenous commerce. Instead, I focus on the numerous ways in which the colonial legal apparatus was appropriated and operationalized by native agents themselves.

By looking at the differences between gaming and ‘commercial’ contracts, the second section of the dissertation draws out the epistemic foundations of contract law and the function it served for the interests of Empire. As stated previously, I inspect a host of discursive and normative strategies that worked *alongside* law to produce the differences between ‘gaming’, ‘wagering’ and ‘commercial’ contracts, even though their fundamental structure remained largely similar. I argue that such differences were produced keeping in mind the economic requirements, civilizing discourses and political concerns of provincial governments. I pick out particular topics of discussion related to debt, fraud and ‘ignorance’, which allows me to interrogate the manner in which the idea of ‘free contracting’ and ‘free bargaining’ were dismissed in the field of ‘gaming’ and ‘wagering’ but defended in commerce. Parsing the field of ‘contracting’ in this manner allowed administrators to constitute gambling and wagering as *social problems* that needed to be tackled through political action and moral reform. So, while the legal and technical differences between gambling and commodity speculation remained unsettled, discursively at least, gambling was constituted as a wasteful activity, a generator of debt, a source of crime and prostitution and as a trap for conning ‘ignorant’ and ‘weak’ colonial subjects of their money.

I concurrently trace the discussions leading to the Amendment to the Contract Act (1899) that also attempted to protect ‘ignorant’ peasants from the unequal and ‘hard bargains’ of native rural usurers. While a significant section of the government machinery felt that the small peasant’s ‘ignorance’ and illiteracy disqualified him as a rational contracting subject, the discussions concluded that such ignorance or illiteracy could not invalidate the terms of written agreements. Usurious contracts were therefore described as *economic necessities*, both for the functional purposes of commercial agriculture and as pedagogical tools for native commercial progress. This bifurcation allowed the government to hold diachronic positions regarding the suitability of contract law in the colony; its paternalist stand on gambling confessed that poor and ‘ignorant’ subjects were unprepared for its principles, while the doctrines and rhetoric of political economy defended ‘free contracting’ as an essential tool for instructing ‘ignorant’ peasants in the ways of commerce which went towards building a modern market society. Thus conceived, the contract acted on two registers; in its pedagogical form, it behaved as a modernizing agent for pre-capitalist economies, and functionally, it was a tool for only mediating such differences and not annulling them. In the absence of equality, the contract generated equivalence between the socio-economic position, intelligence, and the information (regarding the contract) that was available to contracting members. It was thus synecdochic for the ‘strategic’ logic of the market, which established the ‘logic of connections between the heterogeneous and not the logic of the homogenization of the contradictory’.²⁵

²⁵Michel Foucault, *The Birth of Biopolitics Lectures at the College de France, 1978-1979*, New York Palgrave Macmillan 2011, p. 42.

My reading of the contract as the nucleus of market logic also allows me to locate the numerous heterogeneous rationalities that were assimilated within the market framework. Accordingly, the thesis shows how market forces harnessed non-commercial rationalities to draw in petty capital into the newly emergent commodity exchanges of the early twentieth century. Just as the ‘ignorance’ of the peasant was functionally generative for binding them to unequal agreements that fueled commercial agriculture, it was the ‘ignorance’ of non-market actors that was used to incite capital for the speculative markets of the early twentieth century. Thus, I locate a number of astrological texts written in Hindi, Bengali, Gujarati and English which did the work of informing a non-mercantile class of speculators on the futures price of commodities and of ways to invest in the derivative markets of cotton, jute, silver, sugar and grains. I argue that these manuals formed an epistemic regime parallel to the type of economic studies being produced and commissioned by research scholars and market agents respectively. These economic studies attempted to ground commercial speculation as an object of scientific study as well as defend its functional uses in the expansion of the market economy during the very same period. I argue, however, that it was the astrological literature that served as an effective entry point for petty capital to enter speculative commodity exchanges, as it provided an easier pathway for laymen to identify with risk and negotiate a technical world that they may not have otherwise understood. The participation of such ‘small speculators’ was greatly valued by the emergent markets of the twentieth century, as they provided them with liquidity, elongated the chain of intermediary contract holders and therefore stabilized price fluctuation of commodities. Importantly, small speculators also formed a ready pool

of buyers onto whom established market makers could offset derivatives and thus hedge their own liabilities. The motives and knowledge systems of these small speculators have been either overlooked or are assumed to align with the ‘rational’ epistemic models crafted by financial agents in order to demonstrate the importance of speculation within the disciplinary field of economics. However, once we place these two archives—astrology and economic studies—next to each other, we are forced to substantiate the *public* that such markets drew upon. If the effect of colonial governmentality was to push business houses and indigenous commercial bodies to constitute themselves as ‘rational economic subjects’, I argue that such astrological literature, which had previously informed the practices of the ‘petty gamblers’, was recast to produce the ‘small speculator’, who, while also being a market actor, was drawn to the market through a range of previously unrecognized commercial strategies.

Chapters

My dissertation investigates the period following the transfer of power from the East India Company to the British Crown in 1857. In the chapter I, I look at the operation of the Public Gaming Act (Act III) of 1867, an Act specifically designed to tackle the problem of illegal gambling in British India, along with Section 294 A of the Indian Penal Code, which made the conduct and advertising of unauthorized lotteries illegal. I track the effect of these laws in controlling illegal gambling in British Burma in the late nineteenth century. At this time, gambling was treated as a problem of petty crime and ‘nuisance’, not an organized system that mimicked or challenged the very premise of ‘legitimate’ economic activity.

Importantly, the Public Gaming Act, the legal template for several provincial Acts of the nineteenth century, did not define gambling or make it illegal. Attentive to the ties British subjects had with horse racing, whist, and private lotteries, the Act spent its energy in defining and criminalizing ‘public places’ and the ‘common gaming house’ (a house that charged commission on games that involved money), and ‘instruments of gambling’ - and not gambling itself. The first chapter closely interrogates this choice, one that refrained from criminalizing gambling as practice, and displaced it onto the spaces where it was conducted, which then became the *object* of criminalization. Subsequently, I look at the discussions that informed the drafting of the Burmese Gaming Act (1884), a law that was necessitated after the Judicial Commissioner of Burma ruled that a game called *ti* was neither a game or a lottery and should be regarded as a wager instead. Popularized by Chinese gamblers in the Burmese countryside, the decision to de-criminalize *ti* proved to be a problem for police officials and district magistrates, who complained of their inability to act against a form of ‘gambling’ they knew to be harmful to the local Burmese population. The discussions related to the making of the Act of 1884 exemplify the faith that the executive and judicial branches of government had in the powers of statutory definitions, which was reflected through their demands for a lucid and flexible definition of the term ‘place’. They were convinced that framing such definitions was both easy and that it would help them secure a higher number of convictions. I argue that this faith in legislative definitions, especially regarding the word ‘place’ was bred by a technocratic belief that space was a ‘mental’ or ‘Euclidean’ object of knowledge and that its features

and potential uses could be successfully captured through statutory language alone.²⁶ However, as the chapter demonstrates, this belief undervalued the generative powers of gamblers, who repeatedly exposed the limitations of statutory classifications when it encountered actual practice.

While the first chapter focuses on the problems encountered in criminalizing ‘places’ of gambling in British Burma, chapter II moves to Bombay and recounts another process of objectification that aimed to define and criminalize gambling through the ‘instruments’ used in its practice. A common figure runs through these two chapters, that of Justice John Jardine. The Judicial Commissioner of Burma till 1885 and a Judge of the Bombay High Court thereafter, it was Jardine’s ruling that de-criminalized *ti* in Burma and it was his observations regarding the ‘rain gauge’ that helped acquit the ‘rain gamblers’ Narotamdas Motiram and Hemraj Khemjee in Bombay in 1889. In keeping with the arguments laid out in the first chapter, the second chapter demonstrates how Jardine’s formal interpretation of colonial anti-gaming statutes left an indelible mark on the history of native gambling and the approach of various legislative and judicial branches of government in tackling this problem. Jardine feared that if ‘wagering’, ‘betting’ and ‘gambling’ were not formally separated through the precision of statutory language then commercial and actuarial contracts could fall within the purview of gaming laws, especially if the latter were interpreted as a form of wager. So, if in Burma Jardine had ruled *ti* to be a case of wagering (a legal but unenforceable contract), in the case of ‘rain gambling’ in Bombay (a game

²⁶ Henri Lefebvre, *The Production of Space*, Oxford: Blackwell, 2009.

where bets were taken on the probability of rain during a circumscribed period), Jardine showed similar fidelity to the meaning of ‘instrument of gambling’ as conceived by the provincial legislature. The chapter discusses the reasons for Jardine’s strict adherence in interpreting statutory law and its correct method of application. I read his judgments as a form of judicial ‘formalism’, a legal practice that upheld legislative authority in the lawmaking process as opposed to ‘judge made law’ of the common law tradition. Importantly, I see Jardine’s formalist method to be adjacent to the rationales for the process of codification in the first place - the effectiveness of statutory codes could only be realized when accompanied by a formal method of application. As the chapter goes on to demonstrate, in spite of the laborious precision through which the Legislature expressed its intentionality, it was impossible for a code of law to standardize judicial decisions, especially in the case of illegal gambling. Accordingly, I delve into another case of rain gambling brought before the Bombay High Court in 1892, to show how justice K.T. Telang interpreted the language of anti-gaming statutes and assigned for it a different purpose and intentionality. While Jardine had legally defined ‘instruments of gambling’ as only those devices that were designed for the purposes of gaming, Telang’s judgement from 1892 expanded this category when he ruled that a ‘clock’ used by rain gamblers to record the timings of their bets fell within the category of such ‘instruments’. I take this to be crucial moment in the history of anti-gaming laws. In bringing the ‘clock’ within the definition of ‘instruments of gambling’, Telang severed the formal criteria that identified and constituted a ‘common gaming house’. Concurrently, he also loosened the conceptual grip of the

gatekeepers that differentiated ‘gambling’ from similar practices of wagering, betting and speculation.

From rain gambling, chapter II moves onto the early practices of commodity speculation as practiced in the ‘bucket shops’ of Bengal, Bombay and the Punjab during the late nineteenth and early twentieth. While rain gambling was criminalized in the last decade of the nineteenth century in both Bengal and Bombay, I show how similar practices of betting on the price of commodities like opium and cotton carried on uninterrupted during the same period. Through the example of ‘cotton gambling’ in Bengal in 1911, I show how a regime of strict legal classification, one that laid out meticulous differences between various types of ‘legal’ wagering and ‘illegal’ gambling, gradually transitioned to rule by ‘executive authority’. The challenge of maintaining formal distinctions between legal and illegal practices was particularly difficult in the case of business communities like the Marwaris, who were crucial intermediaries in the commercial agricultural trade, the early architects of ‘futures’ and ‘options’ markets in grain, cotton and opium and ran the gaming houses for rain betting and price wagering in Calcutta, Bombay and Delhi. As the demographics, practices and spaces of gambling began mutating during the first decade of the twentieth century, colonial law responded to these proliferating challenges by abandoning its legislative search for a general law and a lasting definition for gambling. Instead, it adopted a more discretionary approach. As a result, twentieth century provincial governments no longer justified punitive action against gambling by referring to a precise activity and used

executive authority and the power of ordinance to selectively target practices that temporarily threatened the moral, civic or economic order of the State.

As the formal distinctions between gambling, betting, wagering and speculation grew ambiguous in the legal archive, their putative representations began ossifying in the realm of public discourse. In historicizing this extra-legal process of reification, chapter III pays close attention to the debates, discussions and motivations for the ban placed on ‘rain gambling’ in Bengal in 1897. In doing so, I go through the official discussions of the Bengal Legislative Council, the opinions of both native and British newspapers, and the case presented by a vocal section of the Marwari population of Calcutta, who defended the practice of rain gambling while accusing the government of partisan action by allowing horse racing to continue uninterrupted. By highlighting the role of S.N Banerjee in aggressively championing the Bengal Rain-gambling Act through the Council, I show how a section of nationalist political actors took up the problem of gambling as an internal question of reform, holding it responsible for ruining native work ethic, encouraging crime and cheating poor and naive subjects of their paltry capital.

As opposed to such accounts, I emphasize the latent commercial logic underlying the Marwari defense of their practice, who presented rain gambling as another and equally valid form of commercial betting like *teji-mandi*, or options speculation on opium. Differing here from Anne Hardgrove’s approach, I resist reading rain gambling as a Marwari ‘cultural’ practice. Instead, by highlighting the socio-economic position of the

proprietors of such gambling houses, I argue for a reading of rain gambling through the commercial logic of the *bazaar* itself.²⁷ I do this by showing how rain gambling and commodity speculation were often carried on in the same premises and that the proprietors of such ‘gaming houses’ were in all probability *arhitiyas* and *goladaars* - *bazaar* intermediaries who were crucial in financing the commodity trade as well storing and speculating on commodities. Informed by the works of Tirthankar Roy and Rajat Ray, I suggest that one of the ways in which to read the spirited defense of the Marwaris regarding rain gambling was the role that such gaming houses played in raising capital for its proprietors during the monsoons, when it was in high demand for the purposes of agricultural production. Since the money for rural moneylending circulated in cash and not through negotiable instruments like the *hundi*, I suggest that we our rethink our understanding of practices like rain gambling and relocate it from the ascriptive domain of culture and custom and onto the sphere of conventional commerce.

While the chapter re-situates gambling beyond ‘culture’ and onto commerce, it works in the opposite direction when it comes to commercial actors who acted through and within the framework of ‘community’. As mentioned previously, following the First World War, provincial governments abdicated their responsibilities in defining and regulating commercial gambling to newly formed indigenous commercial bodies like the East India Cotton Association, or EICA (1922). In sequestering the field of legitimate and illegitimate

²⁷ Anne Hardgrove, *Community and Public Culture, the Marwaris in Calcutta, c.1897-1997*; Rajat Ray, ‘The Bazaar: Changing Structural Characteristics of the Indigenous Section of the Indian Economy before and after the Great Depression’, *Indian Economic and Social History Review*, 23, 3 (1988), New Delhi: Sage, pp. 264-315.

commerce, these Associations utilized anti-gaming laws to target their commercial rivals by accusing their exchanges as sites for ‘gambling’. Through the emblematic case history of *Emperor vs. Thavarmal Rupchand*, (1928) the chapter demonstrates how resemblant practices of futures and options trading in cotton, conducted on the respective exchanges of the EICA and the Shree Mahajan Association, were represented differently, both in court and to the public. The rivalry between these two commercial bodies substantiates the manner in which anti-gaming laws transformed into punitive tools in the hands of the native business communities, who used such laws for personal ends. Additionally, I show the number of private member bills that were introduced during the same period that tried to criminalize ‘wagering’ and ‘gambling’ and define ‘futures’ and legitimate ‘commercial speculation. Moving past the political and moral rationales of the State, I show how by the 1920s, the moral and economic charges related to ‘harmful’ gambling came from non-official and non-governmental forces, who channeled these accusations to secure monopolies in the commodity trade. I therefore argue that the distinction between legitimate and illegitimate, as seen through the difference between speculation and gambling, was shaped more by rivalry and private interest than any substantive difference in the actual practices of rival commercial actors.

Chapter III concludes with a discussion of the representative image of gambling and gamblers in the late nineteenth and early twentieth centuries, as constituted through official discourse and by the debates staged in the public sphere. I pick out topics related to debt, ignorance and fraud and how these themes helped leech out state paternalism in the context

of gambling. Nationalist and protectionist administrators repeatedly emphasized that gaming houses targeted those they coded as the ‘vulnerable’ members from ‘lower social orders’. More directly, the category corresponded to *purdahnasheen* women, children and the poor. The harmful impact of gambling was amplified by the effect that the practice had on such groups, who, it was believed, being unsound financial and economic agents, regularly fell prey to the tricks of the conman and the sharper. The results were described as terrible. I show how in the discussions surrounding the Bengal Rain-gambling Act (1897), gambling related debt and bankruptcy bled into talks of suicide, theft and prostitution. These accusations, however, only circulated as rumors and anecdotes and in spite of repeated inquiries for evidence that backed these claims, official sources refrained from furnishing specific details. I see this silence as part of an unfolding narrative of scandal, which generated a public image of gambling as a wasteful, deleterious and often disastrous ‘social’ activity. Crucially, at time when the legal distinctions between gambling and commodity speculation grew more and more nebulous, the portentous notion of debt served as an important distinction for separating the two practices.

Chapter IV juxtaposes this impression built around gambling and gaming contracts with the discussions that led to the Amendment of the Contract Act (1899). The Amendment deliberated expanding the term ‘undue influence’ so as to include categories of ‘simplicity’ and ‘ignorance’: Could contracts struck between a peasant and a moneylender be declared void if the lender had exploited the borrower’s ‘ignorance’ and committed the latter to blatantly unfair terms? I use the details of these discussions, the reports of Provincial

Banking Enquiry Committees that documented the problem of small peasant debt in the 1920s and agrarian histories of the 1980s and 90s to show how the rhetoric of political economy and commercial modernization were marshaled to defend agrarian usury and its role in promoting ‘free contracting’ and the ‘free bargaining’ in the colony. The chapter recounts how debt financing was instrumental in the cheap production and acquisition of commercially produced crops like cotton, jute, sugarcane, oilseeds etc. and how the colonial legal machinery and powerful native intermediaries were successful in dominating the price of commodities and thereby maintaining a monopsony over the peasant’s produce. The chapter also elaborates on the multiple ideological divisions amongst colonial officials who, in addressing the problem of small peasant debt, attempted to balance their paternal instincts that germinated from the fear of political instability, and the economic imperatives of Empire, which was tied to the process of wealth extraction. The chapter briefly covers the government’s own attempts of turning to rural lending and documents the main reasons for its failure. Eventually, while the terms of rural usury induced official sympathy for ‘ignorant’ and ‘simple’ subjects, unlike in the case of wagering or gaming contracts, this class of agriculturalists received no legal protections. So, even as administrative and judicial officials confessed that moneylending contracts often violated the principles of equity and justice, given its centrality to commercial cultivation, its operations could not be hindered by reworking the terms of contract law. I therefore argue that the criminalization of gaming and wagering contracts produced a field for state action where its paternal and protectionist instincts could be channeled in a manner that did not threaten the exploitative needs of colonial extraction.

One of the central aims of this dissertation is to show how practices and rationalities deemed ‘pre-capitalist’, ‘cultural’ or ‘pre-modern’ remained central and instrumental forces within the discursive and historical process that claimed ‘modernization’ and standardization of commercial practice as its stated aim. Emblematically, this is narrated through the way in which a legal, juridical and political process coded the resemblant practices of gambling and commercial speculation as different (illegal and legal), while simultaneously operationalizing the tropes and rationalities of gambling for economic and commercial ends. The conclusion to the dissertation reinforces this claim by drawing an epistemic connection between the pedagogical literature related to gambling and speculation on derivatives in commodity exchanges. Accordingly, I show how the knowledge of a body of astro-meteorological texts from the nineteenth century, were repurposed for predicting the futures price of commodities like cotton, jute, grain, sugar and silver during the early twentieth century. I argue that a genre of oral histories was converted into texts like the *Bhaḍalīvākyo*, *Bhaḍalī tārī varṣāvāṇī*, *Khanār vacana* and *Dāker vacana* and *Bhaḍḍarī* and *Ghāgha*, which drew on folk sayings, astral sciences and observed phenomena to predict rain, weather calamities, portentous omens and signs of good fortune. Crucially, I argue that some of this literature instructed the ‘rain gamblers’ of both Bombay and Bengal in the late nineteenth century. However, following the ban on rain gambling by the early twentieth century, I show how the astral knowledge forms of these texts were retooled for the needs of the newly emergent commodity exchanges in both Bengal and Bombay. So, by the early twentieth century, Gujarati and Hindi texts like the *Tejī-mandī Prakāśa*, *Tejī-mandī Darpaṇa* and *Tejī-mandī Vigyāna*, harnessed the

knowledge of *phalit jyotiṣa* in order to provide useful tips for market speculation, especially in the options (teji-mandi) markets in cotton, grains, silver and sugar. Though published privately, often these texts carried some connection to a brokerage house as the authors would invite their readers to send in money which would then be invested in options and commodity exchanges. Such investments would be advertised as a lottery, where readers were told that a sum as little as 1 rupee could translate into untold fortunes. While these texts referred to their audience as businessmen or traders (*vyaparis*), I show how their intended targets were anything but men of commerce. Instead, their mode of advertising, their promises of a quick turnover of capital and their inductive astrological models attracted a non-mercantile and non-commercial working class into the field of speculation. In doing so, they instrumentalized the logic of gambling and spot betting to induce a similar demography into a ‘legitimate’ and recognizable field of ‘commerce’. Importantly, because the participation and capital of such actors remained crucial for the expansion of the market economy, the interests and liabilities of this class of speculators, who were previously coded as the ‘vulnerable’ ‘lower classes’ in the discourse of gambling, were ignored by the government machinery and by the leading members of the commodity trade and civil society as well.

CHAPTER 1

Write, Define, Legislate: Producing the ‘Common Gaming House’

This chapter interrogates the faith placed by the colonial government on legislative language and the power of statutory definitions to tackle the problem of illegal gambling in colonial India and British Burma in the late nineteenth century. In order to do this, I draw on Legislative, Police and Judicial records of colonial India and Burma from the period between 1870 and 1895.

As we shall see, there was never a blanket ban on gambling as practice, because of the longstanding ties the British had with horse racing, private sweeps, lotteries as well as card games like whist, bridge and rummy. Instead, legislation like the Public Gaming Act of 1867 and all subsequent anti-gambling acts criminalized certain *spaces* in which gambling was conducted, including ‘public places’ and the ‘common gaming house’.²⁸ Why did nineteenth century provincial governments choose to criminalize space, rendered as object, instead of the practice of gambling itself? This chapter recounts both the silent and stated reasonings for doing so. It therefore retraces the workings of a statist imagination, one that James Scott has labelled ‘high modernist’ thinking.²⁹ Colonial administrators, both in the judiciary and the executive, remained sanguine that precise statutory definitions produced by legislative departments could capture the ‘common gaming house’, ‘public place’ and

²⁸ The ‘common gaming house’ was a place where the house earned profit through lease and commission. Subsequently, in 1870, Section 294-A of the Indian Penal Code criminalized ‘unauthorized’ lotteries and prosecuted those who aided and abetted in the conduct of such lotteries, by advertising it publicly.

²⁹ James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, New Haven: Yale University Press, 1998.

‘place’ in their exact and potential forms. This propelled state legislatures to both expand and sharpen their descriptive language in order to better apprehend the features of a ‘public place’ or a ‘common gaming house’. However, as the chapter narrates, they underestimated the generative powers of actual practice. Gamblers repeatedly exposed the shortcomings of the classificatory imagination when faced with multi-pronged tactics of subversion.

Splitting Hairs: Gaming, Betting, Wagering

In her book *Stages of Capital*, Ritu Birla identifies the Bombay presidency case *Emperor vs. Motiram Narotamdas and Hemraj Khimjee* from 1889 as a turning point in the history of gaming laws across the subcontinent.³⁰ Recounting the manner in which the fine distinctions between wagering and gambling were teased out during the Narotamdas case, Birla argues that it was one of the earliest instances of judicial deliberation on distinctions in gaming practices, and the first major attempt to distinguish legal and illegal gambling. In the following section, I show that the justifications presented in the Narotamdas case were in fact the second iteration of a debate that had been staged in Burma six years previously, involving the same set of actors, most notably, the Chief Justice of the Bombay High Court from 1889, Justice John Jardine. Before Bombay, Jardine had been the Judicial Commissioner of British Burma till 1885. For our purposes it is crucial to track the impact Jardine had on anti-gambling history of British Burma, which would then go on to serve as the historical template for his future rulings in Bombay. Both in Burma and Bombay, these cases served as platforms for Jardine to work out the legal definitions of gambling,

³⁰ Ritu Birla *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Delhi: Orient Blackswan, 2011.

lotteries and betting, as well as the role of key elements that distinguished them, such as notions of ‘skill’ and ‘chance’ and the ‘instruments of gaming’. Additionally, Jardine, who was firmly opposed to judge-made law, recommended statutory revisions in both rulings and concluded that it was the role of state legislatures to formulate more precise laws and unmistakable legal definitions if they wished to curb the menace of illegal gambling.

And so, our story begins in Rangoon, in September 1883, with *Queen Empress vs. Nga Po Thit and others*.³¹ Nga Po Thit was one of the many Chinese gamblers present in Rangoon during the end of the nineteenth century, popularizing the game of *Ti*, amongst the local Burmese. *Ti* or the thirty-six-animal game, centred around a list of thirty-six animals, from which bettors chose the name of one each. The chosen names were written down on little slips of paper that the prosecutor had described as lottery slips, which the banker or *daing*, and his agents would go around gathering. The agents would then register the wagered amount and collect the money on behalf of the *daing*. At the start of the day, the *daing* would select an animal name from aforementioned list and place it in a hollowed-out bamboo receptacle or *ti*.³² In the evening, the slip was retrieved by the *daing* and announced as the winning animal of the day. Those who had selected the animal so declared would be offered thirty times their original bet. Variations of *ti* were also popular in Thailand and the Straits Settlements during the same period.³³

³¹ Home Department JP, November 1883 Judicial, Nos. 54- 58, National Archives of India (henceforward, NAI).

³² A hollowed-out bamboo receptacle.

³³ Philip W. Sergeant, *Gambler's All*, Hutchinson & Co., London, 1931, pp. 31-34.

When Nga Po Thit was arrested by the police without warrant in a *zayat*³⁴ by a public road, he was moments away from declaring the name of the day's winning animal. The magistrate present at the time of conviction, Maung Shwe Myat, convicted three men involved, including Nga Po Thit, under section thirteen of the Public Gaming Act of 1867 - gambling in a 'public place'. Interestingly, however, the betting agents of *ti* were described as 'lottery clerks', the pieces of paper on which the bets were registered, as 'lottery tickets'. The magistrate went on to characterize the game of *ti* itself as a lottery. In keeping with this description, papers indicating a lottery plan and lottery tickets were found on the person of the accused. Under the circumstances, Myat's decision to convict under section 13 (gambling in a public place), and *not* Section 294 A of the Indian Penal Code, which actually criminalized public lotteries, appeared strange. It was at this point that Jardine requested this run-of-the-mill case be transferred to him at the Special Court so that he could review some of its finer aspects. Jardine's first move was the appropriate categorization of the facts of the case. Was *ti* a game? Or was it, like the magistrate had reiterated in his characterization of its various constituents, a lottery?

It should be noted here that till 1876, *ti* was considered a form of gambling and was penalized by the provisions of the Public Gaming Act of 1867³⁵, a classification that had been officially ratified by the Calcutta High Court in 1869. However, in 1876, the rulings of Justice Quinton and Wilkinson of the Calcutta High Court directed the government to now bring *ti* under the provisions of the newly drafted Indian Penal Code (IPC). Section

³⁴ Rest house.

³⁵ Act III of 1867, the Public Gaming Act.

294 A of the IPC dealt exclusively with the illegal advertising and conduct of unauthorized lotteries. As C.P Ilbert, one of the architects of the Burma Prevention of Gambling Act (1884), explained, this ruling annulled previous convictions of *ti* under the Public Gaming Act. When the Po Thit case was reviewed, Jardine agreed with the decision of Quinton and Wilkinson. *Ti* was, indeed, not a game. Crucially, he did not believe it was a lottery *either*.³⁶

Ti, according to Jardine, was not a ‘game of skill’ - there was hardly any element of play involved. So, was *ti* a game at all? Here Jardine cited *Tollet vs. Thomas*, a case from London, where the accused had visited the races with a machine called the *pari-mutuel*, a device which threw up numbers from zero to nine hundred and ninety-nine on the turning of a key. The proprietors offered bettors the chance to bet on a given number that would correspond to one of the horses running on the day. If the horse won, they would be paid their winnings. Jardine took this to be a miniaturized instance of a horse race itself - instead of betting on actual horses, players wagered on the results thrown up by the *pari-mutuel*, strictly speaking, the *pari-mutuel* was not the same as betting. Jardine argued that in this game, the owners of the *pari-mutuel* were using ‘an instrument designed for the purposes of a game’. Added to this, they functioned as a house or banker, as they made their money off commission. Jardine stressed on the putative meaning of ‘instruments of gambling’ when he drew attention to the function of the *pari-mutuel*. For him, what made the device a ‘proper’ *instrument* was that it was designed and operated exclusively for the purpose of registering bets. In *ti*, Jardine failed to identify a corresponding instrument. Five years later, while serving in the Bombay High Court during the Narotamdas case, Jardine’s opinions

³⁶ Home Department judicial proceedings November 1883 Judicial, 54- 58, October 1883 C.H. T., NAI.

remained unchanged. In that instance, the accused were charged with running a rain gambling stall, a game where players bet on the chance and quantity of rainfall on a given day. Accordingly, the public prosecutor had presented a rain gauge as an ‘instrument of gaming,’ which Jardine disregarded because:

It registers quantity just as the watch in the hand of a Judge registers time, or as a thermometer is used to register heat or a barometer the pressure of the atmosphere. Its use resembles further the use of these instruments in that it does not introduce any element of chance into betting.³⁷

As mentioned earlier, Jardine had broadly agreed with Justice Quinton and Wilkinson when they described *ti* as a lottery, since it was played by the drawing of lots, but he once more pushed past their conclusions. The crucial difference between the *ti* and a lottery was that while a lottery combined the capital of all players into one common pot, in *ti* the *daing* placed individual bets with every contestant. In this sense, it resembled a single wager.

Interestingly and quite counterintuitively, he also insisted that *ti* was not a game of chance. His judgment, therefore, presented a formal interpretation of what ‘chance’ could mean in the context of gambling. How, then, was it possible to conceive of a game that was informed neither by skill nor chance? Jardine argued that the result of the game was not settled by external phenomenon, or what could be interpreted as an event of ‘pure chance’. Instead, the *daing consciously* chose one of the animals amongst the 36, which he proceeded to place within the bamboo stalk, *ti*. The fact that the animal was selected with

³⁷ Birla, *Stages of Capital*, p. 158.

prior knowledge and not drawn, as was common with lotteries, in a random manner, was what compelled Jardine to interpret the draw as an act of ‘free will’.

Thus, Jardine summarized his observations into a verdict. *Ti* had neither discernible instruments nor rules like a game and the ‘draw’ that decided the winner was settled not by chance but ‘free will’. The banker did not combine every bettor’s money in a collective pot; rather, he offered every player an individual bet with himself. For Jardine, *ti* was, ultimately, a simple wager:

Unless we are prepared to hold that all betting is gaming, we cannot support the present convictions under section 13 of the Gaming Act. But betting does not appear to me to be within the mischief contemplated by the statute. *If the legislature had intended to deal with betting in Act III of 1867 we may safely infer from the language of the acts of parliament that it would have mentioned betting.*³⁸

The accused were acquitted and Jardine passed a circular on the 14th of September, 1883 describing *ti* as ‘similar to betting with a professional bet maker as to which of 36 horses might win a race.’³⁹ And since betting was not illegal, he found nothing criminally wrong with *ti* and concluded that it ‘was not a game nor a lottery, and the papers on which the memorandum of the bet was written were wrongly described as lottery tickets.’⁴⁰

As Judicial Commissioner, Jardine’s ruling was to be the new standard of interpretation through the province. However, it was challenged almost instantly. In November of the same year, in *Queen Empress v. Ah Choung* (alias Kyauk Seen Let Kauk), the Magistrate

³⁸ Home Department judicial proceedings November, 1883. Judicial, 54- 58, October 1883 C.H. T., NAI. Emphasis mine.

³⁹ *Ibid.* Circular No. 54, 14th September, 1883.

⁴⁰ *Ibid.*

at Rangoon, Mr. Irwin arrested a *ti* agent under the provisions of Section 294-A of the IPC. So, unlike in the case of *Nga Po Thit*, the charge this time was not of illegal gambling, but rather, the conduct of an unauthorized lottery. In passing his sentence on the matter, the Recorder of Rangoon remarked.

If I have correctly apprehended and stated the facts, I cannot see what can be gained by drawing distinctions between gaming and betting, or between both and lotteries or between gambling in one form or fashion and gambling in another, except the broad distinctions drawn in the law as a fact that some forms of gaming are under certain circumstances offenses, some are not, and those that are, some are punishable in different ways or under different Acts.⁴¹

The Recorder therefore attempted to rescue the broad legislative ‘intent’ to which anti-gaming laws were meant to respond. He appealed to substantive claims during arbitration, arguing that each judgment was dependent on the nature of the particular case. Principally, if it *appeared* illegal then it was useless to split hairs or assign a finer point to the matter. The decision, however, contradicted the reasoning put forward by Jardine in the *Nga Po Thit* case, as well as the directive of his circular. Accordingly, the case was referred back to a Special Court, presided over by Jardine and Justice Allen.

Allen’s sympathies lay with the Recorder. He also endorsed the Magistrate’s decision to convict Ah Choung under Section 294-A of the IPC. After all, it was difficult to impose the provisions of Act III of 1867 onto *ti*, as it was ‘a form of gambling which is carried on not by the body collection of the gamblers but by advertisement and correspondence.’⁴² Since it was impossible to physically catch gamblers in the act of gambling or in a ‘common

⁴¹ *Ibid.*

⁴² *Queen Empress v. Ah Choung alias Kyauk Seen Let Kauk*, Legislative Department, October, 1884, Proceeding Nos. 176-211.

gaming house’, treating it as lottery was the only way to secure conviction. Altering the verdict slightly, Allen concluded that Ah Choung be convicted under clause 2 of Section 294-A, which concerned, not the conducting, but the aiding and abetting, of an unauthorized lottery.

Jardine disagreed. Faced with this disregard for both his ruling and his circular, his observations appeared cantankerous, and he proceeded to expose the gaps in the logic presented by the Government Advocate, Mr. VanSomerén. What was particularly irksome for Jardine was the faulty classification, a matter he believed he had already settled during the Po Thit case. Yet VonSomerén’s arguments continued to function with a nomenclature that displayed very little consideration for statutory law or formal procedure.

Mr. VanSomerén did argue pertinaciously that one necessary ingredient of a ‘lottery’, as the word is used in Section 294-A, is a game. But for this argument he could cite no authority, and I know of none [...] I believe Mr. VanSomerén’s contention is made for the first time: he stated that it is based only upon his own construction of statutes and has no judicial sanction.⁴³

The Judge appeared personally offended by VanSomerén’s contravention of his previous reasonings. Especially in view of that, the errors, particularly on the question of ‘chance’ and ‘free will’. Jardine rehearsed the difference with the example of the act of drawing a card from a full pack. Even if no overt motive could be ascribed to why one chose the ten of clubs rather than the ace of clubs, Jardine contended that such a selection was still different from drawing a card out in random from a pack where the cards were placed face down. Exasperated, he asked VanSomerén ‘if I and another man have a bet, Rs 6 to 1, that

⁴³ *Ibid.*

if I throw a dice, ace will turn up, is that a lottery, all your three ingredients being present?’⁴⁴ Possibly just to vex Jardine, VanSomerén answered with a “yes”. As the subtleties of his reasoning and the care in his distinctions hit a brick wall, it occurred to Jardine that the prosecution along with most of the government machinery appeared unconcerned with the correct interpretation and application of law in the way that he understood it; they were concerned instead with finding a quick solution to the problem of *ti*. While expressing his antipathy toward such mockery of statutes, Jardine confessed that he too was bound by procedure, since section 76 of Burma Courts Act stated that in the case of a difference of opinion, it was the ruling of the Court that sought the opinion that would finally prevail, and not the one that reviewed it.

The result is that one doctrine has been applied to Po Thit, who was ultimately acquitted, and now the person accused has a conviction upheld in substantially the same circumstance. If the learned Recorder applies the opinion stated in these two cases, the law enforced in Rangoon will differ entirely from that now in force from the other Courts in Burma.⁴⁵

A second circular was published by Jardine on the 25th of November 1883, reminding the courts outside Rangoon that ‘the Judicial Commissioner’s judgment affirms judgments given in the Special Court, especially that of the Judicial Commissioner in ‘Queen Empress v. Nga Po Thit.’⁴⁶ *This* was the law that was to be followed, one where *ti* was treated neither as a game nor a lottery, just a simple wager.

What led Jardine to so tenaciously and woodenly read the definitions in the Public Gaming

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, Circular No. 59, 25th November, 1883.

Act (Act III) and those of Section 294-A of the IPC? Was it an official position, a judicial ideology, or the reflection of a personal idiosyncrasy? His insistent adherence to the letter of the law echoed a familiar Utilitarian position, one that valued positive law as the reflection of legislative sovereignty, which was the branch of government that held final authority when it came to lawmaking. As Shyamkrishna Balganesh argues, for Utilitarians like Thomas Macaulay, the first law member to the Governor General and the earliest architect of the Indian Penal Code, *precision writing* was the stated objective of law making. In a letter sent to the Governor General in 1837, Macaulay confessed that:

We have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision and of using harsh expressions because we could find no other expression which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader ... [yet] must be found, in every system of law which aims at accuracy. If this necessary but most disagreeable work be not performed by the lawgiver once and for all, it must be constantly performed in a rude and imperfect manner by every judge in the empire and will probably be performed by no two judges in the same way.⁴⁷

If the goal of precision was to eliminate judicial discrepancy, it also demanded a symbiotic method of judicial interpretation and application. On the face of it, Jardine's judicial practice strove to reproduce similar precision, and in doing so, it resembled what legal scholars have characterized and often caricatured as a legal 'formalism'. Originating in the late nineteenth and early twentieth century in England and America, 'Legal Formalism'

⁴⁷ Letter from the Indian Law Commission to the Governor-General of India in Council (October 14, 1837) cited in Shyamkrishna Balganesh, "Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint", in *The American Journal of Comparative Law*, Winter, 2015, Vol. 63, No.1, pp. 33-76, p. 46.

was a normative theory regarding judicial application of written laws.⁴⁸ It was criticized by American jurists of the Realist school in the early twentieth century, who often confused formalism with the Analytical school of jurisprudence made famous by John Austin in the nineteenth century. Perceptibly, formalism was simply the practical application of analytical principles. In congruence with analytical jurisprudence, formalism demanded mechanical rule application to minimize the occurrence of ‘judge made law’, an emblematic feature of the English common law tradition. The substantive rationality of a legal rule or its moral purpose is set aside by the formalist judge since no individual case completely adheres to the general purpose of the rule. To that end, Duncan Kennedy has argued that legal formalism works with the assumption that the world of rules and facts are inherently orderly, and the formal application of rules makes any system objective and predictable.⁴⁹ In order to remain faithful to legislative intent, a formalist judge usually follows the rules of ordinary language when interpreting statutes. For Frederick Schaur, this means that judicial formalism adheres to a higher order of rules where ‘choice is masked by the language of linguistic inexorability’.⁵⁰

For a formalist judge any hermeneutic reading of law is confined to reading statutes and selecting the correct method of rule application. For Kennedy, the formalist approach is

⁴⁸ See Frederick Schaur, “Formalism” in *Yale Law Journal*, Volume 97, Number 4, March 1988, See also Frederick Schaur, *The Force of Law*, London: Harvard University Press, 2015 pp. 21-43, See also, Duncan Kennedy, *Legal Formality*, See also, H.L.A Hart, *The Concept of Law*, Oxford: Oxford University Press, 2012, pp. 64-72, See also, Martin Matczak, “Why Judicial Formalism is Incompatible with Rule of Law”, in *Canadian Journal of Law and Jurisprudence*, Volume 31, Issue 1, February 2018.

⁴⁹ Duncan Kennedy, “Legal Formality”, *The Journal of Legal Studies* Volume 2, Number 2 June, 1973 pp.351-398, p. 363.

⁵⁰ Frederick Schaur, “Formalism”. p. 510.

best maintained when:

Decision according to rule means, in the ideal typical case, the application of per se rules, that is, decision by the selection of one (or very few) identifiable aspect of the situation, and the justification of the decision uniquely by appeal to the presence or absence of that element.⁵¹

This is precisely what Jardine was interested in presenting. Unlike the Recorder in Rangoon, for Jardine the question of ‘legislative intent’ held little meaning outside the language of the actual law. As we have seen at length, his considerations stemmed from the question of classification - was *ti* a game, was there an involvement in it of chance and did its ‘instruments of gaming’ fall within prescribed legal categories? Even when directing his questions at the Government Advocate, he had insisted that the decision be made based on the presence or absence of certain ‘ingredients’ in *ti*, which determined its status as a game, lottery or a wager. Thus, Jardine’s reading and interpretation of statute was the discernment of its constituent elements. Mechanistically, these parts constituted the whole and vice versa - the whole (of the law) was reducible to the verification of each individual part. Thus, Justice Allen’s appeal in favour of a focus on similitude and intention were contrary to his formalist considerations. Within the paradigm, the validity of rule application was not derived from an ethical deliberation of ‘justice’ or ‘right’. More importantly, since a formalist application of law was congruent with an utilitarian perspective, one that viewed aggregated data in the long term, it did not concern itself with a particular case that acted as an anomaly. Allen’s appeal regarding the ‘spirit’ or ‘intention’ of the gaming law would hold little water for a formalist, since:

⁵¹ Duncan Kennedy, *Legal Formality*, p. 355.

The notion of an appeal to the “spirit” of an original compromise—that is, to its purposes against the manifestation in the form of rules—makes no sense because the rules, in the conception involved here, *have no spirit*. Particular rules have no purpose except as pieces in a larger compromise of interest.⁵²

The formalist judge was required to stay away from the logic of purposive ends in the course of a specific case, and any substantive consideration remained the imperative of the legislature, onto whom Jardine placed the onus of corrective; it was their job to provide purpose and objective.

Far from being a stick in the mud, Jardine felt that it was crucial to interpret and apply law from this perspective, since his reading carried repercussions onto other spheres. For instance, a legitimate contract between two private parties could be read as a form of wager - the fulfillment of a certain act resulted in the payment of a certain sum. So, Jardine asked, did the legislature, in their assault on illegal gaming, also plan to ban private contracts that could be read as wagers? In particular some forms of actuary and marine insurance were ‘merely betting against the happening of certain events.’⁵³ Were these to be considered acts of gambling? Of course not. Therefore, any decision that outlawed wagering in one fell swoop would correspondingly determine the legal sanctity of *all* private contracts. Thus, from the formalist standpoint, every judicial decision was an act of balancing alternate substantive claims. For Jardine, it was important to differentiate between events that were brought about for the purposes of betting and those that occurred independently. *Ti*, he felt, corresponded to the latter, and therefore fell within the purview of betting.

⁵² *Ibid.*, p.383.

⁵³ K.J. Ayer, Syed Maqsood Ali Sami, *Gambling in India*, Law Book Company, Lahore 1947, p.45.

As we move here to the next section that revisits the historiography on codification in colonial India, it should be noted that Jardine's formalist judicial approach to statutory law was emblematic of a larger debate regarding 'rule of law' in colonial legal discourse in the late nineteenth century. Regarded as the backbone of Empire, 'rule of law' was taken as an agent of social transformation, revenue management and administrative efficiency in the colony. However, if 'rule of law' implied procedural and substantive equality, how did the state justify racial inequality and the violence of colonialism through the very institution of law? Scholars like Upendra Baxi remain unconvinced by triumphant legal narratives that have equated the success of anti-colonial struggles to the ultimate unfolding of liberal values, coded as 'equality before law'. For Baxi, the colonial discourse surrounding 'rule of law' erased its normative pre-colonial history and expunged its dominant tendencies.⁵⁴ Is it even possible, then, to retrieve an essentialist philosophy of colonial law and its promises of justice? To answer this, we must turn to the history of legal codification in India and explore its unique relation to 'rule of law'.

Codification and the Colonial Rule of Law

The early stage of colonial expansion responded to the revenue needs of the British East India Company which, in turn, required the establishment of a normative legal order. The first attempt at systematization came with Warren Hastings' establishment of the Sadar Diwani Adalat and the Sadar Nizamat Adalat, the highest civil and criminal courts of

⁵⁴ Upendra Baxi, "The Rule of Law in India", *Sur* Vol.3, No. se, Sao Paulo, 2007.

justice, respectively. By defining the private sphere of native law as personal or religious, and that of commerce and property as public, Hastings formally separated the legal field.⁵⁵ The private sphere of law was not to be interfered with, rather it was to be governed according to the prevalent customs of Hindu and Muslim communities. To aid legal administration, Hastings commissioned Orientalist scholars like Nathaniel Halhead to compile codes of native law. These codes relied heavily on the knowledge of Brahmin interlocutors and their claims that *shastric* texts were the autochthonous legal codes already operational in India. The effort was later criticized by jurists like Henry Maine, who accused Orientalists of misdiagnosing the source of native law which was not to be found in canonical literature but in fluid and contextual *customary* practice. More recently, scholars like Donald Davis, insist that the codes of law on which early Orientalist scholars had placed weighted emphasis were more like guiding principles. For Davis, such codes were like the spirit of law, and could be actualized only through contextual application, consistent with the social and political conditions in which they were applied.⁵⁶

Hastings' tenure was marked by issues of official accountability and corruption, resulting in his resignation and a public trial that brought the question of company 'despotism' before the British public. The policies of Lord Cornwallis towards the end of the nineteenth century attempted to correct this image. Cornwallis separated the executive and judicial functions vested in administrative positions like the collector; the collector was no longer in charge of administering civil justice and operated only as a revenue official. [This step

⁵⁵ Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review*, Fall 2005, Vol. 23, No.3, pp. 631-83, p. 59.

⁵⁶ Donald R Davis, "A Realist View of Hindu Law", in *Ratio Jurist*. Vol. 19 No. 3 September 2006 (287-313).

would have met with the approval of future Whig jurists like A.V Dicey, for whom the rule of law was synonymous with the separation of the branches of government.] Cornwallis also standardized revenue collection through the Permanent Settlement in Bengal and set in motion crucial judicial and police reforms. These early attempts in reforming the administration of the Company State were putatively referred to as the Cornwallis Codes.⁵⁷

The reforms were short-lived, however, as Cornwallis' successor, Lord Wellesley and his protégés, brought with them a new imperial ideology. This 'romantic generation', as Eric Stokes referred to them, amalgamated Cornwallis' authoritarian reforms with Edmund Burke's plea for historical continuity.⁵⁸ Figures like John Malcolm, Thomas Munro, Charles Metcalfe and Mountstuart Elphinstone were apprehensive of a tiered bureaucratic structure, preferring instead to centralize power in the hands of paternalist figures like the collector. Charles Metcalfe wanted a 'discretionary government', which he believed was similar to the structure of Mughal authority, while Munro wished to simplify administrative procedures, since small landholding peasants (*ryots*) were better served when appealing to one official instead of many.

By the second decade of the nineteenth century, figures like James Mill, Charles Metcalfe and most notably, Thomas Macaulay, brought the Utilitarian legal theories of Jeremy Bentham to the colony and provided fresh impetus for codification on Anglicist lines. According to C.P Ilbert, law member to the Viceroy's Council, the term 'codification' was

⁵⁷ Chittaranjan Sinha, "Significance of Cornwallis's Judicial Reforms in Bengal Presidency", *Journal of the Indian Law Institute*, Vol. 11, No. 2 (APRIL-JUNE 1969), pp. 185-192.

⁵⁸ Eric Stokes, *The English Utilitarians and India*, Delhi: Oxford University Press, 1959. p.15.

a Benthamite invention.⁵⁹ In his *General View of a Complete Code of Laws*, Bentham declared that the objective of legal codes was to democratize the legal process by allowing the common man to access and consult the laws applicable to his needs. Bentham believed that English law had taken a cabalistic turn in the hands of judges and lawyers of the common law tradition. His call for democratization was reinforced by his belief in the universality of positive or man-made laws coupled with his belief in the sovereignty of the legislature. Firmly averse to ‘judge made law’, Bentham opposed the citation of legal commentaries made in judgments, adding that ‘if a judge or advocate thinks he sees an error or omission, let him certify his opinion to the legislature’.⁶⁰ This stand was echoed in Jardine’s position regarding the classification of *ti* as well. According to Nathan Isaacs, Bentham’s ‘constructivist’ discourse could be fairly summarized as ‘the duty to legislate’.⁶¹ In India, however, jurists like C. P. Ilbert readily admitted that Bentham’s views regarding legislative codes were idealistic and overestimated the powers of government.⁶² Nonetheless, the colonies remained an beacon for several Utilitarian jurists, looking to cut legal codes from whole cloth.

The first concrete steps towards codification in India were taken in 1829 by Sir Charles Metcalfe, in consultation with the judges of Bengal. Subsequently, the Charter Act of 1833 established a Law Commission that would assess the nature and operation of the laws of British India. The assessment resulted in another ideological shift. Utilitarians like James

⁵⁹ C.P. Ilbert, *Legislative Methods and Forms*, Oxford: Clarendon Press, 1901., p. 122.

⁶⁰ *Ibid.*, p. 123.

⁶¹ Nathan Isaacs, “The Schools of Jurisprudence”, *Harvard Law Review*, Vol. 31, January 1918, pp. 373-411, p. 382.

⁶² Ilbert, *Legislative Methods*, pp. 125.

Mill argued that the closest approximation to rule of law in the colony was the ‘rule of personal discrimination’, backed by an effective judiciary.⁶³ For others like Macaulay, the first Law Member to the Governor General’s council, the goal was to “give a good government to a people to whom we cannot give a free government.”⁶⁴

Macaulay arrived in India in 1834 and started work on framing the Indian Penal Code. The first draft was ready by 1836 and after several revisions, it was passed as an Act in 1860. A true disciple of Utilitarian thinking, Macaulay’s legal approach was grounded within its ideological framework. In a letter to the Governor General in 1837, he stated the objective of the law commission was to sacrifice ‘neatness and perspicuity for precision’, such that legislative intention was made unmistakable and judicial exegesis, minimized.⁶⁵ His emphasis on legislative sovereignty was a direct reflection of the influence of John Austin’s legal positivism, which in opposition to the tenets of natural law, advocated for a morally neutral and descriptive theory of law. Austin agreed with David Hume’s observations regarding the epistemological slip between *what is* and *what ought to be* and warned that the confusion was often repeated in legal practice and philosophy. He was open to the moral and political objectives of law but in essence, law was the command of the sovereign and not a reflection of moral beliefs. Similarly, as Eric Stokes noted, ‘for Macaulay, the

⁶³ Stokes, *English Utilitarians*. p.145.

⁶⁴ “A Speech Delivered in the House of Commons on the 10th of July 1833”, *The Miscellaneous Writings and Speeches of Lord Macaulay*, cited in Elizabeth Kolsky, “Codification and the Rule of Colonial Difference: Criminal Procedure in British India, *Law and History Review*, Fall 2005, Vol. 23, No.3, pp. 631-83, p. 631.

⁶⁵ Letter from the Indian Law Commission to the Governor-General of India in Council (October 14, 1837) cited in Shyamkrishna Balganesh, “Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint”, in *The American Journal of Comparative Law*, Winter, 2015, Vol. 63, No.1, pp. 33-76, p. 46.

theory of government rested on certain unquestioned assumptions, rather than a theory that had to be elaborated or defended.’⁶⁶ So, alongside championing legislative sovereignty, Macaulay ensured legal legibility through the passage of Act X of 1835, thus ensuring that written laws were printed in an official gazette and were accessible to both judges and magistrates. The measure spoke directly to the issue of inconsistent adjudication, a problem that expedited codification in the first place. Company administrators felt that in the absence of a code, executive and judicial decisions relied on a patchwork of native customary law and English case laws, giving the framework an unpredictable and discordant form. Even in the 1870s, the Law Member to the Imperial Legislative Council, James Fitzjames Stephen, argued that codes of law would instruct ‘unprofessional’ native judges and magistrates while also aiding British officials who were unable to access case laws from English law libraries in the *mofussil*.⁶⁷

In order to correct the unevenness of judicial decision making, the code and its formality increasingly became an important consideration for colonial jurists. The template for codified law were based on the Roman and Norman law codes of the past, whose formal rather than substantive features had earlier guided British legal reforms in the eighteenth century. According to Karuna Mantena, the formality of Roman jurisprudence allowed legal rules to invent hypothetical and analogical explanations to clarify the meaning of

⁶⁶ Stokes, *The English Utilitarians and India*, p. 192.

⁶⁷ Ilbert, *Legislative Methods and Forms*, p. 149. Not all nineteenth century colonial jurists shared the Utilitarian distaste for customary law or the common law tradition. In fact, many disagreed with Bentham’s strict division between the statutory and customary. For example, much of contract and tort law that was codified in the Contract Act of 1872, was merely the systematization of customary law, where custom was accepted as valid when it did not go against the spirit of the Act itself. See Ilbert, p. 148 and Balganes, “Codifying the Common Law of Property in India”, p. 64.

general rules instead of being limited to the precedents set by particular cases.⁶⁸ This was crucial for those judges and magistrates who were placed outside Calcutta and Madras and were thus unable to refer to an extensive stock of case laws while making their decisions.

Legal codes, however, were not limited to the question of administrative convenience; they were also pedagogical tools for native administration. The putative opinion of colonial officials was that native judges and practicing lawyers of India were deficient in their knowledge of case law and in the application of western legal principles. Unlike India, in a socially and politically advanced nation like England, codification was deemed ineffectual since it was law that played catch-up to the progressive social standards of the country. As a result, Fitzjames Stephens, the architect of transformative Acts like the Criminal Procedure Code, the Contract Act, and the Evidence Act in India, found it difficult to reproduce his statutory abilities in England itself. Stephens had drawn a bill for an Evidence Act in England, modeled on the one he had drafted for India, but the law did not advance beyond a first reading.⁶⁹ In fact, by the end of the nineteenth century, the only codified Acts passed by British Parliament were the Bills of Exchange Act of 1882, The Sale of Goods Act of 1893 and the Partnership Act of 1890. In the colony, however, the substance of codified law was considered an agent of social and political progress. While scholars like Partha Chatterjee and Sabyasachi Bhattacharya have shown how foundational liberal tenets, like the constitution of a free press, free markets and private property, were abandoned in the colony, on the question of codification, what fell through in England was

⁶⁸ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton: Princeton University Press, 2010, p. 101.

⁶⁹ Ilbert, *Legislative Methods and Forms*, p. 127.

considered essential for the ‘rule of law’ in India.⁷⁰

Ideologically, ‘rule of law’ was presented as an imperial gift, similar in scope to technologies like the railways and the telegraph.⁷¹ Accordingly, the objectives of English Utilitarian theories were also redrawn. Bentham and Austin imagined a legal system that broke with traditional forms of legitimacy (moral and providential), while James Mill and Macaulay laid weighted emphasis on the moral purposes of substantive law. Their arguments were bolstered by Evangelical depictions that presented India as a lawless and barbaric society. As a result, imperialism based on the rule of law could break with India’s ‘despotic’ past, a past described as a period ‘empty of law’.⁷² Significantly, as a gift of British benevolence, law rescued imperial conquest from the throes of unreasoned violence. Law was ‘civilizing’ and in order to be an effective agent of social transformation, its principles were declared to be ‘universal’.

The universal principles dormant in codified and statutory law were built on Bentham’s conceptualization of the ‘pannomian’—a code of law based on abstract, universal and scientific principles.⁷³ The connection between functional law and abstract principles was once again drawn through Roman jurisprudence and its ideas regarding ‘equity’ or ‘natural law’. Principles of equity or ‘natural reason’ held a significant grip over English philosophy and literature during the seventeenth and eighteenth centuries, manifest most starkly in the

⁷⁰ Sabyasachi Bhattacharya, “Laissez Faire in India”, in *The Indian Economic and Social History Review*, Vol. II, No.1, January 1965, p. 2.

⁷¹ Peter Fitzpatrick, “Crime as Resistance: The Colonial Situation”, In *The Howard Journal*, Vol. 28, No.4, Nov., 89, p. 279.

⁷² Kolsky, “Codification and the Rule of Colonial Difference”, p. 652.

⁷³ *Ibid.* p. 636.

writings of Thomas Hobbes and John Locke. Natural law sought general principles, true in every context. It exceeded human-made or positive law, and as famously articulated by the eminent jurist William Blackstone, its principles were to be *discovered*, not *made*. The sentiment of this age was captured by Alexander Pope in *An Essay in Criticism*:

rules of old discovered, not devised; Are Nature still, but Nature methodized
Nature, like liberty, is but restrained; By the same laws which first herself ordained.

Utilitarians were enthused by the abstract universals of natural law and believed that such universals could also be reproduced in positive or written law. Austin's analytical jurisprudence built on the study of abstractions, to transform English law into a rigorous and scientific profession. According to the Frederic Harrison, an eminent jurist of nineteenth century England, the turn to abstraction through 'scientific jurisprudence' was crucial to the political needs of an expanding empire as well. The more systematic and abstract the principles of law became, the easier it was to apply them in various colonial contexts, without considering the specific cultural or social variations of each colony.⁷⁴

Armed with this spirit of universalism, Macaulay began work on the Indian Penal Code in 1834. He believed that criminal legal reform would meet with the lesser resistance from the local population, as opposed to civil law. However, it was not the natives but the white settlers of British India who first objected to Macaulay's efforts. As Elizabeth Kolsky argues, alongside social transformation and legal efficiency, the objectives of codification

⁷⁴ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton, Princeton University Press, 2010.

also addressed the criminal activities of non-official Europeans of India, whose numbers grew after the East India Company's monopoly over the Indian trade was abolished by the Charter Act of 1813.⁷⁵ These settlers were placed under the jurisdiction of the Supreme Court in the Presidency town of Calcutta and local courts higher than the *zilla* (province) that were headed by European Judges. While the Sadr-Dewani Adalat (highest civil court) was the court of appeal for native subjects, British born non-official subjects were allowed appeal to the Supreme Court in Calcutta. As Kolsky suggests, logistical reasons, and the expense involved, often prevented natives from the interior to litigate in Calcutta, thus allowing European civil and criminal infractions to go unpenalized. The problem was most acute for the native workers in indigo and tea plantations, where extreme violence and brutalization by British managers was a common occurrence. Magistrates placed in the *mofussil* were also helpless in cases of assault where both parties were European.⁷⁶ Acclimated to legal exemption, white settlers guarded their privileges jealously. So, when the Exemption from Jurisdiction Act was passed in 1836 (Act XI), forcing Europeans to appeal civil matters in the Sadr-Dewani Adalat and not the Supreme Court in Calcutta, they rose unanimously to denounce it as a 'Black Act'. For Macaulay, the protests against the Act were a rebellion against the rule of law itself. He rebuked his fellow Englishmen and emphasized that:

The distinction [of separate courts] seems to indicate a notion that the natives of India may well put up with something less than justice or that Englishmen in India

⁷⁵ Kolsky, "Codification and the Rule of Colonial Difference", p. 639.

⁷⁶ *Ibid.* pp. 641-42.

have a title to something more than justice.⁷⁷

The transformative ambitions of liberalism had hit a roadblock as did the universal promise of the rule of law. British born subjects asserted the possession of inviolable rights as Englishmen and drew a distinction between them and the ‘Indian Human Nature’.⁷⁸ Kolsky notes that white citizens secured certain “rights and privileges” like milder punishments and being tried by exclusively by white judges and jurors when the Criminal Procedure Code of India was first passed in 1861. However, the resentment that initially germinated against Act XI of 1836 eventually culminated in a ‘White Mutiny’ when the Ilbert Bill was first introduced in 1883. The bill, which sought to amend the Criminal Procedure Code by giving Indian magistrates and sessions judges jurisdiction over British-born citizens, was met by fierce resistance by a majority of white settlers and was finally aborted. For Partha Chatterjee, the controversy surrounding the Ilbert bill made clear that racial difference would fundamentally impede the moral goals of the Enlightenment, and according to him, this ‘colonial difference’ signaled an ‘impossibility of completing the project of the modern state without superseding the conditions of colonial rule.’⁷⁹

Even before the controversies of 1883, the revolt of 1857, part of a series of global uprisings against British colonialism during the mid-nineteenth century, had already exacerbated the

⁷⁷ Macaulay’s Legislative Minutes, Minute No. 10, p.177, quoted in Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Michigan University Press, 2006, p.30.

⁷⁸ Kolsky, “Codification and the Rule of Colonial Difference” p. 658.

⁷⁹ Partha Chatterjee, *Nation and its Fragments: Colonial and Post-Colonial Histories*, New Jersey: Princeton University Press, 2007, p. 21. By highlighting ‘colonial difference’ Chatterjee, highlights difference in the histories of colonialism and modernity. If there was nothing specific to colonialism as a system of governance, particularly when it came to the ‘rule of law’, it would seamlessly integrate into the universal history of modernity. The fact that it did not, indicated its inability to dialectically resolve the contradictions of race.

problems of race. As Karuna Mantena has argued, the experience of the revolt deeply altered the universal liberal project. The immediacy of the political event was interpreted by British ideologues as the unpreparedness of a resentful colony to accept British social and legal reform.⁸⁰ Through a detailed study of Henry Maine's term as the law member in the Council of India, Mantena argues that the post-1857 period witnessed a conspicuous ideological turn which privileged cultural relativism over the idea of social transformation. Yet it was Maine himself who accelerated colonial legal codification, as he was instrumental in passing the Succession Act of 1865 and in formalizing the Contract Act of 1872.⁸¹ Maine believed that one of the 'unintended' consequences of colonialism was the dissolution of native institutions of property and law. He argued that western jurisprudence was grounded in civil contractual law while the legal convention in India was based on 'customary' law; the former was emblematic of a society of individuals while the latter reflected communal ties sustained through the kinship. Given that the authority of customary law had weakened under British rule, Maine insisted on the need for statutory law as its replacement. He argued that the codification of customary law was not the alternative, since formalizing the flexible practices of custom would prove deleterious to the institution as a whole.⁸² Unconvinced by the Utilitarian claim regarding the universality of modern law, Maine was persuaded by the cultural arguments of the Historical school of jurisprudence, made famous by Karl von Savigny. Accordingly, he believed that the legal

⁸⁰ Mantena, *Alibis of Empire*.

⁸¹ Michael Anderson argues that colonial law codes had replaced Anglo Islamic laws in all subjects except family and some spheres of property law by 1875. Michael R. 'Islamic Law and the Colonial Encounter in British India', in David Arnold and Peter Robb, eds, *Institutions and Ideologies: A SOAS South Asia Reader*.

⁸² Mantena, *Alibis of Empire*, p. 110

system of a nation was reflective of its historically and culturally determined social form. In India, this meant that customary laws were ‘observed’ rather than being ‘obeyed’.⁸³ Yet he was also convinced by the ‘stadial thesis’ in English political economy, which argued that social evolution moved in tandem with the formalization of private property. As the social moved from ‘traditional’ to ‘modern’ Maine argued that law also evolved from *status* to *contract*. Through this argument, he relocated British law’s universality from a position of transcendence and reconciled it with a process of historical evolution. The legal theorist Peter Fitzpatrick codes this as maneuver where European law now became ‘*the ascent from savagery instead of descent from Gods*’. This meant that modernity, when understood as a rule of law, remained a concept that was both universal in application yet exclusive to the epistemic domain of European history.⁸⁴

After the Revolt of 1857, administration of India passed from Company to Crown rule. Mantena suggests that the ruling ideology correspondingly transitioned to a period of ‘indirect rule’, where social transformation through law was abandoned as an imperial objective, although scholars like Ritu Birla have argued that the transformative ambitions of colonial law remained largely undisturbed in the field of property and the market economy.⁸⁵ Importantly, even as indirect rule arrested British interference in the social field

⁸³ Mahmood Mamdani, *Define and Rule: Native as Political Identity*, Kampala: Makerere Institute of Social Research, Makerere University, 2013, Such a reading of law—as *nomos* or convention—leads to a willful obfuscation of the coercive aspects of customary law, and has even suggested to scholars like Donald Davis, to apply anachronistic paradigms such as ‘realism’ to describe a fictive legal order.

⁸⁴ Peter Fitzpatrick, *Mythology of Modern Law*, New York: Taylor and Francis, 2016, p. 63.

⁸⁵ To that end, Mahmood Mamdani insists that the policy of non-interference eventually resulted in ‘all round interference’, as the ‘occupying powers gave itself the prerogative to define the boundaries, the boundaries in which it will not interfere.” Mahmood Mamdani, *Define and Rule: Native as Political Identity*, Kampala: Makerere Institute of Social Research, Makerere University, 2013; Ritu Birla *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Delhi: Orient BlackSwan, 2011.

of customary law, both custom and statute continued to operate within a “parasitical economy”.⁸⁶ Neeladri Bhattacharya, for example, exposes how the Military Transport Act of 1903 in Punjab appropriated the customary practice of *begar* (forced labour), which allowed the government to alienate labour and draught animals from pastoralists for British military purposes.⁸⁷ As Bhattacharya observes, by citing ‘need’ and ‘urgency’, “officials no longer had to be plagued by the language of liberalism...or be embarrassed about continuing a practice that was not authorized as legal.”⁸⁸ Other postcolonial scholars like Bhavani Raman and Nasser Hussain have also questioned liberalism’s promised equality, enfolded in the sanctity of law. For Raman, the constant invocations of emergency staged through counter-insurgent military campaigns reduced large parts of India into a place where the rule of law was neither in operation nor in suspension.⁸⁹ Similarly, Hussain believes that some of the core propositions of modern law like equality and transparency were fungible in the colony. Formal procedural elements gave the colonial legal system the appearance of being a marker of civilization, but in its actual working, the system ceded to the needs of political power.⁹⁰ Even Macaulay, who had championed the moral virtues of British law, left room for political despotism. This has been noted by scholars like Radhika

⁸⁶ Jacques Derrida, “Law of Genre” *Critical Inquiry* Vol. 7, No. 1, On Narrative (Autumn, 1980), pp. 55-81, p. 59. In the context of the textual tradition, Derrida argues that genres are conspicuous by the rule of contamination and impurity since the mark that establishes a genre does not participate in the category itself. For example, the rules that mark a poem as a ‘ballad’ is itself not a ballad. This suggests to Derrida that the ‘class’ of a genre is neither absolute nor closed and is susceptible to further additions and mutations.

⁸⁷ Neeladri Bhattacharya, “Violence and the Languages of Law”, in *Iterations of Law: Legal Histories from India*, New Delhi: Oxford University Press, 2018, p. 112.

⁸⁸ *Ibid.*

⁸⁹ Bhavani Raman, “Law in the Times of Counter-Insurgency”, in *Iterations of Law: Legal Histories from India*, New Delhi: Oxford University Press, 2018.

⁹⁰ Nasser Hussein, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*. Ann Arbor: The University of Michigan Press, 2003

Singha, who has observed that in spite of his emphasis on precise definitions, the Thuggee Act of 1836, passed during Macaulay's tenure as Law member, "made it an offense to belong to any gang of Thugs without explaining what exactly a thug or the crime of Thuggee was."⁹¹

The steep task of reconciling 'highest might with highest right' should have disheartened British jurists in their effort to establish a codified justice system. In reality, it was quite the opposite—they celebrated colonial absolutism as a condition that granted them freedom to paint their vision without being encumbered by public opinion. A notable example of this thinking is gleaned from the papers of Charles Hay Cameron, who took part in a Commission tasked with investigating and making recommendations regarding the judicial system of Sri Lanka. In his report, Cameron gleefully declared:

A fairer field than the island of Ceylon can never be presented to a legislator for the establishment of a system of judicature and procedure, of which the sole end is the attainment of cheap and expeditious justice.⁹²

When it came to experimenting with legal reform, no one appreciated the fecundity of colonial soil more than James Fitzjames Stephen. Stephen had helped Maine draft the Native Marriage Act and the Indian Contracts Act which were passed in 1872. As a legislator, he is best remembered for drafting the Indian Evidence Act which was also passed in the same year. Having seen his attempt at codification fall through in England, Stephen lionized his Indian accomplishments. He drew comparisons between the legal

⁹¹ Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India*, Delhi: Oxford University Press, 2000, p. 168.

⁹² *Colebrook-Cameron Papers*, vol. 1, 164, cited in David Scott, "Colonial Governmentality", *Social Text*, No. 43 (Autumn, 1995), pp. 191-220. p. 212.

systems of both countries, describing the Indian Penal Code as ‘cosmos’ and English criminal law as ‘chaos’. E.P Thompson had noted, in the context of the passage of the Black Act of 1723, that law has a unique ability to maintain quasi-autonomy from the power structures within which it operates.⁹³ This was not true in the colony, as Stephen knew that it was the real conditions political absolutism which made his efforts in codification possible in the first place. Thus, in a letter written to *The Times* in March 1883, he condemned the provisions of the Ilbert Bill and declared that:

It [colonial government] is essentially an absolute government, founded *not on consent but on conquest*. It does not represent the native principles of government, nor can it do so until it represents heathenism and barbarism.⁹⁴

Political conquest was the indispensable condition for Stephen to actualize his legal revolution; a revolution bereft of compassion.⁹⁵ However, questions of political might quickly ceded to the moral benefits when he claimed that:

The establishment of a system of law... constitutes in itself a *moral conquest* more striking, more durable and far more solid than the physical conquest which renders it possible...Our law is in fact the sum and substance of what we have to teach

⁹³ E.P Thompson while writing on the Black Act of 1723, passed to prevent poaching and deer killing in the royal forests of Windsor, argued that “The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and seem to be just...indeed, on occasion, of actually being just” (p. 259). This is a significant declaration for a Marxist historian, writing in a tradition where law was putatively viewed as an instrument of class domination. E.P Thompson, *Whigs and Hunters: The Origins of the Black Act*, New York: Pantheon, 1975.

⁹⁴ Letter to *The Times* March 1st, 1883. Emphasis mine.

⁹⁵ Hannah Arendt, *On Revolution*, London: Penguin Books, 1990, pp. 66-74. On the social question of revolution, Arendt contrasts the American and French Revolutions which occurred within a decade from each other. She noted that the Founding Fathers of the American Revolution had noticed the lack of ‘poverty’ in the American context, and therefore registered different historical and social context for revolution in America and France. According to Arendt, the founders had confused the lack of ‘misery’ with the lack of ‘poverty’, since misery was tied to slavery, which, as a social problem, went unaddressed in the American revolution. As Arendt argued, the ‘the problem they [founders] posed was not social but political, it concerned not the order of society but the form of government.’ (p.68). Because of the purely ‘political’ nature of the American revolution, the post-revolutionary government revered formality and believed that political will was in itself transformative.

them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.⁹⁶

This statement by Stephen captures the contradictions and ambivalence of colonial statutory codes and the idea of ‘rule of law’. The establishment of British law in India was made possible by violent conquest. Yet the establishing violence of law was erased and rehabilitated through the moral claims of civilization.⁹⁷ Far from an inconsistency, Stephen’s views regarding the conflict between ‘might and right’ were reflective of the fetishistic nature of colonial political authority itself. Homi Bhabha characterizes this as ‘a non-repressive form of knowledge that allows for the possibility of simultaneously embracing two contradictory beliefs, one official and one secret, one archaic and one progressive’.⁹⁸

Therefore, in spite of its inventive claims, colonial law and British codification failed to achieve a complete erasure of past practices and legal conventions. As Radhika Singha argues, even at the height of Utilitarianism it remained ‘despotic’ and borrowed haphazardly from India’s Hindu and Islamic pre-colonial past.⁹⁹ Still, colonies continued

⁹⁶ Hussain, *Jurisprudence of Emergency*, p. 4.

⁹⁷ Like Walter Benjamin, Derrida sees an original violence dormant in every system of law. Regarding the violence of conquest, he argues that the substitution of one system for another “could not have been authorized by any anterior legitimacy.” Much like the mark that announces a genre, the violence that establishes a legal system is capable of classifying what belongs inside and outside that system, although violence itself is beyond such classification, as it is neither legitimate nor illegitimate. Walter Benjamin, “Critique of Violence”, in *Reflections: Essays, Aphorisms, Autobiographical Writings*, New York: Schocken Books, 1986, pp. 277-300. Jacques Derrida, “Force of Law: The “Mystical Foundation of Authority”, in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, David Gray Carlson, New York: Routledge, 1992, pp. 3-67. Jacques Derrida and Avital Ronell, “Law of Genre”, in *Critical Inquiry*, Vol. 7, No. 1, On Narrative (Autumn, 1980), pp. 55-81.

⁹⁸ Homi Bhabha, *Location of Culture*, London: Routledge, 1994. p. 80.

⁹⁹ Radhika Singha, *A Despotism of Law*.

to behave as an idealist beacon for codification, providing legislators and officials the perfect conditions for legal experimentation. They offered jurists an opportunity to construct order from scratch, leading law makers, as Nathan Isaac quipped, ‘to draw constitutions for commonwealths they had never seen.’¹⁰⁰ As Greg Grandin masterfully narrates in *Fordlandia*, the fantasy of barbarism often rendered colonies as empty sites for building idealist societies from the bottom up, societies ordered by law.¹⁰¹

Such statutory order could only be actualized if performed alongside a similar code of judicial application. Codes were only effective if judges applied the provisions of statutes and did not exceed their authority by legislating through their rulings. Scholars like Janaki Nair and Mitra Sharafi have flagged the ‘lack of fit’ in historical analysis in how colonial legislative ideologies translated into actual judicial practice.¹⁰² From Jardine’s restrained reading of the various anti-gaming laws we get a sense of exactly that. In the face of all opposition, he complimented *precision writing* with limited interpretation. Perhaps, to him this is what constituted a ‘rule of law’.

A Plan for a New Act

Jardine’s second circular issued in 1883 triggered a debate amongst Burmese officials. Though many thought it easier to work with the Recorder’s ruling in Rangoon, they were

¹⁰⁰ Nathan Isaacs, “Schools of Jurisprudence” p. 383

¹⁰¹ Grandin, Greg, *Fordlandia: The rise and fall of Henry Ford’s forgotten jungle city*, New York: Metropolitan Books; Henry Holt and Company, 2009.

¹⁰² Mitra Sharafi, ‘The semi-autonomous judge in colonial India: Chivalric imperialism meets Anglo-Islamic dower and divorce law.’ *The Indian Economic and Social History Review*, 46, 1 (2009): 57–81, Sage; Janaki Nair, *Women and Law in Colonial India: A Social History*, New Delhi: Kali for Women, 1996, p.17.

limited by the authority that came with the post of Judicial Commissioner. This, however, did not stop them from expressing their displeasure in official correspondence. The Chief Commissioner of Burma, Charles Crosthwaite, particularly irked, responded by assembling a committee to draft a regional gambling law for Burma in 1884.

Crosthwaite did not consider himself a moral puritan. He even endorsed the opinion of several police officials, who claimed that certain sports, most of which concerned wagering on races, and were considered to be popular cultural events, should be exempted from the contemplated Act.¹⁰³ Crosthwaite's liberal stand regarding gambling was reinforced by C. P Ilbert, who made it clear to the members tasked with the drafting that Crosthwaite was 'not at all in favor of a crusade against gambling of every kind. A people like the Burmese must have an amusement of some sort'.¹⁰⁴

But Jardine's judgment had presented Crosthwaite with an unforeseen problem. In his letter to Alexander Mackenzie, who in fifteen years would lead a crusade against rain gambling in Calcutta, he went as far as to say, 'if Jardine is wrong and I think he is wrong, then we must either alter the law or alter Jardine- whichever you like.'¹⁰⁵ Jardine was, in fact not opposed to this - the alteration of the law. Nor was he averse to the possibility of prosecuting *ti* gamblers. In his opinion, however, the framework of the rules and the

¹⁰³ Legislative Department, October 1884, Proc. No. 176-211, NAI. In fact, four *loogyees* or village elders of the Maoobin Municipal Committee had recommended that 'Pony-racing, Boat racing, Running, Bullock races and Buffalo fights' remain untouched by law.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

language of the law had to be altered by the *legislature* and could not be left to the whims of a sitting judge.

Though he would have liked to alter Jardine, Crosthwaite's settled on altering the law instead. Shortly after the ruling, he circulated a memorandum with a list of questions to district magistrates, police commissioners, *loogyees*, principals of village schools and a list of other 'respectable' citizens of Burmese society that sought their opinions regarding the state of illegal gambling in the province, the prevalence of *ti* in their districts, and the problems that the local police encountered in prosecuting such gamblers. Along with the questionnaire, a copy of the Gaming Ordinance from the Strait Settlements was also circulated, where Chinese gamers had posed similar problems earlier. He informed the readers of the memorandum that:

It is a generally admitted that the present law is ineffectual for the repression of gambling especially that kind which takes the form of a lottery. This sort of gambling is very prevalent over the country and is practically carried on with impunity. By most Burmans and by many Englishmen, gambling in this country is believed to do serious harm. If it is wished to put down professional or public gambling, the law will have to be considerably altered. No doubt a local Gambling act will be required.¹⁰⁶

The memorandum generated an assortment of opinions. 'Respectable members' of society reported that several of the games they encountered in the countryside were organized by a 'syndicate' and drew in untutored 'villagers' who then became the cause of moral and social problems. In some cases, it was the economic problems associated with gambling

¹⁰⁶ Home, Police Proceedings, September 1884, Nos. 61-84, NAL.

that took precedence over its moral threat. In the opinion of the Extra Assistant Commissioner of Sundoway, gambling was a form of addiction that corrupted the younger generation, ‘who then become lazy and would not desire to work and earn their livelihood.’¹⁰⁷ The Municipal Committee of Prome reported obstacles *ti* had generated in his direct duties, complaining that ‘thoogyees (collectors) find it hard to collect taxes’, and money lenders had difficulty acquiring debts from people’ who were already in the grip of a *daing*.¹⁰⁸

Based on the responses, a Select Committee, headed by Ilbert and Crosthwaite, introduced a draft proposal for a local gaming law in Burma. The bill was designed to combat the problems that emerged from the responses to the memorandum, particularly with regard to the precision of legal definitions and categories. Foremost among the demands for clarity of definition, was a more lucid understanding of the term ‘place’.

What, Where, How?

The Public Gaming Act of 1867 prohibited gaming in a ‘common gaming house’. The ‘common gaming house’ was marked as a room, a house, or an enclosure in which gaming for profit took place. The ‘owner’ or a ‘keeper’ of a common gaming house was the one who acted as banker and charged a commission for use of the house for play. Games conducted in private houses, however, were not illegal. Games of skill such as bridge, rummy, poker, and whist were allowed in private homes or clubs, amongst acquaintances

¹⁰⁷ *Ibid.*, Opinion of the Extra Assistant Commissioner of Sundoway.

¹⁰⁸ *Ibid.*

or friends, as long as no one profited through commission. Raffles or lotteries, too, were allowed when they received government sanction through permit; permits were given to organizers who conducted the lottery amongst known acquaintances and refrained from advertising the event in local newspapers, through fliers and posters.¹⁰⁹ However, irrespective of whether conducted privately, and without commission among friends and acquaintances, gaming in ‘public places’ - streets, thoroughfares, markets and other places ‘to which the public had access’¹¹⁰ was deemed illegal. Occasionally, gambling in carnivals or local fairs were ignored, though district magistrates retained the discretion to prosecute.¹¹¹

Now, in Burma, the diligence of Chinese gamers had forced Burmese administrators to move beyond putative definitions. Streets and markets were easier to recognize under the stated definition of public place, but what of paddy fields, jungles, and gardens? In his reply to Crosthwaite, the Deputy commissioner of Thonogus wrote,

It was held by most Magistrates that when section 13 of Act III of 1867 authorized a police officer to arrest any person found playing for money with any ‘instruments of gaming’ in any public place, the authority extended to any place which was not private and to which the public had access. The consequences of the ruling that a paddy field, after the crop has been removed, is not a public place, is that gamblers can and do in some places defy the authorities.¹¹²

¹⁰⁹ Aiyar, Sami, *Gambling in India*, p. 114.

¹¹⁰ Emphasis added.

¹¹¹ *Ibid.*

¹¹² Note by the Deputy Commissioner of Thonogus to the commissioner of the Irrawaddy Division, Legislative Department, October 1884, Proc. No. 176-211.

Paddy fields was just one example of a legally contested, even liminal space. Timber merchants who complained that their workers were going off to gamble on rafts were reminded by district magistrates of their inability to prosecute players on water bodies. Perhaps, for this reason, one of the more unusual suggestions to Crosthwaite's memorandum was for the inclusion of the words 'ashore or afloat' in the new definition of 'place'.

Jungles, forests, and orchards were another ambiguous category. The Burmese government granted permits to private timber merchants for felling, which meant that such spaces were accessed by the labourers they employed. Additionally, others were granted use and passage rights in forests. On the other hand, if a paddy field shorn of crops was private, could forests be private too? Section 13 of the Act had defined a public place as any space to which the public had *access*. The statement and object of the act clarified that the ban was designed to discourage the public from being drawn into games of chance. So, it stood to reason that gambling would be permitted in only such places to which the public did not have ready access. If people were caught gambling in a market, they were to be arrested; if they were discovered in the corner of a forest, they could, in theory, left to their devices.¹¹³

The dilemma regarding 'public place', points to the unsettled nature of the spatial categories in anti-gaming laws. Crucially, the legal vocabulary that determined private and

¹¹³ Aiyar, Sami, *Gambling in India*, p.15.

public spoke outside the language of property. When it came to illegal gaming, private and public spaces strictly concerned questions of accessibility and visibility. This forced state legislatures to abandon settled terms and fashion a distinct vocabulary for space determined along these lines. The term ‘public places’ could not be understood as the residue of all things that were private. In fact, fundamentally, little could be said about what marked space as public or private. What made a paddy field private property after cultivation but public property before? The over-determining concept here was, of course, of access. If the public had access to a property, even if the property was owned or managed privately, the ‘place’ had to be considered ‘public’. For example, orchards and groves were, in the language of property laws, private property. However, since it was customary for people to sit in such groves without seeking the owner’s permission, in terms of surveillance such spaces were to be determined ‘public’. I should clarify here that it is not my intention to posit a dyad; I do not wish to argue that the gamblers who read the law creatively were doing so in an act of resistance, and that the actions of gamblers should be read as supple and evasive while that of the state be looked upon as rigid and procedural. Instead, what I want to draw attention to, in the exchange between legislators and gamblers, is the dialogue between practitioners and administrators regarding the stability and suitability of spatial categories and definitions. A few examples illustrate this point.

To repeat, Section 4 of the Public Gaming Act struck down gaming in a ‘common gaming house’, while section 13 made it illegal to gamble in ‘public places’. So, in the case of *Abbi vs. Queen Empress*, when gamblers were presented in court, the question that the

magistrate faced was whether a garden fell within either category.¹¹⁴ Since the garden was an extension of the house, Section 4 could be applied, although in the absence of a profit motive, it was decided that the space was not a common gaming house. Next, the provisions of section 13 were considered, since gaming had taken place in the open and could have attracted the attention of the public. The magistrate, however, decided that the space was not an ‘open space’ since there was a hedge that skirted the garden. So, even though passers-by could see that a game was in progress, a hedge or a drain formed a conceptual separation. Consigned to liminality, the place was neither a common gaming house nor a public place. Though liminal, the case was not exceptional, as was made evident B.K.S McDermot, the district Superintendent of Police in the Kyaukpyu Province of Burma, who insisted that gardens and paddy fields be put in one category or the other.¹¹⁵

In another case, *Emperor vs. Chotey Lal* (1895), the *chabutra* (raised platform) of a temple was determined to be a public place.¹¹⁶ The remarkable aspect of this case was the argument of the defense, who claimed that the temple was in fact a private space, since it prohibited the entry of the ‘lowest classes’, namely Dalits. Since all forms of the ‘public’ did not have access to the space, the place could not be considered *a place to which the public had access*. This bit of ingenuity was struck down by the presiding magistrate who proceeded to convict the gamblers. Interestingly, the gamblers, or at least their legal defense, did not

¹¹⁴ *Ibid.*, p. 23.

¹¹⁵ Note from McDermot to Crosthwaite, 22.9.84, in Legislative Department, October 1884, Proc. No. 176-211.

¹¹⁶ Aiyar, Sami, *Gambling in India*, p.100.

invoke the language of ownership or property when making their case. Their determination of ‘not public’ rested on the question of accessibility determined by caste injunctions.

Zooming out briefly, is it not strange to imagine that in the history of gambling in South Asia, a legal articulation actually established a principle and mark for whether a *chabutra* was a public or private place? These were not isolated or exceptional forms of deliberation. In *Hari Singh vs. Jadu Nandan Singh*, the judge had to decide whether ‘a compound of a press consisting of open space of land without any fence situated one cubit from the bazar’, was a ‘public place’.¹¹⁷ While in this case the place was adjudged to be public, in *Badr-ud-din v Emperor*, it was concluded that the accused arrested near the water tank of a railway station were not in violation of section 13 of the gaming act, since the place was not public. Again, in *Maula vs. Emperor*, it was decided that ‘where the accused were gambling at a place near a public street and exposed to public view but which was not part of the public street, they could not be convicted of gambling in a public place.’¹¹⁸ Each of the cases laid a fresh precedent regarding the meaning of the term ‘public place’. I lay weight on this history because popular imagination often overestimates the omnipresence of statist categories. Outside the ambiguous realms of public and private ‘spheres’ exist more settled notions regarding public and private space. When produced by state authorities like a municipal corporation or any other administrative body, these places are clearly marked as ‘public places’, and carry with them rules that define use and conduct. A bus station, a courthouse, a public park are common examples of the spaces I am referring to. Laws

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

regarding conduct tend to universalize these spaces and present them with legal homogeneity in a way that lends itself to abstraction. Subsequently, abstraction becomes a naturalized legacy of statist aggrandizement. When speaking of rules of governing conduct in public places such as parks and streets by the Calcutta Municipal Corporation, Sudipto Kaviraj has argued:

What became crucial, through constant intervention, was the reinforcement of the conceptual distinction between the legal and illegal, the reassuring fixity of the shops on the streets and chaos of vendors on the pavement.¹¹⁹

According to Kaviraj, the ‘reinforcement of conceptual distinctions between the legal and illegal’, is aimed towards public conduct. But are such distinctions clear to those who produce them in the first place? Assuming that a railway station is a public place, how much work does abstraction perform if a judge is left in a quandary over the water tank in that very railway station? Put differently, from the perspective of conceptual history, how complete is the work of abstraction when it encounters everyday practices? Such cases beg the question: are legal abstractions the expression of state sovereignty or are they the expression of sovereign anxiety? Either way, the actual deliberative process was an encumbered one. Histories that have assumed the modern state’s infinite ability to abstract, surely overlook how tedious the procedure actually was.

From Space to Place

¹¹⁹ Sudipto Kaviraj, “Filth and the Public Sphere: Concepts and Practices about Space in Calcutta” in *Public Culture*, Volume 10, Issue 1, Fall 1997, p. 85.

In most of the incidents related to Burma, clarification was not aimed at the word ‘public’ as much as it was put on the term “place”. What was ‘a place’ or just ‘place’? In a note to Crosthwaite a judicial officer wrote:

I have read the case referred to, and I confess that it leaves me in an absolute maze of doubt as to what is and what isn’t a “place”. I think [...] an effort should be made to clear up the wording of the section as to make the intention of the Legislature unmistakable.¹²⁰

As was made evident administrators were desperate to marry police sight *with* legal writing, the latter being woefully insufficient in securing convictions. Captain F. D Raikes, the officiating deputy commissioner of Kyaukyu, left nothing to chance. He responded to Crosthwaite’s questionnaire with his own bill, drafted in a manner, so he felt, would address the concerns of the police officers on the ground. On the question of place, he was quite resolute:

“‘Place’, means any place whatever; it includes places afloat as well as on shore, it also includes any place used temporarily.”¹²¹

The district Superintendent of Police in the Kyaukpyu, B.K.S McDermot, supported Raikes suggestion, arguing that ‘a place wants defining, it should be anywhere.’¹²²

Anywhere as opposed to *everywhere*! It was impossible to express ‘place’ being *everywhere* since gaming *was* allowable in many places. By requesting that place should mean ‘anywhere’, McDermot had insisted that ‘place’ behave more like an activity than an

¹²⁰ Note from C.U.A to Crosthwaite, 22.9.84, in Legislative Department, October 1884, Proc. No. 176-211.

¹²¹ Legislative Department, October 1884, Proc. No. 176-211, NAL.

¹²² *Ibid.*

object. ‘Anywhere’ referred to practice - the practice of placing discerning sight, since the problem was that what could be *seen* was difficult to reproduce in a court of law. Instead of blinkering the scopic within descriptive forms, would it not be more liberating to turn writing into a visual act?

Crucially, this was also a response to the gamblers themselves. The police and the legislature were aware that it was no accident that the anti-gaming laws were not fulfilling their intended purpose. The Chinese *daings* were always one step ahead, which meant that they were not the targets of law as much as they were its audience. P.H Martyr, the Extra Assistant Commissioner in charge of Myoungmya, wrote in his reply that the provisions of Section 294 A were being ‘skillfully evaded’ and that it was nearly impossible to procure convictions in *ti* cases. This knowledge and use of law irked officers to no end as the law found more creative purpose in the hands of the gamblers:

If the Burmese have been quick to detect flaws in the lottery laws, they have long ago found out where they fall within and where they are exempt from the provisions of the gambling Act. The instance mentioned by the Inspector General of Police of policemen finding themselves unable to arrest a gambling “waine” of one or two hundred people in a paddy field away from the public road is much to the point. During the sea fishing season in this sub-division, it is the practice to hold large gambling meetings, which are advertised, in the paddy field...and hitherto, the police have been unable to do anything to them, unless they happen to be near a village or a public road.¹²³

Brazen acts of transgression such as the above were not just limited to open fields. *Daings* were aware that Section 294 A could only come into effect if one were to keep a house or

¹²³ Note from the Assistant Commissioner of Pyapone, 27th September 1882, Legislative Department, October 1884, Proc. No. 176-211, NAI.

a room for drawing lotteries. Accordingly, they would draw the lot from one house and declare the winner from another; neither of the houses could then be described as a lottery office. Faced with such open cunning, suspicion escalated that some judges were actually making it easier for the gamblers to hide behind technicalities. When the police had the misfortune of encountering a literal jurist, their task was made all the more cumbersome. For example, the Extra Assistant Commissioner of Prome expressed difficulty in convicting *ti* gamblers after the judgment of the legal recorder in the case *Moon Tsain vs. Ah Lone*:

I am now of the opinion that before a person can be found guilty of keeping a place for the purposes of drawing a lottery, it must be proved that the drawing did in fact take place in such place. With such a construction the law is easily evaded.¹²⁴

This particular ruling appeared to have caused problems for more than one officer, as the complaint also found its way into the report sent by the Assistant Commissioner of Punugdeh to his senior at Prome:

In the present state of law it is absolutely impossible to suppress *tis*. It is only when the ‘dine’ is so careless as to declare the winning animal in the same house or place in which he receives subscriptions and keeps his accounts that the law has a right to interfere.¹²⁵

The sternest condemnation of judicial nitpicking came from Mr. W DeCourcy Ireland, the Inspector General of British Burma:

Owing to the rulings connected with the expression “public place” [...] the police have found it impossible to interfere with gambling ‘*wines*’ [...] To suppose that

¹²⁴ *Ibid.* Memorandum by the Extra Assistant Commissioner in Prome District.

¹²⁵ *Ibid.* Memorandum from the Assistant Commissioner, Punugdeh to the Deputy Commissioner, Prome.

the Burmese regard this not as impotence of the law, but as an act of forbearance [...] is quite a mistake. They are quick to perceive that the law is inoperative, and that, as a consequence, the worst species of gambling remains unchecked.¹²⁶

Though notably irritated, Ireland admitted that correction needed to come through the legislature. He shared the formalist assumption that the problems with the law were to do with its writing; a writing that had been incapable, so far, to translate what was *seen* into what was *meant*. With mild bitterness, he added:

But although this may be the result of the ruling in this case, we are nevertheless bound to declare the law only, and not whilst acting as Judges to assume the functions of the Legislature and extend its operations beyond the limits merely because some good might result therefrom.¹²⁷

The issues around a comprehensive definition of the term ‘place’ sprung up, not just in Burma, but in other provinces as well. In the Bombay Presidency, the Mofusil Gambling Act of 1866, a Police Act for controlling illegal gambling required amending in 1887 in response to similar problems. As Mr. Melvill, member of the Governor’s Council, presented the draft bill to the committee he informed them that ‘Parsis, Hindus, Mohamedans and Chinamen have for their separate use erected sheds in gardens, where they carry on this nefarious practice in an open manner.’¹²⁸ He complained that ‘strings of tongas belonging to gamblers await the arrival of trains at Kurla,’ which ‘take their disreputable cargo of gamblers from that place with all haste to Chimore.’¹²⁹ Securing convictions was particularly difficult since the 1866 Act was inoperative in towns that were three miles away from a railway station, unless they contained 5,000 residents or more.

¹²⁶ *Ibid.* Note from Inspector General of Police of British Burma.

¹²⁷ *Ibid.*

¹²⁸ Legislative, October 1889, Nos. 41-45, NAI.

¹²⁹ *Ibid.*

Gamblers therefore resorted to play in places like Chimore and Salsette, outside the reach of law.

Thus, some policemen favored making arrests without a warrant, a power they believed officers of any rank ought to have. They feared that the delay of procedure - issuing warrants, summoning an officer of proper designation, etc. - would allow the gamblers to pack up their operation and run. The latter were nimble, had an astute understanding of the law and seemed to plan carefully - the police could not afford to extend them further advantage. Though police apprehensions were well-founded, extending the right to arrest without warrant to all officers called for prudence. Here, a clear racial division became apparent.

In Burma, while there was some skepticism about the neutrality of Burmese magistrates, the main concern was with the police force itself. Given the 'propensity' of the Burmese to be drawn to games of chance, the British feared that corruption could not be checked amongst some of the lower class of officers. In his response to the memorandum mentioned earlier, G.J.S Hodgkinson recounted a case where a policeman from Bessein, lost Rs 197 to gambling, money he had been given to move from the police station to the public treasury, 'a distance of some 20 or 30 yards'¹³⁰

Overreach was another concern; the figure of the extorting police officer loomed large. A tension persisted between officers who wanted to expand the language of legislation to

¹³⁰ Note by G.J.S. Hodgkinson, Police Commissioner of the Irrawaddy Province, Legislative Department, October 1884, Proc. No. 176-211, NAI.

reflect *sight* on the ground and amongst those who felt that such sight was entangled with self-interest. A notable example of such misuse of power occurred in Banaras in 1889, when a Kotwal of the region, Yusuf Ally, arrested a group suspected of running a regular gambling ring in the adjacent town of Kalbhairo.¹³¹ While Ally insisted that the group was involved in illegal gaming, the lawyers of the defense had argued that the police had misidentified them as gamblers when they were actually a group of devotees engaged in a *Sattanarayan puja* - the pun was unmistakable.¹³² In this instance, the flawed testimony of the approver Mahadeo, against Jung Bahadoor, the accused, seemed to create problems. Mahadeo initially claimed that Bahadoor was not present amongst the gamblers, later changing his statement at Ally's insistence, to place Bahadoor in the house where the arrest had taken place. Mahadeo had also claimed that the house that had been searched was bolted and locked from the inside, when according to Yusuf Ally, the door was half open when the police arrived. Mahadeo declared that the gamblers were arrested inside the house, which contradicted the police statements placing them in the garden and the street outside the house.¹³³ Added to this, Mahadeo was unable to describe the game that had been played or the instruments that were used; the police's account claimed that they had seized a piece of chalk and an iron ledger from the premises.

The Production of 'Place'

¹³¹ Sanwal Singh, *The Police and a Gambling Case*. Mirzapur, Khichri Samachar Press, 1890.

¹³² *Ibid.*

¹³³ *Ibid.*

For the purposes of the present discussion, let me turn to a particular detail in the approver's testimony described above. Mahadeo had claimed that the 'common gaming house' was locked from the inside although Yusuf Ally had already given evidence to the contrary, that he had found the door ajar. What made the former furnish this extra bit of information; was it an oversight or was it deliberate? A close look at the gaming law would reveal that Mahadeo's statement was informed by legal provisions and not by mere conjecture.

Wherever any passage, staircase, or means of access, in a place lawfully entered as aforesaid, to any part thereof is unusually narrow or steep, or otherwise difficult to pass, or any part of the premises is provided with unusual means of preventing or *obstructing an entry*, or with unusual contrivances for enabling persons therein to see or ascertain the approach or entry of person, or for giving the alarm, or for facilitating escape from the premises, it shall be presumed, until the contrary is shown, that the place is a common gaming house.¹³⁴

The making inaccessible of a place gave evidence to its secretive nature. And yet, in the eyes of the police, the nature of the space was quite apparent. Robert Reid, a retired officer of the Calcutta Police, in a semi-autobiographical account titled, 'Gambling in Calcutta', had weighed in on this question of semblance.¹³⁵ In his story, Reid described the frustration of the Calcutta police in arresting a group of gamblers who had successfully thwarted repeated raids upon their establishment. During one particular raid, like the incident of Kalbhairo, the meeting was staged as a religious gathering, with a 'Hajee reading the Quran amongst a group of devotees'. Yet, to Reid and others, there was no doubt that this

¹³⁴ Section 12 of Ordinance No. XIII of 1879 from the Strait Settlement, Legislative Department, October 1884, Proc. No. 176-211, NAL.

¹³⁵ Robert Reid, *Revelations of an Indian Detective*, City Press, Calcutta, 1885, p. 107.

was a ruse; they were being made to see past the apparent. When Reid *forced the door open*, it was discovered that the Hadjee had been hiding the ‘instruments of gaming’ *inside* the Quran, which it was discovered, was hollow between its two covers.¹³⁶

Again, the description of a locked door makes its way into the narrative. What is its implication? I suggest that the ‘locked door’ was not just a structure but a ‘place making’ symbol. In the gaming laws of Bombay and the Strait Settlements, in Mahadeo’s account and in Reid’s narrative, the door behaves as a symbol for delimitation and separation. Mahadeo did not assume but expected that the door to the gaming house should be locked, just as the Strait Settlement ordinance predicted what kind of spaces may be suspected of being a gaming house. Similarly, for Reid, the door acted as the dividing line between the purported and the apparent. To *force it open* was the actualization of state sight, to be *let in* would be to go along with the farce of a religious gathering.

The door indicates more than just one possibility, especially to the hermeneutic act. As a symbol, it ‘embodies a language of double meaning’ and ‘the act of interpretation is to understand that double meaning.’¹³⁷ A locked door was also a symbol for the ‘private’ and as I have already mentioned, private gaming was not illegal. However, in all three cases, the symbolic weight of interpretation was placed on obscurity rather than privacy. Clearly, the discerning sight of the police already saw these spaces as ‘common gaming house’. Their vision was analytic and piercing when they presented space in a preconceived form.

¹³⁶ *Ibid.*, p. 109-110.

¹³⁷ Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation*, New Haven, Yale University Press, 1970, pp. 7-8.

The scopic knew what it desired (a gaming house) despite what was presented (a religious circle).

In McDermot's appeal - a place wants defining, it should be anywhere— sight was characterized as a practice, an act of 'place making'. The door, on the other hand, was an objective marker that constituted place through its symbolic function. It is for this reason that Mahadeo did not actually need to see the door *as* locked when he gave evidence. In claiming that the door of the alleged gaming house was locked, Mahadeo's testimony broke with his experience of being in a *real* gaming house as he drew a picture of what a gaming house should ideally be. As Shahid Amin argues 'the Approver's Testimony is neither a confession nor a renegade's perception of past events; it is very much a construct of a prosecution's view of the event and its pre-history.'¹³⁸ This 'construct' behaved as a picture and accordingly, the 'locked door' became symbolic of a space that was already in hiding.

Marking *place* as prohibitory was a recurring problem for the gaming laws of the nineteenth century. Since the practice of gaming was itself not considered illegal, space was made the object that could be criminalized. In doing so, the definition of 'place' would have to be set *before* it was infused by action; the scene had to be set for the action to begin. Accordingly, to mark 'place' a symbol was required. In 'The Bridge and the Door', George Simmel indicated how both structures lent themselves to symbolic interpretation.¹³⁹ Regarding the bridge, Heidegger felt similarly - the bridge, if it is a true bridge is never

¹³⁸ Shahid Amin, "Approver's Testimony", in *Subaltern Studies, Vol. 5*, Delhi, Oxford University Press, 1987, p. 86.

¹³⁹ George Simmel, 'Bridge and the Door' in *Rethinking Architecture: A Reader in Cultural Theory*, Ed. Neil Leach, London, Routledge, 1997, pp. 63–67.

first a mere bridge and afterward a symbol.¹⁴⁰ If the symbolic function of the bridge was to connect the banks of either side of a river, in doing so, it made ‘thinking’ of a river possible, and ‘thinking’ of space was the primary and most intimate way of ‘dwelling.’¹⁴¹ The door, on the other hand, functioned as a symbol for separation.¹⁴² Conventionally, it separated the outer from the inner, wildness from habitation. When locked, it became a symbol of the prohibitory—something that literally prohibited entry. By appropriating this symbol of prohibition, the police read the door through its function—a symbol that produced a prohibitory ‘place’. It became the structure that produced the ‘place’ that so desperately required defining. Such symbols transformed descriptive spaces into sites of actual encounter and reduced, what Paul Carter describes as ‘*spatial nausea*’ or the feeling of being ‘placeless’. The feeling of ‘placelessness’ was erased when the police encountered a ‘locked door’, as the structure now became a symbolic boundary for policing.¹⁴³ The rhetorical significance of the boundary is revealed in Paul Carter’s work *The Road to Botany Bay*, in the analysis of a passage written by the Gippsland pioneer W.W. Johnstone. Johnstone relates his attempt at settling after a day spent wading through a ‘sea of logs’. Amongst them, Johnstone identified a ‘big log’, which stood as the landmark of settlement. For Carter, the ‘big log’ was an arbitrary symbol for marking the boundary for settlement,

¹⁴⁰ Martin Heidegger, ‘Building, Dwelling, Thinking’, in *Rethinking Architecture: A Reader in Cultural Theory*, Ed. Neil Leach, London, Routledge, 1997, p. 99. For Heidegger, the bridge as structure unites two opposite banks of a river, but the bridge as a symbol produces those banks as a distinct space and the act of *bridging* is essentially an act of *gathering*. *Gathering* was the activity of clearing space in a manner so that thinking may have a place to dwell. The act of thinking, in turn, required a *location*, a location that has already been cleared so that it may provide a *site* for thought. As a symbol, the bridge acted as this very *location*.

¹⁴¹ *Ibid.*

¹⁴² Simmel, ‘Bridge and Door’.

¹⁴³ Paul Carter, *The Road to Botany Bay: An Essay in Spatial History*. London: Faber and Faber, 1987, pp. 147-152.

since it recorded Johnstone's point and 'moment of arrival.' When the mark of having arrived served its purpose as a rhetorical tool, it transformed space into a place.¹⁴⁴

This is precisely what was required in gaming laws too. Marks were required to transform abstract spaces into points of physical encounter, where a 'place' like the common gaming house could be made to appear. Sometimes these markers were obscure, for example 'the space in front of a 'paan-shop'.¹⁴⁵ In a remarkable case from London, *Brown vs. Fenwick*, it was decided that a moveable stool and an umbrella marked the 'place' of a gambling stall. A comprehensive explication of the principle was witnessed in the statements of Lord Janes of Hereford, made to the House of Lords in 1899 in the case of *Parell vs Kempton Park Race-Course Company*:

[C]ertain conditions must exist in order to bring space within the word 'place'. There must be a defined area so marked out that it can be found and recognized as "the place" where the business is carried on and where in the bettor can be found. Thus, if a person betted on the Salisbury Plain, there would be no 'place' within the Act. The whole of Epsom Downs or any other racecourse where betting takes place would not constitute a place, but directly a definite localization of business of betting effected, be it under a tent or even movable umbrella, it may well be held that a place exists for the purposes of conviction under the Act.¹⁴⁶

The police, on their part, overdetermined this rhetorical quality at the cost of the generative powers of practice. Limited to representation, such places, were 'already always'; a thing that was written and constituted mentally before it could be encountered physically. Subsequently, when they were confronted, they could often disappear, a possibility that J. Nepean, the Deputy Commissioner of Shwegyin Province apprehended before he informed

¹⁴⁴ *Ibid.*

¹⁴⁵ Aiyer and Sami, *Gambling in India*, p. 22.

¹⁴⁶ *Ibid.*

Crosthwaite. In his response to the memorandum, Nepean recommended that the section regarding ‘approaches and exits to’ gaming houses be removed from the draft of the new Burmese gaming law. According to him, the Chinese had devised their own model houses whose walls were secured by thin strips of split bamboo or *kyukyubyne*. Based on tip offs, they would kick down their walls, rendering the structural and symbolic ‘doors’, ‘walls’, ‘enclosure’ meaningless. Effectively, the entire house transformed back into wilderness, robbing *doors*, *walls* and *enclosures* of their powers to communicate or produce a ‘site’ for inspection or legislation. Having seen the ‘common gaming house’ vanish repeatedly, Nepean’s confessed that:

The police can combat with these things only by surrounding the house, and as for the most part in these towns and villages the houses are small and stand little apart.¹⁴⁷

More than a solution, it suggested an alternative place making strategy. By recommending that they ‘surround the house’ Nepean was suggesting that the police construct its own boundary instead of relying on those erected by the gamblers. McDermot, who had desired that the definition of place should be *anywhere*, recorded a similar perplexity regarding the shifting structures of the Chinese. He drew attention to the fact that symbolic place making was useless if it remained representative or fixed, like an image. Instead, he wanted it to be an activity that mimicked those of the practicing gambler. Remarking on the definition for ‘place’ as per the Ordinance in the Straits Settlements, he wrote that:

¹⁴⁷ Legislative Department, October 1884, Proc. No. 176-211, NAL.

This ordinance defines place, but it seems to define a place when there is an entrance to or exit from, not an open place. A place wants defining; it should be anywhere.¹⁴⁸

The Object of Practice

Let me draw out, here, some arguments implicit in the discussion so far. For the purposes of this chapter, the state has been divided into three parts—the Police, the Judiciary and the Legislature—with three corresponding functions—scopic, hermeneutic and written. In the context of the Public Gaming Act, I have argued that the judiciary, beholden to Jardine’s judgment and circular, maintained a formalist approach. The hermeneutic function of the court was to consider the broad yet contradictory interests that framed the law and choose the rule that best applied to the case at hand. To achieve favorable results in arbitration, the legislature, needed to produce exact definitions and categories that both described existing practices while accounting for their future deviations. To achieve this, the legislature had to actualize through writing a desire nestled within technologies of surveillance. A large section of colonial officials believed that such writing was achievable, because of their underlying faith in the omnipotence of written descriptions. Elsewhere, Hayden White captures this faith in a dogma that emerged from European enlightenment itself; ‘the illusion that the ‘order of things’ could be accurately represented in an ‘order of words’, if only the right order of words could be found.’¹⁴⁹

¹⁴⁸ *Ibid.*

¹⁴⁹ Hayden White, *Tropics of Discourse: Essays in Cultural Criticism*, Baltimore, John Hopkins University Press, 1985, p. 232.

James Scott, in *Seeing Like a State*, places this statist discourse in the realm of ‘high modernist’ thinking.¹⁵⁰ For Scott, the major failing of centralized planning by state officials was attributed to a reasoning which condensed a series of interconnected micro relations of place, community or economic practice to a singular form or identity. This, according to Scott, often came at the cost of local knowledge forms that resisted fitting into the State’s ‘scientific’ layout. This willful denial of the customary helped in producing Statist blueprints; plans that neglected the ‘particular’ in the hope of reproducing the plan without adjusting for details of difference. Interestingly, in Scott’s title - *Seeing Like a State* - state sight is cast back as a singularized personification; the State as a subject with vision.

My archive, however, indicates *unitary* but not *uniform* sight. It also draws me to the tapered interests of the separate branches of colonial governance, i.e., the Legislature, the Police and the Judiciary. For the police, the problem was procedural and scopic (how to see the crime), for the judiciary it was hermeneutic (how to read the crime). In presenting a resolution, both departments relied on the legislature’s ability to *write* the crime. Scott’s premise is correct; the state does indeed ‘see’ but in the peculiar case of illegal gaming in Colonial India and Burma, there remains a persistent tension between what the State ‘sees’ and what the State can ‘say’. If Scott’s argument recounts the way in which the State reduces multivocal relations of a space like that of a forest, to a singular commodity (timber), this chapter details the process of enumeration and expansion of categories.¹⁵¹ Far from the reduction of spatial types, what is witnessed is the aggrandizement of spatial

¹⁵⁰ James C Scott, *Seeing Like a State*.

¹⁵¹ *Ibid.*, pp.22-25.

categories. From a room or an enclosure, the discourse surrounding the features of a common gaming house came to debate things like walls, umbrellas, jungles, trees, paddy fields, dams, paths, boats, logs, 'open space' and 'places that had access to the public'. So, for the history of the 'common gaming house', my suggestion is that the problem of state sight, planning or representation cannot be easily explained through oversight, either of local practice or indigenous knowledge, although it is possible that they may have been contributing factors. Instead, what I suggest is that there was a contradiction in the manner in which a 'common gaming house', or 'public place', was produced as a legislative and spatial category.

Since the legislature had no intention of criminalizing the practice of gaming, they decided to move against gamblers by criminalizing space. So, a 'common gaming house' was designated as an illegal space, and gaming within its premises constituted 'illegal gambling'. Similarly, gambling was criminal when conducted in 'public places'. It was the task of the legislature to produce these spatial categories through descriptive writing. Accordingly, they described what a common gaming house could look like (room, enclosure, dwelling), where it could be (with access to public, on shore on water, in jungles, in gardens), what it contained (cards, dice, table cloth, money) who could be in it (an association of five or more people, a bookie charging commission) and what were its markers (a locked door, a place that was difficult to access). How close was representative space to the one encountered in the world? Implicit in this series of questions is the assumption that 'space' is not an empty canvas that awaits action. Rather, it is through

ritualistic, political, or social action that space is produced. According to Henri Lefebvre, much like a commodity, space undergoes a mode of production. It *behaves* like a commodity in so far as it effaces or fetishizes this productive process and presents itself as a universal object of knowledge (like the blueprints of an architect) and not as a product of ideology or labour.¹⁵²

In her book *Rule by Numbers*, U. Kalpagam extends Lefebvre's argument to colonial forms of state power, when she argues that:

The space of the modern state is the abstract space, and although this abstract space is not homogenous, it has homogeneity as its goal and hence attempts to reduce all differences within that space.¹⁵³

This argument is not dissimilar to Scott's determination of statist vision, one that resolves differences through abstract categories. In the case of producing 'public places' or a 'common gaming house', certain geographical categories were borrowed so that a legislative category like the 'common gaming house' was made to appear a real and natural object. However, as Foucault reminds us, such natural and geographical categories are also rooted in juridical and political discourse:

Let's take a look at these geographical metaphors. *Territory* is no doubt a geographical notion, but it is first of all a juridico-political one...*Field* is an economico-juridical notion...*Domain* is a juridico-political notion.¹⁵⁴

Each spatial category, when stripped of its naturalist pretension, performs a kind of abstraction in some other social realm. Lefebvre refers to this abstract space as *mental*

¹⁵² Henri Lefebvre, *The Production of Space*, Basil Blackwell Ltd., Oxford, 1991, p.6.

¹⁵³ U. Kalpagam, *Rule by Numbers: Governmentality and Colonial India*, Orient Longman, 2015, p. 84.

¹⁵⁴ Michel Foucault, "Questions on Geography" in *Power/Knowledge: Selected Interviews and Other Writings, 1972-77*. ed. Colin Gordon, New York: Pantheon Books, 1980. p. 68.

space, *representative space* and in some cases *Euclidean space*. In all cases, to produce space as a pure form of knowledge, the social nature of that space is willfully erased. In this view, space as a category is first a mental or imaginative product and only then does it become a site for action.

In the case of Burma, the act of producing abstract space was emboldened by the police and the judge's belief that exact definitions could do such work. In a note to Crosthwaite, the Deputy Commissioner of the Shwegyin Province wrote:

The first thing necessary is to define 'unlawful gambling;' the next thing is to define 'place:' these once successfully defined, the drafting of a workable Act should not be a matter of insuperable difficulty.¹⁵⁵

This kind of high modernist imagination was sustained by the belief that the image or picture conjured through language shared the same logical structure with what the picture referred to. The history of gaming legislation towards the end of the nineteenth century in India, pushes me to conclude that the branches of the State chose to speak of a practice (gambling) as an object (space), because they believed that the object (space) *was* in fact a product of knowledge, and anything that could be said about it could be first said in mental or representative terms. Accordingly, the 'truth' of spatial types were first encountered in the conceptual realm before it could be encountered in the world. This carried with it the advantage of prognostication. Much like a chessboard, to see space in an abstracted and rule governed form, also implied the ability to view all the possible moves that could be performed on that space.

¹⁵⁵ Legislative Department, October 1884, Proc. No. 176-211, NAL.

The problem was that though a ‘common gaming house’ was conceived of as *a priori* space, the State had no role in its material production. It was only when gaming took place, by certain people, under certain conditions, according to certain rules, an *actual* “common gaming house” or a ‘public place’ was produced. The rules that governed the production of such places were structured by rules of social action and not by universals. By treating space as representative or an abstract object the Burmese government had privileged its own mode of production while undermining that of the practicing gambler. The truth, however, was that the ‘common gaming house’ would have to be first produced by gambler and only then could it be prohibited by the State. So, to produce the gaming house, the first step was to practice (to gamble), then came sight (to witness) and finally came the written (conception). Formalist demands for clarity stemming from definitions, functioned with the understanding that the written was privileged over all other forms. This runs the risk of reducing all forms of practice as resistance—one that defies the rules of conceived spaces, planned and ordered spaces.

The nimble-footed *daing* and his assistants, however, were pushing a conceptual boundary as they challenged the limits of what prohibitory law could meaningfully say. They were demonstrating that before action could be carried out, objectified categories like the ‘common gaming house’ or ‘public place’ remained unhelpful phantasms. Words like ‘public’, ‘enclosure’ or ‘place’ were not fixed or unaltered points of legal reference. Instead, they were products of the very action that they appeared to disallow yet logo-

centrism was the mark of high modernist thinking. Lefebvre regretted that such thinking was particular to ‘Western culture’, where:

The act of writing is supposed, beyond its immediate effects, to imply a discipline that facilitates the grasping of the ‘object’ by the writing and speaking subject. *In any event, the spoken and written words are taken for social practice.*¹⁵⁶

In the field, T. C. Mitchell, the Assistant Commissioner of Kyauktan, Burma, advocated a different approach; he pushed for the abandonment of formal definitions and commented on their ephemeral quality:

“I believe that the difficulty of providing a definition, which could for all cases clearly distinguish between lotteries which ought to be put down and lotteries which do no harm, is next to insurmountable. The best way is to have no definition at all. It is easy enough to *see* the distinctions between a Chinese *ti* lottery [...] and a lottery at the Rangoon ace meeting... But to put the differences on paper so as to cover all cases is quite another matter.”¹⁵⁷

¹⁵⁶ Lefebvre, *The Production of Space*, p. 28, Italics mine.

¹⁵⁷ Note by T. C. Mitchell, the Assistant Commissioner of Kyauktan, Home, Judicial, Home, Police Proceedings, Nos. 61-84, 1884, NAI.

CHAPTER 2

Bringing down the House: In Pursuit of Practice

As we saw in the last chapter, the *daings* who operated *ti* gaming houses in Burma, skillfully evaded the provisions of the Public Gaming Act by challenging the descriptive adequacy of statutory definitions. By constructing makeshift tents from thin slips of bamboo that were easy to disassemble during police raids and by drawing and declaring lotteries from separate houses, they had broken the spatial harmony conjured by the definition of a ‘common gaming house’. Again, when Burmese farmers gambled in abandoned orchards and cultivated rice fields, or on makeshift rafts, they were outside the definition of a ‘public place’. They exposed to British administrators and the police in particular, the problems of precise legal definitions when read mechanically by judges and magistrates. Like an architect with her blueprints, the Burmese government believed that sharp definitions and expansive terms could capture the ‘public place’ and the ‘common gaming house’ as omnipotent legislative categories. They assumed that such ‘places’ of gambling were objective, written and imagined forms. The gamblers, however, compelled some to admit that both the ‘common gaming house’ and ‘public places’ were not the abstract categories they thought they were, rather they were built through the contingency of practice.

The problems faced in Burma soon cropped up in Bombay. This time, the contested definition concerned the ‘instrument of gambling’. Again, it was Justice John Jardine, who complicated matters with his inert reading of statutory law. Given Jardine’s repeated

appearances in key moments of anti-gaming histories, this chapter attempts to unearth the factors that informed his judicial ideology, which in turn affected his interpretation and application of law. This method of reconstruction is then repeated in the case of Justice K.T Telang, a prominent judge of the Bombay High Court, whose reading of anti-gaming statutes was opposed to Jardine's formalism and therefore marked a shift in the direction of gaming histories in the colony. The chapter ends by narrating the rise of commodity speculation and spot betting on prices in 'bucket shops' in Bombay, Calcutta and the Punjab. The rise of the bucket shop and the incessant mutation of wagering practices signaled a new era of control and criminalization. As we shall see in this chapter, by the first decade of the twentieth century, provincial governments abandoned their faith in precision writing, exact definitions and the legislature, preferring instead to regulate illegal gambling through short term executive measures.

Gambling in the Bombay Presidency

The history of anti-gambling legislation in the Bombay presidency can be divided into two distinct phases; it was initially viewed as a problem of 'public nuisance' and only later, with the efflorescence of rain gambling, was it considered an instance of organized crime. Before coming to the second, let me provide a short background of the first.

The earliest law for the regulation of gambling came through Act XIII of 1856, which

operated only in the presidency town of Bombay.¹⁵⁸ Due to the limitations placed by Act XIII, gamblers routinely traveled to towns and districts just outside Bombay to gamble.¹⁵⁹ Towns such as Poona, Thane, Nasik, Ahmedabad, Coorla, Bandora, Chamboor, witnessed heavy footfall in the following years, and they increasingly came to be noted as sites for ‘nefarious activities’ that included ‘drinking, violence, robbery, theft and swindling’.¹⁶⁰ Like in Burma, to address these problems, police commissioners and district magistrates were requested to send in reports of their respective districts, on the basis of which the legislature could frame a new law for the region. The report, ready by 1864, detailed the extent and harm caused by gambling in various districts. It threw up mixed opinions; some officers were eager that a specific law targeting gambling be enacted while many others deemed it unnecessary. W. Hart, the Commissioner of Police of the southern division of the Bombay presidency opposed the idea of a sweeping legal prohibition¹⁶¹ and called for local legislation that would systematically control gambling in areas where it had begun to become a source of nuisance and crime.¹⁶² The Magistrate of Satara, E. Chapman also agreed, and described the introduction of a specific anti-gaming law as both unnecessary and intrusive.¹⁶³ Others, especially officials in Ahmedabad, firmly disagreed. Reports from police commissioners of Cama, Rutnaghar, Ahmadnagar, Sholapur, Poona and Dharwar, concurred with the opinion coming from Ahmedabad; they wanted the enactment a new

¹⁵⁸ Home, Police Department, March 1864 proc. Nos. 20-22, From B.H Ellis Commissioner of Police, Northern Division, to W.H. Havelock, Officiating secretary to the government of Bengal, NAI.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Home, Police Department, March 1864 proc. Nos. 20-22, From W. Hart commissioner of police, southern division to the Hon’ble H.L. Anderson, Chief secretary to the government of Bombay, NAI.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

law or an extension of the Police Acts of Bombay in these districts as well.¹⁶⁴

The incidence of gambling had risen in these parts since the enactment of Act XIII of 1856, a law that was also responsible for displacing the authority of customary laws that earlier managed to check such practices locally. The reports described the new crop of gamblers who migrated in large groups from the city as the “lowest and worst of the people.”¹⁶⁵ Their habits were disturbing to the local populations, and their presence in the districts was associated with a spike in crimes such as counterfeiting, cheating, violence, drunkenness and petty robberies. Just as in Burma, gamblers were portrayed in an amorphous manner and their threat as petty criminals was amplified in official rhetoric. The trope of ‘nuisance’ animated early police reports on the issue, which decoupled the gambler from gambling. His nebulous identity was informed by questions of morality and the gambler was often referred to as a hooligan, thug or thief. As J Neuberger has shown in the context of pre-Soviet Russia, hooliganism did not so much define a specific sort of crime, as much as it suggested a perception of criminality.¹⁶⁶ What was encoded in the word hooligan was the possibility of a threat. Similarly, Peter Stallybrass has argued that the Victorian sensibility regarding ‘nuisance’ and vagrancy shifted the locus of respectable fears from criminal practices and relocated them onto the body of a subject class.¹⁶⁷ Unsurprisingly, this was

¹⁶⁴ *Ibid*

¹⁶⁵ *Ibid.*, Mr. Campbell, Superintendent of Police Rutnagherry.

¹⁶⁶ J. Neuberger, “Hooliganism in the St. Petersburg Popular Press”, *Slavic Review*, Vol. 48, No. 2 (Summer, 1989), pp. 177-194.

¹⁶⁷ Peter Stallybrass, “Marx and Heterogeneity: Thinking the Lumpenproletariat”, *Representations*, No. 31, Special Issue: The Margins of Identity in Nineteenth Century England (Summer, 1990), pp. 69-95. Accordingly, it was the specular gaze of the bourgeoisie that converted heterogeneous actors into homogeneous groups so that they could be made representable. What Stallybrass sees as the merging of the ‘homely’ and the ‘grotesque’ was in fact the lumpenproletariat, an imagined political class that made the unfamiliar consumable.

reflected in police reports on gambling in India, which relied heavily on the feedback of respectable members of the community - town administrators, schoolteachers, principals and 'village elders. Policing acts in the colony like Act XIII were modeled, after all, on the Vagrancy Act enacted in England in 1824.¹⁶⁸ What was missing in all this feedback were *instantiations* that were able to translate 'respectable fears' into real police cases. Perhaps such cases were too mundane to be documented and were therefore absent in official reports.

The hurdle of scanty evidence was overcome by the body of forceful opinions in the end, and the Legislative department of Bombay presidency, under the initiative of Mr. Juggonath Sunkersett, passed a bill to criminalize the 'common gaming house' in towns and urban areas. The bill laid down the specifications of instruments of gaming; secured licenses for those hotels, resorts, or clubs that could allow gaming; assigned power and position to those who could prosecute gamblers, allotting certain officials in the police force the power to convict, and defined the circumstances under which one could either be considered a gambler or guilty of having illegally gambled. Additionally, the bill debated and delimited 'public places' with the intention of curbing games that were practiced in public streets or other places that were open to public gathering. The Act was passed as the Bombay Act III of 1866¹⁶⁹ and was the precursor to Act III of 1867.

Though decisive in scope, the Act harbored was ambivalent about the trustworthiness of the native *daroga*. It was decided that it would not be prudent to grant the police arrest and

¹⁶⁸ Home, Police Department, March 1864 proc. Nos. 20-22.

¹⁶⁹ Ritu Birla, *Stages of Capital*.

warrant powers in *mofussil* areas. Accordingly, the Act was limited to the suppression of gambling only in large towns and their suburbs and not the entire presidency. However, just like in Burma, it was soon discovered that more than the local police, it was the gamblers who circumvented the jurisdictional limits of the law, setting up shop in liminal spaces like railway stations which went undefined in the Act of 1866. To prevent this, the government extended the powers of the act beyond cities and towns. In 1887, therefore, the regional gaming law of 1866 was amended and the Bombay Prevention of Gaming Act (Act IV of 1887) enacted. The latter extended powers of the police beyond cities and towns in the Presidency, also equipping the police with jurisdiction over the island of Salsette, which was considered the new hotbed for gambling. The Superintendent of Police was given the power to take cognizance of any crime related to illegal gaming in the Presidency and issue a warrant for search and seizure.¹⁷⁰ Parts of the city of Bombay, however, remained untouched by the new law and continued to be governed by Act XIII of 1856 (Sections 56 and 66).

Instrumental Logic

Act IV of 1887 was initially successful in tackling the problems of illegal gaming in Bombay. However, novel impediments were faced when rain gambling proliferated in the presidency. In 1889, a case was presented before the Bombay High Court in which

¹⁷⁰ Bombay Prevention of Gaming, Act III of 1887, Home, Judicial Department, Part B, File No. 45, January 1888.

Narotamdas Motiram and Hemraj Khemjee were accused of renting a shed near Mowbadevi, where they had set a stall for the purpose of rain gambling, a game that was soon to gain notoriety as a popular pastime amongst Marwaris in Delhi, Bombay and most notably, Calcutta.¹⁷¹ Rain gambling involved guessing the probability of rain on a particular day. Bets were arranged on the incidence of actual rainfall, on the quantity of rain, and on whether rainfall would be enough to cause a measuring tank, the *moree* or *mohri*, to overflow. In the Narotamdas case a third bet was also in play. The water that overflowed from the *moree* had to strike a wooden cone called '*lakri ki moree*'. The game was arranged around wagers made collectively by the participants and registered by a bookie - in this case, Motiram and Khemjee both - who charged a commission on each individual bet.¹⁷² The police inspector of Mowbadevi attested to the popularity of the game. He himself had witnessed, at a time, nearly five to seven hundred people in the shed, absorbed in play. He seemed certain that the stall run by Motiram and Khemjee was nothing more than a public betting house - a contested description, given that betting and wagering were not illegal in India, but were described as informal contracts that the courts did not recognize or enforce. I will forego a detailed narrative of the case since it has already been covered quite comprehensively by Ritu Birla in *Stages of Capital*.¹⁷³ Instead, through a quick summary, let me highlight the relevant details that inform the ongoing discussion.

The fact that wagering was not mentioned explicitly as an illegal act meant that the prosecution had to prove that rain betting constituted a game. As was the case in Burma,

¹⁷¹ Home, Legislative department, Part B, October 1889, Proc No. 41-45.

¹⁷² *Ibid.*

¹⁷³ Ritu Birla, *Stages of Capital*, pp.156-160.

section 294 A of the Indian Penal Code (IPC) could not be implemented since the bet could not be considered a lottery. Besides, unauthorized lotteries could only be shut down under ‘complaint made by order or authority of government’ - another criterion that was not satisfied.¹⁷⁴ While the defense insisted that rain betting did not constitute a game, Mr. Frere, the lead prosecutor, argued for their similarity. According to him, betting was gaming, and a public betting house was no different in intention than a ‘common gaming house’. After all, the law was not designed to categorize variation but to prohibit people with no prior relationship from gathering and playing for money. Frere contended that rain betting could be viewed as a game of chance if one considered its required paraphernalia, such as the aforementioned *moree* or a rain gauge, which in his opinion were ‘instruments of gaming’. However, the argument moved from the conclusion to the premise. If betting was not the same thing as gaming, then the instruments that facilitated the former could not be used to demonstrate its links to gaming. The premise was fragile and for Jardine, the circumvention was obvious:

The proper meaning of the term “instrument of gaming” of course depends on the proper construction of the term gaming; and if this term does not include betting, it will, I think, necessarily follow that Mr. Frere’s contention is unsustainable.¹⁷⁵

Again, Jardine felt that Frere had confused his categories. The rain gauge, he explained:

[...] registers quantity just as the watch in the hand of a Judge registers time, or as a thermometer is used to register heat or a barometer the pressure of the atmosphere. Its use resembles further the use of these instruments in that it does not introduce any element of chance into betting.¹⁷⁶

¹⁷⁴ Home, Legislative Department, 26th July to 6th August, 1889, Proceeding Nos. 41-45, NAI.

¹⁷⁵ *Ibid.*

¹⁷⁶ Birla, *Stages of Capital*, p. 158.

Like in Burma, Jardine drew attention to *Tollet vs. Thomas*, the London case discussed in the previous chapter, clarifying that only instruments like the pari-mutuel that had been designed *explicitly* for use in gaming could qualify as ‘instruments of gambling’. To extend the definition to objects that were in only in incidental use would set a dangerous precedent. The Chief Presidency Magistrate agreed:

For all I know to the contrary bets may have been laid whether the accused in the present case will be convicted or discharged by the Chief Presidency Magistrate, but I trust that my present judgment may not be deemed an ‘instrument of gaming’ merely because some bets may be dependent on it.¹⁷⁷

I shall return to the astuteness of this comment later. For the moment, let us move to the fallout of the judgment. Though Narotamdas and Khimjee were acquitted, their case sparked a debate in the Legislative Assembly about the need to amend the recently drafted law. In 1890, an amendment was made to section 3 of Act IV of 1887, where the term ‘wagering’ was included within the definition of gaming.¹⁷⁸ During the Proceedings of the Council of the Governor of Bombay, Sir Raymond West made a remarkable statement:

It might be thought that by interfering with this form of gambling, betting on horse racing would by a logical consequence have to be put a stop to; there is something to be said for that, but if you carried out the idea to the logical end then even insurance offices would be doomed; although the ground principles are extremely hard to determine, the general applications are easy, and Government, who have to look to the good of society in general, have been obliged to take the matter up in a *practical rather than a systematic way*.¹⁷⁹

In elaborating the principles propping the Act, West drew attention to the problems of taking the ‘idea to the logical end’, which would have threatened legitimate businesses like

¹⁷⁷ *Ibid.*, p. 159.

¹⁷⁸ Legislative Department, May 1890, Nos. 11-21. NAI.

¹⁷⁹ Bombay Prevention of Gambling Act, Legislative Department, May 12th, 1890, Procedure No. JP 959, British Library (Henceforward, BL).

insurance and leisure activities like as horse racing. Ritu Birla has observed that the Chief magistrate's argument in the case, that 'speculation on commodities and shares was like rain betting' indicated that 'even before wagering was criminalized in Bombay in 1890, market speculation had been interpreted as an engagement with chance, rather than an exercise of skill.'¹⁸⁰ However, when West grouped insurance within the ambit of resemblant practice, the principle extended beyond just taking risk to make money and now included *hedging* to avoid loss. Importantly, as West urged his fellow law members to abandon the *systematic* in favor of the *pragmatic* to achieve purposive ends, he also privileged the substantive over the formal features of anti-gaming laws.

The benefits of administrative pragmatism did not persuade Jardine, who knew that such laws held repercussions over other fields of activity too. More importantly, it undermined the authority and purpose of statutory law, which James Fitzjames Stephen had once represented as the tool of 'moral conquest' in the colony.'¹⁸¹ Judging from his reading of statutes, we have seen that Jardine also held similar regard for legislative lawmaking and abhorred judicial legislation. What informed this particular prejudice?

The question regarding judicial practice and ideology has drawn the attention of legal and post-colonial scholars of South Asia. The ideology or motivations of judges, however, more readily reveals themselves when judicial practice 'deviates' from the explicit directives of the legislature. In a rich and persuasive article regarding 'semi-autonomous' judges in South Asia, Mitra Sharafi has questioned whether colonial judges actually

¹⁸⁰ Birla, p. 159.

¹⁸¹ See Chapter 1.

‘functioned consistently as the state’s emissary.’¹⁸² Instead, what interests her are the real practices of judges who made ‘quiet departures from colonial legislation and treatises’ and let personal notions of equity and ideology permeate their rulings and interpretations.¹⁸³ Sharafi’s method is similar to Partha Chatterjee’s cryptographic reading of the ‘secret histories of nationalism’, through a reading of the silent cultural and political consciousness amongst native judicial agents towards the end days of colonialism.¹⁸⁴

But how do we rescue the ideology and principles of a judge who did not ‘deviate’ from written rules and treatises – of someone who, in fact, followed the code? How do we account for his substantive thought process, silent motivations and desires to bridge the worlds of procedural law with the transcendent idea of justice? Quite obviously, even while following the law to the letter, Jardine could hardly be described as the ‘state’s emissary’. Both in Burma and later in Bombay, his judgments caused a fair bit of controversy. His ruling in Burma triggered the need for a new law, which came through Act XVI of 1884. But when amending this law in 1898, the reviewers admitted that the need for it had only arisen because of ‘the then Judicial Commissioner differing from the Recorder, for some reason *which did not commend itself to anyone else*.’¹⁸⁵ Jardine himself recognized his unpopularity amongst the executive branch and even acknowledged it in an essay written in 1893, where he weighed in on the suitability of the jury system in India:

¹⁸² Mitra Sharafi, “The Semi-autonomous judge in colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law” *The Indian Economic and Social History Review*, 46, no. 1 (2009): 57-81. p. 57.

¹⁸³ *Ibid.* p.74.

¹⁸⁴ Partha Chatterjee, *A Princely Imposter? The Strange and Universal History of the Kumar of Bhawal*, Princeton: Princeton University Press, 2002.

¹⁸⁵ Note by H. Luson, Legislative Department, November, 1898, Proceeding Nos. 17-41, NAI. Emphasis added.

When I was Judicial Commissioner of Burma, I remember hearing a story which is quite consonant with judicial nature. A general inquiry being made about the increase of crime, one Magistrate reported that the Judicial Commissioner was the cause, meaning that the superior tribunal was too prone to acquit on appeal men rightly convicted by himself.¹⁸⁶

But such criticism did not deter Jardine. To understand why requires a bit of historical reconstruction. As critical legal histories have convincingly argued, even when analyzing formalist legal practices, the analyst must abandon approaching the law and its various applications as a closed epistemic system and pay closer attention to the social milieu through which it emerges.¹⁸⁷ In that spirit, through a hermeneutic reading of fragments, what follows is an attempt to recreate the motivations informing Jardine's judicial practice.

Constituting Justice Jardine

John Jardine joined the Bombay Civil Service in 1864. There is no record of when he moved to lower Burma; it would have been after 1872, when the judicial and executive powers of the Chief Commissioner were dissolved and a separate post of Judicial Commissioner was instituted.¹⁸⁸ Jardine was the Judicial Commissioner of Burma in 1883 and would remain so till he became the Chief Secretary to the Bombay Government in 1885, the same year as his investiture as judge of the Bombay High Court. He retired from his post in 1897 and returned to England. In England, he entered politics and was elected

¹⁸⁶ J. Jardine, "Indian Official Opinions on Trial by Jury", *Imperial and Asiatic Quarterly Review & Oriental and Colonial Record* (IAQROCR) V: 9-10 (1893), 293-308], p. 306.

¹⁸⁷ Gordon, *Critical Legal Histories*.

¹⁸⁸ Chittaranjan Sinha, "Evolution of the Judicial Administration in British Burma, 1826-1922", *Journal of the Indian Law Institute*. Vol. 15, No. 2 (April-June 1973), pp. 295-300.

in 1906 as the Member of Parliament for Roxburghshire, which he represented till his death in 1919. In the archive, Jardine is not present in the auto/biographical mode – there is not much by way of self-publication or biographies. The historical traces are in his judgments, questions he asked, and observations he made as a member of parliament, an article he wrote on the suitability of the jury system in India and from a preface written to a book by Maung Tet Pyo titled *Customary law of the Chin Tribe*. These limited sources inform the following analysis.

Jardine took institutions seriously and performed his duties both as judge and as member of parliament accordingly. A firm believer in the separation of the functions of government, he asked a fair number of questions during his time in parliament, which he believed was the duty of every elected representative. In spite of his praise for James Fitzjames Stephen, he did not appear beholden to Stephen's views regarding the despotic power of political conquest and as legislator, he often criticized excessive and unauthorized use of power in the colonies. In fact, he expressed no 'sympathy with that class of writers who wish or expect that no questions will be put in Parliament about the official action taken in India.'¹⁸⁹

Though a majority of his interventions concerned the county he represented in Scotland, he kept a keen eye on both India and Burma. In 1914, he questioned Parliament on the need and fallout of the imposition of martial law in Punjab. He inquired whether the provisions of the order had been reversed by the enactment of a new law, since the previous law had

¹⁸⁹ Jardine, Jury 299.

allowed for significant military excess and brutality.¹⁹⁰ The concerns regarding the use of exceptional or emergency military law in the British Empire were also concerns within the metropole, especially in the wake of the increased militancy of Irish Home Rule movements – this was another one of Jardine’s worries. His opinions regarding the balance between the questions of law and sovereignty surfaced once more during the discussion of the Indian High Courts Act in 1911, where he praised the colonial judicial system for being ‘independent’ of the political compulsions of the state. At the time, his position was endorsed by the future Prime Minister of England, Ramsay Macdonald, who agreed that the High Courts represented ‘the very best sentiments and traditions of British justice.’¹⁹¹

From Jardine’s praise of the High Courts and repeated follow-ups regarding the autocratic use of power, we get a sense of his anxieties regarding executive overreach. The question of executive overreach was one that was already entangled with the operation of various anti-gaming laws, which several administrators felt were constantly misused by native police officers.¹⁹² This impression is reinforced by the case of Jung Bahadoor discussed earlier. But the apprehension was also baked into early police laws, ones that treated

¹⁹⁰ Question by John Jardine on ‘Violent Crimes’, HC Deb 06 April 1914 vol 60 cc1641-2W, <https://api.parliament.uk/historic-hansard/index.html>. Jardine stated that martial law, “[...]authorizes and indeed requires the use of any degree a military force which may be necessary for the purpose, and that rebels with arms in their hands, gangs of dacoits banded together for the purpose of robbery and murder, persons in the act of waging war against the Queen, and all who aid and abet them may and ought to be attacked by force of arms precisely as armed invaders may be attacked.” He was reassured that the order was a ‘descriptive statement rather than a direction or command to executive officers’.

¹⁹¹ *Ibid.*

¹⁹² For a detailed historiography on the subject see, Arnold, David (1986): *Police Power and Colonial Rule: Madras 1859-1947*, New Delhi: Oxford University Press; Basudev Chatterji, ‘The Darogah and the Countryside: The Imposition of Police Control in Bengal and its Impact (1793-1837),’ *Indian Economic and Social History Review* 18, No. 1 (1981), See also, Ranjan Chakrabarti, ‘Pax Britannica and the Nature of Police Control in Bengal,’ ; Giuliani, Erin M (2015): “Strangers in the Village? Colonial Policing in Rural Bengal, 1861 to 1892,” *Modern Asian Studies*, Vol 49, No. 5, pp. 1378-1404; *Wicked City: Crime and Punishment in Colonial Calcutta*, New Delhi: Orient Blackswan.

gambling as a nuisance. Accordingly, through various clauses, curbs were placed on the police in Act III of 1867.¹⁹³ The Secretary to the Government of India, E.C. Bayly, had advocated similar caution when operationalizing the Police Act of Bombay:

The exercise of the power given by Act XIII of 1856 I am directed to observe is reserved to the commissioner of police personally. If any less responsible and less experienced agency were used the Governor General in Council fears that the very large powers given by section 58 would be often seriously abused.¹⁹⁴

Jardine's fears of political excess made him a natural ally of paternalist administrators like Mountstuart Elphinstone and John Malcolm, for whom he reserved generous praise. In his preface to *Customary law of the Chin Tribe*, he described Elphinstone as a 'profound and far-seeing' administrator and in a question regarding the 'Unrest in India and Partition in Bengal', he described Malcolm as a 'distinguished governor', who had said:

[T]hose responsible for pointing indiscriminate abuse at the people of India were usually deficient in a full knowledge of their language...He himself had been associated for years with native Indian judges in the High Courts, men of high reputation, great learning, and versatile capacity.¹⁹⁵

Jardine's endorsement offers some insight into how he viewed native judicial acumen, his

¹⁹³ Section 5 of Act III of 1867 clarified the provisions under which a search and arrest warrant was considered legal. Alongside specifications regarding names and descriptions, was the clause that a warrant for search, seizure and arrest could only be issued by the district magistrate or the superintendent of police. However, in some cases, an irregularity in the warrant regarding the boundaries of the premises, or some of the information provided, could be overlooked through the provisions of section 537 of the Criminal procedure code and the evidence collected could still be presented in court under the provisions of section 6 of Act III of 1867. Similarly, Section 190 of the Criminal Procedure Code ensured that the court could take cognizance of a crime even when the arrest was illegal. However, these exceptions did not supersede the paramountcy of a legal warrant issued on the basis of credible information by a district magistrate or superintendent of police. The term 'credible information' was elaborated in section 7 of the Public Gaming Act, which specified that the magistrate could act on the basis of the sworn oath of an informant. Once the Magistrate or Superintendent was satisfied with the information provided, they could issue an un-named warrant, where any police officer could be given the jurisdiction of search, seizure, and arrest.

¹⁹⁴ Home, Police Department March 1864 Proc. Nos. 20-22, NAI.

¹⁹⁵ Question by John Jardine, Member of House of Commons from Roxburghshire, <https://api.parliament.uk/historic-hansard/index.html>

reference to their 'great learning and versatile capacity' indicates his views on the population he administered, or more accurately, judged. These opinions are elaborated in his essay on the jury system in India. The essay responded to the question regarding the suitability and effectiveness of the jury system in India. As an answer, he composed somewhat of a field review. Though contestable, I detect in it a notable slant towards the usefulness of the system and his trust in native jurors.

Complaints against the native jury came from a section of critics who claimed that natives were prone to acquit their fellow men, a practice that the former suspected stemmed from racial hostility towards the British, a suspicion reinforced by the unwillingness of native jurors to sentence their countrymen to death. But Jardine took this to be the sentiment of an 'advanced civilization', like that of the Hindus and the Jains, who abhorred violence and were also forgiving. More importantly, unlike in the case of Ireland, 'where, it is alleged, crime becomes rampant because local juries, misled by political feeling, agrarian grievances or outside intimidation, refuse to convict on clear un-contradictory testimony,' Jardine failed to detect a similar sentiment in India, where native 'desire for pure justice' was, 'invariably shown'.¹⁹⁶ His belief thus ran contrary to many of his compatriots, especially in the wake of the controversies surrounding the Ilbert Bill. He continued to champion the inclusion of Indians in the colonial justice system, as he reiterated in the context of the Indian Councils Act in the House of Lords in 1909:

It was well known to those serving in India that the administration gained immensely in every way and at every point, and especially in times of peril, when it had competent native advisors on whom it could depend and I welcome the belief

¹⁹⁶ Jardine, "Indian Official Opinions on Trial by Jury", p. 299.

that this Bill was intended to assist the Secretary of State for India to bring into his Council some of the natives of this country, who were familiar with the opinions and the feelings of the people on many questions, familiar to a degree that no British official - however well-qualified in other respects - could possibly be.¹⁹⁷

Jardine remained optimistic on two counts - that Indians were appreciative of British law, and that British law would only succeed when it operated dialogically, by utilizing indigenous knowledge through institutional support. The jury was the embodiment of this medley; a neoteric 'panchayat' of sorts. Perhaps it was this belief, coupled with his general regard for James Fitzjames Stephen that pushed him to endorse the latter's views on the jury, even if the statement contradicted his own formalist methods of decision making.

The use of juries, when fairly good juries can be had, possesses some undoubted advantages. It prevents the main principles of justice and legal reasonings from being hidden away in technicalities. Everything laid before a jury has to receive a popular exposition and be submitted to common sense tests. The jurymen themselves receive and carry away a true idea of legal principles.¹⁹⁸

By including this quote by Stephen in his essay Jardine apparently agreed that British or 'foreign' law was legible only when it was inclusive and transparent. Against pedantic practices, one detects the privileging of West's appeal for the practical over the systematic, the effective over the technical. But when brought together with Jardine's general suspicion regarding executive overreach in the colony, the implications are no longer straightforward. For Jardine, the law was a shield, not a sword. So, the simplification of technicalities could only be understood as 'justice' when it empowered the governed, not the State.

Perhaps the best indication of Jardine's views on codified and statutory law come from his

¹⁹⁷ Question by John Jardine, Member of House of Commons from Roxburghshire in the context of Council of India Bill, HC Deb 05 August 1907 vol 179 cc1673-88, <https://api.parliament.uk/historic-hansard/index.html>

¹⁹⁸ Jardine, "Indian Official Opinions on Trial by Jury", pp. 306-7.

preface to Maung Tet Pyo's book on the customary practices of the Chin tribes of Burma.¹⁹⁹

In his foreword Jardine acknowledged that the 'Burmanizing and civilizing process' were advanced amongst certain tribes as compared to others.²⁰⁰ However, even amongst the more 'civilized':

The question remains, what happens to a Chin if he disobeys a rule? In British Burma a Chin seeking legal redress would have to go to the ordinary courts, which apply the Procedure Codes, the Penal Code, the Contract Act, and the Special Relief Act. There is no statute that perpetuates Chin customs or gives the Chins a right to Chin laws. If any rule contained in the book I am editing is alleged as a custom, it would have to be proved if not admitted by the other party.²⁰¹

In claiming that no rule recognized the ability of the Chin to determine their own rules, Jardine invoked what legal scholar H.L.A Hart would later term the 'rule of recognition' - a higher order or system of rules that legitimize the operation of everyday laws. For modern legal systems, the 'rule of recognition' also maps onto the legislative process - the rules that emanate from this process are recognized as 'law' and are binding on the officials tasked with their implementation. The customary rules of the Chins could not be given the stature of law since colonial conquest had established a new order of legitimacy. At the same time, the violence of this conquest itself remained outside the categories of legitimate or illegitimate. The willful disavowal of conquest continued into Jardine's next set of observations. He believed that customary rules could be admitted into legal canon if 'it was in its nature so reasonable as to be entitled to recognition of a Court of Equity.'²⁰² Jardine

¹⁹⁹ Maung Tet Pyo, *Customary Law of the Chin Tribe: Text Translations and Notes*, Rangoon, Government Press, 1884.

²⁰⁰ *Ibid*, p.2.

²⁰¹ *Ibid*.

²⁰² *Ibid*, Emphasis added.

thus absorbed the original violence of conquest and displaced it onto higher standards of ‘reason’. For Chin or British, it was *reason* and not political sovereignty that determined whether custom could become law. Unlike the paternalists he admired, he refrained from eulogizing the customary simply because it was autochthonous. Attentive to the warnings of Henry Maine, he declared:

The tendency of making a formal record of customs is to give the customs a fixity and uniformity which they never acquire in native society, where they would fluctuate, change or disappear under the influence of new sentiments, new laws, and other changing conditions of life and government...I take the decision of the High Court of Bombay in Mathura Naikin’s case to be in point of fact a judicial declaration against giving any such weight to customs the people have discarded as unsuited for present times.²⁰³

Jardine thus warned the author of a purely mimetic practice of codification. Customs could be made formulaic, standardized and codified, yet their status as law was ultimately dependent on their *reasonableness*, not on their outward appearance. Nasser Hussain has compellingly posited that the contradiction between the political and moral imperatives of colonialism were resolved by the incessant refinement of legal procedure—its most elastic and closely guarded realm.²⁰⁴ However, Jardine’s refusal to separate form from content was a declaration against the cosmetic transformation of custom. Eventually it was the Courts that were left with the task of ‘recognizing a new and good usage rather than an old and bad one, and for their leaning toward the opinion of the more enlightened part of the community.’²⁰⁵ Jardine directly invoked Maine when he claimed “that the change from status to contractual relation is always going on”, and it was the task of the Court to enable

²⁰³ *Ibid.*

²⁰⁴ Hussain, *Jurisprudence of Emergency*, p. 66.

²⁰⁵ Pyo, *Customary Law of the Chin Tribe*.

this transition.²⁰⁶ Broadly then, he argued that political sovereignty was determined by reason and the latter was functionally responsible for the historical evolution from status to contract. Laws in operation such as the Contract Act or the Penal code, were not enforced because of conquest but was the historical culmination of reason itself. As a result, codification was not a process applied over just any content, rather it was the reasonableness of the content that determined its potential to be codified.

These snippets paint an impressionist image of Jardine's judicial philosophy. From the foreword written for Maung Tet Pyo, his opinions resemble those of the early Utilitarians like Macaulay, who believed in both the superiority and transformative capacity of English law when introduced to the colony in the form of codes. His repeated and adulatory references to Stephen reveals the importance he gave to both the legislative process and to its final product. However, he was also sympathetic towards the native population onto whom these laws applied. Like the paternalists, he was attentive to and valued autochthonous knowledge and believed in meaningful collaboration with the governed. He also believed that 'educated' natives both appreciated the sophistication of British law and understood its potential to transform and modernize the country. His faith in such laws, emerged from a deep belief in their underlying principles of equity and justice. In order for this to be actualized, such laws needed to function in accordance with their original intent and be saved from the corrupting influence of executive overreach, a routine affair in the colony.

²⁰⁶ *Ibid.*

Is this what pushed Jardine to read statutory laws formally? In a dense and perceptive article, Faisal Chaudhry attempts to bring Weber's four categories of meaningful action as well as his categories of legal thought into harmonic conversation. According to Chaudhry, 'Weber's choice of conceptually segregating the categories of legal thought from his general sociology of meaningful action is revealed in his precocious but unsuccessful tactic for solving the problem of judicial legislation.'²⁰⁷ Quite astutely, Chaudhry sees Weber's efforts to separate the functions of 'law making' and 'law finding' as emblematic of a consuming debate in the Anglo-continental legal tradition, which 'desired to uphold the ultimate coherence of the formalist construction of the liberal state.'²⁰⁸ Chaudhry agrees with Duncan Kennedy when he concludes that if judicial decision-making were to be placed within Weber's broader categories of 'meaningful action' then, counterintuitively, only when a judge acts formally and not substantively, can his/her action be described as value rational - in accordance to an ethical or higher order value.²⁰⁹ From Jardine's comments in *Customary Law of the Chin Tribe*, it is possible to read his faith in the 'the equity' of codified (British) law as an incitement to formalism. If well-deliberated British legal systems were a guide for society to move from *status to contract*, then its principles needed defending. As a result, as we shall see in the following section, when the opportunity presented itself in a year's time during the proceedings of *Queen Empress vs*

²⁰⁷ Faisal Chaudhry, "The Promise and Paradox of Max Weber's Legal Sociology: The "Categories of Legal Thought" as types of Meaningful Action and the Persistence of the Problem of Judicial Legislation." 20 S. CAL. *Interdisciplinary Law Journal*. 249 (2011), p. 249.

²⁰⁸ *Ibid.* p 285.

²⁰⁹ According to Weber, to be value rational is to be rational in relation to a specific value. So, the mechanical application of law, where the concerns of the 'law finder' stems from procedure and not from the social consequences of his/her legal decision, is in fact more likely to adhere to the overall values of a system than a 'law finder' who reaches a 'judicial decision' in order to actualize a value, an end, or an ethical goal.

*Govind and Others*²¹⁰, Jardine would once again ignore West's plea for privileging the 'practical' over the 'systematic'.

A Man Must have a Code

In *Queen Empress vs Govind and Others* (1891), the accused were arrested without a warrant and charged under section 12 of Bombay Act IV on the grounds that they were playing for money with 'instruments of gaming' on a public footpath. The game was 'pitch and toss'; coins were thrown in the air and those that landed with 'the named side' on top were won by the thrower. The accused were acquitted by the district magistrate on the grounds that coins were not 'instruments of gaming'. The decision was appealed in the Bombay High Court, which brought the case to Jardine's attention. Jardine reiterated his conclusions from the *Nga Po Thit* and *Narotamdas* cases and clarified that only such instruments that were designed for the explicit purposes of gaming could be considered 'instruments of gaming'. In an elaborate analysis of the words 'instrument' 'subject' and 'means', Jardine settled on the principle that for him ended the debate definitively:

[The] Act of 1890 departs from the phraseology of the English Acts and includes 'any article used as a subject or means of gaming' while 'gaming' shall include wagering, I think we ought to see whether the *real meaning* was, as I think, to make it more easy to obtain convictions in cases of wagering at common betting houses and such place. It is difficult to suppose that the words 'subject' and 'means' apply commonly to games...But we do speak of the subject of a bet or a wager, and we find in the decisions that in wagering cases the Courts have had very carefully to consider the legality or illegality of 'means' used to stimulate betting or decide on bets...Whatever the word 'subject' as distinct from 'means' may intend in the

²¹⁰ *Queen Empress vs Govind and Others*, Bombay Law Report, Volume XVI, July 1891.

Bombay Act of 1890, I think there would be no difficulty in holding that the contrivances used are instruments or means of wagering, *it being proved that they have no other use.*²¹¹

The words ‘instruments’, ‘means’ and ‘subject’ though used interchangeably, held particular meanings in Jardine’s reading. Most notably, he decided that the word ‘instrument’ needed to be read in its objective sense and not as the adjective - *instrumental*. Accordingly, an instrument was an object designed for the sole purpose of gaming (like a pari-mutuel) and could have ‘no other use’, a construction that was particularly problematic for certain forms of evidence regarding gambling.

When gamblers were arrested through a sudden raid, the police seized what they could as evidence to prove the place to be a ‘common gaming house’. This task proved particularly difficult for certain games like *flyloo*, a betting game played in Burma during the closing decades of the nineteenth century. The game involved people betting on which cube of sugar, between two cubes, would attract a fly. Those who had bet on the cube on which the fly landed would win the collective pot. In such a game, how would the police determine an ‘instrument’, if all they had to go by were two pieces of sugar on a table? Faced with nothing else, the police often seized money and presented it as evidence of gaming. Money was, of course, an unstable ‘instrument’, difficult to hold to the formal and descriptive reading proposed by Jardine. Even after confiscation, it spoke of its double nature.

In the Jung Bahadoor case, narrated in the previous chapter, of all the objects recovered in the raid and later presented as ‘instruments of gambling’, the most interesting ones were

²¹¹ *Ibid.* Emphasis added.

the cowrie shells that lay on a table. The accused claimed that the shells were ritual objects for the Sattanarayan Puja, while the police felt that it was the money staked in the game. The fact that cowrie shells were instruments of gaming was not a far-fetched suspicion. A successful raid would in all probability recover money in some form or the other. However, after being confiscated, what became of the nature of this money? Was it devalued as a piece of evidence? The question had been raised in the Bombay Province previously in 1878 in *Crown vs Rambhat Paremeshware Bhat and 5 others*.²¹² The accused contended that if the confiscated money was not returned to them after the case was concluded, then a fine was additionally punitive. Seeking clarity on this question, the District Magistrate of Kanara wrote to the Remembrancer of Legal Affairs. The latter informed him that there was nothing in Bombay Act III of 1866 which authorized the confiscation of money. Section 5 did authorize the police to ‘seize all money reasonably suspected to have been used or intended to be used for the purpose of gaming’, but it was left to the magistrate trying the case to decide what to do with the money after the sentence had been passed.²¹³ The Magistrate therefore concluded that:

[...] there is a distinct provision made concerning the instruments of gaming of whatever kind and no provision whatever made for the confiscation of moneys found...Where they [instruments] are alluded to as “cards, dice, counters, cloth board or other instruments of gaming used in playing any game” the section excludes money which is mentioned particularly in the provisions of section 5 but as distinct from instruments of gaming. Section 5 provides for the “seizure of all instruments of gaming and all moneys.”²¹⁴

²¹² *Crown vs Rambhat Paremeshware Bhat and 5 others*, Judicial, Volume 78, 1878, Bombay State Archives.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

Money could not be presented as an instrument of gaming as, even after confiscation, it continued to exert its value monetarily. Jardine partly noted this when he mentioned that section 12 of Act IV of 1887 required the magistrate to confiscate or destroy the evidence of ‘instruments’, which in the case of money was impossible, as confiscating money and then fining gamblers could be regarded as double sentencing.²¹⁵ Since money could not be just the one thing, it could not be evidence of an ‘instrument of gambling’. By drawing attention to its universal nature, it successfully defied any pure descriptive or tautological understanding - an instrument of gaming is an instrument of gaming. Importantly, it pointed to the logical difficulty of descriptively defining ‘instruments of gaming’ since objects like a cube of sugar or money generated meaning only relationally.

The problem was compounded by the provisions of Section 7 of Act IV of 1887 that defined what constituted the ‘proof of keeping or gaming in a common gaming house.’

When any cards, dice, gaming table, counters, cloth, board or other instruments of gaming used in playing any game not being a game of mere skill, are found [...] it shall be evidence until the contrary is made to appear that such house, room or place is used as a common gaming house...although no play was actually seen by the magistrate or police officer or by any person acting under the authority of either of them.²¹⁶

Given that the arrests secured in a ‘common gaming house’ could take place ‘although no play was actually seen by the magistrate or police officer’, ‘instruments of gaming’ needed to be self-evident, like *pari-mutuels*, cards, or dice. In Robert Reid’s short narrative on

²¹⁵ *Queen Empress vs Govind and Others*, Bombay Law Report, Volume XVI, July 1891.

²¹⁶ *Ibid.*, Emphasis added.

‘Gambling in Calcutta’, the final raid on the gaming den had confirmed the police’s suspicions through precisely this definition:

The Hadjee's Koran was bound with the cover of an old musical album, and in the space which once contained the musical instrument, were found two packs of cards, six sets of dice, and a square piece of cloth on which was printed birds and animals, a game in which Chinamen only, as a rule, indulge. The Hadjee's Koran and its contents were produced in Court and caused immense laughter.²¹⁷

Once found, the instruments criminalized the entire space. What was presented as religious gathering now became a gaming house. However, some degree of legal over-determination was still at play when it came to viewing these objects as ‘instruments of gaming’. Could these objects not be found in spaces that were not common gaming houses? This precise question was asked by the *Amrita Bazar Patrika* in the context of the rain gambling bill of Bengal in 1897:

For what ‘house’ in the land, from the Viceregal palace downwards can be found, what ‘tent’ civil or military, what ‘space’, where a Church or bazar is being laid, in which there are not ‘cards’, ‘dice’, table-cloth, boards or other instruments of gaming? And by section 6 of this Act, “when any cards found in any house,” it shall be evidence that such house, tent etc., is used as a common gaming house.²¹⁸

Then came the attack regarding partisan vision:

It is, however, a very hard matter to prove a negative like that; for, how can one prove satisfactorily that the cards found in his house were *not* meant for gaming purposes [...] but as the Viceroy or any civil and military officer or any non-official European has no fear from such raids in their houses, the Gambling Act does not affect them at all. It is thus the poor natives who suffer and suffer terribly.²¹⁹

²¹⁷ Reid, *Revelations of an Indian Detective*, p. 108.

²¹⁸ *Amrita Bazar Patrika*, ‘How They Manufacture Law’, Calcutta, 24th March 1897.

²¹⁹ *Ibid.*

The charge of seeing similar spaces differently was aided by the work of petitioners like Vinayak Sitaram who, in a letter sent to the government of Bombay, declared that his only intention was to ‘prevent Hindus from molestation’. However, he apprehended this exact possibility from the descriptions of ‘instruments of gambling’ in the gaming act of Bombay.²²⁰ He claimed that most Hindu households customarily presented the groom, (who, he clarified, was ‘always a boy’) with *Dashavataari cards* and *Sonytis* (16 wooden or ivory figures). Could these innocent gifts criminalize all households? Even though these gifts were intended for play, play was limited to Diwali.²²¹ Continuing in the same vein, he naively asked whether ‘respectable’ people walking past a cock fight could also be arrested for ‘aiding and abetment’ gaming— terms that required ‘proper definitions’ in his opinion. Clearly, the demand for legible definitions were not made by administrators and the police alone.

What appeared as wide-eyed inquiries in Sitaram’s letter had turned to full scale outrage in the columns of the *Amrita Bazar Patrika* by 1897. Alongside expressing indignation regarding the double standards of gaming laws, the writer of the article in the *Patrika* also exposed the problem with Jardine’s definition of ‘instruments of gaming’. For Jardine, to substitute the words ‘instruments of gambling’ with ‘subject of gambling’, made the actual object of evidence disappear. According to him, reading ‘instruments’ interchangeably with ‘subject’ or ‘means’ of gambling was to overextend the discretionary powers of the judge.

²²⁰ Home, Judicial Part B, January 1887, Proceeding Nos. 43/46 NAI.

²²¹ An exception had been made through Section 4 of the Gaming Act for gambling during the festival of Diwali.

The word “subject” as used in the Act of 1890 refers to something tangible, some article, and is not equivalent to the phrase “subject matter of the wager” [...] I think “subject” is not intended to include stakes or the money risked; *if the legislature had so intended it would have said so*. *Combes v. Dibble* illustrates the difficulty of extending the meaning, and when dealing with stakes, the legislature used definite words...and to include the money or stake would give a dangerous extension to the rule of evidence enacted in section 7.²²²

Proper judicial practice was to clarify and not elaborate on legislative intention. In fact, he repeated the exact phrase he had used in de-criminalizing *ti* in Burma - ‘if the legislature had so intended, it would have said so’. The observation clearly reinforced his distaste for judge-made law. His ruling, on the other hand, demonstrated restraint and sobriety. His mechanical reading, so he thought, would limit ‘the dangerous extension to the rule of evidence’, and avoid unnecessary harassment. At the same time, it also prevented legislative intent from passing to a point of absurdity as anticipated by the comment made by the Chief Presidency Magistrate, during the Narotamdas case – ‘I trust that my present judgment may not be deemed an ‘instrument of gaming’ merely because some bets may be dependent on it.’

However, as the *Amrita Bazar Patrika* article unintentionally exposed, Jardine’s reading of the word ‘instrument’ betrayed a constitutive confusion regarding the true nature of the ‘common gaming house’; the sort of confusion that would be exposed by Ludwig Wittgenstein twenty-three years later in a devastating review of *Science and Logic* by P. Coffee:

He [Coffee] confounds classes and complexes. (Mankind is a class whose elements are men: but a library is not a class whose elements are books, because books

²²² *Queen Empress vs Govind and Others*, Bombay Law Report, Volume XVI, July 1891. Emphasis added.

become parts of a library only by standing in certain spatial relations to one another—while classes are independent of the relations between their members).²²³

Similarly, gaming houses were not a class constituted by elements like ‘instruments of gaming’ and accordingly, ‘instruments of gaming’ did not have to be self-evident. As a complex, the structure received property from the way its elements related to one another, in the act of gambling itself. For this reason, it *was* possible to make a spatial distinction between the Viceregal House and a ‘common gaming house’, even if the same ‘instruments’ were discovered in both places. Neither the term ‘place’ (as in Burma), nor the term ‘instruments’ gave certainty to the features of the ‘common gaming house’. Its only true feature was gambling—a practice that was not illegal and remained legally fungible.

To maintain a legal premise, the term ‘common gaming house’ could not exist prior to ‘instruments of gaming’; the ‘common gaming house’ was a place that contained ‘instruments of gaming’, objects could not become ‘instruments of gaming’ because they were found in a ‘common gaming house’. If strict definitions did not govern the category of what was and what was not an ‘instrument of gaming’, then the only thing that prevented the Chief magistrate’s ruling in the *Narotamdas* case from being included in the category would be arbitrary will. Jardine felt that his reading had prevented this exact possibility. He even congratulated himself on correcting a mistake that others were liable to make:

While I think my interpretation of the language will carry out the *real meaning* of the Legislature and avoid absurdities and undue interference, I am not sanguine that this

²²³ Ray Monk, *How to Read Wittgenstein*, London, Granta Books, 2005, p. 4.

construction will prevent the occurrence of mistakes in applying this Gambling Act to a large and new class of cases. Where so perplexing a word as ‘subject’ is used without explanation, misconstructions are likely to occur.²²⁴

It is worth considering Jardine’s admission regarding the uncovering the ‘real meaning of the Legislature’ coupled with his uncertainty regarding the ‘occurrence of mistakes’ in future applications. The admission acknowledged the aporia at the heart of formalist readings. Fred Dallmayr explains that the problem is that:

[...] rule governance or the ‘rule of law’ can be known independently of circumstances as a purely rational proposition and furthermore the rule is the same for all or applied in the same manner to all individuals [...] however how can the law or its content be fully known apart from any contextual concretization—given that the law can never exhaustively stipulate its range of application.²²⁵

The formality of law is shaken in every case of application, which for Hans George Gadamer is the ‘essential tension’ at the heart of all hermeneutics.²²⁶ Thus, even when staying true to the code, Jardine was not so much rescuing a pre-existent meaning as he was producing that meaning formally. According to Frederick Schaur, the caricature of formalism – ‘to be enslaved by mere marks on a printed page’- does a certain disservice to its ideological premise.²²⁷ As he puts it, ‘it is exactly a rule’s rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule.’²²⁸ However, when

²²⁴ *Queen Empress vs Govind and Others*, Bombay Law Report, Volume XVI, July 1891, BL. Emphasis added.

²²⁵ Fred Dallmayr, “Hermeneutics and the Rule of Law”, *Cardozo Law Review*, 11, 1449 (1990), p. 1460.

²²⁶ Hans-Georg Gadamer, *Truth and Method*, London: Bloomsbury Academic, 2014, p. 275. Gadamer observes, “In both legal and theological hermeneutics there is the essential tension between the text set down—of the law or of the proclamation—on the one hand and, on the other, the sense arrived at by its application in the particular moment of interpretation, either in judgment or in preaching”.

²²⁷ Schaur, “Formalism”, p. 521.

²²⁸ *Ibid*, p.535.

literality impedes the very purpose of law, is there a point in continuing to be tied to it? A formalist answer would be ‘yes’, because the purpose of law is itself contestable, since any immediate ‘purpose’ could always be challenged by a ‘deeper purpose’.²²⁹

Queen Empress vs Govind and Others is just a footnote in the legal archives on the subject. The game of ‘pitch and toss’ was a minor game that did not sustain a historical life in the same manner as rain gambling or commodity speculation. What then prompted Jardine to tease out pedantic differences between language, law, and meaning, instead of handing the gamblers a small fine? His careful attention to the differences between the words ‘instrument’, ‘means’ and ‘subject’ gave evidence of his larger understanding on how to follow a rule, a theme that was debated in both the field of law and linguistics in nineteenth century Britain. The kind of activity that Jardine imagined to be proper to a judge was similar to what Wittgenstein imagined was the work of a philosopher—to clear the confusions caused by ordinary language and reduce propositions to their simplest atomistic forms.²³⁰ In fact, both Jardine’s judicial method and legal philosophy closely mirrored the doctrines of analytical philosophy and jurisprudence that had gripped England towards the end of the nineteenth century.

²²⁹ Schaur, “Formalism”, p. 532. If the purpose of the law was to prohibit illegal gambling but the language of the law impeded prosecution, then one could say that the ‘deeper purpose’ of the rule of law would be to place emphasis on legislative correctives instead of allowing judges to decide when it was right to follow the language of law and when to abandon it.

²³⁰ Wittgenstein, who had rejected the idea of philosophy being a set of theories about the world, saw it more like an activity—the act of breaking ordinary propositions into their simplest ‘atomic forms’. While writing the *Tractatus*, Wittgenstein believed that these atomic forms would reveal the logic of language and its relation to reality. Wittgenstein revised some of these views in *Philosophical Investigations*.

Before Whitehead and Russell were to publish the *Principia Mathematica* in 1912, J.L. Austin had translated Gottlob Frege's *The Foundations of Arithmetics* in 1884. Through the last decade of the nineteenth century, Frege published widely on the nature of language, teasing out the relations and differences between meaning, sense and function. Caught in the tailwinds of natural order, Frege revised and replaced Aristotle's analysis of subject and predicate forms with function and argument, progressively shepherding him towards the discovery of the order shared by both language and arithmetic. Accordingly, the truth value of propositions was captured in logical as opposed to their grammatical forms. Just like in arithmetic, Frege had imagined that the logical form of language could be discovered through proper philosophical work, inspiring a generation of pupils in England, none more notable than Bertrand Russell. Russell demonstrated in his theory of 'definite descriptions' that the logical form of the proposition was not its real form and that most philosophical confusions regarding meaning and sense were caused by philosophers who focused on the 'real forms' of an expression and not the logical form of language.²³¹ However, it was Russell himself who would discover a paradox that impeded the advancement of a singular logical form in the field of linguistics, as it revealed to him that the rules of language did not correspond to the logical order of mathematics.²³²

²³¹ Alfred N. Whitehead and Bertrand Russell, *Principia Mathematica*, Cambridge: Cambridge University Press, 1978, p. 66.

²³² 'Russell's Paradox' demonstrated the contradiction in the nature of classes, which Russell concluded were logical fictions. As he explained, "consider the class of horses. This class is not itself a horse, so the class is not a member of itself. Consider the class of 'non-horses'. This class is not a horse, so the class *is* a member of itself. So, some classes are members of themselves, and some classes are not members of themselves. Consider now the class of all classes that are not members of themselves. Is this a member of itself or not? If it is, then since it is the class of all classes that are not members of themselves, it is not. If it's not, then since this is the defining property of the classes it contains, it is." in Michael Beaney, *A Very Short Introduction to Analytical Philosophy*, Oxford: Oxford University Press, 2017, p.31. See also Anthony Kenny, *Wittgenstein*, p. 32.

There is no immediate historical link discoverable between Jardine and analytical philosophy. Yet, his formal and consistent reading of law reflected his juridical attitude regarding statutory language. It also pointed to the close relation between analytical philosophy and analytical jurisprudence of the nineteenth century. As observed by Nathan Isaac, analytical jurisprudence was different from the constructivist approach of Utilitarian law making, since it only “makes its appearance when there is a body of law on which to work...[and] is worth analyzing because it is consistent with itself.”²³³ However, in *Queen Empress vs Govind and Others*—Jardine himself was struck by the ambivalence of ‘rules’, even in the closely guarded field of law. He understood that what made law a normative system was its rule governed nature. Yet, the very system of rules that governed the production of law did not self-evidently instantiate how the rule was to be followed. One of Jardine’s icons, Fitzjames Stephen, believed that British codes were a ‘compulsory gospel which admits of no dissent and no disobedience’. What Jardine had come to realize was that even in explaining the ‘real meaning’ of the legislature he was still *interpreting* its language and not *obeying* it.

What did it really mean to obey a rule? Wittgenstein once asked whether ‘obeying a rule’ is something that only one person could do just once in their life.²³⁴ It was possible, he thought, although it violated the phrase’s grammatical meaning.²³⁵ What he meant was that a person could both be following the directives of a rule without realizing it but more

²³³ Nathan Isaacs, “The Schools of Jurisprudence”, *Harvard Law Review*, Vol. 31, January 1918, pp. 373-411, p. 396.

²³⁴ Ludwig Wittgenstein, “Following a Rule”, in *The Wittgenstein Reader*, Ed. Anthony Kenny, Blackwell Publishing, 2005, p. 99.

²³⁵ *Ibid*, p.100. According to Wittgenstein, ‘though every action according to a rule was an interpretation...we ought to restrict the term ‘interpretation’ to the substitution of one expression of a rule for another.’

importantly, what they believed was acting in accordance to a rule could be just one of the many applications of the rule itself. Since the application of rules was in itself not ‘rule governed’, Wittgenstein suggested that the act of obeying or following a rule was a communal practice founded in choice, even custom.²³⁶ This led him to believe that ‘it is not possible to obey a rule ‘privately’: otherwise thinking one was obeying a rule would be the same thing as obeying it’.²³⁷ No individual could be the sole authority of a rule, as its very condition was that it should be fallibly readable.²³⁸ Therefore, in extending his analysis Wittgenstein concluded that a ‘private language’ based on a set of personal rules that was invented and legible to just a single person, was an incoherent concept. As he demonstrated through the beetle in a box thought experiment, the rules of language were grounded in its communal usage, where the act of following or violating a rule was ‘understood’ and verified through social sanction, not through transcendental logic.²³⁹

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ Philip Petit, “The Reality of Rule Following”, *Mind, New Series*, Vol. 99, No. 393, (January 1990), p. 3. According to Petit, a rule must be both directly and fallibly readable, for it to be recognized as a rule. Direct readability was when the rule follower directly grasped the directives of the rule, while fallible readability ensured that the individual cannot be the infallible authority regarding a rule, since ‘no matter how fast or apparently the rule follower gets the rule, there is no epistemic guarantee that he has got.’

²³⁹ Ludwig Wittgenstein, “Private Language and Private Experience”, in *The Wittgenstein Reader*, ed. Anthony Kenny, Blackwell Publishing, 2005, pp. 139-171. “The Beetle in a box’ was a thought experiment by Ludwig Wittgenstein to demonstrate that a private language was an incoherent concept. While analyzing what it meant to be in ‘pain’ he refuted the belief that we could, if we chose, have a private language used to reference such immediate sensations. As part of the experiment, he asks us to imagine a group of people, each with a box and a ‘beetle’ in the box. Each person can only look in their own box, similar to how each person can only feel their own pain. He claims that if each person learnt the word ‘beetle’ only by observing its usage among the other people, then whatever the word ‘beetle’ referred to couldn’t be what was in their box, because something different (or nothing at all) could be in the other boxes.

This argument was radically drawn out by Saul Kripke, thirty years later. Kripke’s argued that a qualia or an individual instance of conscious experience, was in itself not instructive regarding the nature of its future occurrence. Like Wittgenstein, Kripke understood that all dispositions regarding rules were socially and not logically derived. So, in a particular instance of rule following the rule itself did not suggest to the follower how they should progress. For example, in the series S1— 2, 4, 6, 8, ?, ?— one might conclude that the numbers

Similarly, Jardine realized that even when his judgment was faithful to the rules of ordinary language it did not guarantee a perfect iteration. He had stumbled onto Wittgenstein's paradox — 'no course of action could be determined by a rule because every course of action can be made out to accord with the rule'.²⁴⁰ This meant that coded law, even when read formally, remained disturbingly arbitrary, and definitely customary. The code itself suggested its multiple yet ideologically consistent applications. So, in 1892, when Justice K.T. Telang provided a contrasting meaning of 'legislative intent' in the same set of gambling laws, his interpretation remained consistent with the provisions of the code itself. His judicial ideology and political sentiments, however, were very different from that of Jardine's.

The Problem of the Penumbra

Jardine's reading and application of anti-gaming maintained somewhat fetishized his fidelity towards statutory codes. Yet, a rigid code that relied on the self-evidence of terms

that fit into the two blanks are 10 and 12. However, what if one were to say that the series actually followed the principle of S2—2, 4, 6, 8, 8, 10, 12, 14, 16, 16...—where every fourth number is repeated. Importantly, till the difference between both series are registered in the reoccurrence of the number 8, how is one to decide whether one is following the rules of S1 or S2? The introduction of a new rule could not fix this problem or even standardize interpretation, since the new rule would be subject to further interpretation; an infinitely sliding scale. It should be noted that Kripke's 'skeptical solution' generated a fair bit of controversy. The idea that, meaning, judgment were communal products without any other points of fixity complicated the idea of 'truth'. Consider the magician who tells a crowd that a 'egg is in a hat', although through a sleight of hand, the egg remains in the magician's hand. If the entire crowd were to believe that the predicate 'is in the hat' refers to the egg and the magician is the single person who does not believe so, the truth of the proposition is not influenced by the collective disposition of the crowd. See, Saul Kripke, *Wittgenstein on Rules and Private Language*, Cambridge: Harvard University Press, 1982, chapter 2, see also Paul Boghossian, "The Rule-Following Considerations". *Mind* 98: 507, 1989: 507-549.

²⁴⁰ Wittgenstein, "Following a Rule", p. 99.

and phrases was constantly up for creative challenge. As seen in Vinayak Sitaram's letter, clarity regarding definitions of terms like 'instruments' were demanded by the population over whom the law applied. It may be that Sitaram was one of many law-abiding citizens who was asking the government what it meant to '*follow* the law'. However, given the extraordinary number of transgressions in the context of gambling, it was equally possible that he was asking - 'how to get away after *breaking* the law'. Just two short years after the Amendment of 1890, under the weight of a growing list of challenges, a formalist application of the Public Gaming Act had been stretched to its limit.

In 1892, in the town of Bhooleshwar in the Bombay Presidency, Khanjee Bhimjee and Dosabhoy Eduljee were found running a rain gambling stall on Cathedral Road.²⁴¹ The accused claimed that they had 'kept' the stall for Puroshatamdass Hurkidordas, the owner of the property. Curiously, they ran it quite openly and made little attempt to disguise its nature. As the police were to discover, the problem of prosecuting this set of rain gamblers was that they kept no instruments in the stall itself. Instead of having a *mohri* or cistern that measured the quantity of rainfall, they ingeniously used the gutter lines and rooftops of adjoining houses to measure rainfall. Oblivious to how it appeared, they were convinced that legally speaking, they were not running a gambling stall. When brought to the Bombay High Court, the matter was presided by Justice Parsons and Telang. Clear on the intent and nature of the stall, the Judges had to admit that the *limited definitions* of 'instruments of

²⁴¹ Judicial Files, Volume number 275, 1894, Bombay State Archives.

gambling’ and that of ‘keeping and owning’ made it difficult for them to prosecute the accused.

The books that recorded bets, recovered in the police raid, were disbarred as evidence by Justice Telang, who contended that they were ‘too remotely connected with wagering to be described either as instruments or means or subject of wagering’.²⁴² That left the rooftops and the gutter lines of the houses neighboring the stall that had been used to measure the rainfall. Mr. Inveravity, who had previously represented Narottamdas Motiram’s in 1889, contended that if these structures were included in the definition of ‘instruments’ then they would have to be seized and destroyed as was customary under the provisions of the Bombay Prevention of Gambling Act (Amended in 1890). The argument was rejected, as Telang informed Inveravity that the law stated that the fate of such ‘instruments’ was to be decided at the discretion of the District Magistrate, Mr. Cooper, who could decide to leave them where they were. Still, there was no getting around the fact that the ‘instruments’ had not been ‘kept’ in the house itself, as Justice Parson observed.

The roofs of the adjoining houses clearly are not kept in the place in question. But the advocate general contends that they are used therein since they are made use of for the purpose of wagering therein. If this argument is sound, then it would have been far simpler to have proceeded against the accused for the use of the rain itself since that admittedly was used as the subject of wagering within the place. The bets were laid on or against the fall of rain. I am unable, however, in any way to accept the argument.²⁴³

Previously in Burma, Chinese *daings* had drawn lots in one house and announced winners in another, thus allowing neither to be constituted as a ‘common gaming house’; in this

²⁴² Judicial Files, Volume number 275, 1894, Bombay State Archives.

²⁴³ *Ibid.*

instance, Eduljee and Bhimjee had broken its spatial harmony once again. Due to Jardine's formal interpretations, the Act had encouraged what the legal scholar H.L.A. Hart referred to as 'problems of the penumbra'. As a problem related to the reading of statutory law, the challenge of the penumbra was first highlighted in the nineteenth century by legal scholars the Realist school of jurisprudence.²⁴⁴ Hart critiqued the Realists for overdetermining the endemic nature of the penumbra and concluded that they had overdetermined the influence of the natural sciences on positivist theories of law. However, he did admit that:

They opened men's eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was usually illuminating; for in spite of some exaggeration, the Realists made us acutely conscious of one cardinal feature of human language and human thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence.²⁴⁵

Paraphrasing the Realists, Hart invited us to think of a park that bans vehicles from its premises. At this point, objects like cars were close to the general meaning of the term 'vehicle' and would be naturally included within the prohibition. But what about a toy car, roller-skates, or an airplane for that matter? Were these objects obviously denoted by the term 'vehicle' and if not, what exactly was the legal rule that made the car a 'vehicle' as opposed to a pogo stick? Since the objects did not declare themselves as 'vehicles', judgement in such cases were not dependent on any logical deduction, since 'deductive reasoning cannot serve as model for what judges should do to bring particular cases into a general rule'.²⁴⁶ This was the problem of the penumbra, a problem that early Utilitarians

²⁴⁴ H.L.A Hart, *Essays in Jurisprudence and Philosophy*, Oxford : Clarendon Press, 2001. pp. 63-69.

²⁴⁵ *Ibid.*, p. 63.

²⁴⁶ *Ibid.*, p. 64.

like Bentham and Austin had not given much thought to, though Hart felt that in such cases even they might have given their approval for judges to legislate. For Hart, it was Blackstone's 'childish fiction – 'judges *find* never *make* law', that birthed formalism in the first place, while in Hart's consideration, a particular judicial interpretation resulted in a particular conclusion, but logic still remained 'silent on how to classify particulars' which 'is the heart of the judicial decision'.²⁴⁷ He seems, however, to have underestimated the fidelity that the practice would inspire in colonial judges like Jardine.

A similar aporia haunted Jardine; even statutes fell short of standardization since following the code was an act of interpretation and not obedience. To eliminate variation, he tied his interpretation to the rules of language, which he believed held logical coherence. Accordingly, when he read 'instruments of gaming' as instruments designed for the purpose of gaming, he thought he was providing stability to the code itself. However, Marwari and Burmese gamblers had understood that terms like 'common gaming house', 'place' and 'instruments of gambling' did not describe the world as it really was; such terms were only legal fictions dressed in semantic formality.

Let us return to the trial. As was common in these cases, the prosecution struggled to establish the 'common gaming house' as per the vocabulary of law. They presented the money seized in the raid as evidence of having found an 'instrument of gaming'. Predictably, the court dismissed the argument. Justice Telang even remarked with amusement that 'if halfpence are instruments of gaming, then we all carry these dangerous

²⁴⁷ *Ibid.*

instruments.’²⁴⁸ Even as their arguments crumbled rapidly, the prosecution boldly claimed that they had recovered a clock from the house which according to them was *instrumental* in deciding the time within which a bet could be placed. Would the judges be persuaded? Mr. Invaravity invoked Jardine’s spirit when he argued that the meaning of the words ‘instrument of gaming’, as per the law, ‘must be confined to things that are specially devised for and intended to be used for the purposes of gaming.’²⁴⁹ The Advocate General raised objections to this definition and claimed that any object *used* for the purpose of gaming should be an ‘instrument of gaming’; Justice Parsons remained unmoved. He failed to see the ‘instrumentality’ of the clock:

All he says is that the clock kept accurate time, and was watched by gamers, and that bets were decided by persons seeing the time by the clock, if necessary, but in cases of no doubt, without reference to the clock. I cannot infer from this that bets were made and decided by the time kept by this clock, which is necessary, in order to make it an instrument of wagering.²⁵⁰

The prosecution was given a more sympathetic hearing by Parson’s Indian counterpart, Justice Telang. Before coming to Telang’s verdict, let us consider the factors responsible for his reasonings.

Reconstructing Telang

²⁴⁸ Extract from *Times of India* 21st October 1892. Judicial Files, Volume number 275, 1894, Bombay State Archives.

²⁴⁹ *Ibid.* Emphasis mine.

²⁵⁰ *Ibid.*

Born in 1850, K.T. Telang matriculated from Elphinstone College, Bombay in 1864 and obtained his LL.B. in 1869, following which he became a ‘senior fellow’ at Elphinstone and lectured in Sanskrit philology and literature. More than a passing interest, Telang’s extensive knowledge of Sanskrit literature is evidenced in a detailed rebuttal of an article by Albrecht Weber, who had claimed that the *Ramayana* was a copy of the Homeric epics.²⁵¹ He also wrote an essay on the life of Shakaracharya and his translation of the *Bhagvad Gita* into English was included in Max Mueller’s compilation titled *Sacred Books of the East*. A proud Maratha, both Shivaji and the Peshwa state found heavy praise in many of Telang’s essays and speeches.²⁵² Telang’s scholarship was not limited to the classics, as he showed equal dexterity in political economy, natural philosophy and European history. Ironically, he held respect for both Edmund Burke and Herbert Spencer, the latter being the chief proponent of ‘social Darwinism’, a concept that heavily influenced theories of eugenics and scientific racism in the colony.

Telang joined the Bombay High Court as a barrister in 1872. Here began his long association with notable Indian lawyers, some being the founders of the Indian National Congress in 1885. Inevitably, his political outlook was deeply influenced by the first blush of nationalist thought forwarded by figures like Mahadev Govind Ranade, Sir Pheroz Shah Mehta, Badruddin Tyabji and Dinshaw Edulji Wacha. In 1877, in a speech delivered at the Sassoon Mechanics Institute in Bombay, he spoke in favor of preserving the seven and half percent tariff charged on Lancashire and Manchester coarse cotton, arguing that the tax did

²⁵¹ K.T. Telang, *Selected Writings and Speeches*, Bombay: K.R. Mitra and Manoranjan Press, 1916.

²⁵² *Ibid.*, p. 200.

not violate the tenants of free trade and was vital for the development of indigenous industries like the Bombay cotton mills. He even spoke on the floor of the Congress in 1888, but removed himself formally from the organization when he was elevated to the position of judge in the Bombay High Court in 1889.²⁵³ According to D.E Wacha, the nationalist circles of Bombay were struck with profound regret by Telang's elevation, as it cut short his promising political career.²⁵⁴ Others were of the opinion that the new position lent further gravitas to his politics.²⁵⁵ What was this politics and what was the nature of its influence, if any, on his judicial decisions?

As mentioned previously, Fitzjames Stephen had written an article in the *Times* in 1883, where he characterized British colonialism as “an absolute government, founded not on consent but on conquest”. Writing in the wake of the Ilbert Bill, Stephen accused the Viceroy of India, Lord Ripon, of shifting the foundation of colonialism in India. In a public meeting held in Bombay in 1883, Telang repudiated Stephen's arguments by putting forward his understanding of colonial liberalism. Playing on the British imperial desire to be traced back to Rome, Telang reminded them that the Romans had shared political privileges with conquered populations in order to impart instruction.²⁵⁶ In reiterating his loyalty to the British government he held them to the universalist assurances avowed in liberal discourse. It was obvious that this generation of nationalists remained invested in the transformative promises of Empire. Meanwhile, Auckland Colvin, a member to the

²⁵³ *Ibid.*, p. 25.

²⁵⁴ *Ibid.*, p. 27.

²⁵⁵ R.P Karkaria, *K.T Telang and the Present Political Movement in India*, Bombay: 1895, p. 22.

²⁵⁶ K.T. Telang, *Selected Writings and Speeches*, pp. 195-96.

Viceroy's Council responded to the stirring around the Bill by asking educated Indians to focus on internal social reform rather than political concessions; 'indirect rule' allowed imperial discourse to place the task of transformation back onto Indians. Colvin claimed that the political freedoms being demanded by Indians were harmful in the long run and the gains of colonial modernity would be wasted by a non-progressive native society. How did nationalists respond? We get an idea through Telang's articulations.

In a letter to B.M. Malabari, a social reformer who campaigned against infant marriage and enforced widowhood in the Bombay presidency, Telang shared his opinion regarding the efficacy of eradicating such social practices through legislative action:

My faith in "the education of public opinion" as a great force is almost unlimited, I believe that in the long run the results of that education are not only more enduring but (what might seem paradoxical), more rapid than the results of artificial remedies.²⁵⁷

At this time, Telang's proposal was thus in direct opposition to the strategies adopted by early social reformers like Vidyasagar, who utilized the State's political might to effect social changes onto an unwilling, orthodox Hindu majority.²⁵⁸ In just a couple of years' time, however, Telang revised his views dramatically. Speaking to a public gathering in 1886, he confronted Colvin's charge head on:

²⁵⁷ K. T. Telang, "Response to Malabari's note on Infant Marriage and Enforced Widowhood in India", in *Selected Writings and Speeches*, p. 251.

²⁵⁸ As Tanika Sarkar has shown, Vidyasagar's crusade had succeeded largely due to his ability to gather signatures from a minority of like-minded native subjects before the orthodox majority had the chance to mobilize. He used the signatures to lobby the government of the time and convinced them that the majority of the native population were ready to accept a bill that would allow widow remarriage. By the 1880's, when Malabari was active, the colonial state was unwilling to let universal moral laws permeate the native domestic sphere. Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism*, Bloomington: Indiana University Press, 2010. p 232.

It is said that a nation socially low cannot be politically great, that history shows no instance of such a condition. Now if this means that political and social progress go on together, that the spirit of progress working in the political sphere always manifests itself in greater or less vigor in the social sphere, I at once admit it.²⁵⁹

To emphasize his point, he provided a pre-colonial example:

In the days of the Peshava *regime* again, there was a liberalizing process going on...I am inclined to strongly draw the inference, which I have held for a long time, the if Peshva rule had continued a little longer, several of the social reforms which are now giving us and the British Government so much trouble would have been secured with immensely greater ease.²⁶⁰

Telang therefore coupled political action with social transformation. In doing so, he privileged the moral and political importance of law as an agent of social change. But his statement was fraught with internal contradiction, as reported by his fellow jurist Raymond West. Following his untimely death in 1893, West penned a heartfelt tribute to his colleague, documenting Telang's many achievements and a few of his failings.²⁶¹ West's fondness did not impede him from expressing disagreements. So, he saw Telang as a Hindu, an erudite Sanskrit scholar, a progressive rationalist fostering a scientific temper but also a father who married his daughter off at the tender age of eight, even though 'the act was opposed to his principles.'²⁶² Sensitive, West registered this last detail as the contradiction ubiquitously wrestled with by enlightened natives - looking to the future while being tethered to tradition. Accordingly, when the stakes were not as personal, 'he

²⁵⁹ K.T. Telang, *Selected Writings and Speeches*, p. 274.

²⁶⁰ *Ibid.* p. 294.

²⁶¹ Raymond West, "Mr. Justice Telang", *Journal of Royal Society of Great Britain and Ireland*, January, 1894, pp.103-147.

²⁶² *Ibid.*, p.143.

hailed with warm welcome the principle that custom must ameliorate, even the Hindu law, and it was refreshing sometimes to hear him argue for ‘modernization’.²⁶³

In this, Telang bore resemblance to Jardine, who placed equity over custom, enfolded within ‘modern’ British standards. But this is where the similarity ended. Unlike Jardine, Telang valued the political and substantive objectives of law, which often went against autochthonous sentiments. So, as opposed to Jardine, Telang did not hold a high opinion of the native jury system and even opposed their involvement when ‘juries were found unequal to the duties cast upon them.’²⁶⁴ Such substantive concerns marked a decisive break between the two judges and while Jardine’s formal approach regarded the procedure of law as an end in itself, for Telang, it was more of a means to an end. As a result, his reading of law was informed by their intended effect, not their precise wording.

Redefining the Instrument

When the Bombay Public Gaming Act was first drafted in 1887, Telang expressed both his awareness of and displeasure with its creative circumvention:

I am informed that people of the same class as those who were described by mover of Bill have been exercising their wits to find out how to frustrate the working of the Act when passed and one of the ways which seems to have suggested itself to their ingenuity is that

²⁶³ *Ibid.*, p. 108.

²⁶⁴ *Ibid.*, p. 113.

they might go into Bombay harbor and play in boats... Council should expressly legislate for these acts.²⁶⁵

He knew that many gamblers were one step ahead of the law, a problem which could not be corrected by fixing its wording. This realization propelled him to take matters into his own hands, and in the case from 1892, he declared the ‘clock’ to be an ‘instrument of gambling’. In contradicting Justice Parson, he breathed *intent* into the words of the legislature.

It is true that if Mr. Inverarity’s argument is correct to its full extent, these points will be all immaterial. He contends that the interpretation of the material of the phrase instrument of gaming in Watson Martin, and other authorities, adopted by this court in more than one ruling is still good in spite of Bombay Act I of 1890. This certainly appears to have been the opinion of Jardine J. But I find it difficult to concur in that opinion. Prima facie, I should say that the very fact that the legislature having all these authorities before it, lay down a fresh interpretation of the phrase “instruments of gaming” affords by itself an indication, that some enlargement of the scope of the words was intended. And secondly, I think that the word “means” is a word with a wider signification than was given to the word “instrument”, by the judicial decisions that have been alluded to. Taking the phrase means of wagering in its ordinary idiomatic sense, I should say that it might fairly be regarded as somewhat wider than the phrase: instruments of wagering. And when the former phrase is added to by the latter, it seems to me difficult to avoid the inference that some widening of the scope of the old law must have been intended.’²⁶⁶

Telang took the language of amendment as a sign of legislative endorsement and decided that the judiciary should take the lead in laying out a fresh definition for ‘instruments’. As

²⁶⁵ Home, Judicial B, Proceedings, January-1888. Nos. 43-46.

²⁶⁶ Extract from *Times of India* 21st October 1892. Judicial Files, Volume number 275, 1894, Bombay State Archives.

opposed to Jardine, his reading of legislative ‘intent’ reinforced the substantive rationality and moral prerogatives of law. Should we take this as a reflection of his politics?

In *A Princely Imposter?* Partha Chatterjee argues that “there was no mistaking the nationalist location of the legal-political thinking of Pannalal Basu and Charu Chandra Biswas”, judges who gave favorable verdicts for the petitioner claiming to be Ramendra Narayan Roy, the middle child and a *kumar* (prince) of the Bhawal Estate in Bengal.²⁶⁷ Basu and Biswas were emblematic of a colonial judicial system that had silently turned nationalist and was lying in wait for the transfer of power. Such judges were versed in the universal principles of law, but they also understood the cultural peculiarities of the country in which they were to be applied. For Chatterjee, they represented the *secret* history of decolonization, “carried out not so much in street demonstrations, prisons, and conference tables but within the interstices of the governmental apparatus itself.”²⁶⁸ Though the Bhawal case was tried in the 1930s, by which time the national movement had matured significantly, is it nonetheless possible to read back his observations as early as 1892? Were there political and cultural imperatives animating Telang’s decision?

Gambling was low-hanging fruit, and Telang’s reading of legal intent repurposed law as a political agent to effect social change. On the question of native gambling, his initiative was not an anomaly either. Five years later, Surendranath Bannerjee, a senior leader of the Indian National Congress in Bengal, would lead a crusade against the ‘vice’ of rain

²⁶⁷ Partha Chatterjee, *A Princely Imposter? The Kumar of Bhawal and the Secret History of Indian Nationalism*, Permanent Black: Delhi, 2003. p. 376.

²⁶⁸ *Ibid.* p. 378.

gambling in Calcutta. A persistent question for nationalist thought, native gambling was treated as moral problem that was to be eliminated for the sake of social progress; as late as 1935, Gandhi would describe gambling as a ‘moral evil’ that ‘destroyed the soul within’. Telang’s verdict in 1892 quietly addressed these future concerns. It also marked a reversal, where social transformation was absorbed within the political objectives of a liberal rule of law. This did not go unnoticed by British commentators. When the bill to ban rain gambling was framed in Bengal in 1897, *The Englishman* gleefully reported the irony that ‘Saturday’s Bill has been initiated, not by the restless and interfering European, but by the ease loving and innovation-hating native of the country.’²⁶⁹

But let us not ahead of the story. The details of the Bengal rain gambling Act will be addressed in the following chapter and, for now, let us conclude the case from 1892. Once Telang had given his opinion, the final ruling was handed to the District Magistrate, Mr. Cooper. The case had generated significant local interest and the *Times of India* ran weekly periodicals reporting a blow-by-blow account of the events to its readers. On 23rd of November 1892, Cooper’s final decision was disclosed:

It seems to me that looking as we are bound to do, at the history and course of legislation on the subject we ought to hold that any article which is in fact used as a means of wagering must be held to be within the definitions of wagering even

²⁶⁹ *The Englishman*, ‘Will it Cut Both Ways’, Monday, March 22nd, 1897, The paper continued, ‘There is at first a suggestion of topsy turveybdom when we are confronted with the fiery reforming zeal of Mr. Surendra Nath Bannerji, Mr Das, Rai Eshan Chander Mitter, and Rai Durgagati Banerjea, and when on the other side we find the Hon’ble Mr. Wallis, the apologist of an abuse which is hallowed by the associations of three quarters century...And Mr. Surendra Nath Bannerji asked why Mr. Wallis or the Chamber of Commerce, or the Trades Association, should be supposed to take any interest in the matter. The curse did not affect the Europeans. It was on the poor natives that the baneful spell rested, those natives who have cause to bless themselves that they have a champion like the Hon’ble Surenda Nath, when a matter of life and death to them is being discussed. This was all very pretty, and if Lord Ripon had been present, he would doubtless have felt that he had not lived in vain.’

though it may serve some other purpose or purposes. From the evidence it is proved that this clock, though an ordinary clock, was placed in a prominent position at this place and kept there and used there for the purpose of fixing the time of the rainfall, or the time when the chance expired... that being so, I must hold, that it was an instrument kept and used at the place as a subject or means of gaming.²⁷⁰

Cooper's exegetical reading captured a sense of both success and failure. The fulfillment of apparent justice was premised on judicial overreach, replacing the legislature as the source of legal authority. Three short years ago, Jardine disqualified the rain gauge as an 'instrument of gambling', because it 'registers quantity just as the watch in the hand of a Judge registers time'. It is ironic that it was a 'clock' that finally broke his reasoning.

Telang's judgment and Cooper's decision instituted a new regime for colonial gaming laws, where their constitutive powers were privileged over their regulative function. Jardine had contended that since the police did not need to *see* gambling take place, the evidence recovered from a 'common gaming house' needed to authoritatively suggest that they were 'instruments of gambling'. Accordingly, 'instruments of gambling', recovered as evidence could only be those objects that were designed for the purposes of gaming. Thus understood, the law was regulative—it regulated 'an activity whose existence was logically independent of the rules', made by the legislature.²⁷¹ By including the clock within the ambit of 'instruments of gaming', gaming laws became 'constitutive'—the features of the 'common gaming house' was constituted by the law itself. John R Searle argued that propositions that bear the structure: "X counts as Y in context C", where 'Y'

²⁷⁰ *Times of India*, 'Barsat ka Satta' November 1892.

²⁷¹ John R Searle, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge : Cambridge Univ. Press, 2012. p. 33.

carries positive or prohibitory consequences, are examples of constitutive rules.²⁷² As Searle explains:

Constitutive rules do not merely regulate, they create or define new forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess, but constitute the game itself.²⁷³

As per Jardine's definition, 'instruments of gaming' were self-evident objects, which existed *apriori* to becoming a legal category. Telang's ruling reversed this as 'instruments of gaming' were now constituted by the needs of various gaming laws. By severing the formal distinctions placed on law by ordinary language, the Act came to exclusively define what was to be seen as gambling and what was to be considered legal. Having embraced its constitutive function, gaming laws returned to an original despotism that formal codes hoped to overcome. In opposition to the words of Blackstone, gaming laws were no longer required to *find* a 'common gaming house' as much as they could just *make* one.

What of the gamblers themselves? Derrida remarks that 'the 'sufferance' of deconstruction...is perhaps the absence of rules, of norms and definitive criteria that would

²⁷² The difference is elaborated in the following examples:

It is rude to speak when someone else is speaking.

In football when any player, who is not the goalkeeper, intentionally touches the ball with their hand inside their own penalty box, a penalty is awarded to the opposing team.

The rule expressed in the first instance regulates forms of social behavior, where custom admits that the act of speaking over someone else is considered rude. However, 'rudeness' is not constituted by this particular act. In the second instance, however, the term 'penalty' only has meaning and consequences when one submits to the rules that 'constitute' the game of football itself.

²⁷³ Searle, *Speech Acts*, p. 33

allow one to distinguish unequivocally between *droit* [Law] and justice.”²⁷⁴ In the absence of a centre or strict rule, gamblers who had previously constructed and deconstructed the structure of the ‘common gaming house’, were to now undergo a period of sufferance. Jardine’s ideological expulsion meant that gaming laws would now unfurl arbitrarily. By 1898, an Amendment to the Public Gaming Act (Burma), even included coins within the definition of ‘instruments of gambling’. As if to erase Jardine’s legacy comprehensively, the inclusion was made to regulate the ‘public nuisance’ of ‘pitch and toss’.²⁷⁵ Again, when the case against rain gambling rose in Bengal in 1897, the Bengal Legislature no longer felt the need to explain the formal differences between horse racing and rain betting and opium betting. As anti-gambling laws overcame their need to explicate a ‘general rule’, the Bengal Rain Gambling Act of 1897 simply banned the practice of ‘rain gambling’. Regarding ‘instruments of gambling’, *The Indian Daily News* reported:

The report of the Select Committee on the Bill was presented, which defines “rain gambling” as “wagering on the occurrence or non-occurrence of rain” while “instruments of gaming” are defined as anything used as a means of rain gambling” making it clear that clocks and waterspouts are included in the definition.²⁷⁶

‘Anything used as a means of rain gambling’ meant that the category was open for future inclusions. Stirred by the indignation of the rain gamblers of Bengal, the article asked fiercely:

Rain gamblers might take it into their heads to use the new Post Office clock as “an instrument of gaming [...] Then again, rain gamblers may not care to continue their speculation in Burra Bazaar, or even in private, and might decide to assemble in

²⁷⁴ Jacques Derrida, “Force of Law: The Mystical Foundations of Authority”, in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, David Gray Carlson, New York: Routledge, 1992.

²⁷⁵ Legislative Department, 1898, November, Proc. 17-41. NAI.

²⁷⁶ *Indian Daily News*, March 29th, 1897, Calcutta, Home, Legislative Department, Part B, Proc No. 24, 1897, NAI.

Dalhousie square, and register their bets by the waterspouts on any building in the vicinity, say the Writers' Building. Would those waterspouts be destroyed or removed?"²⁷⁷

Having lost their authority in producing the features of a 'common gaming house', rain gamblers might as well have played out in the open, in Dalhousie square. It might be less objectionable to do than playing in a room or a house, behind closed doors.

Bucket Shops

While Telang's judgment and the Amendment of 1890 effectively criminalized rain gambling in the Bombay province, Bengal went in a different direction. In 1897 the government passed the Bengal Rain Gambling Act, a specifically targeted law to prohibit rain betting in the province. The events leading to its passage will therefore be covered in the following chapter. It should be noted, however, that the efflorescence of rain gambling had signaled a decisive break in colonial gaming histories. The organization of rain gambling houses in both Bengal and Bombay had shifted the target of colonial law. The concerns regarding gambling were no longer limited to petty crime or 'nuisance', nor did the gambler map onto a class that could be coded as the 'lumpen-proletariat'.²⁷⁸ Gambling now came to be understood as a form of betting or wagering and involved a class of participants who were men of commerce. To that end, other forms of wagering that involved predicting the future prices of commodities like opium, cotton, grain, and silver

²⁷⁷ *Ibid.*

²⁷⁸ Peter Stallybrass, "Marx and Heterogeneity: Thinking the Lumpenproletariat" *Representations*, No. 31, *Special Issue: The Margins of Identity in Nineteenth Century England* (Summer, 1990), pp. 69-95.

developed coterminously with rain gambling. In many cases, like in the Punjab, rain and commodity betting were carried on in common premises.

At the close of the nineteenth century, for instance, Egerton Road in Delhi played host to a set of forty-four shops where speculators tried their hand at guessing the weekly price of a chest of opium.²⁷⁹ *Satta* (betting), as it was popularly known, involved shopkeepers offering individuals one to ten odds to guess the last two figures on monthly opium rates. Opium was processed and packaged in Kanpur, following which it was shipped to Calcutta where its price was declared through auction. Soon after, brokers would telegram shop owners in other cities, informing them of both current prices and other relevant details which might induce future fluctuations. So, if the chests were priced at Rs. 996, those who put their bets down as 96, would be declared winners.

Limited by the definition of gambling and gaming as provided in Act III of 1867, the authorities in Delhi and the Punjab encountered familiar problems when it came to prosecuting these practices. Meanwhile, the alarming growth of wagering in the United Provinces had begun to make local administrators apprehensive. Hatim Mirza, the Deputy Inspector of Police in Rewari, was particularly disturbed by the prevalence of opium gambling in his circle, and expressed amazement at the frequency with which his attempts to regulate these practices were thwarted by his seniors, who repeatedly dropped charges made against these shopkeepers.²⁸⁰ Frustrated, he wrote to the District Inspector of Delhi

²⁷⁹ Home Department, Judicial, February 1899, Proceeding numbers 1-2, NAI.

²⁸⁰ *Ibid.* Letter dated 23rd November 1898 from Hatim Mizra, Deputy Inspector of Police Rewari City to District Inspector of Police Gurgaon.

in 1898, alerting him to the duplicitous nature of legislation when it came to rain and opium. He conveyed his suspicions that administrative apathy when it came to the latter was fueled by the profits the government realized from the high volume of activity on the telegraph lines the shopkeepers used to keep track of commodity prices in real time. Additionally, he suspected that the government considered such wagering useful, since it maintained a buoyancy in the market price of opium.²⁸¹

A year after Mirza aired his concerns, Mr. Madan Gopal, barrister and member of the Punjab Legislative Council, acted concretely on his misgivings by drafting a bill which he and other likeminded members, proposed to the Legislative Council and the General Secretary to the Government of Punjab, H.J. Maynard.²⁸² The Bill was framed on the lines of the Bombay Prevention of Gambling Act and recommended the inclusion of the word ‘wager’ in the ‘Punjab Prevention of Gambling Act, 1899’. This suggestion was, however, turned down as the Secretary to the Government of India, J. P. Hewett, informed him that what went on in the premises of these shops was not gambling, ‘but a form of betting on the average price of the monthly opium sales in Calcutta.’²⁸³ Since ‘no appliances are required and it is possible to bet at any place or any time... the Governor General in Council considers that a sufficient case has not been made out for the amendment of Act III of 1867.’²⁸⁴ As the following chapter demonstrates, this statement contravened the reasonings

²⁸¹ *Ibid.*

²⁸² Home department, Legislative Branch, April 1900, progress number 1-4, Part A. NAI.

²⁸³ Home Department, Judicial Branch, February 1899, progress number 1-2, Part A, NAI.

²⁸⁴ *Ibid.*

that had spurred the Bengal government to pass the Bengal Rain Gambling Act just a couple of years ago.

The government's dismissal of Madan Gopal's bill was taken as silent endorsement of the practice and in the following years the shops rapidly multiplied. As per the report filed in 1908 by Mr. Missick, Superintendent of Police in the Punjab, sixty-six shops on Egerton Road promoted daily gambling while the remaining facilitated opium *satta* on a particular day of the month. Missick submitted his findings on *Ank* and *Dara*, variations of the original *satta*.²⁸⁵ So, if the price of opium was Rs 995, those who bet on the number 5 would receive ten times their deposit and those who bet on 95 would receive eighty times their deposit. The former was referred to as *Ank* (the Marwari word for 'one') and the latter as *Dara* (the Marwari word for 'two').²⁸⁶ In the same year, Mr. Humphry, the Deputy Commissioner of Police, wrote to the Commissioner of Delhi to inform him of the growing concern over the ascendance of crimes which large sections of the respectable community associated with the thriving practice of *Ank* and *Dara*. He suggested the introduction of some kind of law that would at least control and survey big gaming institutions, even if the smaller shops slipped through the gaps in surveillance.²⁸⁷ After making a trip to Delhi's Egerton Road personally, Humphrey noted the excitement amongst the large crowds that gathered on the street when the monthly betting shops released their results in the first week of every month.²⁸⁸ He reported that tickets were issued from printed books which contained

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*, Report of Mr. Humphry, Deputy Commissioner of Police, Delhi, dated 26th August 1908.

foil and counterfoil. The amount of the bet was left to the discretion of the bettor. According to him, a system it seemed to offer the lure of a ‘get rich quick’ scheme. However, even if a cluster of bettors chose the winning number, the shop owners would always be left with a profit due to the very high possibility that on most days, most people, bet on the wrong number. Crucially, Humphrey questioned the reliability of the information at the disposal of the common man who placed the bet. Not only was the latter unaware of both market dynamics and price fluctuations, Humphrey suspected that the proprietors spread false rumors on the quoted prices, or favored odds which they secretly knew were bound to fail.²⁸⁹

In a recent article, Christina Lubinski and Julia Rischbieter describe such practices of spot betting on opium, and more importantly on cotton, as the development of early ‘futures markets’ in colonial India.²⁹⁰ However, from appearances at least, it is more likely that these shops had nothing to do with futures and were more akin to the ‘bucket shops’ that cropped up in America during the closing decade of the nineteenth century. The term bucket shop was used sparingly in India and was only invoked by the stewards of the Turf clubs of Bombay and Calcutta when reporting illegal off site betting carried on race days by unlicensed bookies. But the shops on Egerton road were similar to the bucket shops that Stuart Banner has described as ‘a simulated brokerage where customers could ‘buy’ or ‘sell’ stocks or commodities.’²⁹¹ Banner makes the claim that the number and popularity

²⁸⁹ *Ibid.*

²⁹⁰ Christina Lubinski, Laura Julia Rischbieter, “Sound Speculators: Public Debates about Futures Trading in British India and Germany, 1880-1930, *Enterprise and Society*, Volume 22, Number 3, September 2021, pp. 808-841.

²⁹¹ Stuart Banner, *Speculation: A History of the Elusive Line between Gambling and Investment*, New York: Oxford University Press, 2017 p. 92.

of bucket shops grew significantly following the invention of the stock ticker in 1867, which allowed ‘anyone with a telegraph connection to receive price information nearly in real time.’²⁹² He also draws a difference between ‘honest’ and ‘dishonest’ bucket shops, the former representing a more existential threat to the trades conducted on legitimate commodity exchanges.²⁹³ Fraudulent bucket shops, like those that cropped up in the United Provinces at the close of the twentieth century, were easier to distinguish. In spite of their claims, in many cases, such shops had rigged odds from the very beginning. They attracted an ignorant and unsuspecting clientele who approached commodity speculation as a form of number betting, in which luck proved to be the prime motivator for play. Added to this were more serious charges of fraud which involved a series of innovative strategies to dupe customers. The easiest and most common method was the release of a false price, usually a number that had the least bets placed on it. But other more cunning options were also at the disposal of the proprietors:

[a] bucket shop owner could ‘hold the market’, that is, post prices only after a delay, so the bucket shop operator would know the market’s directions before his clients did. A bucket shop could even fleece its customers with real prices. Customers typically purchased on very small margins, putting down as little as 1 % of the value of the stock or commodity nominally being purchased, so a price movement of 1 % in the wrong direction was enough to wipe out a customer’s account. A bucket shop operator seeking to make price move by 1 % could buy from a confederate on the real exchange at the desired price, which would be duly reported by telegraph. Once the customer’s accounts had been emptied, the confederate would buy back at the same price from the bucket shop operator.²⁹⁴

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.* 93.

The last tactic indicates that bucket shop owners were probably speculators themselves, who, by acting in consortium, could influence the daily price movements of commodities by slight percentages for their own ends. While their own speculative activities remained legitimate, the same could not be said for what went on in their shops, which was simply price betting and bore little resemblance to futures or options contracts drawn between merchants and buyers or amongst traders themselves.

Humphrey's detailed report regarding such bucket shops served as warning to the Punjab government. Rehearsing Mirza's suspicions, he accused the government of maintaining a purposive silence because of the profits realized from the telegrams sent by the shopkeepers to Rewar, Bombay and Calcutta, which Humphrey calculated as amounting to 'thousands of rupees on a yearly scale.'²⁹⁵ Like his predecessors, Humphrey's request for legislative interference, too, fell on deaf years. The decision emboldened shopkeepers once more. By 1909, 'some of those interested in *satta* gambling', approached the Punjab Government and requested them for a license for select shops.²⁹⁶ They suggested that they be charged Rs 1000 for each license, which should remain valid for a period of three years. While this particular appeal was rejected, the government's apathy towards active interference in the day to day operations of these shops encouraged them nonetheless. By 1910, the Deputy Commissioner of Delhi, Mr. Barron, reported that 36 monthly betting shops, 38 daily betting shops and 73 agencies (for the purchase of wager tickets) were to be found in Delhi. Agencies were no less nefarious, as they drew the 'respectable classes' to such games

²⁹⁵ Home Department, Police-A, Proceedings, 96-96, June, 1916, NAI.

²⁹⁶ *Ibid.*

through the aid of domestic servants, who visited these shops to procure tickets on behalf of their employers.²⁹⁷ In a couple of years, this phenomenon of number betting took roots in Bengal as well, only this time with cotton.

Cotton Gambling in Bengal

‘A pernicious form of gambling has recently made its appearance in Calcutta, known as “cotton gambling”’ reported H. Wheeler, the Private Secretary to the Viceroy Lord Chelmsford in 1911. Mostly conducted near Burrabazar in north Calcutta, the gambling activities were similar to the occurrences in Egerton Road. Boards were hung at the awnings of the shops which displayed numbers between 0 and 9, inviting players to bet on any number in between. The winning number was obtained by posting on a board the five items of cotton future and the demand sale quotations from America and England, which were then added together and divided by five. The result was rounded off and declared the winning number.²⁹⁸ The betting was an elaboration on *ank* and *dara*, only, this time, the government of Bengal took the problem more seriously. Its resolve to action was spurred by misgivings of fraud - apprehensions that had remained mere insinuations in Punjab but were disclosed in full detail by the English periodical *Empire* in Bengal. The paper reported that the shops indulged in ‘wholesale cheating’ where ‘the winning number [was] surreptitiously changed if too much money [had] been laid on it.’²⁹⁹ A member of the

²⁹⁷ *Ibid.*

²⁹⁸ Home Department, Police-A, Proceedings No. 116-118, April 1912, NAI.

²⁹⁹ *Ram Protap Nemani vs King Emperor*, Home, July 1913, Nos. 17-28. NAI.

Lieutenant Governor's Council, Vernon Dawson, inspected the matter more thoroughly. Late at night, after business hours, he drove down Lower Chitpur Road and counted 'within the space of about 300 yards, 35 "shops" displaying boards with the quotation of odds against the figures 1 to 10, headed in some cases in English "American Cotton Figure" and in others in vernacular "Cotton game"'".³⁰⁰ Alarmed by this brashness as well as the heavy footfall in these establishments, Dawson called for immediate action. Some arrests were made soon after. However, when the case came up for review in the Calcutta High Court, both Justice Holmwood and Justice Syed Ali Imam decided in favor of the accused Hari Prosad Bhoowalka. Like Jardine previously, the judges reasoned that the activities conducted in these shops 'appeared to be pure betting' and could not, from the face of it, be called gaming. The onus was on the prosecution to prove these spaces were 'common gaming houses' which they did by presenting the items seized in the police raid as 'instruments of gambling'. These items included a tin board containing the day's cotton figures, a wooden board hung outside the premise, a canvas board showing the odds on a series of figures, a small board for writing the figure of the day, a small tin ticket with 9 the winning digit on it, a board giving the odds on place betting, a board giving the odds on 'mixed double and triple' betting figures and a cash box containing Rs. 410.³⁰¹ However, the judges concluded that:

Every one of these things is exactly what may be found in any stall of any book maker at the races, and though such boards may have been declared illegal in England, they have certainly not been made penal by any Statute in force in Calcutta [...] In the case of rain gambling these have been specially made instruments of gaming by the Legislature in Act III of 1897, and it is therefore clear that they are

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

excluded from the operation of the Police Act in the case of cotton gambling. To sum up therefore we find that this cotton gambling is not a lottery; it is not a game or a contest; and it is not a form of gambling in which instruments of gaming are kept or used for the profit or gain of the person owning or using the place.³⁰²

Once more, the impetus to action was placed at the doors of the legislature. Fatigued by the newfangled innovations they repeatedly encountered on the ground, the local government dismissed the possibility of a legislative solution. 'We cannot cover everything by definition' confessed the Lt. Governor of Bengal, F.W Dukes in 1912, adding that, 'whatever we do, some sportsman will get behind it and invent a new method not covered by definition.'³⁰³ The certainty of legal representation was all but breached.

F.W. Dukes therefore proposed a different solution, one where gaming would include 'any kind of betting, gaming or wagering, which the local government may, by notification in the *Calcutta Gazette*, specify on this behalf.'³⁰⁴ The proposal, however, was struck down by the office of the Viceroy of India, who while sympathetic to the motivations of the local government, deemed the strategy to be 'legislation by notification'. This left too 'wide a discretion to the executive authorities' and therefore could not be accepted.³⁰⁵ Instead, they advised Bengal to walk the path of Bombay and include wagering within the meaning of gaming through an amendment to the local gaming act. In turn, the government of Bengal found this solution to be unacceptable. Their objection to a blanket ban concerned the criminalization of horse racing, which they had no intention of prohibiting. A way of getting around the problem would have been to declare horse racing a 'game of skill' ,

³⁰² *Ibid.*

³⁰³ Police - A. April 1912, Nos. 116-118. NAI.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

providing it exemption from the amended law. But this would have drawn the unwanted attention of vocal moralists, apart from inciting accusations from native periodicals who had previously attacked it over partisan action during the passage of the Bengal Rain Gambling Act in 1897. Syed Ali Imam, one of the judges who ruled in favor of acquittal of the cotton gamblers in 1911, offered a more practical alternative. He understood that a ban on all wagering would 'be resented by an influential class of Calcutta society', and suggested instead that:

The answer to this is that since 1890 the amended law has been administered in Bombay and for a period of 22 years it has not been applied to horses racing there, and that there is no reason why the executive in Bengal should not wink at betting on horse racing as it has been doing in Bombay.³⁰⁶

The reasoning puzzled Dawson. To him, the substantive differences between 'legislation by notification' and exercise of executive discrimination were negligible; in principle, both appeared arbitrary. At least 'legislation by notification' carried a hint of procedure, while banning all wagering and then turning a blind eye towards the turf skirted the definition of despotic enforcement. The more pressing concern, however, came from stewards of Calcutta Turf Club themselves, who demanded legislative protection for their practice and refused to accept executive guarantees. So, they asked that any amendment to the law explicitly exempt wagering on horse races from its jurisdiction. Otherwise 'any private opponent of horse racing could lodge a complaint under the Gambling Act', and a

³⁰⁶ Police—A, July 1913, Nos. 17-28. NAI.

magistrate would find it difficult to 'decline to take cognizance of it on the ground that executive authorities were averse from enforcing the law.'³⁰⁷

Beyond British sentimentalism, the Calcutta Derby Sweep was the largest in the world and horse racing attracted a fair bit of revenue for the local government during the winter. The government of Bengal therefore resented the possibility of framing a law that would allow 'any crank' who took offense at the practice to move court.³⁰⁸ As a result, Bengal and Delhi reached a temporary impasse. As a stop-gap solution, the local government passed the Bengal Cotton Gambling Ordinance in December 1912, making the practice illegal for a period of 6 months. This, however, was not a durable strategy and during the proceedings of the Bengal Legislative Council, Dukes reiterated the 'ingenuity of the persons who organize public gambling in Calcutta', who at a moment's notice could shift their game to the prediction of the 'price of jute at Hatkhola or to the meteorological reporter's figures of daily temperatures.'³⁰⁹

All was not going smoothly in Bombay either and by the end of the first decade of the twentieth century, rule by executive discrimination faced stiff resistance. The government's protection to the Western India Turf club had been jeopardized by the mushrooming of 'bucket shops', which through wire transfers enabled players to conduct offsite betting. Hostile opinions brewed in the local press and intensified after a second course was inaugurated in Poona in 1910. While money came in from all quarters, critics

³⁰⁷ Note from C.J Stevenson-Moore to the Secretary of the Government of India, Home Dept., 12th November, 1912, Police-A, July 1913, File Nos. 17-28, NAI.

³⁰⁸ *Ibid.*

³⁰⁹ Proceedings of the Bengal Legislative Council, March, 1913, Legislative, May, 1913, Proc. Nos. 8-15.

drew the government's attention to a large class of mill workers who were drawn to betting establishments. Pressured by public reproach, the government of Bombay was forced to pass the Racecourse Licensing Act in 1912. The Act secured monopoly over betting and racing in favour of the Royal Calcutta Turf Club and the Western India Turf Club.³¹⁰ It laid down that racecourses would have to obtain licenses issued by the provincial government in order for the venue to be considered legitimate. In the absence of a license the course would be shut down and the owner fined a sum of Rs. 200.³¹¹ Only a select number of bookies were issued licenses to register bets on the races organized in or by these clubs. These bookies were managed by the Stewards of the respective clubs, thereby centralizing the governing authority over racecourse betting. On paper, at least, the law effectively criminalized 'bucket shops', although informal betting stalls remained scattered in both Poona and Bombay. The new betting system was thus a collaborative arrangement between licensed book makers and the totalizators³¹², which dispensed betting tickets and displayed betting lists along with odds for each horse.

The Stewards of the Western India Turf Club were dissatisfied with the outcome. Their complaint was directed at the practices prevalent in Bengal, where a comparable law had yet to be passed or even discussed. So on the day of the 'Trials', the 'Viceroy's Cup', the 'King Emperor's Cup', the 'Civil Service Cup' and the 'Army Cup', bookmakers in Bengal

³¹⁰ Home department, Judicial A, Proceeding Nos. 170-172, April 1913, NAI.

³¹¹ Cited on <http://bombayhighcourt.nic.in/libweb/acts/1912.03.pdf>

³¹² A machine for computing and showing totals, especially a pari-mutuel machine showing the total number and amounts of bets at a racetrack. Cited in <http://www.thefreedictionary.com/totalizator>.

continued to advertise and take bets through wire transfers, a practice that affected business in Bombay. In a strongly worded letter, the Acting Secretary of the Western Union Turf Club, J.E. Hughes, laid serious charges against his Calcutta counterparts.

It will not have escaped the notice of Government that the Bombay and other daily papers publish almost in every issue long advertisements from book makers having their places of business in Calcutta and elsewhere outside the Bombay Presidency, and that these, of set purpose, offer to do business with owners and backers on terms calculated upon published Totalizator results. Some of these firms, e.g. Lee and Bettie, are believed not even licensed and recognized by the Calcutta Turf Club, though other advertisers are so recognized [...] If such betting is permitted to proceed without check, racing on this side of India must be so seriously handicapped that it is possible, at no distant date that it may be necessary to abandon it. The stewards gladly acknowledge that the Bombay Government have done their utmost to control and prevent “Bucketshop” betting within the Bombay and Poona. They are, however, compelled now, in the light of the experience gained during the Poona racing season to point out that a “Bucketshop” is just as effective in Calcutta or any other part of India, to prejudice the Totalizator business of the Western India Turf Club.³¹³

In response, the Chief Secretary of the Calcutta Turf Club, James Hutchison, admitted that indeed “Bucketshop” betting was ‘most detrimental to the best interests of racing’.³¹⁴ The acknowledgment went towards correcting the Club’s questionable commitment to standardized betting and signaled a willingness on part of the Bengal racing community to act against bucket shops in general.³¹⁵ Pincered by the concerns of Bombay and the growing concerns regarding cotton gambling at home, the Bengal Government, long wary of committing to a stand on wagering explicitly, finally included wagering within the definition of gaming. Instead of passing a licensing act for racecourses, the government

³¹³ Home department, Judicial A, Proceeding Nos. 170-172, April 1913, NAI.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

amended the Bengal Public Gaming Act (1867) and the Howrah Police Act (1866) so that 'gaming' would now include 'wagering', except when wagers were made on horse races. The law was thus modeled on the provisions of section 2 of the English Street Betting Act of 1906.

Following Bengal's lead, discussions regarding the opium betting in Punjab were also reopened in 1916, when W.M. Hailey, the Chief Commissioner of Delhi, wrote to the Secretary to the Government of India, requesting action on similar lines.³¹⁶ Since the considerations shown to turf betting in Bombay and Calcutta were absent in the Punjab, Hailey recommended that all wagers be included within the definition of gaming by extending the Bombay Prevention of Gambling Act (1890) to Delhi through the 'machinery provided by section 7 of the Delhi Laws Act, XIII of 1912 and VII of 1915'.³¹⁷ His solution was ultimately accepted by Lord Chelmsford and after having circled the issue for nearly twenty years, wagering was added to the definition of illegal gaming in the Punjab in 1916 as well.

Bringing Down the House

Radhika Singha notes with irony that following the revolt of 1857, when a chorus of British voices advocated for firm 'paternalist executive' rule in India, the Crown chose to embark

³¹⁶ Home Department, Police-A, Proceedings, 96-96, June, 1916, NAI.

³¹⁷ *Ibid.*

on a manic spree of legislative codification.³¹⁸ This was the fate of gaming laws as well. Gambling as a practice was not subject to blanket criminalization, instead, the practice underwent a series of statutory divisions. Gambling included lotteries, ‘games of skill’ and ‘games of chance’. As opposed to private raffles or sweepstakes conducted by members of a club or an association, lotteries were illegal when they were unauthorized and when openly advertised, advertisers were booked for ‘aiding and abetment’. Similarly, ‘games of skill’ like whist, rummy and bridge were considered legal and ‘games of chance’ were made illegal only when played for profit in a ‘public place’ or a ‘common gaming house’. Anti-gambling laws of the nineteenth century like the Public Gaming Act (1867) or various provincial Police Acts, felt confident in their ability to define such spaces and the ‘instruments of gaming’ that populated them. Provincial legislatures held unquestioned faith in their expressive abilities, convinced that any slippage in conviction was due to poorly constructed or faulty definitions in the law themselves. So, when encountered with new practices, devices and tactics, their solution was to reword, re-define and expand the categories covered by law, such that ‘the order of words would come to fully express the order of things’.

This belief in linguistic and legal representability began losing ground by the twentieth century. Confronted with ever mutating innovations and purposive cunning, anti-gaming laws had passed from a history of legislative control to that of the executive. Having relinquished belief in their own omnipotence, such laws no longer needed to anticipate the

³¹⁸ Radhika Singha, “Colonial Law and Infrastructural Power: Reconstructing Community, Locating the Female Subject”, *Studies in History*, 19, 1, n.s 2003, New Delhi: Sage Publications.

gambler's practice *before* it was practiced. Instead, executive control allowed the state to act *after* and define post-facto. Anti-gambling laws had therefore acknowledged the impermanence of their field and their own fraught histories. Simply consider the figure of the 'professional gambler' as reported from 1898:

Considerable harm is done by the *professional gambler*, generally town bred men, who wander about the rural districts cheating cultivators out of their hard-earned wages by means of marked cards and loaded dice.³¹⁹

This figure was soon rendered unrecognizable. Contrast him to what the President of the Calcutta Stock Exchange, B.N Chaturvedi, described as the players in the *Katni Bazar* in Bengal, 1943.

This is an assemblage of people on the roads around the Stock Exchange Building, who have a system of dealing in differences only at the end of the day adjusting their transactions of the day on the basis of a fixed closing price.³²⁰

According to Chaturvedi these 'gamblers' had previously been brokers at the Bengal Share and Stock Exchange Association Ltd. and now operated adjacent to the Royal Exchange Place, once the Association was liquidated in 1938. Legally, gambling had turned too ambiguous to be contained within familiar and set vocabularies. The gambler now mapped onto a market actor, a commercial agent and a speculator; 'instruments of gaming' now included account books, ledgers, receipts and household objects like clocks; the 'common gaming house' overlapped with commercial shops, association buildings or even the footpaths outside these buildings. The *apriori* assumptions of nineteenth century anti-gambling laws were so thoroughly destabilized that the careful distinctions between

³¹⁹ Legislative Department, 1898, November, Proc. 17-41. NAI.

³²⁰ Finance Department, 1945, September, Proc. Nos. 17 (7) F/45 NAI.

wagering, gaming and betting, erected by figures like Jardine, were almost completely erased. With it, the walls of the ‘common gaming house’ had also finally crumbled. Importantly, when administrators like Dukes acknowledged that banning one form of gaming and wagering only lead to the invention of other games or more creative forms of wagering as replacement, the government also realized that the prohibitory functions of anti-gaming laws were simply an ‘incitement to capital’.³²¹

The shift in defining and prosecuting gambling through executive action, however, came at a certain cost. It left a void in the heart of law. As gaming, betting, and wagering were enfolded into an indistinct category, anti-gaming laws began operating without much certainty regarding the nature of the practices they claimed to regulate. The situation soon grew complicated, when exchanges in commodities like grain, cotton and jute began trading futures and options contracts. Controversy broke out regarding the legitimacy of certain kinds of trading, especially in futures—were these ‘useful’ and legitimate commercial contracts or was it gambling dressed as commerce? As the government abdicated its responsibilities of defining that which it prohibited, the task was taken up by speculators, brokers, traders, *arhatiyas*, and commercial associations. As a result, anti-gaming laws soon became tools in the hands of the native business groups for targeting

³²¹ I am paraphrasing Foucault’s observations regarding the prohibitory injunctions placed sexual discourse from the 17th century. Prohibitory power was in fact productive, as prohibition necessarily birthed multiple possibilities and fields discourse. Foucault demonstrates this through the Victorian prudishness regarding the moral discourse of sex, which in turn birthed multiple ‘rational’ outlets of discourse that talked about sexuality as an object of knowledge. Foucault notes that ‘Rather than the uniform concern to hide sex, rather than a general prudishness of language, what distinguishes these last three centuries is the variety, the wide dispersion of devices that were invented for speaking about it...Rather than a massive censorship, beginning with the verbal proprieties imposed by the Age of Reason, what was involved was a regulated and polymorphous incitement to discourse.’ Michel Foucault, *A History of Sexuality: Vol. 1 an Introduction*, New York: Pantheon Books, 1978. p. 34.

their professional rivals. Crucially, in the absence of a settled legal definition regarding gambling other normative discourses began filling this vacuum. As the following chapters will show, it was the moral associations, the financial outcomes and the social standing of the ‘gambler’ that served as the putative definition of what the practice implied. As the law itself grew more nebulous, such impressionist representations of gambling were reified.

CHAPTER 3

Gaming contracts: Normative Strategies and the Making of a Discourse

In July 1895, Surendra Nath Banerjee, a senior member of the Indian National Congress, directed the attention of the Bengal Legislative Council to the proliferation of rain gambling in Burrabazar.³²² Unlike in Bombay, the gaming houses of Calcutta were more organized and drew a diverse crowd. Marwari proprietors claimed that rain gambling took place for only a month and that bets were taken three times in the day; from 9:00 a.m. to 12:00 p.m., 12:00 p.m. to 4:00 p.m., and occasionally from 6:00 p.m. till almost midnight.³²³ The locality of Burrabazar played host to three gaming owned by Babu Shew Nandan Tewary (Shiv Nandan Tewari), who had appointed bookies/brokers entrusted with maintaining the betting ledgers recording the player's debts and winnings. They would give players the odds of the day and charged them one anna on each rupee as commission. The betting system, which found little mention in government and police reports, is recovered from an ethnographic piece published in *The Statesman* in, October, 1896. The report claimed that the odds lay against those betting in favor of rain, who also stood the chance of winning a highest sum. In case rain was imminent, those who bet against its probability, could hedge their bets by speculating on the quantity of rain. A measuring container called the *mohri* (also referred to as the *Calcutta mohri* or *lakdi ki mohri*) was placed on the roof of these betting houses. If the quantity of rain was significant enough to cause its overflow

³²² Home, Judicial, file t-5I-8(1-2) Proceedings 7-8 July 1895, Bengal State Archives.

³²³ *The Statesman*, October 2nd, 1896, Legislative Department, Proceeding No. 26-54, May 1897, NAI.

then the secondary wagers could trump the initial bet. If the cistern did not overflow, the players still recovered some of their money, as the odds were lowered during the second call. Bookies would rely on the information of the *rangbaz* (callers), who would position themselves on rooftops and called out when they spotted a change in the weather. According to their calls, the bookies would place revised odds in front of players. The report stated that Marwari players were allowed to bet on credit at these rain gambling houses, which allowed them the advantage of changing bets at the last minute or betting big when they sensed the opportunity to win.

The Marwaris who defended the practice claimed that rain gambling was a tradition they carried for nearly eighty years, when they first migrated to Calcutta.³²⁴ Indifferent to these sentiments, S.N Bannerjee raised an alarm over the game's increasing popularity. In fact, he claimed the support of the 'respectable' classes of Burrabazar when he made his case. Bannerji's caution was bolstered by the report filed by Sir John Lambert, the Police Commissioner of Calcutta, in August 1894. Opposing the Marwari claim, Lambert dated the game to the last twenty years. During this period, the number of gaming houses had grown from one to three, all on Cotton Street in Burabazar.³²⁵ This locality, which also witnessed the most intense play, was plagued with nuisance and overcrowding during crucial market hours. He reported that rain gambling was no longer limited to the Marwaris and players from Muslim, Jewish, Hindu, Arab and Eurasian communities were all

³²⁴ Letter by Babu Hukmi Chand Chaudhury, Legislative Department, Legislative, Part B, Proceedings 24, March, 1897.

³²⁵ Legislative Department, Legislative, Part B, Proceedings 24, March, 1897.

involved. Bolton's report failed to translate as law since Sir Charles Elliot, the Lieutenant Governor of Bengal in 1895, advised against it. He argued that a legal ban would push the game into secrecy, or more problematically, spur other more nefarious games. The more pressing issue, however, was that:

[Elliot] does not think it possible to devise a law which would stop the form of betting known as rain gambling without also bringing such practices as betting on races, or on events of chance, within the same prohibition.³²⁶

Elliot's therefore cautioned against a punitive ban on a particular practice in the absence of a general principle. But he was soon replaced as the Lt Governor of Bengal by Alexander Mackenzie in December 1895, who held a different view. Following Elliot's transfer, in April 1896, Tulsi Das Dey sent a petition signed by 200 residents of Burabazar requesting the government to check the 'evils' of rain gambling once more. Unsurprisingly, this request was met by a more agreeable audience. Sympathetic to the grievances of the petitioners, Mackenzie still needed to secure a wider opinion before proposing legislative action. Accordingly, he asked the Calcutta Corporation, the British Indian Association, the Indian Association, the Central National Muhammadan Association and the Muhammadan Literary Society on their views regarding the subject. The British Indian Association seconded the opinions held by Charles Elliot but the rest informed Mackenzie that the practice had mushroomed alarmingly and required intervention. The Muhammadan Literary Society further alleged that rain gamblers had preyed on the *pardah-nashin* women of the Moghul, Memon and Surti communities through a class of female brokers. The majority eagerly anticipated a law to check the menace.

³²⁶ *Ibid.*

The endorsement of these various associations provided Mackenzie the succor needed to initiate the process of law. His decision, however, was met by uncharacteristic protest from the 'Marwaris'³²⁷ who regarded themselves as traditional absentees from the political sphere in Bengal. Their enduring protest through petitions and newspaper editorials, and the staging of mass demonstrations in Dalhousie Square and Cotton Street (Burabazar) attested to the significance of the practice. From September 1896 to April 1897, a slew of newspaper articles discussed the Bengal Government's decision. British newspapers and periodicals like *The Pioneer*, *The Statesman*, *Capital* and *The Englishman*, were disheartened by the moral specter animating the Government's steadfastness; *Capital* dubbed the attitude 'grandmotherly'.³²⁸ Native newspapers presented a restrained outrage; they admitted that gambling was indeed a vice but were struck by the partisan criminalization of rain gambling as opposed to horse racing. Most regarded legislation on the matter excessive, since customary arrangements and police control were more than adequate in controlling its spread. *The Bengalee*, an English periodical run by S.N Bannerjee, maintained studied silence on the matter between September 1896 and April 1897, limiting themselves to reporting the proceedings of the Legislative Council. This was in stark contrast to the number of opinion pieces they published during the term of Charles Elliot, when they were looking to influence public opinion.

³²⁷ I have put the term Marwari in quotes to indicate that those who protested against the ban on rain gambling claimed to represent the 'entire Marwari Community', although this was contested in many government reports.

³²⁸ *Capital*, Calcutta, 23rd September, 1896.

There was some resistance to the Bill in the Bengal Legislative Council when N.N. Ghosh and Bhupendranath Bose questioned the need of a separate law to regulate the problems in one particular street in Calcutta. ‘Nuisance’ could be better regulated through police action than a new law, they argued. Bannerji, Mackenzie, and Sir Charles Paul (the Advocate General of Bengal) felt otherwise, even as their case rested on vague anxieties and potential harms.³²⁹ Concrete examples that would substantiate their anxieties into actual incidents were sparse to the point of puzzlement. Even charges related to foul play and cheating were left unconfirmed. Rumors circulated that the proprietors of rain gambling houses had tampered with the water tanks or *mohris* and that they cheated the poorer and more vulnerable players off their winnings. However, in spite of a raid on one such establishment, the police failed to discover evidence substantiating these claims.³³⁰ Marwari lobbyists admitted that the game had grown unruly in Bombay, but similar charges could not be leveled in Calcutta where it functioned as a well-regulated outlet for popular entertainment.³³¹ They used newspaper reports to show that the practice had not escalated significantly from 1895 to 1897. If nothing had changed, why was the government introducing a Bill that had been considered unsuitable both in its aims and enforceability just two years earlier? English newspapers like *Capital* and the *Englishman* also voiced the apprehensions of the British subjects of Bengal, who feared that in its puritanical zeal, the government may soon prohibit betting on British indulgences. Horse races were their primary concern but some expressed apprehension that perhaps even ‘the

³²⁹ Proceedings of the Bengal Legislative Council, Legislative Department, Proceeding No. 26-54, May 1897, NAI.

³³⁰ *The Hindu Patriot*, 3rd October, 1896.

³³¹ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

modest rupee bet on whist at the Bengal Club' may soon be outlawed.³³² In rehearsing the importance of non-interference, they reminded Mackenzie that puritan doctrines were impossible to implement through legislative authority alone. Cracks within the government further widened when the opacity of legislative procedure was exposed to the public. The day the Bill was to be voted upon in the Bengal Legislative Council, a squabble erupted between Babu Bhupendranath Bose and S.N Banerji. Bose apparently arrived late, assuming that the issue of rain gambling, would be discussed only after the Council had concluded other ordinary matters. However, at the behest of Surendra Nath Bannerji, the matter was put to an early vote, and the Bill was passed in Bose's absence. When Bose arrived, he demanded the bill be reintroduced for discussion and was, on the behest of an agitated Bannerjee, ruled out of order by the Chairman of the Council.³³³ The standoff projected an image of divide, and the *Madras Standard* expressed concern that the incident was emblematic of the manner in which 'the breach in the Congress party is widening daily.'³³⁴ The incident also weakened public trust, as many were left speculating the designs of a deeper plot. Was the government was trying to redirect the Marwari's speculative instincts onto government opium, or did the government just want to escape the heat of the plains and pack off to Shimla early?³³⁵

³³² *The Englishman*, 10th April, 1897.

³³³ *Amrita Bazar Patrika*, 23rd September, 1896.

³³⁴ *Ibid.*

³³⁵ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

When the Bill passed the first reading and was referred to a Select Committee, Marwari's led by Hukmi Chand Chaudhury and Babu Premsook Das, organized a town hall, which the *Indian Daily News* referred to as a 'Monster Meeting'.³³⁶ The meeting was held in 68 Cotton Street, Burabazar, a house away from the gaming house in question. The group that met that day claimed to speak on behalf of all the Marwari's of Calcutta. They argued that rain gambling was harmless compared to horse betting or stock and share speculation and by banning it, the government would be enacting a law that was both intrusive and unwarranted. They invited a few members of the Bengal government and a section of the press to their meeting where they moved resolutions and voted over the next course of action. It was all very parliamentary. Many like Babu Saligram Lokhani and Janki Dass suggested that the Marwaris in attendance should stay away from *teji mundi* (options) transactions on the government sale on opium. Indian dailies were quick to report on the competency of the threat, which they held to be responsible for the drop in price of that week's opium. They even pointed to the pinch in government revenue that resulted from the lack of activity on telegrams sent from Bombay and Calcutta relaying information on the current rate of opium.³³⁷ Some spoke of the racial partisanship of the bill and others refuted the many allegations raised against the game and its proprietors. In spite of their many apprehensions, the Bengal government passed the Bengal Rain Gambling Act in April, 1897. Some members of the Council, otherwise in support of the Bill, recommended a broader wording that would give the Act the power to prohibit other games of chance

³³⁶ *Indian Daily News*, March 29th, 1897.

³³⁷ *Ibid.*

apart from rain gambling.³³⁸ These recommendations were sidelined and unlike Bombay, where the Act of 1890 banned all wagering (except in horse racing), the Bengal Rain-gambling Act (1897) tweaked specific sections of the Bengal Gaming Act (1867) and the Calcutta Police Act (1866) to act against the practice in particular. To the definition of the ‘common gaming house’ the following words were added, “or in which rain gambling, that is to say wagering on the occurrence or nonoccurrence of rain, is carried on for the profit or gain of any such person as aforesaid”.³³⁹ Similarly, the definition of ‘instruments of gaming’ now included ‘water spouts, clocks and betting ledgers’. which when found in a room, house, enclosure, or office, could be used as evidence to establish the space as a gambling house. The ambitions of framing a general law were shelved temporarily.

Even with the benefit of hindsight, the events and the manner of the proceedings remain puzzling. Judging from the public sphere, the Act was forced upon an unconvinced population, British and Indian alike. Despite their repeated efforts, the chief architects of the Bill could neither prove the extent of harm, nor could they authoritatively explain why rain gambling was singled out at the expense of other kinds of gambling, especially horse racing. The way in which the Bill was bulldozed through the legislature was surprising. The tentative speculations of native dailies like the *Amrita Bazar Patrika* also fail to explain the events satisfactorily. The ban on rain gambling did not inaugurate a slew of legislation against other native games of chance, neither did it effect the volume of activity

³³⁸ Some like A.M Bose rehearsed anxieties regarding police harassment, similar to the concerns expressed by administrative and legal officials in Burma and Bombay in the past. Some members felt that the Bengal Rain-gambling Act presented the perfect opportunity to fix the flaws in the Public Gaming Act of 1867 itself; doing so, they argued, would prevent the occurrence of such specific legislation in the future.

³³⁹ Legislative Department, Part B, Proc. No. March 24, NAI.

on commodity speculation, as the Marwaris did not come good on their threats of boycott. In fact, despite the ban, rain gambling continues in Calcutta to this very day, albeit discreetly.³⁴⁰

What then was the significance of the event and its outcome? According to Anne Hardgrove, the incidents of 1896-7 reified the communal boundaries of the Calcutta Marwaris.³⁴¹ She argues that the protests actively unified the Calcutta ‘Marwaris’, who were previously scattered amongst caste identities like the Oswals, Maheshwaris, Agarwals, Jains, Serogis etc.³⁴² The protests were therefore emblematic of a public ‘performance’ of political identity, which in turn produced communal homogeneity along cultural lines. Hardgrove insists that we see the defense of rain gambling as the performance of culture, where the functional significance of rain gambling is unaffected by whether the practice was a custom or an ‘invented tradition’.³⁴³ Ritu Birla on the other hand reads the events as part of the continual bifurcation of the field of economic and cultural binaries effected by the work of colonial governmentality on native commercial practices.³⁴⁴ In fact, the cultural claims put forward by the Calcutta Marwaris regarding

³⁴⁰ Anne Hardgrove, *Community and public culture, the Marwaris in Calcutta, c.1897-1997*, New York: Columbia University Press, 2002, p. 126.

³⁴¹ *Ibid.* See also Anthony P Cohen, *The Symbolic Construction of Community*, New York: Routledge, 1985.

³⁴² Hardgrove, *Community and Public Culture*, p. 5. In marking the rising valency of the term ‘Marwari’, Hardgrove reminds us that the majority of this population were not from the Marwar region in Rajasthan in the first place. Apart from intra-religious diversity, even caste groups like the Agarwals comprised of smaller groups like the Bansals, Goels, Garg, Jindals, Kansal, Mittal etc. See also Akar Patel, “A History of the Agarwals”, *Mint*, February 6th, 2015; see also Thomas Timberg, *The Marwaris: From Jagath Seths to the Birlas*, Gurgaon: Penguin, 2014.

³⁴³ Eric Hobsbawm and Terence Ranger ed. *The Invention of Tradition*, New York: Cambridge University Press, 1983.

³⁴⁴ Birla, *Stages of Capital*.

rain gambling was the *effect* of a colonial politico-legal process that sequestered native capitalist practices into domains of public and private. Birla situates Foucault in the colony to demonstrate how ‘the relation between the concept of economy as a model for governing and the economy as an object of governance’ emerged during the latter half of the nineteenth century.³⁴⁵ As the objectified reality of the ‘colonial economy’ emerged, indigenous commercial practices that drew on ‘symbolic capital’, structured by caste and kin networks, were progressively demarcated and marked as ‘private’ or cultural matters. Rain gambling and other forms of native gaming were slotted accordingly. Birla's analysis resists the interpretation that the ‘Marwari’ protest was a pre-existent and self-evident moment of cultural resistance, one where the logic of culture and community are pitted *against* the colonial state. Instead, her framework allows her to see the logic of culture to be the product of the bifurcations effected by colonial power itself.

These arguments illuminate the historical process and clear ground by way of explanation. They are however, largely determined by the arrangement of the archive itself, which requires a secondary revision. The explanation of the events of 1896-7 in Calcutta are mostly reliant on one substantial file, whose copy is distributed between the National Archives of India, the West Bengal State Archives and the ‘Archives and Manuscripts’ section of the British Library. In it are the original report filed by Lambert in 1894 and Charles Elliot's response in 1895. It also contains the petitions attacking and defending of rain gambling, some newspaper reports, the proceedings of the Legislative Council of

³⁴⁵ *Ibid.*, p. 21.

Bengal and the remarks of the Select Committee that reviewed the Bill. The file ends with the passage of the Act. The information is bound serially which generates its own temporal sequence—a petition calls for banning rain gambling, the government acts on behalf of the petitioners, the practitioners protest, the law is passed. The narrative generates a rhetoric and produces a truth effect where the categories deployed in the telling appear self-evident.³⁴⁶ For example, in the contest of opinions regarding rain gambling, terms like scandal, debt, fraud, culture, human nature and moral legislation are used frequently. These terms produced an image of both gambling as well as the gambler. Crucially, the discursive reification of such categories filled an obvious void in the law itself, which still stopped short of providing a comprehensive definition of gambling. In the absence of a legal definition, the public sphere acted as a site where terms, representations and impressions of gambling ossified. As a result, these categories require deeper interrogation and cannot be accepted passively. While appreciative of the value and sophistication in Birla and Hardgrove's arguments, the impetus of this chapter is to understand culture and the operations of colonial law differently. First, it does not overdetermine the significance of rain gambling as understood through the framework of custom and culture. Second, it does not pit the community and the government in oppositional terms and does not treat the colonial legal machinery as something that acted *on* practices of native commerce. Third, it pays attention to the discursive strategies that worked alongside colonial law to 'dis-

³⁴⁶ The truth effect produced through rhetoric of narrative is widely accepted by most historians. This, however, does not make historical writing the same as fiction. Instead historical writing utilizes facts and clues from the past, while employing literary tropes, to 'persuade' readers regarding the facts of their historical claims. Michel de Certeau, *The Writing of History*, New York: Columbia University Press, 2005; See also Carlo Ginsburg, *History, Rhetoric and Proof*, Hanover: University Press of New England, 1999 and *The Judge and the Historian, Marginal Notes on a Late Twentieth Century Miscarriage of Justice*, Translated by Antony Shugaar. London: Verso, 1999.

embedd' the practices of the *bazaar* and render it the 'market'.³⁴⁷ The *bazaar*, according to Rajat Ray, was the indigenous money market that was dominated by native banking and mercantile communities and which sustained the trade in grains, cotton, piece goods and precious metals.³⁴⁸ Accordingly, it is my intention is to re-situate the relevance of rain gambling within practices that may be deemed *bazaari*. Importantly, it is by paying close attention to the operation of the terms in the transcript – 'debt', 'scandal', 'suicide', 'weaker and vulnerable sections'— that we understand how the term 'gambling' was naturalized in discourse and thereby established as a social problem and as a means for targeting individuals. To paraphrase Neeladri Bhattacharya, the examination here is one of 'deep conquest', one that ascertains the range of normative technologies that acted alongside law upon *bazaari* practices.³⁴⁹ Correspondingly, it verifies the extent to which the *bazaar* was truly 'disembedded' and the extent to which it remained an incomplete colonial phantasm. So, alongside mapping the strategies through which colonial law constituted and deployed its categories, the chapter also aims to recover the hidden transcript through which the *bazaar* communicated.³⁵⁰

³⁴⁷ The term 'disembedding' is being used in opposition to how Karl Polyani uses the term 'embedded' systems where no activity can be extracted as purely 'economic' as all practice are inscribed within conjoined social, cultural, and commercial field.

³⁴⁸ Ray argues that it was the *bazaar* that financed the hinterlands, 'linking them by its wide-ranging *hundi-arhat* operations to the European banks and firms at the port.' Rajat Ray, "The Bazaar: Changing Structural Characteristics of the Indigenous Section of the Indian Economy before and after the Great Depression", *IESHR*, 25, 3, (1988), p.267

³⁴⁹ Bhattacharya claims that the colonization of the Indian agrarian sector involved a 'deep conquest' by which he means: 'It did not simply happen through some inexorable economic process that displaced earlier forms of livelihood and work. It proceeded by developing a new and enabling imaginary whereby the rural universe could be made afresh: revisualized, reordered, reworked and altogether transformed.' *The Great Agrarian Conquest; The Colonial Reshaping of a Rural World*, Delhi: Permanent Black, 2019, p.1

³⁵⁰ James C. Scott, *Arts of Resistance: Hidden Transcript of Subordinate Groups*, New Haven: Yale University Press, 1990.

Decoding the Public Sphere

Jurgen Habermas argues that the liberal public sphere emerged alongside the rise in wealth and power of a new mercantile class in Europe during the eighteenth century, a class that re-situated private interests of wealth management from the domain of the 'family' onto the emergent sphere of civil society. Civil society, thus conceived, constituted a space for 'public opinion' based on reasonable and rational debate. For Habermas, the emergence of civil society was integrally linked to the rise of mercantile class and capitalism, where news regarding exchange and the price of commodities grew in importance. Accordingly, he characterized civil society as an institution that 'established itself as a realm of commodity exchange and social labour governed by its own laws'.³⁵¹ Its rise during the period of 'enlightened despotism' in eighteenth century Europe meant that as an institution, it remained antagonistic to the political rationality of the State and served as a check to its power.³⁵² Seyla Benhabib describes this early bourgeois public sphere as 'a sphere which mediates between society and the State, in which the public organizes itself as the bearer of public opinion.'³⁵³ So, within the liberal view, the public sphere developed as a space where state power and public discourse co-constituted the realm of political rationality,

³⁵¹ Jurgen Habermas, *The Structural Transformation of the Public Sphere*, Cambridge: MIT Press, 1991, p.3

³⁵² The 'reason and rationality' of civil society that were built on the principles of the European Enlightenment, exceeded the bounds of a pure political rationality and enveloped the discussions of the wider domain which Habermas refers to as the 'literary public sphere' It must be noted, however, that the political rationale of 'enlightened despotism' was not naturally inimical to the growth of public reason, as evident in Kant's defense of Frederick the Great in Prussia. Kant maintained that a 'lesser degree of civil freedom gives intellectual freedom enough room to expand to its fullest extent.' Immanuel Kant, "What is Enlightenment?"

³⁵³ Geoff Eley, "Nations Publics and Political Cultures; Placing Habermas in the Nineteenth Century", p. 291, in *Habermas and the Public Sphere*, ed. Craig Calhoun, Cambridge: MIT Press, 1996. Similarly, Charles Taylor pays attention to the twin efforts of Locke and Montesque, theorists who were instrumental in producing the State *v.* society binary, where the 'will' of society presented a different and autonomous logic from that of the monarch during Absolutism. Taylor 'Modes of Civil Society'

where both categories remained distinct, but operated through a juridical relation.³⁵⁴ Scholars of South Asia argue, however, that Habermas' liberal 'bourgeois public sphere', was in remission before it had the chance to mature in the colony. Many question the suitability of this term in explaining the constitution, assertions and actions of autochthonous non-statist or anti-statist actors. Instead, they find analytic potential in categories like 'public culture', 'public arena' and 'theatre politics'. These categories better explain how the modern European 'public sphere' adapted to colonial conditions and gave shape to political discourse. They also demonstrate the importance of 'public space' as a site for both political action and cultural consolidation. Scholars like Sandria Freitag and Douglas Haynes see public space as crucial for contesting, performing and constituting public opinion and 'community politics'; the latter drew on meanings generated by 'ritual, symbol and theatre' rather than *reason* as it is putatively understood within the ambit of European enlightenment.³⁵⁵ Given this alternate history, how relevant is the analytical potential of the bourgeois public sphere in colonial India? In uncovering the genealogy of civil protest and mass strikes in India, Lisa Mitchell persuades us to take autochthonous modes of resistance characteristic of civil society seriously, and thereby avoid the language

³⁵⁴Seyla Benhabib, "Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas," in *Habermas and the Public Sphere*, ed. Craig Calhoun p. 81. Benhabib does provide a caveat when she insists that in his moral theory of discourse ethics, Habermas idealizes the mode of the 'liberal public sphere' thus overdetermining the similarities between justice and the 'good life,' which more often than not, papered over the interests of oppressed groups by 'restricting the scope of public conversation' (pp. 84-85).

³⁵⁵In contrast to the individuated reason emblematic of the liberal 'bourgeois public sphere', these frameworks highlight the role of collective action as witnessed through crowd participation in festivals, public ceremonies, and street protests. See Sandria B. Freitag, *Collective Action and Community: Public arenas and the emergence of Communalism in North India*, New York: Oxford University Press, 1990, p. 19; See also Douglas Haynes, *Rhetoric and Ritual in Colonial India: The shaping of a Public Culture in Surat City, 1852-1928*, Delhi: Oxford University Press, 1992.

of a colonial archive that suppresses elements that speak outside its categories.³⁵⁶ Mitchell's caution applies to the case of rain gambling, which has been characterized as an instance of 'community' defending its cultural practice against intrusive legislation. If, however, we read the protests against rain gambling through the mode of the 'liberal public sphere' and its quintessential form of reasoning, we may be able to bypass the language of colonial exceptionalism, which often results in 'making India look peculiar'.³⁵⁷

Hardgrove contends that the protests against the Bengal Rain Gambling Act was an instance of 'community as political actor', in which the Marwari community asserted and therefore constituted, its communal and cultural claims in the public sphere.³⁵⁸ Latent in Hardgrove's analysis is a limitation, one that invalidates the colonial public sphere as a site for the articulation of universal interest. This would be inappropriate in the case of the Bengal Rain-gambling Act of 1897. After all, while rain gambling was presented as a native custom, its public defense also engaged a mercantilist logic that stood against a reigning political order. It is important to recover this dormant commercial logic that was expressed through customary and cultural idioms. Importantly, as Tanika Sarkar reminds us, while the colonial public sphere of nineteenth century Bengal operated through the 'politics of recognition', in which practices of community were exempt from legal scrutiny,

³⁵⁶ "Mass Strikes at the Other End of the Commodity Chain", p. 17.

³⁵⁷ Dipesh Chakrabarty, "Governmental Roots of Modern Ethnicity", in *Habitations of Modernity: Essays in Wake of Subaltern Studies*, Delhi: Permanent Black, 2006, p. 82 When talking about ethnic conflict in India, Chakrabarty points to the labels and categories that differentiate similar practices through the mark of colonial or more specifically, Indian exceptionalism. Regarding the term 'racism' Chakrabarty notes that the term putatively refers to something that white people do to South Asians, while ethnic discriminations amongst South Asians is referred to as communalism, regionalism, casteism, etc. but never racism.

³⁵⁸ Hardgrove, *Community and Public Culture*, p. 140.

community practices themselves had turned ‘post conventional’.³⁵⁹ As a result, cultural practices were no longer justified by appealing to the unconditional authority of custom, rather they were debated and defended through universal standards of ‘reason’.³⁶⁰ A closer look at the arguments presented by the Marwaris would confirm Sarkar’s contention. In fact, while discussing the ‘monster meeting’ held in protest by members of the Marwari community in 67 Cotton Street on the 27th of March, 1897, Hardgrove herself notes that ‘the structure of the meeting was quite remarkable’ given ‘the choice of language, the format of speeches the use of parliamentary procedure.’³⁶¹ The choice to conduct the meeting in English was so ‘unusual’, that even *The Bengalee* could not resist a comment.

So the friends of the rain gamblers met at the Dalhousie Institute on Thursday last to protest against the action of the government. They made speeches; they recorded resolutions. But it so happened that neither the resolutions nor the speeches were read out by the speakers themselves.³⁶²

The jibe disguised a furtive anxiety. Indeed, the hubris of some members of Calcutta’s civil society generated an impression that the methods, etiquettes and language of liberal parliamentary agitation was strictly an upper class Bengali phenomena. This belief found space in the speech of Babu Hukmi Chaudhury, who at the meeting at 67 Cotton Street declared to the attendees that ‘We are not agitators, gentlemen, as our Bengali friends are said to be’.³⁶³ Even so, these political debutants had caught many off guard.³⁶⁴ Conducting

³⁵⁹ *Ibid.* p. 232

³⁶⁰ Tanika Sarkar, *Hindu Wife, Hindu Nation: Community Religion and Cultural Nationalism*, Bloomington: Indiana University Press, 2010, pp. 230-32.

³⁶¹ Hardgrove, *Community and Public Culture*, p. 141.

³⁶² *The Bengalee*, March 7th, 1896.

³⁶³ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

³⁶⁴ *The Statesman*, March 26th 1897.

meetings in English, writing petitions to the government, expressing opinions through newspaper editorials and adopting a parliamentary style of politics, speaks strictly to the form of agitation. What of the content? Was it about safeguarding custom or were commercial interests at stake too? A closer look at the language and motifs of the defense provides some indications.

Newspapers and periodicals highlighted the government's hypocrisy regarding native gambling. *The Hindoo Patriot*, *Amrita Bazar Patrika* and the *Indian Daily News* openly accused the government of racial partisanship when they banned rain gambling while 'winking at the worst form of gambling on the turf'.³⁶⁵ *Capital* naively explained this as an instance of making 'one law for the rich and another for the poor'.³⁶⁶ What peeved Marwari petitioners was their belief that rain gambling was more honest and transparent than betting on horses. They argued that the chances of fraud were limited, even non-existent in rain gambling, while in horse racing everything from the horse to the jockey could be influenced, thus fixing the outcome of the race. Cases of conspiracy and fraud from both India and England were raised to support the claim that horse racing was a plagued and manipulated sport.³⁶⁷ But "no one can manipulate the clouds", declared a letter written to the Editor of the *Indian Daily News*, who added that "the whole transaction is

³⁶⁵ *Ananda Bazaar Patrika*, March 25th, 1897

³⁶⁶ *Capital*, 23rd December 1896

³⁶⁷ This accusation has carried over to the contemporary too. As Stine Simonsen Puri argues, the 'science' of short term betting at the Delhi racecourse is largely determined by predicting people rather than horses, since it is believed that the race is usually fixed and some are in the know of the results beforehand. So, instead of studying the abilities of individual horses, short term bettors tend to follow the betting patterns of influential people, who they believe already know the outcome of the race. Stine Simonsen Puri, "Betting on Performed Futures: Predictive Procedures at Delhi Racecourse", *Comparative Studies of South Asia, Africa and the Middle East*, Volume 35, Number 3, December 2015, pp. 466-480

aboveboard.”³⁶⁸ The accusation of racial partisanship grew so loud that S.N Banerjee was forced to respond to it on the floor of the Legislative Council:

It has been urged that because we cannot suppress betting on the turf, therefore we must not interfere with rain gambling...does it stand to reason and common sense that because we cannot suppress both these evils we must not suppress one of them when it is in our power to do so?³⁶⁹

More than turf betting, however, the defense gainfully exploited the similarities between rain gambling and the resemblant practices of spot betting, futures and options trading. These arguments transcended questions of race and community. Instead they asked a more fundamental question—what exactly was gambling and how could a law prohibiting its practice do so without first settling on its definition?³⁷⁰ In a letter written to Alexander Mackenzie on the 3rd of February, 1897 by the ‘Marwari citizens of Calcutta’, the petitioners noted

Your Honour’s Memorialists will not refer to transactions recognized as legitimate by law and society, specially such as [those] relate stocks and shares, to opium, and even on commodities of commerce and trade although these fully partake of the nature of gambling.³⁷¹

In the opinion of the *The Hindoo Patriot*:

If rain gambling is to be stopped because number of men have been ruined by it, then we submit that “forward” transactions of every kind, whether in government

³⁶⁸ *Indian Daily News*, March 20th, 1897

³⁶⁹ Legislative Department, Proceeding No. 26-54, May 1897, NAI

³⁷⁰ Permit me to intercept an impending critique that could reasonably ask whether my argument has both isolated and overdetermined the ‘legal sphere’ as *the* objective realm of social discourse

³⁷¹ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

papers, gold and other shares, or jute or opium or indeed any other kind of produce, ought to be suppressed also.³⁷²

The following year, at the meeting held at 68 Cotton Street, Babu Hukmi Chand Chaudhury, responded to the government's accusation that crowds of rain gamblers had paralyzed the ordinary operations of Burabazar. Instead of drawing attention to crowding at the Turf club on race days, Chaudhury asked the government to direct their attention to the more sizable crowds that regularly gathered at the *opium chowrasta*.³⁷³ At the same meeting, Babu Bungsidhur from the firm of Juggernath Goverdhone Das asked the attendees:

We all know that thousands of people are ruined every year and are forced to seek relief in the insolvent court on account of their indulgence in stocks and shares speculation. But whoever heard that a person was ruined by rain gambling?³⁷⁴

The implicit accusation was that the government had maintained purposive ambiguity regarding the legal definition of gambling, thus allowing them to legislate arbitrarily. So, as part of their defense, the defendants put all kinds of commercial speculation, especially on government opium, on trial. The trade in government opium was unanimously referred to as “*tejimundi* speculation”. *Teji mundi* is faithfully translated as an options contract, where *teji* meant rise (bull option) and *mandi* meant fall (bear option).³⁷⁵ *Teji* and *mandi* were single options and *teji-mandi* was the double option. In *teji-mandi*, a buyer could pay a nominal premium to purchase the ‘option’ to buy a commodity in the future; unlike

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ H.L Dholakia, *Futures Trading and Futures Markets in Cotton*, Bombay: New Book Company, 1942.

forward contracts, the buyer of *teji-mandi* did not commit to purchase, rather, he just bought its ‘option’. I am arresting further descriptions related to the practice, as I will have occasion to return to its discussion in the epilogue. For now, I am more interested in the manner in which *teji mandi* was both presented in the public sphere and compared to gambling. Again, I draw attention to the language of papers like the *Amrita Bazar Patrika*, who declared:

Ask a child in Burra Bazaar and he will tell you that this *teji-mundi* unlike rain gambling, involves the betting of thousands of rupees...Government, however, does not venture to interfere with it; for if it does, the *opium gamblers* will strike and not purchase opium, and that means great financial loss to Government.³⁷⁶

The switch between ‘opium speculation’ and ‘opium gambling’, should not be dismissed as oversight; the cues came from the defendants themselves. In a letter to the Editor of the *Indian Daily News*, a gentleman who signed off as ‘Marwari’, asked:

Why should A or Z be at liberty to gamble in Government Paper with impunity (for it *is* gambling after all) while I am to be restrained by special legislative enactment from placing my money on the behavior of the clouds.³⁷⁷

In his letter to the Chief Secretary to the Government of Bengal, Babu Premsook Das, member of the “Rain Gambling Managing Committee” blended the distinctions more skillfully:

The petitioners desire to point out that rain gambling is distinguished from all other forms of gambling, such as betting on the turf, wagers on the rise and fall of the value of Government and other securities and of shares of commercial concerns, as also those speculations in the mercantile world which are known by the name of forward transactions.³⁷⁸

³⁷⁶ *Ananda Bazaar Patrika*, 25th March, 1897.

³⁷⁷ *Indian Daily News*, March 20th, 1897.

³⁷⁸ Legislative Department, Part B, Proc. No. March 24, NAI.

Das included rain gambling within a list of, what he felt to be, analogous activities. Far from naiveté, he took full advantage of the gambling's grey legal status, with the understanding that the 'nature' of gambling—risk, hedging, prognostication—impregnated every commercial venture. By describing conventional commercial activities as gambling his position spelt out the strategies of argumentation indirectly. This silently worked its way into the public sphere as well. Apart from the *Amrita Bazaar Patrika*, other newspapers like *The Hindoo Patriot* aggressively asserted that “the Government itself is indirectly the patron of *opium gambling*”.³⁷⁹ Clearly, the public sphere was not just medium for registering complaint or deploying a defense, it was also the active site for constituting the meanings and connotations of the term gambling. Accordingly, it could be many things— a cultural practice, an economic activity, a moral and social problem, a universal condition— all at the same time. In a letter to the Editor of the *Indian Daily News*, a writer calling himself “Marwari” insisted:

It has been admitted from time immemorial that gambling or gaming is a vice; but it is a vice so thoroughly human and permeates human thought and acts so universally that any attempt to stop what is known as rain-gambling by law will probably rouse much feeling that had much better be left alone.³⁸⁰

Gambling exceeded the confines of any specific cultural or customary claim as its universal nature manifested itself through an instinct. The ban on rain gambling then was not an attack on a particular custom, limited to a specific community. The “Members of the Marwari Community” dispelled cultural confinement in a second petition to Alexander

³⁷⁹ Legislative Department, Part B, Proc. No. March 24, NAI.

³⁸⁰ *Indian Daily News*, March 20th, 1897.

Mackenzie, where they asserted that “human nature is human nature.”³⁸¹ This is precisely why petitioners like Babu Premsook Das and periodicals like the *Hindoo Patriot* argued that if rain gambling were banned in Calcutta, then *Jota Sowda*, a ‘game’ based on the sale of cotton bales in the London market, would come in to vogue as it did in Bombay. In their petition to Alexander Mackenzie, the “Members of the Marwari Community” described *Jota Sowda* as “a new form gambling...not unlike, in some of its aspects, to the betting called Teji-mundi in connection with the government sales of opium”.³⁸² While Teji-mundi was otherwise referred to as speculation, *Jota Sowda* was called gambling. Importantly, both of them were the natural outcome of the human nature. The argument suggests that more than a sectarian custom, gambling, betting and wagering were expressions of a universal instinct of commerce. The existence of such proclivities was *rational* and their suppression would be *irrational*.

The British press held consensus with their Indian counterparts in describing the actions of the government as being morally inspired and therefore intrusive. As mentioned earlier, *Capital* described the Act as ‘grandmotherly’ and even released an editorial that targeted Alexander Mackenzie specifically, who they named ‘the moral man’. The *Pioneer*, *The Statesman*, *The Englishman* and *Capital* feared that after rain gambling the government would target horse racing. *The Englishman* concluded that the governing ideology had replaced “utilitarianism with morality”, an approach last encountered before 1857, when Evangelical dogma permeated the corridors of power. While the British press dreaded the

³⁸¹ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

³⁸² *Ibid.*

possibility, the champions of the Bill celebrated its arrival. Having been thwarted by the former Lt. Governor, Charles Elliot, *The Bengalee*, anticipated the arrival of the ‘Christian Ruler’, Alexander Mackenzie.³⁸³ The implications of this were seen in the case of rain gambling too:

We have *now a wise and Christian ruler* over us and we trust that he will take a different view of the matter, and put down with a firm hand what is little short of a scandal and which has brought ruin and misery upon many a home at Bars Bazar and elsewhere.³⁸⁴

Ironically, the impending ambitions of Christian rule negatively stirred the passions of the British press. Their fears were possibly stoked by the actions of moral puritans in both Britain and America, who had steadily mobilized against gambling towards the end of the nineteenth century. Debates surrounding legality and enforceability of gaming contracts, which enjoyed a checkered history in America, gained increasing attention in the public sphere from the 1870’s onwards. In response to the sharp drop in agricultural commodity prices in the 1890’s, the ‘People’s Party’ of America was constituted to safeguard farmers interests. The virulence of their attack was directed at the moral and financial irregularities of commodity speculation, which was commonly dubbed as gambling.³⁸⁵ The political challenge to gambling was even sharper in England. In the early nineteenth century, wagers were legal in England, except those that breached the peace, hurt the character of a third person, against the rules of sound policy or morality and those that were contrary to the positive enactment of law.³⁸⁶ England enacted The Gambling Act in 1845, which made

³⁸³ *The Bengalee*, March 7th, 1896. Emphasis mine.

³⁸⁴ *The Bengalee*, May 16th, 1896.

³⁸⁵ Stuart Banner, *Speculation*, p. 70.

³⁸⁶ John Disney, *The Law of Gaming, Wagers, Horse Racing and Gaming Houses*, London: J Butterworth, Law Book Seller, 1806.

recovery of money in gaming contracts legally unenforceable.³⁸⁷ However, it was the Betting Act of 1853 that marked the British government's resolve to crackdown on popular gaming. The Act was intended to target the problem of working class gambling which had been on a rise ever since betting on horse races had become a popular pastime in England. This had its roots in the rapid democratization of big races such as the Royal Ascot, which became productive leisure to both industrial workers and to the emergent entertainment industry.³⁸⁸ The 10 Hours Work Act, foundational in overhauling older patterns of labour and restructuring 'work time' in factories, had also produced 'leisure time' as its unintended corollary.³⁸⁹ To facilitate this burgeoning industry, new forms of leisure were devised and managed by proprietors, who benefitted greatly from the patronage of the working class. Gambling and drinking were some of the most popular ways of industries in this regard. Horse racing in particular replaced some of the more violent games like boxing that had dominated popular interest in the past.³⁹⁰ By the 1880s the betting industry had grown considerably, owing to innovation in the communications industry. The telegraph and the development of the railway were crucial in developing a national sporting market that offered off course bets to racing enthusiasts. The betting laws of England had made wagers unenforceable by law and as a result, a number of cash betting offices began pullulating the country, replacing the credit networks of the past.³⁹¹ By the close of the

³⁸⁷ David M. Dixon, *From Prohibition to Regulation: Bookmaking, Anti-gambling, and the Law*. Oxford: Clarendon Press, 1991, p-39.

³⁸⁸ David M. Downes et al. eds. *Gambling, Work and Leisure: A Study Across Three Areas*. London: Routledge & K. Paul, 1976, p. 37.

³⁸⁹ E.P Thompson, "Time, Work-Discipline and Industrial Capitalism, *Past and Present*, no.38 (1967), pp. 56-97.

³⁹⁰ Dixon, *From Prohibition to Regulation*.

³⁹¹ *Ibid.*

nineteenth century, the increased commercialization of gambling, an activity that cut across both work and leisure had become a serious concern for British Parliament. The increase in real wages meant that instead of saving, most of the excess money of workers was being spent on what many considered puerile ends. As David Dixon notes, the issue, a major concern, became a matter of routine discussion in churches and social organizations. By 1890, the NAGL (National Anti-Gambling League) had been established. Their aim was to curb off course cash street betting, an institution which they believed was largely responsible for corrupting work ethic, fostering immoral temptations and profiting off the unawareness and naiveté of the working class.³⁹² On hindsight, Marxist examiners of gaming histories in England considered the project of the NAGL as an inauthentic exercise of moral legislation. Arguments of the art critic and psychoanalyst Peter Fuller, highlight this opinion which regarded the NAGL's effort as an eyewash for appeasing popular anxiety without acting against aristocratic or high end gaming in England.³⁹³ Dixon, however, stops short of labelling the efforts of the NAGL as superfluous and deceptive. He contends that the NAGL's intention was to go after not the gamblers themselves but the bookies and off course cash betting networks. Dixon makes a fair argument in this regard. It is not necessary for all movements, especially those inspired by moral infuriation, to consider the implications of the wider structures in place. The actions of activists can remain honest but ill-fated as history has made obvious repeatedly. However, Dixon does

³⁹² *Ibid.*, p. 46.

³⁹³ Crucially, as Fuller and Halliday have argued, the entire gaming industry was structured by individual profit motives and functioned as a safety valve for the government, since it provided workers with paltry amusement that kept them occupied and away from organized workers' movements. Jon Halliday, and Peter Fuller. eds. *The Psychology of Gambling*. New York: Harper & Row, 1975, p. 67.

concede that lobbies, political interests, long term gains etc. were as important as impassioned puritanism, both acting in each other's interests. Eventually, the efforts of the NAGL ended with the enactment of the Street Betting Act of 1906 that prohibited all off-course cash betting. As Dixon remarked, this meant "the virtual completion of the criminalization of public working-class gambling", without affecting a corresponding blow to high end gamers.³⁹⁴ It is possible that the NAGL's growth in Britain accentuated the anxieties of sections of the British press in India. India, after all, was a haven for British amusements, which remained shielded from moral reproach. Already, the Calcutta Derby was a celebrated racing event and by the first decade of the twentieth century the 'Derby Sweeps' attracted action from all corners of the globe. Published in 1930, in his book titled *The Romance of the Calcutta Sweeps*, Major Henry Hobbs recounted how British citizens from as far as South Africa and Australia would purchase derby tickets through agents or friends in Calcutta.³⁹⁵ Racing also provided pecuniary benefits to the Provincial governments of Calcutta and Bombay. In fact, when spot betting on cotton prices grew wildly popular in Calcutta in 1913, the Bengal government finally contemplated a ban on all forms of wagering (not just on rain). However, the Chief Secretary of the Bengal government advised caution against a blanket ban, since "it [horse racing], also attracts large number of the wealthier classes to Calcutta during the cold weather season and thus contributes to the general prosperity of the city."³⁹⁶

³⁹⁴ Dixon, *From Prohibition to Regulation*, p- 22.

³⁹⁵ Henry Hobbs, *The Romance of the Calcutta Sweeps*, Calcutta: 1930.

³⁹⁶ Bengal Cotton Gambling Ordinance, 1912 and Bengal Public Gambling (Amendment) Bill, 1913, Home, Police-A, July, Nos. 17-28, NAI.

It is likely that British newspapers were apprehensive regarding the status of the Turf and therefore stood in defense of rain gambling in 1897. They admitted that gambling was morally wrong and financially illogical, however, it was equally foolish to ban it through legislation. When it came to characterizing rain gambling, however, it was British rather than Indian periodicals, who appeared eager to describe the practice as a sectarian and cultural activity of a community. They either failed to comprehend or willfully suppressed the potential of a universalist or commercial argument in the Marwari position. They were also apathetic to the manner of protests. The medium of English and the parliamentary proceedings left *The Englishman* unimpressed—‘ We confess we are not greatly struck by the literary style or the logical reasoning of the memorials which have been forwarded to the Lt. Governor on the subject.’³⁹⁷ They mocked those who drew attention to the benefits that rain gambling provided for the emergent science of meteorology and weather prediction, a claim that Marwari defendants pushed with all earnestness. In doing so, they highlighted how rain gambling exceeded the specific cultural boundaries of a community, and that its underlying knowledge could be productive for universal ‘science’.

It would be unfair to claim that it was only British commentators who coupled rain gambling with custom, as certain Indian periodicals also made efforts to bracket the practice similarly. In a letter to the Editor of the *Indian Daily News*, a contributor who inexplicably signed off as “Abandoned Cows, Hacks, and Poor Doggies”, warned that “Meddling and puddling with the ways of the Asiatic...is a great mistake throughout the

³⁹⁷ *The Englishman*, March 19th, 1897.

country”.³⁹⁸ Others found gambling to be a practice that had roots in the ‘Indian’ tradition ‘from the time of the Mahabharata’. Having previously gained a wider readership in 1891 when targeting the government over the “Age of Consent Bill”, it was the *Amrita Bazar Patrika* that pushed for a cultural defense forcefully. Its protectionist position from 1891 had secured financial success for the paper, so much so that from being a weekly paper it began to be published daily.³⁹⁹ Regarding the “Age of Consent Bill”, Mrinalini Sinha notes that while the *Amrita Bazar Patrika* had chosen its line of argument clearly, Surendra Nath Banerjee and *The Bengalee* had faltered and remained indecisive.⁴⁰⁰ At the time, he attracted British scorn, the latter concluding that ‘Indian rationalists’ were still unprepared for the benefits of modernity. Perhaps in order to correct this image, Banerjee doggedly pursued the moral evil of rain gambling in 1897.

It is not that Marwari practitioners did not employ a cultural defense while making their case. After all, it was a tested legal strategy and a certified method of gaining public sympathy. However, the nature and manner of their argument exceeded the limits of a specific cultural defense and extended to questions regarding the freedoms and guarantees built into the foundations of any capitalist venture. This, the British press were unwilling to admit. By labeling the stir against the law as a *Marwari* agitation, the native agent was

³⁹⁸ *Indian Daily News*, March 20th, 1897.

³⁹⁹ Mrinalini Sinha, *Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century* Manchester: Manchester University Press, 1995.

⁴⁰⁰ *Ibid.*

rendered pre-capitalist, to be distinguished through ties of community and kinship.⁴⁰¹ Accordingly, *Capital* carried the following warning for the Bengal government—‘ it is difficult for people who know nothing of natives to understand and appreciate the value they set on cherished customs, peculiar idiosyncrasies and fixed prejudices.’⁴⁰² Similarly, *The Englishman* characterized rain gambling as both ‘a foolish form of wasting money’ and ‘a long established custom’.⁴⁰³ As a result, the inner/outer, cultural/material dyad was pushed more sharply by the English press than it was by the Marwaris themselves. Alongside a nativist defense, the Marwaris had argued that the practice was universal in the sense that it was commercial. They believed the practice to be fair and questioned what kinds of economic activity were deemed legitimate for colonial subjects. On the other hand, the *Englishman* wondered about the ultimate object of introduction of the Bill - ‘is it to improve the morals of the Marwaris who have such an inveterate propensity for gambling?’⁴⁰⁴

Amongst other implications, the description reproduced a distinction between the commerce driven Englishman and the native Marwari, whose *propensity* for gambling

⁴⁰¹Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton: Princeton University Press, 2008, p. 13. In discussing the difference in views between the English Marxist Historians and the Subaltern Studies School regarding the question of peasant movements and whether they were political or ‘pre-political’, Chakrabarty asks whether the term ‘political’ was the correct marker of analysis, since “the sphere of political [peasant protest] hardly ever abstracted itself from the spheres of religion and kinship in pre capitalist relations of domination”. If the presence of ‘pre capitalist’ elements could distinguish a claim from being political, as determined by the operations of modern (European) capital, seeing kinship as the unifying condition of a demand is equally limiting when establishing it as a ‘political’ claim.

⁴⁰² *Capital*, March 24th, 1897.

⁴⁰³ *Englishman*, 10th April, 1897.

⁴⁰⁴ *Ibid.*

stemmed from practices of culture and community. The argument erected an undeclared boundary, which established gambling as a non-commercial, cultural practice.

A Genealogy of Rain Gambling

However, if the genealogist refuses to extend his faith in metaphysics, if he listens to history, he finds that there is “something altogether different” behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms.⁴⁰⁵

In spite of the spirited defense presented by the pro-rain gambling lobby, the issue struggled to escape its cultural trappings. However, nested within the din of arguments was an unsettling detail. When Tulsi Das Dey sent Alexander Mackenzie the petition, thus reigniting the government’s interest in rain gambling in 1896, he did so under the influence of a Marwari gentleman. S.N Banerjee, amongst others, had taken this to be evidence of a division within the community and had welcomed the petition as the effort of a small but determined group of social reformers. Indeed, Banerjee and Bolton had claimed to have consulted the ‘respectable’ members of the Marwari community on the issue and later assured the Legislative Council that almost all were opposed to rain gambling, and it was only ‘caste obligations’ that prevented them from going public with their disapproval. But the story was not as simple as it was made to appear. Those opposed to the ban claimed that a personal rivalry had penned Dey’s petition. They claimed that ‘a man from

⁴⁰⁵ Michel Foucault, “Nietzsche, Genealogy, History, in In John Richardson & Brian Leiter (eds.), *Nietzsche*. Oxford University Press. pp. (139-164) (1978), p. 142.

Allahabad' had recently approached Babu Shew Nandan Tiwari (Shivnandan Tiwari) and had asked for a stake in one of the rain gambling houses in Burabazar. When asked to deposit Rs. 10,000 for the privilege, he refused, since he did not have the money. Subsequently, he acted with notable alacrity to malign the game and with it, Tewary's reputation. This accusation circulated as rumor and in all its length, the file does not assign a name for this individual. He was referred to 'the man from Allahabad' and in some of the more passionate indictments, as 'the cook from Allahabad'. The defense therefore argued that the ill will towards the game stemmed from cynical motives of rivalry and payback and the concern regarding the immorality or criminality of the practice were feigned and untrue. Was there truth to this accusation? Pursuing the details of this story also entails the investigation of a term recurrently deployed in the record - 'Marwari'. Since this reading refuses to take the categorical descriptions of culture and community as self-evident, this too demands further scrutiny.

Who were the Marwaris and who fell within this category? Each side claimed that they were its true representatives. *The Bengalee*, a paper run by S.N Banerjee, claimed to have 'talked the matter over with many influential men of Burrabazar, whose names for obvious reasons we do not disclose, and they are unanimous in their testimony as to the ruin and misery which this gambling house is working at Burrabazar.'⁴⁰⁶ Speaking in defense of the practice, at the meeting at 68 Cotton Street, Babu Rung Lall Poddar made a similar assertion:

⁴⁰⁶ *The Bengalee*, 15th June, 1895.

Gentlemen, give me permission to emphatically declare that the Marwari community has nothing to do with this memorial [against rain gambling] and that the same does not represent their views in this respect. You are aware, that a counter-memorial, largely signed by Marwaris, including the heads and managers of all the respectable firms of this city, has been submitted, showing that rain gambling is far less injurious than several other recognized forms of gambling⁴⁰⁷

C.W Bolton later claimed that the meeting where this memorial was adopted was ‘not a public but a private one, attended by only 100 to 125 persons, mostly interested in rain gambling, nearly one-third of whom belonged to the same house.’ He said that ‘none of the members of the influential members of the Marwari community were present’ and concluded that ‘the meeting was thus of no importance’.⁴⁰⁸

Who is to be believed? Poddar and the “Members of the Marwari Community” followed by providing the government with a memorial carrying 1,290 signatures, almost ten times the number Bolton claimed were at the meeting.⁴⁰⁹ On the other hand, the census report of 1901 placed the Marwari population of Calcutta at nearly 14,000, making the signatories to this memorial only a tenth of the total population.⁴¹⁰ So, who were the authentic representatives the Marwaris of Calcutta? The question is particularly relevant if rain gambling is regarded as a cultural practice or as a Marwari custom. Hardgrove believes it was and takes the Marwari defense of rain gambling as an instance of a ‘community as political actor’. Accordingly, she argues that the ‘Marwari’s defense of gambling as

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⁴⁰⁸ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁴⁰⁹ Apart from the 1290 who signed, Poddar claimed the support of 50 Share Brokers, 50 Stock Brokers, 100 Opium Brokers, 200 Opium Teji Mundi Dealers, 60 Cloth Brokers, 50 Tisi Brokers, 20 Cotton Brokers, 5 Gold and Silver Brokers, 25 Cotton Dealers, 25 Gunny Dealers.

⁴¹⁰ Thomsas Timberg, *The Marwaris: From Traders to Industrialists*, Delhi: Vikas, 1978, p.89.

essential to their character was a performance to establish an interiority that could then be mobilized in the demand for political rights.”⁴¹¹ However, the narrative of cultural homogeneity is somewhat punctured by the fact that the petition calling for its ban emanated from within the community itself. But Hardgrove explains this complaint as ‘an act of betrayal’, which somewhat damaged the perception of ‘a presumed cohesion’ within the community.⁴¹² She argues that the putative belief amongst public commentators at the time was that the Marwaris ‘were entitled to a form of gambling *so culturally specific to them*’ and the fact that the petition was initiated by an insider raised suspicions that the instigator had been blackmailed. Interestingly, similar charges of foul play were also raised by the opponents of the practice. When S.N Banerjee first raised the issue in 1895, *The Bengalee* had published the following piece:

In Bura Bazar the conduct of the Police has been open to serious misconstruction. It may be wholly undeserved, and probably it is; but people put two and two together, and say it makes four. The police have no excuse in the matter. The gambling house flourishes in the full blaze of publicity.⁴¹³

Again, a month before the Dey sent his petition to the government, *The Bengalee* made a startling allegation.

Bye the bye, can anybody tell us why a particular Superintendent of Police, whose name, we are prepared to give, if necessary, has been actively interesting himself with a view to persuade one of the organizers of this movement not to send the petition?⁴¹⁴

⁴¹¹ Hardgrove, *Community and Public Culture*, p. 179.

⁴¹² *Ibid.*

⁴¹³ *The Bengalee*, 15th June, 1895.

⁴¹⁴ *The Bengalee*, 16th March, 1896.

A few months later, on November 14th, 1896, in a piece titled “An Extraordinary Case”, the paper narrated the story of a ‘Marwari (kerosene) merchant of Bura Bazar’, entangled in a dispute with a rival businessman. The report claimed that the local magistrate had dismissed the charges made against him by his ‘jealous rivals’, but the matter was far from settled. Apparently, following a threat to his life, the merchant was ‘chased all the way to the North Western Provinces by *budmashes* armed with sticks and knives.’⁴¹⁵ The piece reported that the merchant’s pleas for protection had gone unheard by the Superintendent of Police at Bura Bazar and it was only when he was reassured of security by the Superintendent at Howrah did he return to Calcutta. The paper asked provocatively:

What could be the meaning of all this? It is believed rightly or wrongly it is not for us to say, that the Bara Bazar Police, *the supporters of rain gaming*, are thick in the plot, and are in the hands of his enemies.⁴¹⁶

These subterranean plots ran parallel to the weightier discussions of the public sphere that debated morality, the right to custom, racial partisanship and the limits of governmental interference. Yet these details remain compelling for those in search of a genealogical history, for often it is these ‘personal conflicts that slowly forged the weapons of reason.’⁴¹⁷ While scribbled at the margins, these stories of internal strife, personal rivalry, jealousy and commercial competition failed to emerge as fully disclosed arguments in the public sphere. Instead, they marked the transcript as an ‘open secret’, written in the language of insinuation that never resolved as to who was the kerosene merchant, who was his rival, who were the extorting police officers of Burrabazar and most importantly, who was the

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ Foucault, “Nietzsche, Genealogy, History” p. 142.

‘man from Allahabad’? While these answers may be irrecoverable, the inquiry is not pointless. The effort is to understand the process through which rain gambling was rendered customary and gambling was consigned as a social/cultural rather than commercial practice. The stakes are therefore weighty, since ‘community’, as Partha Chatterji reminds us, remains a loaded term in the colony. Revisiting the Hegelian divisions between civil society, the state and the family, Chatterjee argues that civil society was conceived as the individuated sphere of the subject, where he/she was free to pursue personal interest as per the norms of reason. The mode of civil society was opposed to that of the family, which functioned on the ascriptive bonds of love and sacrifice, compelling the individual to freely surrender personal interest for the good of the collective. Chatterji argues that this ascriptive logic was mapped onto community, and accordingly, ‘in the narrative of capital, community becomes relegated to capital’s pre-history’.⁴¹⁸ Indeed, if rain gambling were to be the practice of community, then Hardgrove’s reading of the motive regarding an intra-community instigator necessarily conveys a sense of ‘betrayal’. But what if we flip the narrative and pay closer attention to the hidden transcript? What if we relocate the ‘man from Allahabad’ outside the community (and therefore ‘betrayal’) and into the sphere of a contracting civil society?

Customary, or *Bazaari* Practices?

⁴¹⁸ Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories*, Princeton: Princeton University Press, p. 232. Chatterjee argues that “Ethical Life” as a narrative of community where subjective rights must be negotiated within the ascribed field of the community. I will also recall here that Hegel makes the family the site for that other great process by which individual subjectivities could be negotiated.’

While it appears that the gambling houses in Calcutta were devoted exclusively to rain gambling, this was generally not the case. When in 1901, Madan Mohan Gopal introduced a private bill for amending the Public Gaming Act in Punjab, he isolated both rain and opium gambling as the target of legislation. But the feedback of local officials alerted the government to the fact that rain gambling was only a fraction of the total dealings of these ‘gaming houses’. The Deputy Commissioner of Delhi, Major Davies informed the government that

Rain gambling is only carried on in Delhi to a very small extent, only during the rains. There are 44 shops in which rain gambling is carried on to a greater or less extent— but the shops are used throughout the year for gambling in opium which goes on all year round. This opium and is far more popular than rain gambling, and as it takes place every month, its evils are far more extensive.⁴¹⁹

While Davies referred to both rain betting and the betting on the price of government opium as ‘gambling’, he did not refer to these spaces as ‘common gaming houses’. Rather, he describes them as ‘shops’, for that is what they were. Not only were these spaces of legitimate commerce, but the owners of these ‘shops’ were men of commerce as well. The Deputy Commissioner of Jullunder, Lt. Col. Rennick, informed the government that ‘my experience has shown me that it [rain gambling] is principally carried on in large centers amongst grain brokers and dealers’. The Deputy Commissioner of Gujarat, J.R. Drummond, supplemented this view, stating that alongside rain gambling, betting on opium prices was conducted mostly by ‘several rather well to do and to all appearance reputable traders of the Aggarwal and Dhussar communities.’⁴²⁰ In a note sent in 1898, The

⁴¹⁹ Simla Records, Home Department, Judicial A. Nos. 1-3, February 1901.

⁴²⁰ *Ibid.*

Deputy Superintendent of Police in Rewari, Hatim Mirza, appeared particularly outraged by the efflorescence of these shops and the nefarious practice of opium speculation in Delhi. But what really disturbed him was that some of these shopkeepers had begun ‘to pay income tax on the income realized from this bargain,’ which ‘made them bolder’ and convinced them that ‘they are doing nothing against the law.’⁴²¹

As stated in a previous chapter, when the government realized that Gopal’s bill, intended to target rain gambling, would impact opium speculation more severely, they declined to table it in the Legislative Council of Punjab. They argued that ‘this particular form of betting is well known in Calcutta and elsewhere and could not be effectually stopped any more than any other form of betting could be.’ The reasoning was in exact contradiction to the logic that outlawed rain gambling in Calcutta a couple of years previously. Crucially, it gave weight to the claims of the Calcutta Marwaris who had argued that rain gambling and speculation on the price of opium, conducted through forwards (*badni*) or options (*teji-mandi*), were part of a conjunct field of commercial activity. Emplotting the value of rain gambling within the commercial operations of the *bazaar* therefore requires a clearer understanding of characters like Babu Shew Nandan Tewary, the owner of the gaming house in Calcutta.

Reports of Davies and Drummond, amongst others, suggest that the ‘grain merchants’ who ran and participated in the betting establishments in Delhi, Punjab and Gujarat were

⁴²¹ *Ibid.*

probably *arhatiyas*, a crucial member of the *bazaar* economy. These *arhatiyas* or commission agents would procure produce either directly from the peasants or from smaller itinerant traders like the *faria* or *bepari* (as in the case of jute) on behalf of European managing houses, wholesale exporters or for mills and native merchants. *Arhatiyas* were either *pucca* or *kutchi*. While the *kutchi arhatiya* was a commission agent in the pure sense, according to Justice Beaman of the Bombay High Court, the *pucca arhatiya* ‘was something more’.⁴²² Previously a ‘creature of custom’, the legal identity of the *pucca arhatiya* was first established by Justice Chandravarkar in December 1904 in the case *Kanji Deoji v. Bhagwandas*. Unlike the *kutchi arhatiya*, who was an in-between agent for urban (mercantile) buyers and up-country suppliers, the *pucca arhatiya*:

[...]receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due date. His peculiar feature, and on which is, as far as I know, not shared by any other agent known to the law is that he can allocate his principal’s contracts to himself when it suits him to do so.⁴²³

So, while the *kutchi arhatiya* was an intermediary who received commission and dropped out of the transaction once he had established contractual privity amongst his constituents, the *pucca arhatiya* could assign the contract to himself.⁴²⁴ Tewary was never directly referred to as an *arhatiya* but most clues point to that direction. The most obvious indication comes from the fact that rain gambling, even in Calcutta, skirted the *opium chowrasta*.

⁴²² Rammiklal R. Mody, *The Law of Pakki and Katchi Adat and Teji Mandi Contracts*, Bombay: N.M Tripathi and Co Law Publishers, 1937, pp. 6.

⁴²³ *Bhagwandas Parasram v. Burjori Rattonji*, (1912) 14 Bombay Law Reporter 807, 809. Cited in Rammiklal R. Mody, *The Law of Pakki and Katchi Adat*, pp.2-14.

⁴²⁴ The relation between the *kutchi arhatiya* and his constituents is what may be described as a *del credere* relationship, like one that the auctioneer has between the seller and the buyer. The *pucca arhatiya* on the other hand could buy goods upcountry and sell these goods to a Bombay *shroff*, without establishing privity between the *shroff* and the upcountry producer.

Added to this was the repeated invocation of *teji mandi* by the defendants to prove that rain gambling was nestled within a host of ambient speculative activities. Second, the ethnographic piece carried by *The Statesman* in 1896 had stated that bookies would ask players, '*khayega*' (will you eat), when approaching them with the odds of the day. The players in turn would respond by saying *khaya* (I have eaten) if they wished to register a bet. Interestingly, Sir Purshotamdas Thakurdas, the chairman of the East India Cotton Association would inform the Wiles Committee in 1930 that these were the same terms used by speculators and spot brokers in the cotton markets of Bombay.⁴²⁵ At least idiomatically, the 'extensive negotiability', as Ritu Birla terms it, between symbolic capital and the 'unmarked space of universal capital' remained intact in spite of the efforts made by the colonial legal apparatus to sequester its operations.⁴²⁶ Finally, there is the question of charity. While defending the reputation of the Tewary, the pro-rain gambling lobby argued that the proceedings earned from rain gambling went towards the upkeep of "two infirmaries for aged and useless animals".⁴²⁷ While the ostensible aim was to bolster Tewary's moral reputation, it is equally important to read such charity within the enframed code of native commercial practice. Rajat Ray argues that such 'charity charges' were part of standard business and these rates were fixed by *arhatiyas*' market panchayats.⁴²⁸ It should be noted that even in the bylaws of the Cotton Dealers' Managing Committee, one

⁴²⁵ Madhoo Pavaskar, "Options Trading in Commodities", *Economic and Political Weekly*, July 22-28, Vol. 41, No. 29, July 2006, pp. 3150-3154, p. 3150.

⁴²⁶ Birla, *Stages of Capital*, p. 21. Birla uses the term 'extensive negotiability' to refer to the intermingling of two separated fields of commercial activity; the sphere structured by the logic of symbolic capital—kinship, caste, lineage—and the unmarked *universal* space of capital circulation.

⁴²⁷ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁴²⁸ Rajat Ray, "The Bazaar: Changing Structural characteristics of the indigenous section of the Indian economy before and after the Great Depression" *IESHR*, 25, 3, New Delhi: Sage, 1988.

of the earliest organizations founded by 200 cotton traders in Bombay in 1855, clause 8 specified that ‘pigeons and other birds should be fed daily and rupee one be spent for that purpose.’⁴²⁹ The similarities in idioms and practices indicate that at the very least, Shew Nandan Tewary was more than just a proprietor of a ‘gambling den’ in Burabazar.

It is notable that the legal recognition and the economic importance of *pucca arhatiyas* grew alongside the increase in the volume of forward trading⁴³⁰ in opium, cotton, linseed, sugar, and most importantly, grains. To that end, the *pucca arhatiya*, often complemented his function of procurement with *goladari*— the storage of grain—a service that richer peasants availed off in lieu of short-term advances.⁴³¹ They even made advances on the basis of their holdings which were stored in grain pits or *khattis*. In fact, these practices of storage, hoarding and speculation were held responsible for the artificial inflation of the price of rice in Bengal in 1918, when Marwari speculators gained notoriety for cornering its market. Amongst calls for greater scrutiny members of native civil society demanded that the government make clear the legal status of speculation in food grains and the laws that regulated its practice. The Maharaja of Cassimbazar, Manindra Chandra Nandi, wrote to the Revenue and Agricultural Department in 1920 to ask ‘whether any special steps can

⁴²⁹ M.L. Dantwala, *A Hundred years of Indian Cotton*, Bombay, East India Cotton Association, 1947, p. 62.

⁴³⁰ Forward trading was a legal agreement where two parties agree to exchange a commodity at a predetermined price sometime in the future. The price agreed to is known as the *forward price* and the date on which the exchange takes place is known as the *delivery date*. For example, A and B agree enter into a future contract in May, where A will deliver 100 bales of cotton to B for Rs 10,000 in December (100 rupees a bale). Come December, if the market price of Cotton is Rs. 101 a bale, then B makes a profit of Rs 100, since he paid only Rs. 10,000 for a 100 bales. If the market price of Cotton is 99, then A profits similarly.

⁴³¹ Goladari was commonly combined not merely with cloth business but in the case of the biggest goladars and cloth merchants, with hundi banking. The same firms were involved in the cloth business and had a stake in urban banking and rural moneylending too. Ray, “The Bazaar”, p. 294.

be taken to prevent speculation in food grains', but received an answer in the negative.⁴³² The Government courted further reproach when the price of wheat rose unnaturally in 1921 and Marwari 'wheat gamblers' of Burrabazar were accused of storing almost 10,000 tonnes of wheat illicitly.⁴³³ At the time, the speculative trade in wheat was seven times more than its actual availability in the market.⁴³⁴ These incidents typecast certain commercial communities, particularly the Marwaris, as being self-interested profiteers who acted against nationalist interests. While the image was partly negated by their endorsement of Gandhian mass politics in the 1930's, the suspicion was never fully abandoned. As shown by Rohit De, the impression was imported into the post-independence years and was reinforced by depictions of the *baniya* as one who prioritized business over the nation.⁴³⁵

These practices, however, were not indisputably labeled as wagering, betting or gambling. Indeed, in *Bhagwandas Parasram v. Burjori Rattonji*, Justice Beaman firmly stated that to say that

[...] the Pakka Adatia is and always has been nothing more than a book-maker accepting bets on commodities instead of race horses, is to say the least an exaggerated assertion tinged with unnecessary prejudice... People who act as Pakka Adatias are generally respectable and financially substantial businessmen who actually give and take delivery of goods which they contract to sell or purchase.⁴³⁶

⁴³² General, Department of Revenue and Agriculture, June, 1920. Proceeding No. 3, Part B, NAI.

⁴³³ Hardgrove, *Community and Public Culture* 160-165.

⁴³⁴ Ray, 'the volume of speculative transactions can be estimated from the fact that wheat was traded in futures to the extent of 70 million tons, though 10 million tons were produced in India.' p. 296.

⁴³⁵ Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic*, Princeton: Princeton University Press, 2020, pp. 77-122.

⁴³⁶ *Bhagwandas Parasram v. Burjori Rattonji* (1912), in *The Law of Pakki and Katchi Adat and Teji Mandi Contracts*, pp. 79-80.

The commercial agency of the *arhatiya* was marked by a certain fluidity, where according to context, they were either gamblers or ‘businessmen’. While these monikers were contestable in the commodity trade, in the case of rain betting the doubts grew thinner. However, the question still remains, what was gambling—was it the social and cultural practice of businessmen, or was it business itself?

Reflecting on the paradox between a solvent native money market and the sluggish environment in industrial investment, Tirthankar Roy argues that most native bankers and merchants, with the exception of the Parsis, kept their money idle for most of the year so that they had liquid capital for seasonal lending. The most lucrative market, which fetched the highest return, was the market for rural usury. Rajat Ray argues that native money markets that moved capital through negotiable instruments like *hundis*, were the most active from January to June, when the rabi harvest was procured from the hinterlands.⁴³⁷ However, this market did not advance to peasants directly since the market for rural usury was cash dominant and *hundis* were limited to metropolitan exchanges, mostly amongst bankers themselves.⁴³⁸ The absence of negotiable instruments in rural usury was due to the high volume of unsecured lending which urban bankers found too risky to handle. So, instead of partaking in it directly, they preferred to have their capital trickle down through the hands of *arhatiyas* (both *katcha* and *pucca*) who then lent to big peasants and local usurers; the latter being familiar with the social structures of the village were better placed to recover the advance. Roy claims that the money market in rural usury was most active

⁴³⁷ Ray, “The Bazaar”, p. 279.

⁴³⁸ Roy, “Monsoon and the Market for Money in Late Colonial India” p. 343.

from end October, just after the monsoons, when the rabi crop was sown. It is also true that the *arhatiyas* themselves held a wide range of portfolios, of which usury was an important one. For example, when in a tax assessment from 1923, Misra Lal, the proprietor of the firm Jhandu Lal Shiam Lal of Johri Bazaar Agra, requested the income tax department to count a loss of Rs 29000 in ‘forward contract business of cotton yarn’, the tax officer reviewing the balance sheet found that apart from profits on gold and silver jewelry, ‘the assesses’ return an income of Rs 1000 from sarrafi business and Rs 7065 from money lending.’⁴³⁹

Is it tentatively possible to refigure our understanding of rain gambling in light of the lucrative demands of seasonal lending? Both the pro and anti-rain gambling lobbies had forcefully declared that the game held an attraction that extended beyond the Marwaris, as it did not require a specialist knowledge like commodity speculation. Given that the practice generated a wider base, its cash profits were also substantial. In fact, it was the rapid efflorescence of rain gambling establishments that first attracted legislative attention towards these houses. While in Bengal the number had escalated gradually, from one in 1867 to three by 1896 (the last two cropping up in a span of two years), the Deputy Inspector at Rewari, Hatim Mirza reported that the growth was alarming in Delhi, where ‘about four or five years ago there were only a few shops which transacted business of this sort, but since that time forty five shops have been opened.’⁴⁴⁰ Later, in 1916, the Chief Commissioner of Delhi, W.M Hailey reported the number to have risen to one hundred and

⁴³⁹ Central Board of Revenue, 1924, File No. 90, NAI.

⁴⁴⁰ Simla Records, Home Department, Judicial A. Nos. 1-3, February 1901.

fourteen. So, it is worth enquiring whether for the *arhatiyas* straddling the worlds of urban banking and rural usury, these gaming houses were gainful avenues for generating liquid capital that were then redirected into moneylending. Though I hold the discussion on rural usury for the following chapter, I will emphasize that such lending was crucial in sustaining commercial agriculture and in securing networks of agricultural procurement. While it is impossible to ascertain whether Babu Shew Nandan Tewary's rain gambling houses were a means for such ends, the conjecture is not entirely implausible.

What can be asserted with more certainty, however, is that the plot scripted against Tewary by the 'man from Allahabad' was by no means exceptional. Nor was it a subplot in an otherwise serious discussion. From the early 20th century, more than the government, it was commercial actors who actively adopted the discourse on 'gambling' to target their rivals. Unlike in the case of rain gambling in Bengal, where the government took an active interest in banning the practice, the situation had notably changed within a decade. By the time of the First World War, most provincial governments had relinquished their role in determining the legitimacy and illegitimacy of commodity speculation. Instead, they abdicated these responsibilities to newly formed commercial bodies like the East India Jute Association and the East India Cotton Association. Using cotton, let me illustrate how factional interests made use of the colonial legal apparatus to further sectarian agendas, and in doing so, shaped the structure and practices of the industry as a whole.

Subjects of Interest within Community

Efforts to organize the native cotton trade had its beginnings in the mid nineteenth century. As mentioned previously, the first consorted effort came in 1855, when 200 merchants came together to form the Cotton Dealers' Managing Committee. This was followed by the the Bombay Native Merchants Association in 1884, which through restricted membership, attempted procedural standardization.⁴⁴¹ The European end of the cotton trade had the Bombay Cotton Trade Association, a joint Stock company established in 1875, floated with a share capital of Rs. 50,000, split amongst 50 members. The racial partisanship of the Association peeved native merchants, and notable figures like Sir Dinshah Petit, Cursondas Vallabhdas and Narandas Purshottamdas responded by setting up their own joint stock company and named it the Bombay Cotton Trade Association. Through charters, these organization regulated the practices of its members and settled their disputes, most of which arose from trading hedge and forward contracts. Despite such efforts, the trade showed no notable homogeneity by the beginning of the First World War. According to M.L Dantewala, hedge and forward contracts were not well-defined regarding volume, the standard of delivery and the period of settlement and so, 'the market was entirely dominated by speculative interests.'⁴⁴² Significantly, the Indian textile industry began expanding rapidly during this period. From being largely an article of export, Indian cotton was now directed towards the demands of the Bombay mills, who met nearly 42 % of the domestic demand for cloth. Given that the mills were now consuming almost half of the total cotton grown in India, it was in the interest of most sectors to organize the haphazard and informally structured trade and bring it under some

⁴⁴¹ Dantwala, *A Hundred Years of Indian Cotton*, p. 43.

⁴⁴² *Ibid.* p-67.

central authority. The first concrete steps towards this were taken in June 1918, when the Cotton Contracts Committee was set up under the Defense of India Act. The Committee's most immediate task was to streamline and standardize hedge and forward contracts, as it was this contract that regulated the 'futures market', which in turn, set the rates for other sectors like farming, spinning and the mills.⁴⁴³ To do so, the Committee authorized the establishment of clearing houses for settling contracts through price differences and for passing delivery orders. For clearing houses to function smoothly, an agreement regarding the range of the forward or 'basis contract' (were they to be 'wide' or 'narrow'⁴⁴⁴) and the intervals for clearing such contracts (weekly or fortnightly) was required.⁴⁴⁵ The Bombay Cotton Contracts Control Act was passed in 1919, which established a Board entrusted to set up clearing houses and organize the trade. This process was more arduous than it appeared. A consensus needed to be generated within each sector of a trade that included growers, exporters, importers, commission agents, *jaithawalas*, *muccadums*, brokers, and mill owners. The apprehensions of the Mill Owner's Association were difficult to assuage; they feared that the terms of the trade were being settled in the sellers interests rather than the buyers. The tireless negotiations of Neville Ness Wadia convinced a section of the mill owners to come under the direction of the Board. Concurrently, Sir Purshottamdas Thakurdas was busy putting together a representative Association, which could centralize the operations of the cotton market. The association was named the East India Cotton

⁴⁴³ The futures market was the centralized market for forward and hedge contracts, that report 'the consensus of trade opinions since the composite judgement of all the operators is being constantly recorded in the current or ruling price of the commodity.' *Futures Trading and Futures Marketing in Cotton*, p. 7.

⁴⁴⁴ The 'width' of a contract implies the range of grades and staples that are accepted for delivery in a forward contract with promise of future delivery. For example, the following 5 staples were officially recognized in

⁴⁴⁵ At this time the gap for settling contracts ranged as far as 2 years. *A Hundred Years of Indian Cotton*, p. 70.

Association (EICA) and was registered under the Company Act in October 1921. Subsequently, in June 1922, it requested the Government of Bombay for statutory powers through which it could regulate the cotton trade through the issuance of bye-laws.

The unification of the native trade under the EICA was unable, however, to rid the terrain of its agonistic edges. This fragile consensus was plagued by lingering disagreements, especially on three issues; restriction regarding membership to the Association on the volume of cotton that was traded, the mandatory security deposit of Rs 10,000 to become a member and the exclusion of brokers from the representative body.⁴⁴⁶ More plainly, many resented that in the name of the Association, the Government had handed putative monopoly to the big players at the cost of minor traders with limited capital. The fact is that many continued to circumvent the EICA's regulatory authority and conducted business where speculative contracts dealing in a lesser volume of cotton were enforced informally. Evidence for this is gleaned from the number of private member bills that were sent to the governments of Bengal and Bombay, which under various headings, sought a ban or the criminalization of those associations that functioned outside the EICA's purview. The first came in 1925 when Babu Debi Prasad Khaitan drafted the 'Wagering Associations Bill'. This was followed by the 'Futures Market Bill' tabled by P.D Himatsingka in 1927 and the 'Calcutta Suppression of Wagering Baras Bill', drafted by K.C Roy Choudhuri in 1930. These bills echoed a common objective - to characterize certain kinds of speculation as legitimate business and define others as pure wagering or more specifically, gambling. In

⁴⁴⁶ *Ibid.*

the opinions of these drafters, several firms or *baras* were conducting trading operations with no intention of taking delivery of the product being traded; profits were made on the difference between the market price and forward price of the contract. This is how money was made. 'A' agrees to a contract with 'B' in August, promising him delivery of 50 bales of cotton at Rs 500 a bale in January. In January when the contract expires, if the price of cotton is Rs.490 a bale, then A makes a profit of Rs. 10 a bale, i.e Rs 500 in total. If the market price of cotton in January is Rs. 510, then B makes a profit of Rs 500. However, instead of actually giving or taking delivery of the 500 bales, A and B settle the contract by paying each other the difference between the market price of the commodity and the forward price agreed to in the contract. Usually, such contracts were passed off in a chain, which was also referred to as 'cross contracting'. So, before January, B could find a new buyer C, who could buy the contract for Rs. 510 a bale. C in turn could sell the contract to D and so on. Each of the intermediaries in this chain would only collect the difference between the forward price and the market price. Theoretically, the last member holding the contract would take actual delivery, although in many cases, even he would settle through price differences.

It should be noted that this kind of trading was not limited to *baras* alone, as many established exchanges including the EICA conducted business similarly. More importantly, such contracts, where profits accrued through price differences, were not considered 'wagering contracts' as per section 30 of the Contract Act. Indeed, it was argued that even if the contract passed through the hands of several intermediaries who settled

only through differences, if delivery was made at the final end of the chain, then the intermediary contracts were not wagers and thus were not voidable. This for example was the verdict of Babu Baijnath Das of the Lower Appellate Court of Cawnpore in *Hazari Lal Chang Mal vs Keshodas Rangopal*:

The Plaintiff's books disclose all adjustment in differences. Possibly it is so. But then what will you say about the 1375 bags covered by 18 sold notes. Will you say that even in those cases with the actual goods behind each of those 18 sold notes the transactions were merely gambling because the plaintiff by counter contracts simply passed on the goods and received as profits only the differences?⁴⁴⁷

The judge concluded that such contracts were not wagers and ruled that these transactions could not be termed gambling. Given the ubiquity of settling contracts through differences, the target of the bills was less to prohibit a form of practice as much as to have such transactions conducted under the umbrella of bona fide Associations like the EICA and their exchanges.⁴⁴⁸ Accordingly, a recurrent demand was that all *baras* should all be registered under the Companies Act, failing which, they should be declared as ventures for illegitimate gambling. Take for example, the Statements and Objectives of the Futures Market Bill, where P.D Himatsingka listed the problems of unrecognized *baras*.

While it is necessary to control and regulate the dealings in properly controlled Futures Markets so as to, in the words of the London Jute Association, “employ controlled speculation to assist sound trading”, it is essential to put a stop to *Baras* which are of a purely gambling nature.⁴⁴⁹

⁴⁴⁷ Central Board of Revenue, 1924, File No. 90.

⁴⁴⁸ In the 'Futures Market Bill' the EICA was given the same status as the New York Mercantile Exchange and the Liverpool Cotton Exchange, Legislative, 1930, File No. 29, NAI.

⁴⁴⁹ *Ibid*

While appreciative of the intention, the government remained wary of enacting these bills into law. The primary objection, as stated in a note by the Secretary of the Department of Commerce, was that ‘it involves excessive governmental interference in private concerns.’⁴⁵⁰ Clearly, by the second decade of the twentieth century, the Government considered the details of trading as a ‘private’ matter and were therefore weary of directly interfering or actively shaping these practices. Instead, they preferred that the regulation come from within the trade itself, mostly because they were still unable to decide or definitively legislate as to what was and was not gambling. Even in *Hazari Lal Chang Mal vs Keshodas Rangopal*, the Judge Babu Baijnath Das observed:

The line between what may be called speculation—a term which I interpret largely in the sense of making forward contracts—and gambling is a very fine one and each case has to be decided on its merits.⁴⁵¹

Das’ ruling overturned a previous decision taken by Justice Aghore Nath Mukherjee, thus indicating just how nebulous this field of law was. This confusion was not exclusive to the colony. Even the commodity markets of early twentieth century America were marked by such uncertainty. As Stuart Banner notes, in many cases it was the moral position of the judge that finally determined what they they saw as commerce and what they decreed as gambling.⁴⁵² In India too, the government’s withdrawal left the field of gambling and speculation open. Consequently, it was the competing interests and monopolistic ambitions of private players that gradually came to determine the contours of these practices. Its most

⁴⁵⁰ Legislative Department, General, Nos. 416, 1925, NAI.

⁴⁵¹ Note by W.Gaskell to A.R. Loftus Tottenham, Central Board of Revenue, 1924, File No. 90, NAI.

⁴⁵² Stuart Banner, *Speculation*, p. 70.

notable example was observed in the clash between the EICA and the Shree Mahajan Association in 1926.

The EICA vs. the Mahajan Association

As a direct challenge to the EICA's authority, the Shree Mahajan Association set up its offices on June 25th, 1925, at New Sutta Gulli, off Sheikh Memon Street, in a place called Motishaw Chawl in Bombay. In 1925, the president of the EICA, Sir Purshottamdas Thakurdas, wrote a letter to the government of Bombay and directed their attention to the activities of the Mahajan Association; practices he deemed to be gambling. He wrote a second letter to the government on October 28th, 1925, urging them to take strict action. Following this, the Association was raided on 21st January 1926 and 327 brokers and merchants were arrested under the Bombay Prevention of Gambling Act, 1887. Though acquitted soon after, the government of Bombay appealed the decision in October 1928. The charge against the Association was that it dealt in American futures, *teji mandi*, and *kachi khandi*, transactions which in the opinion of the prosecution, were pure forms of gambling. Interestingly, it was the EICA that pressured the government to apply the Bombay Gaming Act against these traders. This made their contracts criminal and not just voidable, as per the terms of the Cotton Contracts Act of 1918.

In terms of trade, the Mahajan handled a large volume of *kachi khandi* as opposed to the *pucca kandhi* contracts carried by the EICA. According to the Magistrate who first tried the case, the difference between the two was that 'in *Kachi Khandi* the minimum unit for

forward business is five bales and in *Pucca Khandi* it is one hundred bales.’⁴⁵³ Additionally, the contracts of the Mahajan Association were ‘narrow’ —they were only for fully good broach cotton and could not be substituted for fully good Bengal or fine fair staple Oomra varieties—and their contracts were cleared weekly rather than fortnightly, as was the case for the EICA. But as the appellate Judge in the case, Justice Mirza observed, the most important difference was that ‘*kacha*, as applied to cotton soudas, has come to acquire a special significance in the bazaar as meaning cotton soudas in which no delivery is taken or given or contemplated.’⁴⁵⁴ But the Mahajan contended that their practice of settling differences was no different from the EICA; the only difference was the volume. This made their exchange lucrative for small traders who could not trade in the volume required by the EICA. The prosecution on the other hand alleged that the settlements of the EICA happened once every fifteen days, as opposed to the weekly or sometimes even daily clearances of the Mahajan. More importantly, they insisted the contracts of the EICA were carried over, i.e., they were not terminated after settling differences in price, but prolonged to the point that delivery was made. This was different from *kacha khandi*, where contracts were terminated following settlement. The prosecution therefore insisted that though the Mahajan and the EICA indulged in similar practices, for the EICA settling contracts fortnightly through price differences was a method of hedging and was ‘intended to be for the protection of the brokers and intermediate parties and for regulating and controlling

⁴⁵³ *Emperor vs. Thavarmal Roopchand*, BLR, Volume 53, 1929.

⁴⁵⁴ *Ibid.*

transactions periodically before the due date.’⁴⁵⁵ To that end, a member of the EICA turned witness for the prosecution, admitted that on their exchange:

[H]edge contracts are settled by settling off once against the other and not by delivery and a large number of hedge contracts are settled from day to day. This may be so, but the difference as I understand it, is that in legitimate business Hedge or cover contracts are ancillary or subsidiary to the main contract and are merely designed to protect the operators against loss.⁴⁵⁶

Since the Mahajan did not carry over their contracts, nor show any intention of delivering actual cotton, their trade was deemed suspicious. Their weekly and sometimes daily practice of settling contracts as per the rate released by the market at Sewri Bazaar, gave their operations the appearance of number betting. This impression was reinforced by the fact that at the time of the police raid, the Association did not own a godown for storing the cotton being hypothetically traded. It was only two days after the raids that the Mahajan passed a resolution to ‘carry over contracts’, and a week after they rented a godown. Though the Shree Mahajan Association was convicted under the provisions of the Bombay Prevention of Gambling Act, they received only a light slap on the wrist in the form of a fine of Rs. 50. They assured the Court that they had rented a godown and had every intention of delivering cotton. To the ire of the EICA, they continued their operations, till in 1930 a Committee was formed under Sir Gilbert Wiles to review the workings of the Cotton Contracts Act of 1918. On the basis of this Committee’s recommendations, the government of Bombay introduced a Bill in July 1931, whose objects, amongst many, was to declare trade conducted under any other Association but the EICA criminal. M.L

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

Dantewala tells us that the Mahajan Association was quick to rally support on its behalf and were successful in amending Section 6. of the contemplated Bill. The section, which originally read ‘no forward contract shall be entered into except by or through the agency of a member of the Association [EICA]’, was amended to ‘no forward contract shall be entered into except by or through the agency of a member of the Association *or any other association*’. ⁴⁵⁷ The bill thus became a dead letter.

The episode highlights that by the 1920s, while law remained the medium of narrative, the story of colonial gambling was no longer simply of statist definition or intervention. Instead, it was private agents who used the law and the colonial court apparatus to define their trade and set its standards of legitimacy and accuse their competitors of gambling. The ubiquity of this line of attack was not limited to business alone, as even in horse racing, the fear regarding private lawsuits kept the Calcutta and Western Union Turf Club on their toes. ⁴⁵⁸

Government apprehension regarding the definition and legitimacy of betting and wagering peaked, however, in the sphere of market activity. In fact, when endorsing the provisions of the Bombay Cotton Contracts Control Act of 1918, Sir Purshottamdas Thakurdas convinced the provincial government by reassuring them that unlike the Frauds Act (1863), this Bill would hand the powers of regulating the trade to the ‘representatives of

⁴⁵⁷ Dantwala, *A Hundred Years of Indian Cotton*, p. 84.

⁴⁵⁸ Note from C.J Stevenson-Moore to the Secretary of the Government of India, Home Dept., 12th November, 1912, Police-A, July 1913, File Nos. 17-28, NAI.

commercial interests only’ and not the government.⁴⁵⁹ Such contestations also broaden our understanding of the inner workings of law, business, culture and community—categories that continue to animate the scholarship on Indian commerce. According to Tirthankar Roy, historiography has largely understood the working of ‘key institutions’ of Indian commerce through endogenous (caste norms and community networks) and exogenous (colonial legislation) factors.⁴⁶⁰ While the inner working of native commerce was structured by symbolic capital, its external presentation was directed by governmental intervention that came in the form of colonial law. Similarly, Ritu Birla argues that colonial law successfully sequestered the embedded sphere of native commerce into the private sphere of culture and the public sphere of commerce—‘the unmarked space of universal capital’.⁴⁶¹ While binaries like culture/commerce or private/public were imperfectly sealed, this characterization assumes that the field of symbolic capital resisted the externality of colonial law and State intervention. However, as this history suggests, community was not always a homogenous organizing principle, nor were the courts and colonial legal apparatus the exclusive weapons of an interventionist State. Instead, it was often members from within an ‘endogamous’ and putatively coherent ‘community’ that used ‘exogamous’ institutions to intervene in commerce and define the norms of legitimacy and illegitimacy. To that end, Mitra Sharafi demonstrates how the Parsis, a major commercial community of modern India, were highly litigious and much of Parsi personal law was the product of the community bringing suits against one another. Accordingly, Sharafi concludes that the

⁴⁵⁹ Dantwala, *A Hundred Years of Indian Cotton*, p.71.

⁴⁶⁰ Roy, “Monsoon and the Market for Money”, p. 327.

⁴⁶¹ Birla, *Stages of Capital*.

Parsis experienced colonial law as a forum that resolved internal questions of community instead of as purely foreign manifestation of colonial rule.⁴⁶² It would therefore be an overdetermination to understand government/law and community in purely oppositional terms. It is also an overdetermination to understand ‘community’ as a purely enabling entity of symbolic capital, one that provided native agents of commerce the shield of ascriptive unity as well as access to privileged flows of capital. If ‘community’ was the collective subject of native capital, then its actors should also be understood as the contracting agents of civil society, who pushed past ascribed homogeneity and adopted colonial law to target rivals and further personal interests. The appellate judge in the suit against the Mahajan Association, Justice Baker, observed as much when he described the case as ‘really a fight between the East India Cotton Association and the Mahajan Association.’⁴⁶³ W. Chadwick of the Commerce department was blunter in his pithy description of Babu Debi Prosad Khaitan’s ‘Wagering Association Bill’, as a bill designed ‘by a Marwari to prevent other Marwari’s from gambling.’⁴⁶⁴ From being a accusation leveled *against* native commerce, by the second decade of the twentieth century, gambling had become a tool in hands of commercial agents to target intracommunity rivals. Ironically, its faded origins were first encountered in Bengal in 1897, when Babu Shew Nandan Tewary was cornered similarly by a ‘man from Allahabad’.

⁴⁶² Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture 1772-1947*, New York: Cambridge University Press, 2014.

⁴⁶³ *Emperor Vs. Thavarnal Roopchand*.

⁴⁶⁴ Legislative Department, General, Nos. 416, 1925, NAL.

Why did accusations of gambling provide fodder for personal attacks and mudslinging? One of the primary reasons concerned the language of legislation, which saw gambling a social practice and therefore, a problem for and within the ‘community’. While the legal apparatus treated these consequences as self-evident, as we shall see, they too were produced discursively

Scandal!

Silence itself—the things one declines to say, or is forbidden to name, the discretion that is required between different speakers—is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies.⁴⁶⁵

I ask you to make connections, all you bring me are anecdotes.⁴⁶⁶

While referring to the tragedies precipitated by rain gambling, C.W Bolton mentioned a case of suicide in 1892 and another case from 1894, in which a son stole jewelry from his father in order to pay off his gambling debt. These were among the many examples Bolton claimed to reserve that highlighted the social harms of rain gambling. However, when the Police Commissioner of Calcutta, John Lambert submitted his report to Charles Elliot in 1894, he did not mention either of these incidents. Lambert had stated - ‘Still the state of things is such that a scandal may at any time arise’.⁴⁶⁷ Were these incidents not scandal worthy? Lambert had been scathing in his assessment and had requested legislative

⁴⁶⁵ Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, Translated by Robert Hurley, New York: Pantheon Books, 1978, p. 27.

⁴⁶⁶ *Boardwalk Empire*, Season 4 episode 8.

⁴⁶⁷ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

intervention to prohibit rain gambling in Calcutta. It can therefore be inferred that if he was aware of these incidents, he would not have hesitated in citing them.

Scandal was a powerful category, one that unfailingly kindled the interest of the public sphere. As a result, it was repeatedly deployed to describe the fallout of gambling. Tanika Sarkar argues that the emergent public sphere of colonial Bengal was constituted and inflected by the ‘process of scandal’, which operated in opposition to the culture of erudite and ‘rational’ debate.⁴⁶⁸ Sarkar describes this public sphere as one of sensational reportage, rumors and gossip that were personified in popular literature and paintings, as well as the efflorescence of obscene farces and theatre. The Bengal government hoped to utilize this ‘process of scandal’ to its own ends and generate a public sentiment against gambling.

Responding to Alexander Mackenzie’s inquiries, the Mohammedan Literary Society mentioned that the *pardanashin* women of the Surti and Memon and Moghul communities had been drawn into the game through a network of female agents and brokers. The Society alleged that many had to “have recourse to means of bad livelihood” to pay off their own or their husband’s debts. The “Members of the Marwari Community” were quick to respond, assuring the government that “Indian communities guard their females very jealously” and that incidents of such tremendous transgression would surely have caused ‘general commotion’ and attracted police attention.⁴⁶⁹ Since the police had not filed cases regarding such allegations, it could be assumed such stories were nothing more than rumor.

⁴⁶⁸ Sarkar, *Hindu Wife, Hindu Nation*, p. 53.

⁴⁶⁹ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

Again, when the topic of suicides was broached, the agitators against the Bill claimed that the government was operating without hard facts. In response, at the meeting of the Council for the Lt. Governor of Bengal, C.W Bolton stated:

Instances of ruin and crime resulting from indulgence in rain gambling have been mentioned, and it is impossible to doubt that many such cases have occurred. In the memorial presented last year, to which I have already alluded, it was stated that native bankers and merchants and young women of respectable families ruined themselves by this pernicious habit. If the Council desires to hear specific cases, I would mention two. In 1892 a young man committed suicide in consequence of his inability to repay a sum of money embezzled from his employer for the purpose of rain gambling. Two years later, another case came to notice in which a son had stolen ornaments of large value and money from his father for the same purpose.⁴⁷⁰

Such responses were anecdotal, not meticulous. Even if true, did they firmly establish the deleterious and widespread ills of rain gambling? Finding Bolton's evidence 'curious' at best, *The Indian Daily News* wondered whether "one suicide and one robbery through rain gambling" was enough to condemn the practice.⁴⁷¹ Such criticisms did not stem the flow of the affect that passed as evidence. To convince the recalcitrant Charles Elliot in 1895, *The Bengalee*, published an ethnographic piece documenting the tragedies that resulted in the rain betting houses of Burabazar. The piece was written as a conversation between a reporter and European gentleman, also an ardent gambler. A heady doze of sentimentalism compensated for the report's somewhat scanty details. When the reporter pressed on the question of suicides, he received the following answer.

"You spoke of suicides; did you ever know a suicide to take place here?"

"No, not actually here, there would be no room! But I have known many men who were once regular customers here, who are now mouldering beneath the tongueless dust; men who have gone to their last home by their own hands. A case happened

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Indian Daily News*, April 3rd, 1897.

quite recently. A Chinaman came here lost all he possessed and then sought repose in the bosom of Hooghly. Such cases are very common, and are usually recorded as ‘Suicide by drowning’ by ‘opium poisoning’, by ‘hanging’ and what not; the public have neither time nor desire to enquire into the cause of such suicides. Careful enquiry would reveal the fact that many of them are attributable to this particular form of amusement.”⁴⁷²

This ‘European gentleman’ was as solvent as any other government sources. Contesting the authenticity of such anecdotes, the agitators against the Bill claimed that a ‘careful enquiry’ would actually confirm that their practice was harmless and transparent. Bolton, however, reassured Mackenzie that the Bill had not been contemplated in haste and was the result of a ‘full enquiry’.⁴⁷³ Still, the vagueness in official language appeared remarkable. Addressing the Marwari attendees at the meeting held at 68 Cotton Street, Babu Sheodut Roy challenged “anyone to give a specific instance of a *purdanashin* lady being driven to have recourse to a bad livelihood.”⁴⁷⁴ Babu Sheonath Chowdry laid a similar challenge on the question of financial ruin.⁴⁷⁵ Again, S.N Banerjee responded to these at the Council of the Lt. Governor of Bengal:

Calcutta society was not long ago convulsed by a tale of an atrocious murder committed by a Bengali named Annoda Prosad Ghose. He murdered his sons. And when the story of his life was published, what was the most startling fact which is disclosed? He was a confirmed rain gambler, and lost the whole of his fortune, amounting to two lakhs of rupees, in the rain gambling establishment. Only the other day I was having a conversation with one of the foremost men in the Marwari community. He said there was a respectable lady living in Bara Bazar who had taken to rain gambling; she went through the whole of her money and then went astray; another person embezzled his master’s money, and then expiated his guilt

⁴⁷² *The Bengalee*, 26th July, 1895.

⁴⁷³ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁴⁷⁴ *The Indian Daily News*, March 26th, 1897.

⁴⁷⁵ *The Statesman*, March 26th, 1897.

in the Presidency jail, and there are no doubt other cases which have not seen the light.⁴⁷⁶

The public sphere refused these temptations as the incidents mentioned by Bolton and Banerjee were not investigated or speculated upon in either native or British newspapers. Despite the commercial profitability of such salacious scoops, *The Hindoo Patriot* warned its readers that ‘for the sake of the reputation of Native women, it is to be hoped that the memorialists [against rain gambling] will find it extremely difficult to prove such a monstrous allegation.’⁴⁷⁷ Accusations that the game was rigged were similarly dismissed, some labeling them as “absolutely false” and “obviously libelous”.⁴⁷⁸ Regarding the question of debt, Marwari lobbyists insisted that the safeguards of hedging built into the game meant that even a particularly unlucky player stood the risk of losing no more than 10-15 rupees in a season. The two-lakh figure quoted by Banerjee appeared outlandish. In fact, the *The Amrita Bazar Patrika*, reported the case of Babu Dinobundhu Singh and 31 others of Bankipore, were arrested and harassed through the provisions of the Public Gaming Act (1867), but were later released when it was found that they were not in fact gambling but were engaged in a Hindu marriage ceremony. The paper insisted that “hundreds of people are thus harassed”.⁴⁷⁹

The lack of hard evidence catalyzed the suspicions of the British press too. Exposing the “sublime mediocrity” of the Calcutta Municipal Corporation, *Capital* reported the details

⁴⁷⁶ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁴⁷⁷ *Hindoo Patriot*, September 22nd, 1896.

⁴⁷⁸ *Hindoo Patriot*, October 3rd, 1896.

⁴⁷⁹ *Ananda Bazaar Patrika*, 24th March, 1897.

of a meeting held in August 1896, where the Municipal Commissioners were found lacking when asked for specific details regarding the ills of rain gambling. The paper reported that

Two dissentients asked for facts and figures in support of this resolution [against rain gambling], but apparently none were produced...Possibly the committee who framed the resolution have some facts and figures up their sleeves, but if so, it is only fair that the general body of tax payers [...] should hear on what grounds the opinion of the committee has been formed. How can they [the Municipal Commissioners] present to speak of the opinion of the public without consulting them and without using the ordinary courtesy of explaining why they have delivered such an opinion on the public's behalf?⁴⁸⁰

One imagines that it would be in the interest of the government to expose these 'scandals' that spurred their actions. As the sociologist Ari Adut argues, the function and effect of scandals are best understood through the logic of publicity, which both accentuates and transforms the meaning of social transgressions.⁴⁸¹ Since a scandal was constituted by the 'public exposure of private information', the degree of secrecy correspondingly determined the magnitude of the scandal.⁴⁸² The government's evidence, however, found no such exposition. Importantly, rain gambling itself was not a hidden or secretive practice. It was conducted openly and quite publicly on the streets of Burabazar and was known to the government since at least 1894. Exposing the existence of rain gambling did not give publicity to a secret. Rain gambling was indeed a vice, but as *The Englishman* remarked-

⁴⁸⁰ *Capital*, 23rd September, 1896.

⁴⁸¹ Ari Adut, "A Theory of Scandal: Victorians, Homosexuality and the Fall of Oscar Wilde" *American Journal of Sociology*, Vol. 111, No. 1 (July 2005), pp. 213-48. In his study of the trial of Oscar Wilde, Adut shows how British civil society were aware of and quite tolerant towards Wilde's homosexuality for some time before his trial. Wilde's 'deviancy' was only established when the Marquess of Queensberry ran a campaign broadcasting this information publicly and Wilde's own flamboyancy and flippant attitude during his public trial did not help matters. Adut thus concludes that the nineteenth century British public sphere was in fact a 'reign of appearances' where the logic of collective action and social control was actualized only when 'deviancy' was actively publicized.

⁴⁸² *Ibid.*

“condemning the practice is one thing, stopping it another.”⁴⁸³ However, the stories of financial ruin and sexual transgressions were instrumental in drumming up moral and public support for the Bill. Crucially, these incidents were presented as threats to the moral institution of the family. Heads of households were committing suicide or murdering their children, sons were stealing from their fathers and wives were selling heirloom jewelry and going ‘astray’. So, the discussion around gambling was actually a discussion about something else entirely, where anecdotes, gossip and rumor constituted a more effective armory than facts, figures and numbers. According to Max Glockman, the credibility of both scandal and gossip are reinforced when they elaborate on predominantly held social values and community standards as well as their transgression.⁴⁸⁴ Were Banerjee and Bolton marshaling such tropes for political ends? The practitioners of the game raised their own defenses and shared with the public stories of Tewary’s public gifting. A contributor to the *Indian Mirror* expressed surprise when he discovered on his visit to a gaming house that the gamblers ‘were not the demons I thought they were.’ In fact, ‘Old Tewary, almost an octogenarian, daily feeds a large number of Sadhus’, practices that were emblematic of his impeccable social merits.⁴⁸⁵ Armed appropriately, a speaker at the Marwari gathering at 68 Cotton Street, Babu Sheonath Chowdry, denounced the idea that rain gambling could ever compromise the respectability of Hindu women. Chowdry laughed at the suggestion that “*Hindu* female chastity, after having withstood for countless generations every other method of assault, had suddenly succumbed to the approaches of the wily rain gambler”.

⁴⁸³ *Englishman*, March 19th, 1897.

⁴⁸⁴ Max Glockman, Luis White.

⁴⁸⁵ *The Indian Mirror*, Friday October 9th, 1896.

⁴⁸⁶ Had he forgotten that the matter of women gamblers and sexual transgression was originally raised by a section of the Surti Muslim community in the context of *purdanashin* women? Were the Surtis, a mercantile community like the Marwaris, using the bogey of rain gambling to attack their commercial rivals, or was there merit to their accusations? A more textured investigation regarding women gamblers, both as practitioners and as discursive construct, is needed.

Economic Agents or Custodians of Culture

It is challenging to capture the unmediated voices of women in the available literature on colonial Indian gambling. They appear at archival margins, presented as unsound financial agents and prey for conmen and sharpers. Placed as victims, their subjectivity is further mediated by their status in the native family structure. Instead of being seen as economic agents or consumers, women were rendered domestic, private and cultural agents; the wives or the mothers of their respective homes.⁴⁸⁷ Colonial anthropology and law were instrumental in locating women through this lens of kinship; the latter constituted women as the domestic subject of governance.⁴⁸⁸ In the context of gambling, they were represented as ‘respectable women’ who had fallen from grace. This image of ‘respectability’ met the

⁴⁸⁶ *The Statesman*, March 26th, 1897.

⁴⁸⁷ Kinship and how colonial anthropology penetrated the discourse of women by understanding their subjectivity within a family or kinship system. In this respect, the figure of the rape victim or the ‘mourning mother’.

⁴⁸⁸ Scholars such as Janaki Nair, Radhika Singha, Mrinalini Sinha, amongst others have argued that the inscription— women as wife/mother/widow— was especially pronounced in the case of urban, upper-class/caste women, although Prabhu Mahapatra argues that even working-class women and indentured laborers were framed through similar legal technologies. Prabhu Mahapatra, “Restoring the Family: Wife Murders and Making of a Sexual Contract for Immigrant Labour in British Caribbean colonies, 1860-1920, *Studies in History*, Vol. II. 2, 1995, pp. 225-60.

economic and the cultural ends of an incipient nationalism, particularly regarding the discourse of *swadeshi*, which insisted on keeping western values and its commodities out of the native home. Notwithstanding some nominal yet legitimate contestation⁴⁸⁹, it is largely acknowledged that nationalist discourse and colonial law unproblematically converged in reifying the native structures of patriarchy. This included the category of ‘respectability’, which in turn played a crucial role in defining the cultural ambitions of a new urban middle class. Colonial law thus ensured that the native domestic sphere was governed by personal, religious and customary laws which preserved and reinforced patriarchal privileges. Defining and safeguarding the notion of ‘respectability’, particularly for women, was crucial in maintaining this form of power. Accordingly, the ‘respectable woman’ became the standard bearer and reservoir of an incorruptible autochthonous culture.⁴⁹⁰ Accordingly, the ‘respectable woman’ gambler was shadowed by twin anxieties. The first concerned her engagement with a moral vice and the second involved the exercise of her agency as an autonomous economic subject.

S.N. Banerjee’s rhetoric played on these nascent *bhadralok* anxieties when he presented women as gullible victims, ‘lured’ from of their homes, trapped in debt and then forced to compromise on their ‘respectability’. Alexander Mackenzie on the other hand, embraced the domestic sphere as the only place where gambling could exist respectably:

We are not entitled to interfere with rain gambling except so far as it is carried on in a common gaming house. It is open to all the Marwaris in the place to remain in

⁴⁸⁹ Mitra Sharafi, “The Semi-autonomous Judge in Colonial India: Chivalric Imperialism meets Anglo-Islamic Dower and Divorce law, in *Indian Economic and Social History Review*, 46, 1, (2009): 57-81.

⁴⁹⁰ Partha Chatterjee, “Colonialism, Nationalism, and Colonialized Women: The Contest in India” *American Ethnologist*, Vol. 16, No. 4 (Nov., 1989), pp. 622-633.

their own courtyards and have as many of their European friends as they please, and to sit there with all the appurtenances for gambling and bet away till midnight if they like.⁴⁹¹

Mackenzie thus attempted to flip the cultural defense and along with it the broader questions of morality. The administration had no problem with gaming in private homes, he claimed, just with a ‘common gaming house’. If gambling was indeed a native custom, practiced during weddings and religious holidays (Diwali), then its place, quite unproblematically, was in the home. In all probability, Mackenzie was duplicitous in this offer. Even as custom, gambling was purely ritualistic and if it were to be practised routinely it would threaten sanctity of the domestic space itself. He had to simply look to the history of English gambling to confirm this contention. The nineteenth century historian, John Ashton, in his *History of Gambling in England*, provides glimpse at how ‘homes’ were turned into ‘gaming houses’ through the clever appropriation of the domestic veneer. Unsurprisingly, in the archives of gaming histories, this is one of those rare cases where women were presented as perpetrators instead of as victims. In recounting the stories of the ‘faro ladies’ of London, Ashton narrated the history of those women who ran faro (a card game) circles from their homes. A satirical headline titled “Modern Hospitality or a Friendly Party in High Life”, captured the unease these soirees produced amongst Londoners condemning the overlay of commerce with domesticity.⁴⁹² Faro parties were conducted by ‘respectable’ women like Lady Archer and Lady Buckinghamshire, who traded social capital for pecuniary returns. They threw lavish dinners where guests played

⁴⁹¹ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁴⁹² John Ashton, *The History of Gambling in England*, London: Duckworth and Co. 1898, p. 76.

faro, baccarat and roulette, while the hostess actively encouraged them to play on credit or to take loans from friends. The events were held in different houses and most of the women organizers hired their own muscle for debt collection, some of them even keeping pistols on their own person. Ashton admits that their spouses were equal partners in the ruse.⁴⁹³ Yet, it was the domesticity of the settings that made women the target of newspaper editorials, like the one in the *Morning Post* on January 12th, 1800, which claimed that “society has reason to rejoice the complete downfall of the *Faro Dames*, who were so long the disgrace of human nature.”⁴⁹⁴

Similar attitudes inhabited native dwellings too. Gambling had no place in Bengali and Marwari homes and if it did, it certainly held no place for the women of that home. The urban middle class household in Bengal was undergoing a process of material and social transformation in the late nineteenth century that saw it embrace a new standard of morality which refashioned the discourse on women’s pleasures. Women’s sexual pleasure in particular was increasingly tethered to the moral fulfillment found in motherhood. The household, sanitized of questionable traditions, reflected this new standard. Sumanta Banerjee details how sexually explicit songs of wandering Vaishnavs, which were popular in the homes of upper class Bengalis, were gradually marginalized towards the end of the

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*, p.79 This was just one of several newspaper articles that Ashton quoted to malign the *faro women*. Indeed, while women played a key role in organizing such evenings, their role was amplified in the public sphere because of the corruption of the home. Ashton concludes his narrative with the thoughts of one Col. Hanger and his sanguine verdict - “Can any woman expect to give to her husband a vigorous and healthy offspring, whose mind, night after night, is thus distracted?”

nineteenth century.⁴⁹⁵ Charu Gupta documents a parallel process amongst Marwaris, where sexually explicit *gari* songs that were sung by women during weddings or festivals like Holi, were condemned and targeted as a site for moral reform in the late nineteenth century.⁴⁹⁶ This condemnation fell within the broader process of reification of the domestic function of Marwari women, who Hardgrove suggests were gradually anchored to the concept *pativrata* that valorized the ethic of wifely duty and devotion.⁴⁹⁷

The social discourse that accompanied the economic mobility of nineteenth century Bengal demands further investigation, as do the charges of the infidelity of *purdahnashin* women, which were loosely coded as ‘recourse to bad livelihood’ or as ‘going astray’. Contrary to its presentation, in reality it was not uncommon to find women from respectable households turn to prostitution in late nineteenth century Calcutta. Scholars like Sumanta Banerjee and Janaki Nair show that in spite of the material and moral precariousness of prostitution, the profession promised certain freedoms for women that lay outside the suffocating control of middle-class domesticity. Accordingly, even as a section of upperclass women criticized the profession publicly, they coveted the economic and personal freedoms they thought its practitioners enjoyed.⁴⁹⁸ However, from information

⁴⁹⁵ Sumanta Banerjee, *Under the Raj: Prostitution in Colonial Bengal*, New York: Monthly Review Press, 1998, pp.24-28.

⁴⁹⁶ Charu Gupta, *Sexuality, Obscenity, Community: Women, Muslims, and the Hindu Public in Colonial India*, New York: Palgrave, 2002.

⁴⁹⁷ Hardgrove, “Sati Worship and Marwari Public Identity”, *Journal of South Asian Studies*.

⁴⁹⁸ Sumanta Banerjee lists other compelling reasons that saw respectable women turn to prostitution in times of distress. The most common cause was born from the cruel treatment imposed on young *kulin* widows who lived harsh and austere lives in their married homes. The cruelty of in-laws or husbands drove even married women away from home, many taking shelter in the only profession they could access, prostitution. Additionally, even women who loved outside the institution of marriage, but were later abandoned by their

gathered on these activities, which relied heavily on colonial regulatory laws such as the Contagious Diseases Act (1868), gaming debts were rarely cited as a cause of prostitution. As Ashwini Tambe demonstrates in her narrative regarding the horrific torture and murder of a sex worker named Akooti, it was the debts incurred from ordinary moneylending and usury that drove women to prostitution.⁴⁹⁹ Though far more deleterious, this form of usury rarely faced the same manner of censure as shall be argued in the following chapter.

Expanding the scope of discussion beyond Bengal will help gauge how allegations were circulated as familiar tropes in the discourse on gambling. In his letter to H.J Maynard, the Judicial and General Secretary to the Government of Punjab, Madan Gopal Rai had claimed that rain gambling ‘ruined thousands of families...the losers have in some cases committed suicide.’⁵⁰⁰ Though Rai did not mention women directly, he did repeat an accusation previously made in Bengal when he claimed that ‘people sell their wives’ and children’s jewelry and stake everything on chance.’⁵⁰¹ Similarly, the Deputy Commissioner of Gujarat, J.R. Drummond claimed that gambling effected ‘our own young people, servants and apprentices’ and ‘this is just the class that the native community believes to have, of late, enjoyed an increased measure of immunity.’⁵⁰² His opinion was reinforced by the testimony of W.M Hailey, the Chief Commissioner of Delhi, who filed a report on rain and opium gambling in 1916.

paramours often turned to prostitution. Sumanta Banerjee’s information regarding the demographic and social make up of prostitution rests on the efforts of the colonial regulatory apparatus of the late nineteenth century.

⁴⁹⁹ Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay*, London: University of Minnesota Press, 2009, pp. 79-99.

⁵⁰⁰ Home Department, Judicial A, Proc. February 1901, Nos. 1-2, NAI.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

It is beyond doubt that the system invites and encourages the very poor to risk sums which they cannot afford to lose and has a direct result in driving the unsuccessful to crime. In view of the ruin which this practice brings to the coolie and servant class, the more enlightened ranks of Indian society regard the presence of these shops and the public manner in which their transactions are conducted as a blot on our administration.⁵⁰³

Hailey's report also mentioned a note by Mr. Humphry, the Deputy Commissioner of Police, who in 1908 informed the Commissioner of Delhi about increase in petty crimes, which the 'respectable community' linked to the thriving practice of unregulated gambling. Humphrey personally made a trip to the site of activity, Eagerton Road, where he noted particular excitement amongst large crowds that gathered on the street when the monthly betting shops released their results in the first week of every month. Humphrey observed that regular bettors were not men of business or even education. Instead the population comprised chiefly of coolies, sweepers, *Kahars*, labourers and occasionally some zamindars of neighbouring villages.⁵⁰⁴ He also noted that the *Kahars* were responsible for several petty crimes committed in the city, and was quick to conclude that the fault lay with reckless gambling. His note, however, made no mention of women gamblers, although he did describe an incident where a *faqir*, having lost his possessions at one of these shops, had killed a prostitute and stolen her ornaments.⁵⁰⁵

Such allegations were repeated in 1911, when Calcutta was gripped by the menace of 'Cotton Figure Gambling'.⁵⁰⁶ The game, dubbed as a 'get rich quick' scheme, was reported

⁵⁰³ Home, Police-A, June, 1916, Nos. 96-97, NAI.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Home Department, Police-A, Proceedings, 96-96, June, 1916, NAI.

to have a ‘remarkable fascination’ amongst the ‘lower orders’ of society.⁵⁰⁷ In his note appraising the Government of India of the situation, the Chief Secretary to the Government of Bengal, C.J.S Moore reported that “From the specimen tickets which have come to the notice of Government, it appears that the poorest section of the community are being widely attracted by the excitement of cotton gambling.”⁵⁰⁸ Moore repeated the testimony of the rain gamblers from 1897, when he claimed that the amount bet rarely exceeded Rs. 1 anna. The large number of players and the total volume of play, however, still made for a substantial haul. In fact, it was the low stakes that attracted both women and players of the ‘poorest classes’ to try their luck. There was nothing in the report regarding *purdanashin* women. In spite of the unmistakable inflection of upperclass anxieties, provincial governments and British officials viewed deleterious gambling as largely a subaltern and working-class problem

Interestingly, it was in native reports that frequently mentioned the threat that gambling held for ‘respectable women’. Take for example the report of a sub-committee of the Delhi Municipality, a body comprising of Indian ‘respectable classes’:

Not only men but women also send money through their watermen or water women, to be staked in opium gambling, and if they have no servants they do it through their neighbours [...] Later the women become emboldened and attend the gambling house in person, without the knowledge of their guardians and wander about the streets and are disgraced and when their guardians come to know of it, and scold or punish them, they generally end in suicide, by throwing themselves down wells or running away from their homes.⁵⁰⁹

⁵⁰⁷Home, Police-A, April, 1912, Nos. 116-118, NAI.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

One must also account for a degree of displacements in these accounts. If ‘respectable’ opinion had an axe to grind, it should have been with the horse racing, a game that denotes risk, fraud, and intemperance in upperclass Bengali discourse even today. Take for example Mrinal Sen’s 1965 film *Aakash Kusum*, in which anytime the lead protagonist, a young entrepreneur from a declining middle-class family, contemplates a risky business venture, Sen cuts to the image of a horse race. But when the issue of turf betting was raised in 1897, S.N Banerjee absurdly declared that ‘betting on the turf is supported b the opinion of the *civilized* world and a legislator wastes his breath who legislates in violent opposition to public sentiment.’⁵¹⁰ How true was this statement?

As early as 1871, the Police Commissioner of Calcutta, H.L Harrison, had observed that ‘poor clerks and others are plied by designing men to subscribe to a reckless course of foreign gambling (Derby Sweeps), the worst feature of which is that it is not at all understood in this country.’⁵¹¹ The popularity of the turf and an unchecked pullulation of unlicensed bookmakers and bucket shops⁵¹² was responsible for attracting a large section of the native population to horse racing. As a result, the Governments of Bengal and Bombay passed the Race Course Licensing Act (1912), which decreed that only bookmakers registered with the Calcutta Turf Club and the Western Indian Turf Club could legally handle the betting action of these courses. This, however, did not rid the practice of moral accusations. In fact, during the discussions regarding the Bengal Cotton Ordinance

⁵¹⁰ Legislative Department, Legislative, Part B, Proceedings 24, March, 1897, NAI.

⁵¹¹ Judicial, Proceedings 221-223, May 1871, Bengal State Archives.

⁵¹² In this context, Bucket shops refer to informal and unlicensed shops where race goers could place bets on a device called the *totaliser*.

Act in 1913, a member of the Bengal Legislative Council, Mr. Chakravarty, accused the Stewards of the Turf club of sending agents to register bets in the neighborhoods of Bhawanipur and Alipore, even from women.⁵¹³ In the same year, an anonymously published pamphlet titled *The Curse of Race Course Gambling*, leveled serious charges against the turf authorities:

Recent numbers of the Calcutta and Bombay Sheet Racing Calendars have published columns of closely printed names of defaulters on the turf— men who have failed to pay their gambling debts. This list includes the names of the officers of the Army, of the different Government Civil Departments, of mercantile assistants, clerks etc. This list is silent on the subject of men who have shot, poisoned or drowned themselves after being ruined through race course gambling.⁵¹⁴

These accusations were also framed vaguely and exploited a similar format. However, since neither the Bombay nor the Bengal government considered horse racing a problem, the efficacy of this rhetoric was quite impotent. A telling example of this is witnessed in the discussions related to the Bombay Totalizator Betting Tax Bill. The Bill contemplated giving the Government of Bombay the power to levy a 4% tax on totalizators and on bookies that operated on the premises of these Western Indian Turf Club. The government contended that the tax would generate six lakh rupees in revenue, a notable sum that could be redeployed for municipal works in Bombay. Several members of the Bombay Legislative Council, however, opposed the Bill and accused the government of tapping into an immoral revenue stream. Mr A.N Surve was one such member. In presenting his case,

⁵¹³ *Ibid.*

⁵¹⁴ Home, Judicial-A, Aril 1913, Nos. 170-172.

he employed the same tropes that legislators had previously used to corner rain gambling.

However, his exchange with Ness Wadia was quite revealing:

Mr. A.N. Surve: I am told that once in Poona a man came from Bombay with one lakh of rupees in his pocket and when he lost about rupees sixty thousand in a race meeting his heart was broken and he fell down dead.

Mr. C.N Wadia: When did it happen

Surve: I do not know the exact date. I have asked a question whether there were such accidental deaths in the racecourse at Poona, but it has not been answered yet. But what I stated is from information obtained by me from non-official sources.

Wadia: May I ask what he lost

Surve: He lost 60000. That is what I was told, but of course I have no official information on the point. I have asked a question on the point, but as I said, it has not yet been answered. Perhaps the answer may be given during the course of this session.

Wadia: Can the honorable member state the year in which this took place?

Surve: It occurred within the last three years.
(Laughter)⁵¹⁵

Wadia's mockery appears odd, given that he was the Chairman of the Bombay Mill Association at the time. In fact, one of the accusations leveled at the same meeting was that the government had reduced the weekend fare of railway tickets so that mill workers could travel from Bombay to Poona to attend the races held there as well. Evidently these workers, who otherwise corresponded to the category of 'lower orders' or 'weaker sections' that anti-gambling laws purportedly protected, garnered little sympathy.

⁵¹⁵ Legislative, No. 232/III/25-G, 1925.

So, while allegations peddling stories of suicide and crime fell flat in the case of horse racing, it held a mystical power when it came to native games of chance. The discourse hinged on the fears of ‘respectable’ native opinions. By including ‘respectable’ women within the ambit of discussion, this discourse extended a protectionist appeal that the ‘lower orders’ would not have generated on their own. More importantly, clubbing ‘respectable’ women with the ‘lower orders’, produced a homogenous category of vulnerable economic subjects; populations described as ‘ignorant and unwary’ and the perfect target of a swindler.⁵¹⁶ Take for example of the statement made by Dr. Sarvadhakari, while addressing the Bengal Legislative Council in the context of horse racing:

But on the race-courses very much more goes on than even the Turf Club Stewards know, and the self-same *school boys* and *zenana ladies* who suffered from the evils of cotton gambling...suffer.⁵¹⁷

Such was the delicacy of *zenana/purdanashin* women, that their economic acumen was comparable to that of schoolboys.⁵¹⁸ The effective assumptions of the discourse rendered further evidence redundant. Its enduring force was witnessed in verbatim repetitions in future cases of gambling, be it Bengal, where in the case of ‘cotton gaming’ the Finance Secretary Henry Wheeler remarked ‘its prevalence has all the makings of a *scandal*’.⁵¹⁹ A

⁵¹⁶ *Ibid.*

⁵¹⁷ Shimla Records, Legislative Department, May, 1913, Nos. 8-15, NAI. Emphasis mine.

⁵¹⁸ Legally, however, *purdanashin* women were not on the same footing as minors and children for the purposes of the Contract Act. While contracts struck with minors were considered void, this was not true for *purdanashin* women. *Pardanashin* women were legitimate contracting agents, although those striking contracts with them had to demonstrate that the woman understood the nature of the contract she had entered. The reason - ‘The jurisdiction rests on a presumption of imperfect knowledge of the world and exposure to undue influence.’ Radhika Singha has shown how this clause was gradually weakened over the course of the twentieth century as the State grew weary over the number of *benami* transactions conducted under the cover of *purdah*. On the other hand, Singha also highlights the allegations made by sections of the native community who claimed that unscrupulous creditors would prey on the vulnerability of *purdahnashin* women by lending them money at high interest, and then pressuring them to pay through the threat of exposure and dishonor.

⁵¹⁹ April 1912, Police-A, Proc. Nos. 116-118, NAI.

few months later, when introducing the Bengal Cotton Gambling Ordinance, a member of the Governor's Council, emphasized that the Ordinance was not intended for the 'general enforcement of public morality', rather, it provided 'protection to the *ignorant* and *unweary* and the prevention of a *scandalous* state of things'.⁵²⁰ Again, as late as in 1929, in the proceedings to amend the Public Gaming Act in Punjab, Sir Fazl-i-Husain remarked

Complaints were received by government that satta gambling is on the increase, that it is an evil which is impoverishing the people to such an extent that it has become a very great *scandal* to which can be attributed the ruin of a large number of families in very many towns in Punjab...in Hoshiarpur satta gambling was on the increase and the *ignorance* of the people made them easy victims to being run into gambling dens.⁵²¹

This constant repetition naturalized a sentiment that captured ambiguous anxieties; *scandal* was inevitable when the *ignorant* gambled or struck contracts of a betting or wagering nature. Scandal entailed social evils like crime, suicide and prostitution, consequences that the law assumed to be self-evident even as they were generated through the legal transcript itself. Both effectively and affectively, scandal rallied public opinion for the purposes of law.

In his article titled "The Kalki Avatar of Bikrampur", Sumit Sarkar describes an incident from Bengal which contained all the elements of scandal even though it failed to translate into one. Sarkar concludes that this sensationalist event, full of reformist value, was ignored by Bengali civil society because it did not involve any conventional transgressions and

⁵²⁰ Legislative, May, 1913, Proc. Nos. 8-15, NAI.

⁵²¹ Legislative, 1929, File No. 50/II No. 1-3, NAI.

therefore it was ‘impossible to derive any moral message’ from the incident.⁵²² This was not the case for rain gambling or any gambling for that matter, which corresponded to the moral and social anxieties of a modernizing urban populace. Ironically, if the scandalous rape and death of the underage girl Phulmoni had catalyzed the passage of the Age of Consent Bill in 1891, in the case of the Bengal Rain-gambling Act, it was the law that searched for a scandal to justify its enactment.⁵²³ The stories of ‘respectable’ woman gone astray functioned as a trope, similar to the ‘mourning mother’ or the ‘rape victim’, which Charu Gupta argues were ‘common symbolic constructs in fundamentalist nationalist and colonial rhetoric for wider mobilization.’⁵²⁴ These tropes were deployed anecdotally so that they circulated as an unending apprehension in public discourse. As Anjali Arondekar argues, it was in the nature of the colonial archive to keep transgressive sexuality as “obvious and elusive - undeniably anecdotal, yet rarely sustainable in any archival form”.⁵²⁵ This ‘necessary absence’ and play between ‘invisibility/hyper-visibility of sexuality’ fulfilled its functional purpose, where the truth regarding the incidents of scandal remained immaterial to its sustenance ‘as a constantly unfolding narrative.’⁵²⁶

Perhaps in a final tabulation, the losses suffered through stock and commodity speculation resulted in more cases of suicide than rain gambling. This, however, was not the point. At a time when the legal definition of gambling had turned increasingly fungible, its social

⁵²² Sumit Sarkar, *The Kalki-Avatar of Bikrampur: A Village Scandal in Early Twentieth Century Bengal*, in *Subaltern Studies Vol. 6*, Delhi, Oxford University Press, 1994, p. 43.

⁵²³ Sarkar, *Hindu Wife, Hindu Nation*, p. 63.

⁵²⁴ Gupta, *Sexuality, Obscenity, Community*, p. 9.

⁵²⁵ Anjali Arondekar, *For the Record: On Sexuality and the Colonial Archive in India*, p. 14

⁵²⁶ *Ibid.*

connotations were one of the few ways in which it was distinguished from resemblant commercial practices. So, while many remained unsure regarding the technical differences between forward contracting, options, wagering and gambling, they knew at least that gambling resulted in morbid consequences, especially for ‘*ignorant*’, ‘*weak*’ and ‘*vulnerable*’ populations that corresponded to the ‘*lower orders*’, *pardanashin* women and children. The investigation, however, would be left incomplete if we fail to compare the government’s attitude regarding the capacity of such vulnerable and ‘ignorant’ populations in spheres of contracting other than gaming. The following chapter does so by looking at the Amendment to the Contract Act that sought to bring parity between ‘ignorant peasants’ and ‘intelligent moneylenders.’

CHAPTER 4

Commercial Contracts: The Pedagogy of Political Economy

The man who has escaped the Marwari's grip with a whole coat on, has the makings of a Finance Minister in him.

These words conclude a section titled 'A Solemn Warning' in the Marathi social reformer, B.M Malabari's polemical piece on the Marwaris of the Gujarat and Bombay provinces.⁵²⁷ His prejudice can be traced to a perception generated towards the community in the build-up and aftermath of the Deccan riots in 1875. Part of a series of rural unrests spurred by agrarian distress, the Deccan riots turned emblematic of the balance needed when marrying the principles of political economy to the social relations of agrarian production. The riots, which ostensibly concerned the high indebtedness of the cotton cultivating Marathi Kunbi peasants of Western India, spawned discussions regarding commercial farming and contracting, land dispossession and political unrest. Having occurred shortly after the Indigo and Santhal rebellions, the political ramifications of the Deccan riots had once more put the sustainability of credit-based cultivation and commercial agriculture in question. The focus of mercantile financing had shifted from opium to cotton in Western India in the 1850s, a process that was coterminous with the declining importance of Malwa opium in the Chinese market. The cultivation of Malwa opium and its export to China began in the mid eighteenth century and remained mostly shielded from the monopolistic ambitions of the British East India company till the late 1820s. Its shipping through the port of Bombay was gradually arrested following the final Anglo Maratha war in 1818, though its inland

⁵²⁷ Behranji M. Malabari, *Gujarat and the Gujaratis*, Delhi: Mittal Publication, 1885, Reprint 1983, p. 196.

and sea movement continued through Sindh till the 1840s.⁵²⁸ Marwari merchants were involved in every step of the trade; they financed the cultivation of the crop through loan advances, had collection agents (*gomastha*) secure the produce, and had wholesale merchants ship the processed opium. Following the abrupt decline of opium, the enterprise re-oriented itself around cotton. This is where the story of the Deccan riots begins. While the outcome of the riots is historiographically contested, its causal factors yield scholarly consensus. These can be condensed in the following manner.

The introduction of the *ryotwari* settlement in the Deccan resulted in a degree of social atomism that disturbed the customary arrangement of revenue collection in the region. Previously organized on communitarian grounds, where the Patel or the village headman would collect revenue from the village collectively, the system gave way to individual and direct agreements between the ryot and the state. As land revenue was assessed and fixed through the Ricardian principles of rent, the economic importance of the moneylender grew at the expense of the Kunbi Patel farmer. The social makeup of monied capital also transformed during this period as the urban *sowcar* supplemented the village *vani* as a financier during the agricultural season. Both collaborated in fueling cotton cultivation by

⁵²⁸ For a wider History see, Amar Farooqui, *Opium City: The Making of Early Victorian Bombay*, Gurgaon: Three Essays Press, 2006; *Smuggling as Subversion: Colonialism, Indian Merchants and the Politics of Opium*, New Delhi: New Age International Corp., 1998; "Opium enterprise and colonial intervention in Malwa and Western India, 1800-1824", *Indian Economic and Social History Review*, Volume: 32 issue: 4, page(s): 447-473 Issue published: December 1, 1995; See also, "The Indian Empire and Peasant Production of Opium in the Nineteenth Century", *Modern Asian Studies* Vol. XV (1) 1981, pp. 59-82.; See also Om Prakash, 'Opium Monopoly in India and Indonesia in the Eighteenth Century', *IESHR*, Vol. XXIV (1) 1987, pp. 63-80, See also, Amalendu Guha, 'Parsi Seths as Entrepreneurs: 1750-1850', *Economic and Political Weekly*, Vol. 35, 1970, pp. M-107-15; See also Archana Calangutcar, "The Marwaris in Opium Trade: A Journey to Bombay in the 19th Century", *Proceedings of the Indian History Congress*, Vol. 67 (2006-2007), pp. 745-753, and "Marwaris in the Cotton Trade of Mumbai: Collaboration and Conflict (1850-1950)", *Proceedings of the Indian History Congress*, 2012, Vol. 73 (2012), pp. 658-667.

giving individual ryots seed advances at the beginning of the cultivation process and distress loans at the time of revenue collection. While facing rapid marginalization in the economic sphere, the Kunbis also saw their juridical authority replaced by colonial courts; the latter were keen on elevating the tenets of contract amongst cultivators. This shift in legal authority favored moneylenders once more, as contractual disputes were settled usually in favor of the *vani* and *sowcar*. Concurrently, Act XXVIII of 1855 (The Usury Repeal Act) repealed the stipulations on interest rates in Bombay that were in operation since 1814 and which limited interest on secured and unsecured loans to 6% and 12% respectively.⁵²⁹ The high interest rates placed on advances trapped ryots in long term debt cycles which were mostly paid in produce. By securing cotton at an undervalued rate merchant-lenders were also able to maintain their monopolies over networks of local trade. The ryot's situation improved briefly in the 1860s when the global supply of cotton was disrupted by the American Civil War. As the demand for Indian cotton grew in this period, its price rose correspondingly. Whether these gains reached the producer is debatable. While Kumar and Neil Charlesworth claim that the price increase allowed peasants to temporarily escape the debt cycle, Jairus Banaji and David Hardiman insist that the bump in price did not percolate to the small proprietor.⁵³⁰ Unquestionably, however, the cultivators did experience the crash in prices once the supply of American cotton was restored. A significant development complemented this downturn in the price of the commodity. Sumit Guha demonstrates how land prices in Western India witnessed a

⁵²⁹ David Hardiman, *Feeding the Baniya: Peasants and Usurers in Western India*, Delhi: Oxford University Press, 2000, p. 50.

⁵³⁰ Jairus Banaji, *Theory as History: Essays on Modes of Production and Exploitation*, Chicago: Haymarket, 2011, pp. 299-207; Hardiman, *Feeding the Baniya*, p. 274.

notable uptick in the 1860's in comparison to the 40s when there was little value or activity in the market.⁵³¹ As prices increased, title deeds were sought as securities for advances, thus inflating the region's total volume of debt. The legal changes that accompanied these economic transformations also had an effect on the cultivators. From 1810, debt contracts shifted from customary enforcement to the field of civil law and by 1840, the number of contracts that were contested in the newly established Civil Courts had grown exponentially.⁵³² The process was exacerbated by the Limitations Act (1859), which stipulated that suits for money debts be settled within a period of three years. The increase in the number of mortgage bonds from the late 1850's indicates that the land that was held originally by Kunbi cultivators was, on paper, gradually transferred to the *vani*. The process gained further momentum a decade later when land prices increased. During this period, ryots were denied distress loans to meet their subsistence requirements and revenue demands, as *vanis* hoped that defaulting peasants would have their land seized and auctioned through revenue courts where its title deed could be later secured.

The immediate spark came from the Francis Settlement, which re-assessed the revenue rates in the Deccan region and increased them substantially by including wasteland within the ambit of rent. Even as peasants complied during the boom in the 60's, by the 1870's they were unable to keep up with payments. A couple of years of inadequate rainfall, coupled with ruthless implementation of revenue collection saw a large number of Kunbi

⁵³¹ Sumit Guha, "Commodity and Credit in Upland Maharashtra, 1800-1950", *Economic and Political Weekly* Vol. 22, No. 52 (Dec. 26, 1987), pp A126-A138.

⁵³² Hardiman, *Feeding the Baniya*, p. 51; Ravinder Kumar, "The Deccan Riots of 1875, *Journal of Asian Studies*, Vol. 24, No.4 (Aug. 1956), pp. 613-635, p. 616.

peasants slip into the dispossessed sharecropper category. Things were at a boil, and in May and June, 1875, riots targeting the *vani* and the *sowcars* erupted in the Pune and Ahmednagar regions of the Deccan. Though moneylenders were spared of physical harm, their homes were invaded and their debt bonds and ledgers were destroyed. There is some disagreement over the historical interpretation regarding the outcome of these riots. Ravinder Kumar explains them as a reaction to the progressive dispossession of landholding Kunbi families to an ‘outsider’ community of moneylending Marwaris. Charlesworth, on the other hand, argues that the traditional landowning elite were never seriously threatened by the aggrandizing ambitions of the Marwaris and that only 5% of the land under plough in the Deccan was directly owned by the Marwari *sowcar*. Instead, he believes that the riots should be read as a reaction of the Kunbi’s marginalization in the legal and social structure of the region.⁵³³ Similarly, Kumar argues that it was the colonial legal machinery that had emboldened and abstracted the *vani* from the rural social structure; his power presented little threat to the Patels earlier, since it was on the Patel’s authority that loans were recovered in the first place.

The riots precipitated the passage of the Deccan Agriculturalist Relief Act of 1879, an emergency law that targeted predatory lending and land alienation.⁵³⁴ The more enduring

⁵³³ Neil Charlesworth, “The Myth of the Deccan Riots of 1875”, *Modern Asian Studies*, 1972, Vol.6, No. 4 (1972), pp.401-421. He argues it was the high caste brahmin moneylender—the Yajurvedi-Deshast caste—who enforced actual possession. This community largely escaped the ire of the Kunbis, partly because the elided the outsider tag, but mostly because the urban based Poona Sarvajanic Sabha that lent support to the raiyats, was composed largely of the same community.

⁵³⁴ Title deeds attached to debt bonds were now to be valid only when the agreement was executed in front of a court registrar. Additionally, courts were given the right to go behind the contract when they felt it had been executed through ‘undue influence’, or if it outrightly contradicted the principles of equity. A new insolvency law through which the ryot could declare bankruptcy, was also contemplated.

impact of the riot was the imprint it left on the colonial imaginary, as it convinced a sizable section of colonial officials that the unrest was symptomatic of brewing socio-economic upheavals exposed by commercial cultivation and that these tensions held longterm political consequences. Charlesworth, however, dismisses these claims as an exaggeration, or ‘myth’ created by a section of alarmists who instrumentally used the riots to steer colonial agrarian policy in a more paternalist direction. Accordingly, he labels it as somewhat of a glorified ‘grain riot’ that indicated ‘no symptoms of revolutionary or social change’.⁵³⁵ Yet, as Sugata Bose rightly points out, even if the empirical evidence of transfer and dispossession of land remains contestable, ‘indebted peasant labour, left in possession of smallholdings but brought firmly under the sway of moneylending capital, [did] represent a real measure of social and economic change under colonial rule’.⁵³⁶ Eventually, the Deccan riots drew in the colonial state more intimately in the role of mediating this neoteric fiscal and legal relation between the moneylender and peasant. By doing so, it incited two coeval yet contradictory impulses that lay dormant in the government machinery; one engaged the Government’s paternal instincts, germinating from the need for political stability, while the other addressed its penchant for the abstractions of political economy which was tied to the process of wealth extraction. This chapter looks closely at the discussions held between 1892 and 1898, which finally led to the Amendment to the Contract Act in (1899). In doing so, it examines the explicit tensions between protectionist and free market discourses, first highlighted during the Deccan riots, particularly when it

⁵³⁵ Charlesworth, “The Myth of the Deccan Riots of 1875”, p. 421.

⁵³⁶ Sugata Bose, *Agrarian Bengal: Economy, Social Structure and Politics, 1919-1947*, Cambridge: Cambridge University Press, 1986, p. 10.

came to the principles of ‘free contracting’ and ‘free bargaining’. In a different context, Andrew Sartori aptly describes this liberal contradiction as the ‘celebration of capitalistic development as the practical foundation of freedom’, and its counter ‘critique of capitalist development as the abolitions of the conditions of freedom.’⁵³⁷

In the previous chapter, I explicated the official position on rain and other forms of gambling, which were attacked for generating debt amongst the ignorant, the poor and vulnerable classes, who were putatively coded in official discourse as the ‘*the weaker sections of society*’. I showed how various forms of native gaming were characterized as morally degenerative and socially deleterious—it corrupted women and children, it was responsible for bankruptcy and suicide amongst the commercial classes, it precipitated crime (theft and murder) and it eroded the work ethic of the community at large. Importantly, I described the nature of this discourse as one that was deliberately vague; the absence of specific examples underlined the ubiquity of the dangers. This chapter contrasts that characterization with a more familiar discourse of debt, one which was incurred by small peasants through free contracting in the context of commercial farming in the late nineteenth and early twentieth centuries. The aim is to uncover the operation of a singular discourse—debt; a concept that was sequestered into operative categories—*social* (gambling) and *economic* (commerce). One typified debt as a threat to the social order, while the other regarded it as instructive for native progress and productive for colonial enterprise. While the individual categories may appear atomistic and non-

⁵³⁷ Andrew Sartori, *Liberalism in Empire: An Alternative History*, California: University of California Press, 2014, p.16.

integrative, it is important to see them not as contradictions, especially not when their common aim lay in vitalizing the colonial liberal order.

An Amendment for Parity

The DARA was only a palliative for the early faults that emerged in the system of commercial agriculture. A broader and more permanent solution was still required. So, shortly after the passage of the Bengal Tenancy Act of 1885, a nationwide discussion was broached on limiting small peasant indebtedness and land transfers without harming the existent system of rural credit. From 1892 to 1898, the Government of India contacted Judges, legislators and revenue and police officers for their opinions regarding an Amendment to the Indian Contract Act. The most notable question in the discussion concerned the expansion of the term ‘undue influence’ so that it incorporate the categories of ‘simplicity’ and ‘ignorance’: Could contracts struck between a peasant and a moneylender be declared void if the lender had exploited the borrowers ‘ignorance’ and committed the latter to blatantly unfair terms?⁵³⁸ The question of a related change to Section 111 of the Indian evidence Act was also put before the interlocutors, where the onus of proving ‘good faith’ would be placed on the party that benefitted from the agreement. The Amendment also contemplated allowing judges to declare ‘unconscionable’ contracts void, where the terms of the contract went against the putative

⁵³⁸ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

tenets of equity. The question of repealing Act 28 of 1855, which had lifted the legal limit imposed on interest charged on money contracts, was also raised.⁵³⁹

Many of the answers in the correspondence showed distinct sympathy towards the condition of smallholding peasants. The more affective accounts furnished specific details of predatory lending, which trapped ryots in long term debt cycles that were commonly passed on to their next generation. The opinions resist racial categorization, since both sets of officers, Indian and British, lamented the condition of the small cultivator while drawing attention to the precarious conditions under which the rural usurer operated. The sheer volume in responses impedes general elaboration. Instead, let me start by quoting the note sent by the renowned legal scholar and Judge in the Calcutta High Court, Justice Syed Ameer Ali, which also turns emblematic for the purposes of the following discussion:

Hitherto, the views of the government, as well as the Judicature, have been largely influenced—I might say, hampered—by English legal notions; and the idea about “freedom of contracts” has been turned almost into a fetish. Courts of Justice, especially the inferior tribunals, often prone to take a narrow view of equitable considerations, have either had no discretion, or felt themselves so fettered in its exercise as to be wholly unable, unless the borrower succeeded conclusively in establishing the bargain to be fraudulent, to reduce the interest, however extortionate, or to modify or rescind the contract, however hard or unconscionable....The courts seldom interfere to protect the impecunious *ryot* whose *necessities* force him to borrow from the village *bunniah* grain for seed and food, or money for marriage expenses at 50 to 100 percent. The working of the *dadni* system, wherever it prevails, is well known. Cases have come before me in which an advance of 30 maunds of paddy to be paid at the next harvest, with 50 percent addition, has swelled into the course of a few years to 150 maunds... A person borrowed Rs. 4,000 from a *Mahajan* in one of the Behar districts in eight years that amount swelled up to Rs. 32,000. There was no doubt as to the extortionate character of the claims, but it was a “free bargain” and in the absence

⁵³⁹ *Report of the Bengal Provincial Banking Enquiry Committee, Vol. 1, (RBPBEC)* Calcutta: Bengal Government Press, 1930, p. 198.

of any special circumstances, the Courts that had to deal with the case felt they had no discretion to reduce the claim for interest.⁵⁴⁰

Once filtered through Ali's concerns, the broad issues raised in the correspondence regarding the Amendment can now be unpacked. Recently, post-colonial South Asian scholarship has pointed to the concept of 'over-legislation', a practice and ideal in colonial governmentality after the transfer of power in 1858. The practical problem here was the generation of multiple laws covering a related field or a singular subject of law.⁵⁴¹ Take for example contracts, a subject that was covered by the workings of the Contract Act of 1872, but which remained equally inundated by the provisions of the Public Gaming Act, The Limitations Act, The Specific Relief Act, the Negotiable Instruments Act, and more recently the DARA. While these laws overlapped in subject, they responded to different legal principles as well as substantive administrative concerns. While the Civil Procedure Code (1859) instituted a formal procedure for juridical decision making, over-legislation served to undercut the instructive value of the code. Each ruling, therefore, responded to a formal or substantive rationale that corresponded to each specific law. Ali felt, more often than not, the principle elevated by most judges was a formal adherence to the 'freedom of contract', and the notion of 'free bargains'.

⁵⁴⁰ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁴¹ Tirthankar Roy; Anand V. Swamy, *Law and the Economy in Colonial India*, Chicago: University of Chicago Press, 2017, p. 7.

Essentially aligned to mercantilist practices, the principle of ‘freedom of contract’ had been resurrected as one of the cornerstones of ‘liberty’ in the positivist legal tradition of Europe. Money contracts, however, overcame a more challenging and hostile history. Far from archetypal, ‘usury’ went against medieval Christian dogma, which considered all time as theological time and viewed the merchant’s practice of charging interest as a blasphemous form of mortgaging.⁵⁴² The belief was gradually eroded when commercial and mercantile wealth grew exponentially through a flourishing Mediterranean trade. This new wealth helped revive and build cities like Bruges and Antwerp in the fifteenth century.⁵⁴³ Antwerp notably became a center of financial innovation, exulting novel advancements in marine insurance and money markets by 1564.⁵⁴⁴ The latter, where profits depended on the fluctuation of currency rates, was a particularly significant development. According to Francesca Trivellato, this medieval form of arbitrage indicated ‘private finance’s incipient autonomy from commodity trade.’⁵⁴⁵ By the early 18th century, under the aegis of Montesquieu and the French Physiocrats, the medieval antipathy towards usury had been

⁵⁴² See Jacques Le Goff, *Time Work and Culture in the Middle Ages*, translated by Arthur Goldhammer, Chicago: Chicago University Press, 1977, pp. 29-43 and *Your Money or Your Life: Economy and Religion in the Middle Ages*, translated by Patricia Ranum, New York: Zone Books, 1990.

⁵⁴³ Henri Pirenne, *Medieval Cities: The Origins and the Revival of Trade*, Princeton: Princeton University Press, 2014

⁵⁴⁴ Jairus Banaji, “Merchant Capitalism”, in *The SAGE Handbook of Marxism*, ed. Beverly Skeggs, Sara R. Farris, Albert Toscano, Svenja Bromberg, London: Sage Publication, 2021, p. 10.

⁵⁴⁵ Francesca Trivellato, *The Promise and Perils of Credit: What a Forgotten Legend About Jews and Finance tells us about the Making of European Commercial Society*, Princeton: Princeton University Press, 2021, p. (2) Much to the resentment of the landed nobility, the 17th century saw mercantile classes translate their wealth into discernible forms of political influence. A cultural maneuver was also afoot, where ‘usury’ was uncoupled from Christianity and made to settle onto a distinctly Jewish history. Trivellato thickly details the making of ‘Jewish Usury’, a history that began with the legend that European Jews had invented ‘Bills of Exchange’ as a financial instrument for salvaging their wealth during successive expulsions from the Kingdom of France in the 7th, 12th and 14th centuries. The legend persisted in spite of evidence of Christian banking communities like the Lombards, Cahorisins, Guelfs, who used bills of exchange in their moneylending operations too. A legacy of European cultural stereotypes, however, rendered ‘Jewish Usury’ as ‘bad business’, which was contrasted with ‘prudent, upright and legal ways of handling bills of exchange’. p. 61.

largely dispelled. As a result, by 1787, Jeremy Bentham could confidently declare that one should be at ‘the liberty of making one’s own money bargains’, adding that ‘this meek and unassuming species of liberty has been suffering much injustice.’⁵⁴⁶

In Bengal, however, the English East India Company set it’s sails against these Continental winds. Within five years of Bentham’s public defense of the individual’s right to determine interest on money contracts, the Government of Bengal capped the amount to 6% and 12% for secure and unsecured loans respectively. The Governments of Madras and Bombay followed in 1802 and 1814 respectively. The prevalence of rural usury predated the Company, of course. According to Irfan Habib, peasants frequently borrowed to pay off land revenue demands under the Mughals, while smaller amounts went towards personal expenditures like marriages and festivals.⁵⁴⁷ As evidenced from the prevalent rate of near 150% charged on simple interest bonds in Bengal during the eighteenth century, only a nominal eye regulated this market.⁵⁴⁸ It is unclear whether the limits imposed by the Company on interest rates provided actual relief to cultivators and rural borrowers. Interestingly, in 1855, only a few months before the conclusion of the Santhal rebellion that had been precipitated by high tribal indebtedness, Act 28 was repealed. The repeal had a crippling effect on the cultivators of the hinterland. The Deccan riots exposed the fallout

⁵⁴⁶ Jeremy Bentham, “In Defense of Usury”, in John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 3, New York: 1962, p.4.

⁵⁴⁷ Irfan Habib, “Usury in Medieval India”, in *Comparative Studies in Society and History*, Jul. 1964, Vol. 6. No. 4. pp. 393-419, p. 395.

⁵⁴⁸ While usury was prohibited by Islamic law, members of the Muslim community engaged in usury too, a practice that continued into the nineteenth century as evidenced from the extensive networks of Pathan moneylenders in the Punjab. Neeladri Bhattacharya, “Lendors and Debtors: Punjab Countryside, 1880-1940, *Studies in History*, 1,2, n.s. (1985) Sage Publication, New Delhi.

of this unregulated market, and by the time of the correspondence regarding the Amendment, several officials appeared eager to forward rebuttals to Bentham's vision of liberty. J. Whitmore, the District Judge of Birbhum declared that "Act 28, has most certainly never been in touch with anything or anybody but a group of Western thinkers, of whose ideas at the present moment the West itself is growing tired."⁵⁴⁹ The Financial Commissioner of the Punjab added that even England had shed its fidelity to laissez faire economics and embraced a 'modified socialism', which privileged security of population over the sanctity of individual interest.⁵⁵⁰ Ali's critique, however, had been a distant cry from 'socialism'; it simply questioned the meaning of 'freedom' within the given standards of liberalism itself. Was the raiyat truly 'free' and on 'equal footing' when he borrowed money under duress and conditions of *necessity*; if not, how did the system maximize his liberty? That all kinds of borrowing responded to some form of necessity, remained a foil to Ali's contentions. The Collector of the Godavari district forthrightly stated that 'To say that a lender shall not take advantage of the borrowers necessities is to strike at the root of money-lending.'⁵⁵¹ The subdivisional Judge of Allahabad, Pandit Suraj Narayan felt given the risky environment in which the lender operated, the courts needed to account for his 'necessities' as well. These arguments obfuscated Ali's core objection, which only when placed against the backdrop of commercial agriculture, appears appreciably forceful. So, the system as whole deserves closer scrutiny.

⁵⁴⁹ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

The Commercial Problem

It would not be misleading to suggest that the Bengal Tenancy Act of 1885 signaled a shift in the colonial government's economic strategy in the Subcontinent. The Act reflected the state's declining faith on zamindars, both as capitalist farmers entrusted with improving the conditions of agrarian productivity and as loyal political subjects. A related change concerned the nature of wealth extraction, in which land revenue was heavily complemented and somewhat sidelined by usuriously financed commercial agriculture as the primary mode of the surplus appropriation. Commercial agriculture heralded India as a site for cheaply produced cash crops that would service globally integrated manufacturing industries located overseas. While commercial agriculture expanded unprecedentedly from the 1870's, its origins can be traced to the infrastructural advancements of the 1850's. Primary among them were the introduction of technologies like the telegraph and the railways that provided peasants of the hinterland information regarding the real time prices of commodities as well as the facility to transport them to coastal trading ports. Additionally, the railways nurtured national grain markets that allowed cultivators to shift their land acreage from food crops to cash crops like cotton, jute, poppy, tea, sugar, oil seeds and tobacco.⁵⁵² With the notable exception of tea, which was cultivated in plantations, many of these crops were produced through a 'putting out system', where merchant financed the ryot through advances, but the ryot still controlled the means and

⁵⁵² B.B Chaudhuri, "Commercialization of Agriculture", *IESHR*, March 1, 1970; 7 (1); 25-60, pp.30-33. Chaudhuri for example notes that as the national market for grain expanded due to the railways, the national aggregate acreage of rice cultivation fell. As centers like Bengal could now produce and transport rice to different parts of the country, the demand and need for locally cultivated rice reduced. This was particularly true for Western India, where the demand for Bengal rice grew when Marathi ryots began growing cotton on their land.

organization of production. It was the intricacy of this system that bred the phenomena of widespread rural debt.

Brilliantly thick descriptions of the arrangement are found in Omkar Goswami's and Saugata Mukherji's studies on jute cultivation in Eastern India.⁵⁵³ To give an idea of the system's complexity, Goswami shows how between the fields and the consumer, "jute went through nine layers of intermediaries, three transport systems, the mill sector with its conflicting entrepreneurial groups, speculators, shippers, balers, eleven industry and trade associations, and importers."⁵⁵⁴ Importantly, the chain demonstrates just how far removed the average Bengali peasant was from the market for which he/she produced. Sugato Bose views this as a 'conceptual problem', one where 'agrarian society with an extensive subsistence base...[was] at the same time tied firmly to a far-flung market.'⁵⁵⁵ The reason, he observes, was that the market came to the peasant rather than the other way around. Only a fifth of the peasant's produce in jute, for example, was sold directly by the cultivators in local *hats*, that too by *jotedars* (large peasants). The rest was procured by a series of intermediaries like the *farias* (itinerant jute peddlers), *beparis* (merchants) and *aratdars* (secondary market merchants). While some *farias* were self-financed, most were local level purchasers or commission agents for *arhatdars*. Who were these *arhatdars* that purchased raw produce? Rajat Ray insists that unlike in the case of oilseeds, cotton and most importantly food grains, jute was dominated by European baling houses, commission

⁵⁵³ Omkar Goswami, *Industry, Trade and Peasant Society: The Jute Economy of Eastern India, 1900-1947*, Delhi: Oxford University Press 1991.

⁵⁵⁴ *Ibid.*, p.6.

⁵⁵⁵ Bose, *Agrarian Bengal*, p. 34.

agents and the mill owners of Bengal.⁵⁵⁶ Since mills were unwilling to purchase jute from non-European brokers, even native Marwari merchants connected to the trade were forced to pay a brokerage fee to European agents to process their product. However, Goswami argues that in spite of the power wielded by the European Baling Houses, the day-to-day movement of the raw jute trade remained primarily in Marwari hands, the lower end occupied by the Marwari *aratdar* and the upper end in the hands of whole sale Marwari exporters. The dominance of the Marwaris in procuring, storing, and marketing raw commodities (particularly jute and grain) increased significantly after the First World War.⁵⁵⁷ The nodes of control made little difference for the average Bengali ryot, since his labour and marketing power remained subordinate to the monopsony of the commission agent and moneylender. Eventually, the manner in which the crop was acquired remained tied to the system of credit that fueled its production. Like jute, cash crops for export like opium, cotton, sugar, oil seeds and tobacco were cultivated through credit forwarded through financial instruments like *satta patras* or *karjapatras*. These instruments or direct cash loans were advanced to peasants to cover their costs of production, which included seed purchases, maintenance of drought animals, labour charges for weeding and

⁵⁵⁶ Rajat Ray, 'The Bazaar: Changing Structural Characteristics of the Indigenous Section of the Indian Economy before and after the Great Depression', *Indian Economic and Social History Review*, 23, 3 (1988), New Delhi: Sage, pp. 264-315, p. 313.

⁵⁵⁷ Goswami, *Industry, Trade and Peasant Society*, p. 50. Goswami provides a more forceful rebuttal to Ray's argument regarding the 'exclusive dominance' of European capital in Eastern India elsewhere, and remarks on the myth that "Students of Indian economic history still tend to believe that the history of modern industry in Eastern India is simply a story of unrelenting hegemonic control of European managing houses.". Omkar Goswami, 'Then came the Marwaris: Some aspects of the Changes in the Pattern of Industrial Control in Eastern India', in *The Indian Economic and Social History Review*, 22, 3(1985), Delhi: Sage. The argument regarding the gradual rise of the Marwaris from arterial intermediaries of European firms to a dominant position in industrial takeover from the early twentieth century is also documented by B.R Tomlinson in, "Colonial Firms and the Decline of Colonialism in Eastern India", *Modern Asian Studies*, 15(3), 1981, p. 234.

harvesting of crops, etc. Why the Marwaris came to dominate this credit market is explained by the command this tightly knit banking community held over streams of liquid capital. The capital circulated through negotiable instruments like the *hundi* and its intra-community availability was sustained through bonds of kinship.⁵⁵⁸ While other commercial communities, notably the Parsis employed capital in industrial investments that promised long term returns, the Marwaris preferred to keep their capital liquid in order to work in a 'high risk geographical and economic environment.'⁵⁵⁹ Accordingly, Marwari financiers held control over financial networks tucked within the hinterland, like in the case of cotton, where Europeans dominated the overseas operations but held little control over the channels that brought the crop from the interior to the ports.⁵⁶⁰

Let us now turn to the operation of cash advancements and how it came to dominate peasant labor. The earliest and most coercive form of this system was witnessed during indigo cultivation in Bihar and Bengal in the late eighteenth to the mid-nineteenth centuries. European planters would advance cash payments to small proprietors so that they grow indigo on lands over which they held tenant rights. The advance represented a contract which gave the planters the right to dictate the crop the ryot should grow. It did not, however, grant any formal right over the cultivator's title deed on the land or lock the price

⁵⁵⁸ For a fuller history of the *hundi* (from the early 17th to the 21st centuries) see, Rajat Ray, "The Bazaar" and Lakshmi Subramanian, "Capital and Crowd in a Declining Asian Port City: The Anglo-Bania Order and the Surat Riots of 1795", *Modern Asian Studies*, Vol. 19, No. 2 (1985), pp. 205-237 .

⁵⁵⁹ Tirthankar Roy, *A Business History of India: Enterprise and the Emergence of Capitalism from 1700*, Cambridge: Cambridge University Press, 2018, p.95, Goswami maintains that the situation changed by the 1920's following the huge capital gains made by Marwari bankers in the last two years of WWI. 'Then Came the Marwaris', p. 231.

⁵⁶⁰ Roy, *A Business History of India*, p. 82.

of the indigo purchased, it only ensured the acreage of land on which it was grown. Indigo was not the only crop that was cultivated through this arrangement. The *sahukars* in Saurashtra, for example, denied *raiya*s seed and food advances if they did not agree to plant cotton on their lands.⁵⁶¹ These arrangements reflect the skewed relations between land and labour in the early nineteenth century, where it was the labour that was coveted, not the land. In the absence of a formal Contract law, Act V of 1830 made the breach of contract a criminal charge, though it was only a veneer for the brute force employed by European planters and Bengali factory officers operating the system. The cash advancements led to the maintenance of a debt ledger and a loan account for the peasant that was (partly) cleared when he/she delivered the crop. The first signs of systemic resentment appeared in the early 1850s, when the price of grain grew higher than that of indigo. Peasants demanded the right to self-determination, many preferring to grow the more remunerative rice crop instead of indigo. Extra-legal coercion implemented through illegal confinement and torture failed to dent their resolve and by 1859 the cultivators declared open rebellion against the planter's demands. Armed with stamp paper agreements and books of accounts, the planters took the ryots to court, accusing them of a breach of contract. A majority of these cases were dismissed by the judges and others were withdrawn by the planters themselves.⁵⁶²

⁵⁶¹ Hardiman, *Feeding the Baniya*, p. 131.

⁵⁶² The stamp papers produced were often blank with only the ryot's thumb print or signature. Those that were filled in did not carry any provisions for compensation regarding the breach of contract. Roy, *Law and Economy*, p. 132

The rebellion catalyzed an immediate vigor, one that led to formalizing a nationwide Contract Act. By 1866, a committee headed by John Romilly completed the first draft of the Act and the task was completed by Sir Henry Maine in 1872. Informed by her close reading of Maine's *Village Communities*, Karuna Mantena argues that Maine's ideological commitment differed from past Utilitarians who had harnessed law to effect social and political changes in the colony. Maine, on the other hand, viewed the relation between the east and west through the prism of 'cultural relativism', an idea that informed the doctrine of 'indirect rule' that held sway during Maine's time as Law Member to the Viceroy's Council.⁵⁶³ He was, however, forceful in replacing the authority of customary arrangements with codified law for governing the legality of agreements. The Contract Act was thus modeled on the principles of English common law, which was felt to be appropriate for adjudicating commercial disputes that developed over the course of colonial modernity. Tirthankar Roy, however, sees things differently. He argues that commercial laws like the Contract Act borrowed generously from 'secular' mercantile conventions that predated British colonialism. Drawing on the lineage of an active coastal trade, Roy argues that 'custom' played little to no part in the deals struck between Indian, Portuguese, or Arab merchants, since the communities held very few customs in common.⁵⁶⁴ So, while the Contract Act of 1872 did integrate parts of Common Law, it also incorporated significant departures from its principles. Crucially, one of them concerned the principal of *ignorance* - 'an act performed in ignorance of a proposal but consistent with it could

⁵⁶³ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton, Princeton University Press, 2010.

⁵⁶⁴ In fact, from 1862-72, when most commercial disputes were adjudicated in the High Courts of India, the judicial principle of 'equity' held precedent over any specific Indian custom or tenet of common law.

count as acceptance of the proposal'.⁵⁶⁵ The other addressed penalties regarding a 'breach of contract'.

With an eye on the conditions of indigo cultivation in Bihar and Bengal, 'breach of contract' initially fell within the purview of criminal law in the 1830's. Though the institution of the Civil Procedure Code and the Contract Act shifted it to civil law, the provisions for imprisonment continued till 1926 in India, as opposed to England, where penal punishment was abolished early as 1875.⁵⁶⁶ The discrepancy was due to laws like the Workman's Breach of Contract Act of 1859, a law designed to subordinate the labour of plantation workers and indentured laborers in the tea estates of Assam and British overseas colonies.⁵⁶⁷ The Act provided for three months of imprisonment when a worker, who having accepted an advance for his/her labor, ran away or refused to work for their employer. The penal consequences of this debt bond bolstered this system of indenture. As a result, when the government of Bengal contemplated abolishing imprisonment of *purdanasheen* women for breach of contract in the 1880's, the association of Bengal's landed gentry, the British Indian Association, warned against its general application. They argued that the revocation would 'sap the foundations of Indian society in the relations between the debtor and creditor.'⁵⁶⁸ The alarm was unwarranted, as imprisonment for breach of contracts continued undisturbed through the nineteenth and early twentieth

⁵⁶⁵ Roy, *Law and Economy*, p. 136.

⁵⁶⁶ Singha, "Colonial Law and Infrastructural Power", p. 114.

⁵⁶⁷ Nitin Verma, "Coolie Acts and the Acting Coolies: Coolie, Planter and State in the Late Nineteenth and Early Twentieth Century Colonial Tea Plantations of Assam", *Social Scientist*, May - Jun., 2005, Vol. 33, No. 5/6 (May - Jun., 2005), pp. 49-72, Sunanda Sen, "Indentured Labour from India in the Age of Empire", *Social Scientist*, January-February 2016, Vol. 44, No. 1/2 (January-February, 2016), pp. 35-74.

⁵⁶⁸ Singha, "Colonial Law and Infrastructural Power". p. 115.

centuries. Evidence of this appears in the testimony of the Judicial Commissioner of Burma, H.F Ashton, who conveyed in a lengthy note sent to the Chief Commissioner in 1893, how small proprietors were rapidly falling under the yoke of serfdom:

In the last stage the peasant proprietor becomes a mere serf and signs a service bond, which enables the moneylender landlord to imprison him for debt if he ceases to work for his creditor.⁵⁶⁹

The discussion regarding the Amendment to the Contract Act in 1893, seemed aware of the problems the administration had actively fanned. Officials acknowledged that the financial and juridical apparatus that facilitated commercial cultivation had also pincered the peasant and aggrandized his rapid decline into servitude. Some, like Durga Dat Joshi, the Munsif of Bilgram, documented the odious operation of debt bonds and its pervasive circulation in the countryside:

As regards the agriculturist his dealing with the money-lender begin and end thus. He always lives from hand to mouth. It is very seldom that he has any savings. So at the commencement of every 'rabi' or 'kharif' he goes to the time honored mahajan for the loan of the seed grains. This done he is need of irrigation expenses. Unless the money-lender advances cash in time the poor agriculturalist is undone. Very often he has to obtain grain loans for sustenance of his family and himself. And when the harvest time comes the landlord (himself an impecunious man) presses hard for his rents. He will not wait till the tenant can sell his grain in the best markets. So the latter has no option but to propitiate the mahajan. The latter pays the rent. This done, he assesses the grain at mahajani rate (which is more disadvantageous than the bazar rate).⁵⁷⁰

At this point, the peasant was firmly under the grip of the *mahajan*. Apart from interest, the latter would fix a penalty for an impending default. Following default, the *mahajan*

⁵⁶⁹ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

Note from Durga Dat Joshi, Munsif Bilgram 11th August 1893, ⁵⁷⁰ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

would approach a civil court and attach the peasant's standing crop as the terms of penalty. Joshi's conclusion was cynical, describing migration as the only option where the peasant would repeat the same story 'under another landlord and a ubiquitous money-lender'. The universal problem then was the operation of these credit and cash advances which enabled merchants/moneylenders to acquire the peasant's crop. Credit instruments like the *satta patras* (forward contracts) were instrumental in allowing the merchant/moneylender to maintain price domination over the ryot's produce.⁵⁷¹ According to *Report of the Bengal Provincial Banking Enquiry Committee*, 1928 (RBPBEC), though *satta patras* were 'undertakings to deliver fixed quantities of produce at much below than market price', since they met the peasant's need of food, seed and labour during a time of insolvency, 'borrowing on such unfair terms was possible.'⁵⁷² *Satta patras* were comparably equitable to the terms in certain distress loans extended to ryots lacking securities. The Secretaries of the *Berar Sarvajanik Sabha* informed the Commissioner of Hyderabad in 1894, of "Laoni agreements" where the peasant received a third or fourth of his crop's market rate in lieu of a cash advance.⁵⁷³ These were similar to the contracts penned by the *dadandars* in Bengal, in which an excessively high interest was disguised in the procurement price of the peasant's produce.⁵⁷⁴

⁵⁷¹ Bose, *Agrarian Bengal*, p. 110.

⁵⁷² RBPBEC Vol.1, p. 71.

⁵⁷³ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁷⁴ Goswami shares an example of such a loan from the 1920's, 'which bound the debtor to deliver 16.5 *maunds* of jute against a loan of Rs. 33, i.e., at Rs 2 per *maund*, at a time when the average harvest price during the past three years was Rs 7.65 per *maund*.' *Industry, Trade and Peasant Society*, p. 37.

While credit advances crippled the agriculturalist at the time of planting, his powers of negotiation remained as anemic during harvest. In the monsoon months of *Sravan*, *Bhadra*, *Aswin*, when the jute crop was weeded and harvested and the *aaman* rice crop was transplanted in Bengal, the rate of interest on cash loans jumped from 2-3% a month to almost 16-17%.⁵⁷⁵ It was during harvest, however, when the peasant needed immediate liquidity to meet his/her many cash obligations. The least of them involved the expenditures on *id* and *durga puja*, festivals which coincided with the jute harvest. The heavier payments included rental and land revenue payments. On paper at least, rental dues had plateaued towards the end of the nineteenth century, especially after the passing of the Bengal Tenancy Act of 1885. One of its more significant inclusions had granted ryots with occupancy status to pay their rent in cash instead of produce. In many cases, however, monetary rents still exceeded the concomitant rise of crop prices or the bump in prices was mitigated by the increased cost of cultivation precipitated by the decrease in productivity of the land and a shrinkage in available acreage.⁵⁷⁶ The punctual enforcement of revenue collection by intractable revenue officers exacerbated the peasant's problems. As early as 1822, the Commissioner of the Deccan Districts, William Chaplin, observed that 'the ryots in many villages, though usually frugal and provident are much in debt to *sowcars* and merchants owing to the oppression of revenue contractors.'⁵⁷⁷ In 1894, the Judicial Commissioner of Burma confirmed similarly, when conveying that most Collectors

⁵⁷⁵ *Ibid.*

⁵⁷⁶ Sugato Bose, *Agrarian Bengal*; Rajat Ray, "The Crisis of Bengal Agriculture, 1870-1927— the Dynamics of Immobility" *The Indian Economic & Social History Review*. 1973;10(3):244-279, p. 259-60.

⁵⁷⁷ *Extracts from the Reports of the Deccan Riots Commission*, in S.C Ray, *Agricultural Indebtedness in India and its Remedies*, Calcutta: Calcutta University Press, 1915, p. 1.

regarded the moneylender an adjunct, not an encumbrance to the system of revenue collection.⁵⁷⁸ Apart from revenue, peasants were also burdened by the illegal exactions charged by landlords. In Bengal, for example, cess was demanded by zamindars in the form of *abwabs*, the levying of which grew increasingly common once the Tenancy Act placed checks on the enhancement in rental rates. Apart from extracting surplus from the ryots, *abwabs* were also the ‘the symbolic demonstration of the landlord’s power’ over his estate.⁵⁷⁹ The tightest squeeze, however, came from the moneylenders themselves who turned remarkably inflexible regarding loan repayment during the harvest period. Faced with the threat of court proceeding, cultivators were forced to sell their produce at farm gate prices instead of holding their crop till market demand generated a better purchasing rate. The outcome squarely benefitted the merchant/usurer, who secured his supply of raw commodity well below its market value. Importantly, this crunch in the ryot’s liquidity was forcibly maintained.⁵⁸⁰ Rent and revenue demands as well as the Government’s currency policy, precipitated by its constant interference in native money markets, further limited the small peasant’s capacity as a consumer. This had a stunting effect in growing domestic markets for the consumption of Indian agricultural goods.⁵⁸¹ Officials once again

⁵⁷⁸ Note by H.F Ashton to Chief Commissioner of Burma, 6th July 1894, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁷⁹ Partha Chatterjee, *Bengal, 1920-1947. Volume I; The Land Question*, Calcutta: Bagchi, 1984, p. 18. Jack, for example noted that the *abwabs* in Bakarganj in 1921 was more than the land revenue and a quarter of the entire rental.

⁵⁸⁰ Sugato Bose, *Agrarian Bengal*, p. 62; In Bengal, for example, it was the fluctuations in global demand and the buying price of the rupee that determined the price of commercially cultivated crops; the latter was precipitated by the government’s constant interference in native money markets that spuriously increased the value of the rupee and therefore affected the relative value of occupancy mortgages in a manner that benefitted the usurer/mortgagee. This was also reported by Ashton in his report. Note from H.F Ashton to Judicial Commissioner of Burma, July 6th, 1894, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁸¹ Ray, “The Crisis of Bengal Agriculture, 1870-1927”, p. 256. This topical problem was inherited by the post-colonial State, and even today a downturn in rural spending acutely impacts the gross domestic production of a largely agrarian country like India.

recognized their role in debilitating the peasant's ability in marketing his/her crop. Justice Chatterji of the Chief Court of Punjab held the government's fiscal policy responsible for requiring landowners to have 'ready money at stated times of the year', lacking which he turned to the moneylender.⁵⁸² As Shahid Amin notes, for the sugarcane farmers in Gorakhpur, 'in a world dominated by consumption, seed and rental loans, the rigid enforcement of *qist* payment by a colonial regime assumed a force of its own.'⁵⁸³ The Inspector General of Registration of Madras, Srinivasa Raghavaiyengar, had therefore suggested that along with the Amendment to the Contract Act, the government should also revise the 'installments fixed for the payment of land revenue, with greater reference to the periods at which the ryots sell their produce in different parts of the country'.⁵⁸⁴ These aspirations, more often than not, were thwarted through powerful lobbies, as Rajat Ray demonstrates through an example drawn from Dacca in 1914.⁵⁸⁵

Apart from cash loans, small peasants also relied on grain advances to meet their food requirements through the year. The preponderance of widespread subsistence advances in late nineteenth and early twentieth century is explained by Shahid Amin as the 'great

⁵⁸² Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁸³ Shahid Amin, "Small Peasant Commodity Production and Rural Indebtedness: The Culture of Sugarcane in Eastern Uttar Pradesh, 1880-1920", in *Credit, Markets and The Agrarian Economy of Colonial India*, Ed. Sugar Bose, Delhi: Oxford University Press, 1994, p. 129.

⁵⁸⁴ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁵⁸⁵ There, the District Magistrate recommended a loan of Rs. 2.5 lakh for the ryots reeling from the dramatic fall in raw jute prices during the initial year of the First World War. European balers, however, viewed the loan as a form of temporary liquidity, which they believed would help peasants hold their crop till they received better prices for it. As a result, they applied pressure on the government through the Bengal of Chamber of Commerce and had the loan rescinded. Ray, "The Crisis of Bengal Agriculture, 1870-1927", p. 265.

difference between the working time and production time' in peasant economies.⁵⁸⁶ In a detailed study of sugarcane cultivation in Western Uttar Pradesh, Amin shows how the production cycle of the crop enveloped and exceeded labour time. Mechanized manufacturing and the glut in rural consumption had led to a decline in artisanal manufacturing, which meant that the sugarcane cultivators who had earlier interspersed their labour between farming and artisanal labour, now required subsistence loans to see them through unproductive periods. In this context, the *RBPBEC* also confirmed that even the smallholding jute cultivators in Bengal 'from the time of sowing till the crops are harvested [are] practically left without any income and needs financial help that moneylenders provide.'⁵⁸⁷

The evidence of subsistence loans reinforces the credibility of two ongoing arguments—the alienation faced by peasants in holding and marketing their produce and their feeble position as consumers. Why were grain cultivators unable to store enough produce to see them through lean seasons? The lack of storage facilities was a pervasive reason, but the confluence of artificial strains was likely more responsible for this anomaly too. A compelling factor concerned the shift in rent collection that had moved from cash to produce rents towards the end of the nineteenth century.⁵⁸⁸ The transition in many cases was enabled by dominant agricultural groups like the Moga Jats, the Kunbi Patels, the

⁵⁸⁶ Amin, "Small Peasant Commodity Production and Rural Indebtedness" p. 120. "The production process consists of working period and a period during which the form of existence of the commodity is abandoned to the sway of natural processes, without being at the at time in the labour process. Crops taking time to grow is the productive process. Thus, unproductive labour has to be sustained over long periods."

⁵⁸⁷ *RBPBEC*, Vol. 1, p.108.

⁵⁸⁸ Chatterjee, *Bengal, 1920-1947*, pp. 17-31.

Jotedars in North Bengal and the Gurjars in Central provinces. These landed communities were looking to tussle monopsony away from merchant moneylenders and control the marketing of grain themselves. The nature of native money markets and the structure of credit financing, however, impeded the success of these groups from displacing the commercial class' hold over procurement, storage, and marketing of grains. Rajat Ray's analysis of the 'Bazaar' and Tirthankar Roy's study of the seasonal velocity of the money markets go a long way in explaining why.⁵⁸⁹ Ray, demarcates the commercial operations in late nineteenth and early twentieth century in India into three distinct spheres; the European dominated overseas markets, the indigenous 'Bazaar', and the small peasant commodity and artisanal industry in rural India. The 'bazaar' was the indigenous money market, which was dominated by native banking and mercantile communities, and which sustained the trade in grains, cotton, piece goods and precious metals. It did so through negotiable instruments like the *hundi*, which were bills of exchange discounted by big merchant houses and native bankers (*shroffs*). It was the 'bazaar' that financed the hinterlands, 'linking them by its wide ranging *hundi-arhat* operations to the European banks and firms at the port.'⁵⁹⁰ When it came to rural usury, however, money was circulated in cash instead of through *hundis*; the latter was limited to metropolitan exchanges, mostly amongst bankers themselves.⁵⁹¹ So, while the finance and procurement of raw agricultural commodity remained within the operating field of the 'bazaar', the 'financial structure of

⁵⁸⁹ Rajat Ray, "The Bazaar" and Tirthankar Roy, 'Monsoon and the Market for Money in Late-colonial India', Cambridge: Cambridge University Press, published on behalf of the Business History Conference, January 22, 2016, pp. 324-357.

⁵⁹⁰ Ray, "The Bazaar", p. 267.

⁵⁹¹ Roy, "Monsoon and the Market for Money in Late Colonial India", p. 43.

each sector was so different that credit did not flow from one sector to the other, except through bottlenecks.⁵⁹² The argument is reinforced by the fluctuating interest rates on similarly structured loans in urban and rural Punjab.⁵⁹³ The disparity was caused by the large volume of unsecured rural lending, which urban bankers found too risky to handle. Instead of partaking in rural moneylending directly, they preferred to have their capital trickle down through the hands of *arhatiyas* and commission agents who, being familiar with the social structures of the village, were better placed to recover the advances. These (*kutchha*) *arhatiyas* or commission agents were also financed by Managing Houses or by European wholesale exporters and would procure produce either directly from the peasants or from smaller itinerant traders like the *faria* or *bepari* (as in the case of jute) on behalf of mills and export houses. The First World War and the Great Depression jarred this arrangement, as export houses like the Ralli Brothers and Volkart gradually withdrew their agencies and capital from the interior. This left the procurement of produce, particularly grain, in the hands of native financiers who supplied capital to commission agents for inland procurements.⁵⁹⁴ The commission agent (*kutchha arhaitiya*) procured for the urban *pucca arhatiya*, who often complemented his function of procurement with *goladari* - the storage of grain - a service that richer peasants availed off in lieu of short term advances.⁵⁹⁵ These *goladars* or *pucca arhatiyas*, were the nodal links in the produce trade, as they

⁵⁹² Ray "The Bazaar", p.276.

⁵⁹³ Neeladri Bhattacharya, "Lenders and Debtors: Punjab Countryside, 1880-1940, *Studies in History*, 1,2, n.s. (1985) Sage Publication, New Delhi.

⁵⁹⁴ Ray states that 'the marketing of wheat in nine markets of Lyallpur, Ferozepore and Attock showed that the grain *arhatiyas* in the *mandis* were now buying between 66-77 percent of their wheat purchases direct from the peasant. p. 289.

⁵⁹⁵ Goladari was commonly combined not merely with cloth business but in the case of the biggest goladars and cloth merchants, with hundi banking. The same firms were involved in the cloth business and had a stake in urban banking and rural moneylending too. Ray "The Bazaar" p. 294.

collected produce from commission agents, stored it, sold it to mills and export houses and often (particularly in the case of grain) traded it through exchanges. They even made advances on the basis of their holdings. Crucially, by the early twentieth century, they became credit intermediaries who supplied *kutchā arhatiyas* with the capital drawn from the *hundis* negotiated from banking centers like Burabazar.

The withdrawal of European export firms had pushed the grain trade in native hands in the early twentieth century. While it was the Marwari and Bhatia communities who controlled the trade in staples in the Bombay Province, in Bengal and Bihar rice was controlled by the credit apparatus of the Marwari *amdawalas*.⁵⁹⁶ The virtual monopoly of the indigenous mercantile and banking classes over grain made it one of the most speculated commodities in colonial India in the early twentieth century. The speculation conducted either through futures exchanges (*badni ki satta*) or through options (*teji-mundi*) was dependent on amount of grain stored in the *khattis* (grain pits) of various *goladars*. While speculative activities on grain exchanges peaked at the close of the First World War, its occurrence witnessed a steady increase from the late nineteenth century itself. When reporting on the impact of rain and opium betting in the North-west Provinces and the Punjab in 1901, the Deputy Commissioner of Jullunder, Lt. Col. Rennick, claimed that several grain traders from Rohtak had been ruined by rain gambling. He was contradicted, by the Deputy Commissioner of Rawalpindi, H.P Leigh, who clarified that it was not rain gambling but ‘the practice of betting on the prices realizable the large central markets for wheat’ that was

⁵⁹⁶ Banaji, *Theory as History*, p. 285, Ray, ‘Crisis of Bengal Agriculture’, p. 256.

responsible for the losses.⁵⁹⁷ He was careful to add that this form of speculation was ‘regarded by respectable public opinion with indifference.’ The confluence of wartime shortage and artificial inflation, however, had an unsettling effect on ‘respectable opinion’, and when the price of rice shot up in Bengal in 1918, Marwari speculators gained notoriety for hoarding the commodity and cornering its market.

Only when a trader had monopolized a commodity, mostly by hoarding it beyond a critical point, could he corner a market successfully. Its effectivity then, was premised on it being sudden and secretive. The profits from a corner, however, were dependent on the trader’s ability to silently amass futures contracts in the same commodity.⁵⁹⁸ Take wheat for example. A trader looking to corner the wheat market would buy wheat futures from those looking to sell.⁵⁹⁹ Many of these sellers would sell with the expectation that the price of wheat would fall in the months before the contract expired, at which point they would buy it at a cheaper price and make their delivery. If, however, a trader who stocked wheat futures had also managed to successfully hoard the commodity, there would be no wheat for sellers to buy, which would cause them to default on the day of delivery. These sellers

⁵⁹⁷ Home Department, Police-A, Proceedings, 96-96, June, 1916, NAI.

⁵⁹⁸ One of the most notable examples of cornering a grain market was one pulled off by Benjamin Hutchinson in 1888 in the Chicago Board Exchange. See Emily Lambert, *The Futures: the Rise of the Speculator and the Origins of the World's Biggest Markets*, New York: Basic Books, 2012

⁵⁹⁹ A futures contract is a legal agreement where two parties agree to exchange a commodity at a predetermined price sometime in the future. The price agreed to is known as the *forward price* and the date on which the exchange takes place is known as the *delivery date*. For example, A and B agree enter into a futures contract in May, where A will deliver 100 bales of cotton to B for Rs 10,000 in December (100 rupees a bale). Come December if the market price of Cotton is Rs. 101 a bale, then B makes a profit of Rs 100, since he paid only Rs. 10,000 for a 100 bales. If the market price of Cotton is 99, then A profits similarly.

were therefore ‘cornered’.⁶⁰⁰ In most cases they would buy back the wheat at a highly inflated price from the person to whom they had sold the futures in the first place. As is obvious, to pull off a corner, a degree of secrecy was needed regarding the details of a trader’s stock. As a result, it was crucial to secure produce through regular and clandestine channels. It was why native merchants preferred to finance their agents with channels of capital that circulated outside the ambit of the Imperial Bank, since ‘the Bank’s practice of advancing against produce gave too much publicity to the transaction’ and merchants were unwilling to disclose how much grain they actually held.⁶⁰¹ This was also why some usurers often did not write down the terms of loan agreements, like in the case of ‘paddy loans’, where even in the absence of a legal pledge, ‘the lender generally sends a man round at the time of the harvest and takes away his share of the crop’.⁶⁰² In the context of wheat, Stokes relays the observation of the settlement officer of Jhansi from 1893, who claimed that ‘wheat is grown mainly for the *bania* and revenue collector’.⁶⁰³ The fact that the peasants of Bundelkhand, who were mostly subsistence farmers of millet, which was grown through techniques of extensive cultivation, switched to an exchange oriented commodity,

⁶⁰⁰ Often, futures did not involve the physical delivery of the commodity on the date of the contract’s expiry and profits were made from settling the contract on the basis of the price difference between the *forward price* and the market price on the *delivery date*. In that case, the sellers were forced to buy back their futures from the buyer at an inflated price, since they were unable to deliver the commodity physically. The trader who had pulled off the corner would then flood the market with the commodity, which meant that the artificial shortage would now turn into a glut and cause the price of the commodity to collapse. In the lingo of the futures traders in the Chicago Board of Trade and New York Mercantile Exchange, this was referred to as ‘burying the corpse’. The losses made from the collapse in price would cause no harm to the hoarder whose profits came from the money he made from the price of selling its futures.

⁶⁰¹ Roy, *Business History of India*, p. 92.

⁶⁰² *RBPBEC* Vol. 1, p. 74. The Report admitted that it was the ‘peasant’s *illiteracy and ignorance* of business methods [that] are sometimes exploited by the lender’.

⁶⁰³ Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India*, Cambridge: Cambridge University Press, 1980, p. 62.

suggested to Stokes that ‘the engine of debt was driving the expansion of the cultivated area and of cash-cropping to artificially high levels’ in the region.⁶⁰⁴

This scramble for monopsony over grain, exacted either through rent or through debt repayments generated a perennial shortage of food grains for actual cultivators. Although the phenomenon was exacerbated during and after the First World War, it was by no means a twentieth century phenomenon. In fact, grain advances like the *bhojer dheri*, where interest ran as high as 50% p.a., were quite common in Bengal by the late nineteenth century.⁶⁰⁵ This avaricious acquisition of produce generated its own vicious cycle, where having repaid his/her debt to the moneylender, the peasant was immediately forced to incur another one to secure his subsistence for the coming season. This cycle of domination had prevented cotton growing farmers of small *talukas* like Dhulia in Maharashtra, from realizing the profits of the cotton boom of the 1860’s.⁶⁰⁶ Little seemed to have changed thirty years later. Having realized how rental dues, loan repayments and food shortages had cornered the ryots of his district, the *munsif* of Tilhar (NWP), Ahmad Ali Khas, notified his superiors of the peasant’s brow beaten position:

In Hamirpur and Jalaun districts [...] a well-known moneylending class called Marwaris, have of late become landholders. Here I found that the entire produce of tenants holding goes to his landlord, who takes it in payment of rent, and partly in satisfaction of his bond debt. The poor tenant has in fact no grain left to live upon or to sow the next crop; and consequently, applies to his creditors again for *beej* and *khawai* bonds.⁶⁰⁷

⁶⁰⁴ *Ibid.*

⁶⁰⁵ Goswami, *Industry, Trade and Peasant Society* p. 34.

⁶⁰⁶ Banaji, *Theory as History*, p. 305.

⁶⁰⁷ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

The preponderance such agreements stirred doubts regarding the sanctity of the moneylender's *necessities* in the context of unsecured lending. Noting that 'the highest interest on seed loans were charged usually after a drought or failure of harvest', a district judge of the N.W Provinces, T.A Redfern concluded that it was 'greed' and not the risk of unsecured lending that spawned high rates of interest on unsecured advances.⁶⁰⁸ The usurer's dubious circumvention of legal safeguards soured opinions further. The provisions of the DARA were almost immediately enervated by the *baniya* and *sowcar*, who continued demanding title deeds as securities for loans or shifted their preference from mortgages to direct sales of land.⁶⁰⁹ Land also became the collateral for *dadān* loans, where interest was embedded in the price differential between the selling price of the title deed and the cost of its re-purchase.⁶¹⁰ In other cases, lenders arranged lien settlements that gave them possession but non-alienable rights over occupancy settlements, and the ryot's labor power behaved as the underlying security.⁶¹¹ The manipulation of interest rates were also creatively managed. While the Negotiable Instruments Act prohibited compound interest, there was no equivalent law for money contracts. Specific laws that were operational in certain districts did, however, openly prohibit compound interest. The Santhal Parganas was one such place, where section 24 of Regulation V of 1893 placed conditions on the terms of lending.⁶¹² Still, the Deputy Commissioner of the region, R. Carstairs complained that the moneylenders would draw ryots outside the boundary of the Santhal Pargana and

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Hardiman, *Feeding the Baniya* p. 280, Banaji, *Theory as History*, p. 301.

⁶¹⁰ Roy, *Law and Economy*.

⁶¹¹ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶¹² Its stipulations limited interest rates to 25%, banned compound interest and capped the recoverable to twice the amount loaned.

execute bonds where the law was inapplicable.⁶¹³ His distress was compounded by the discovery that written bonds often mis-stated the loaned principal. In many cases it was greatly exaggerated to justify the amount collected in interest; the ryot's *illiteracy*, disabled him in verifying the terms of the contract at the time of drafting. The *munsif* of Lucknow (South), Mirza Ismail alerted his superiors of another cunning, which limited the power of even those judges who reserved sympathy for the borrower:

Since compound interest is not allowed...when a debtor executes a bond in his creditor's favor, a certain rate of interest is agreed upon for six months; if the money is not paid by that date, the interest is agreed to be added to the principal, thus forming a new principal and then interest is to be calculated on the new principal.⁶¹⁴

A conspicuous reason that enabled lenders to skirt various legal safeguards was the help they received at the lower end of the colonial judicial order. Syed Ali had cautioned the government that '*mahajans* regularly combined moneylending with the legal profession', a warning that was borne out in the reports of other officers as well. The Superintendent of Police, Rawalpindi, Lt. Col. Montgomery and H.F Ashton, the Judicial Commissioner of Burma, directed their suspicions towards subordinate judicial officers and insisted that since they were recruited from the banking classes, the sympathies of such officers lay with the moneylender and not the borrower. Ashton referred to them as the 'white clothed classes, Brahmins and Bunniahs, writers and traders (all ready to lend money if they can), the very persons to whom the ryot has been cast as prey.'⁶¹⁵ In spite of the blame dished by such superior officers, some *munsifs* did express regret regarding the ryot's habitual

⁶¹³ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.*

defeat in court. Interestingly, their conclusions targeted officials of an even lower position. While the *munsif* of the lower court of Deoband, Mohanlal Hukhu only hinted that the ‘scribes and marginal witnesses of a bond are generally the friends or dependents of the lender’ the testimony of the *munsif* at Allahabad, Babu Prag Das articulated the ambit of this nexus more fully:

The *asami* (accused) more often than otherwise places implicit confidence in his *mahajan*, and leaves blank stamp paper with him, on which the terms of the contract are to be drawn up as much as the mahajan likes. Ignorant of all writing, he takes for granted all that is written on it *as read to him* by the village patwari or the village scribe, who frequently are bound in close bonds of interest to the moneylender.⁶¹⁶

The quagmire of coercion and legal overreach that had sunk indigo cultivators in the early nineteenth century had yet to dry by the twentieth. The ryot was outmatched in both capital and cunning and could hardly be described as a ‘free’ agent who transacted on an ‘even footing’ with the moneylender. The proof of his bondage was reinforced by his limitations in finding alternative sources of credit. Lenders rarely sued to recover loans, as their interest lay in securing produce payments, land titles or creating service bonds through the capital they advanced. Ahmad Ali Khas, however, insisted that in *Tilhar*, moneylenders showed tremendous alacrity when they sensed that a borrower had approached different *mahajan* to contract a fresh loan. This was truer in the case of the zamindar turned moneylender, who exerted greater fiduciary powers over the ryots settled on his estate - ‘If he stands in need of further loan, he must apply to his old creditor... if he does not do this and goes to some other money-lender, the former at once puts him into court.’ The veracity of this observation demands qualification. Stokes, for example, suggests that the credit market in

⁶¹⁶ *Ibid.*

the North-West Provinces was competitive and that small peasants had access to both the moneylender's and the rich peasant's capital. For Punjab, Neeladri Bhattacharya argues that the structure of credit financing should be seen as a 'structural subordination of petty producers to money capital in general, not their individual bondage to particular creditors'.⁶¹⁷ Even J.C. Jack confirmed in his study of the district of Faridpur in 1916 that peasants were indebted to more than one moneylender, often as high as three, each holding a different asset as collateral (jewelry, land etc.).⁶¹⁸

This long appraisal substantiates some of Ali's concerns regarding the candor of rural credit relations. He admitted that necessity (the lender's necessity) informed financial agreements but questioned those agreements where 'necessity' itself was induced by one of the transacting parties. His views were echoed by other officers engaged in correspondence, like the *munsif* of Shahabad, Pandit Tribhuwan Nath, who claimed that peasants usually 'has not the option of rejecting the terms of the mahajan even if he finds them unreasonable, unfair and hard'. So, 'though he [the ryot] gives his consent he cannot have given his 'free consent' to the terms in both equity and law.'⁶¹⁹ In the eyes of such officers, the distinctions between free market contracting and taking a loan at gun point was fast fading.⁶²⁰

Fathers and Sons

⁶¹⁷ Neeladri Bhattacharya, "Lenders and Debtors: Punjab Countryside, 1880-1940, *Studies in History*, 1,2, n.s. (1985) Sage Publication, New Delhi, p. 325.

⁶¹⁸ Jack, *The Economic Life of Bengal District*, Oxford: Clarendon Press, 1916, p.97.

⁶¹⁹ *Ibid.*

⁶²⁰ David Graeber, *Debt: The First 5000 years*, New York: Melville Press, 2011, p. 20.

Bipartisan opinion, however, was eager to hold the asymmetry between the peasant and moneylender's *intelligence* accountable for gestating the structural faults in commercial farming. The discovery was old, and the arguments were therefore recycled. Officials reviewing the incidents of the Deccan riots had alleged that 'sharp witted usurers' had manipulated the legal system against a 'dumb witted peasantry'.⁶²¹ The complaint was repeated in the Famine Commission Reports of the 1880's and was littered in the official correspondence regarding the Amendment to the Contract Act of 1899. Sample a limited selection. Pandit Tribuwan Nath claimed that the 'the *mahajan* is always too clever for the ignorant and simple *khudkashtkar*' while a subordinate Judge in Lucknow, Pandit Bhakt Narayan, described the peasants of the 'interior' of Oudh as 'needy and poor' and as 'illiterate rustics'. A *munsif* at Lucknow, Kali Charan Bose, commented on the 'disparity of intelligence between the moneylending class and the poor agriculturalist'. The *munsif* at Tilhar, Ahmad Ali Khas insisted that in many districts the 'executants of bonds are illiterate and unable to understand the contracts they enter into', a statement that found resonance in Justice Chatterjee's note from the Punjab, who claimed that the 'difficulties of agriculturist debtors in their dealings with moneylenders arise from...their utter ignorance and want of education.' Importantly, both 'simplicity' and 'ignorance' were read legally; that is to say, how contracts struck with 'minors' were void because of their 'ignorance' regarding both the nature and the concept of a legally enforceable agreement. These opinions reinforced the conviction for an Amendment that accounted for the borrower's 'simplicity'; or as the

⁶²¹ Hardiman, *Feeding the Baniya*, p. 285.

Deputy Commissioner of Gurudaspur, J.R Machonachie put it, an Amendment that could provide ‘protection to the ignorant and stupid against the knowing and intelligent.’⁶²²

Who could be charged with restoring this parity? Instead of new alternatives, some officers desired the elevation of a fallen authority—the zamindar. Tanika Sarkar argues that the zamindars of Bengal were progressively sidelined after 1858, a process that she believes prompted this class to abandon the promises of liberal reform initiated by the Brahmo Samaj and embrace a conservative, nationalist Hindu revivalism towards the end of the nineteenth century.⁶²³ The first notable clip to their sovereignty came from the Rent Act (Act X, 1859), which created three distinct tenurial classifications for the Bengali ryot. In defining the ryot’s legal liabilities, the Act gave peasants who had cultivated a particular plot of land uninterrupted for a period of 12 years, occupancy rights and a fixed rental rate over their land. Act XI (Bengal Land Revenue Sales Act) was passed in the same year and stabilized the sale of land for arrears of revenue in Bengal, which according to B.B Chaudhuri conspicuously strengthened the security of land for the creditor class.⁶²⁴ The Bengal Tenancy Act of 1885 served a crucial blow to the zamindar’s authority. It cornered landlords who had evaded the provisions of the Rent Act by moving peasants from one plot to another; the Act now guaranteed possession or *khudkasht* status to peasants who cultivated *any* plot of land in a village for over 12 years. It also provided small peasants

⁶²² Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶²³ Tanika Sarkar, *Hindu Wife Hindu Nation* pp.1-17.

⁶²⁴ B.B. Chaudhuri, “Land Markets of Eastern India, 1793-1940 Part I: The Movement of Land Prices” p. 30. The Act allowed those creditors who had taken out liens or mortgages on zamindari estates to pay the revenue arrears of that estate and prevent it from being sold or auctioned.

with legal safeguards such as compensation for land improvements, streamlining cases regarding revenue disputes and fixing the revision of rental rates to an interval of 15 years. Most importantly, it sanctified the payment of rent in cash instead of produce for occupancy peasants. Unofficially yet effectively, the Act instituted a settlement plan modeled closer to the Ryotwari system than the Permanent Settlement in Bengal and gave legal formality to those arrangements that were previously deemed customary. In doing so, it signaled ‘an end to high landlordism, and with it, the increasing displacement of a rent-based mechanism of surplus extraction by credit-based ones.’⁶²⁵ The political and economic demotion of the zamindar disturbed a section of native administrators that saw him as a paternalist figure who did not function with the same ruthless liability of the *mahajan*. The concern seeped into Ali’s memorandum as well. With pronounced apprehension he informed the Bengal administration that ‘old families are being sold out and their estates are being bought up by moneylenders and pleaders’. He reminded them that these families ‘have stood by the Government in times of emergency’ and were a ‘stable propertied class’ who acted as the only ‘medium of communication between itself [the government] and a vast and generally *ignorant* population with whom it cannot otherwise be ever in touch.’⁶²⁶ The key to helping the ryot, according to Ali, lay in restoring the status of these original landlords.

British officials, however, had withdrawn hopes regarding the zamindar and were unwilling to be persuaded otherwise. Functionally he was the relic of an unproductive era,

⁶²⁵ Sartori, *Liberalism in Empire*, p. 85.

⁶²⁶ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

unlike the moneylender who was crucial to the ongoing machination. In fact, the zamindar's non-industrious and apathetic spirit was invoked to demonstrate that most rural usurers did not exploit a blatantly 'ignorant' party. The Commissioner of Jullundar, Lt. Col C.F. Massy, for example, was an officer who found that a borrower's 'simplicity' was absent in several rural transactions. With the N.W Provinces and Bengal in mind, Massy refuted the terms of the Amendment, arguing that the zamindars of these estates were 'sufficiently intelligent to justify us in assuming that they are competent to look after their own interests'.⁶²⁷ Even zamindars with small holdings extracted limited sympathy in spite of testimonies which stated that most money disputes involved suits against 'petty landlords, cultivators, laborers and clerks on small pay'.⁶²⁸ The Divisional Judge of the Chief Court of Punjab, H.M Wood, directed attention towards the 'Rajput zamindar', when he claimed that such landowners did not require special protections, since it was their 'wasteful expenditures' that was the likely cause of their indebtedness. The Magistrate of Howrah, E.W Colins reported that his districts were scattered with 'unthrifty people', burdened by loans taken for 'marriages and shows'. The Deputy Commissioner of Kangra, A. Anderson, believed that an intervention in the existent system of rural credit would have been justified if the money 'were used in improving land, or bettering circumstances of cultivation.' However, he failed to see 'why we should feel sorry because we made a zamindar waste only 200 rather than 400 on a marriage.'⁶²⁹ The congealment of such opinions over the late nineteenth century outlined an impression of native proprietors as an

⁶²⁷ *Ibid.*

⁶²⁸ Note from Lala Pyare Lal, 17th August, 1894, Lucknow, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶²⁹ *Ibid.*

extravagant and improvident class of people, an opinion that was then reflected onto occupancy cultivators and petty landholders too. The veracity of these claims, however, were only marginally confirmed through official figures. The *Report of the Deccan Riots Commission* concluded that the expenditure on festivals and weddings had only fractionally contributed to the volume of debt in 1875. Similarly, social expenditures contributed to only 6% of the debt held by jute cultivators in Bengal in the early twentieth century.⁶³⁰ Even the *RBPBEC* admitted that though the peasant regularly borrowed for non-agricultural expenditures, ‘social and religious ceremonies make but small contributions to the total indebtedness.’⁶³¹ Lavish social expenditures may have met with official disapproval, but the officers in questions were overlooking a key point. Spending on social ceremonies elevated honor and prestige. The fact that the ‘peasant’s ability to borrow depended on his social standing in the community’, was acknowledged by the *Bombay Provincial Banking Enquiry Committee* too and remains a reality in contemporary South Asia as well.⁶³² Importantly, social expenditures included, but were not limited to social ceremonies. As seen in stories like *Dena Paona* or *Pui Macha*, many of the small holders and petty professionals borrowed incessantly to pay off the *dowry* demanded by their daughter’s in-laws. Their desperate thirst for liquidity was not spent in wasteful pomp, rather it mitigated the ill treatment they feared their daughters would receive.

⁶³⁰ Goswami, *Industry, Trade and Peasant Society*, p. 42.

⁶³¹ *RBPBEC Vol. 1* p. 72.

⁶³² Goswami, *Industry, Trade and Peasant Society*, p. 35; Katherine Neilson Rankin, *Cultural Politics of Markets. Anthropology, The: Economic Liberalization and Social Change in Nepal*, London: Pluto Press, 2004, p. 11. The *Bombay Provincial Banking Enquiry Report*, stated that “Among the large landholders a big debt is as often regarded as a sign of prosperity as of adversity., and so long as the landlord is well nourished, well clothed and well housed and has many cattle and servants as he wants and enough ready money for a wedding or a feast, indebtedness causes him, no anxiety.’ *Report of the Bombay Provincial Banking Enquiry Committee*, Bombay: Government of India, 1930, p. 47.

Since zamindars were not to be entrusted with protecting the ‘ignorant’ from the ‘knowing’, some officials chose to repose their faith in Judges. They could, it was argued, restructure a contract, or declare it void when they found its terms as ‘unconscionable’. In this respect, the Acting Collector of Anantapur, F.A Nicholas, pleaded with the government to follow the precedent set by Austria and Germany, where the Usury Law of 1880 asked courts not to enforce those claims that took ‘advantage of the necessities, improvidence or inexperience of another to obtain unusual terms for a loan or a rate of interest higher than that ordinarily prevailing.’⁶³³ Ironically, the recommendation was more popular amongst police and revenue officials than the Judges themselves. While some Judges, like R.S Aikman from the North-West Provinces, argued that a court should investigate when they found interest rates to exceed 24% on simple bonds and 12% on mortgaged loans, most were weary of the imprecise guidelines that were to inform their decisions. The District Judges of South Malabar wrote in unison that ‘simplicity implies a condition in which intelligence and comprehension of full bearing and effects of a contract are defective, much in the same way that they are assumed to be defective in a person underage.’ When thus understood, ‘simplicity’ was already factored in the Contract Act, which voided such agreements. If the criteria were expanded to accommodate common ignorance or illiteracy, then ‘the difficulty will lie in the practical determination by the Courts of what degree of simplicity is entitled to protection’, and judicial decisions would turn inconsistent and arbitrary.⁶³⁴ Uprooting the certainties of legal language would have resulted in systemic

⁶³³ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶³⁴ *Ibid.*

difficulties too. The Officiating Registrar of the High Court in Calcutta informed the Home Department that in the collated opinions of the Judges of Bengal, the volume of litigation concerning disputed contracts was already too high, since ‘the debtor avails himself of every opportunity of contesting the claim on all possible grounds’.⁶³⁵ Now, if ryots were to learn that a contract could be invalidated through a personal appeal made to the sympathies of a Judge, this number would increase and bring the legal machinery to a standstill. As it is, felt the Judicial Commissioner of the N.W Provinces, ‘dishonest borrowers’ had already inundated the court with ‘frivolous and baseless pleas’.⁶³⁶ Outranking all other concerns was the fact that:

The Judges consider any such change undesirable, because the Court, not knowing the facts beforehand, might view with suspicion many circumstances not really suspicious, and might thus be led into useless inquiries entailing much waste of time and expense.⁶³⁷

The warning regarding the limits of judicial omnipotence resonated with tones of market determinacy, an argument which was later amplified by Frederich Hayek while critiquing the system of bureaucratic state planning.⁶³⁸ A Subordinate Judge from Nainital, John Edge, put it quite bluntly when he admitted that a 20% rate of interest on a loan with good security may be high, while even 70% on an unsecured loan could be low with respect to

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ Frederick A Hayek, *Road to Serfdom*, Chicago: Chicago University Press, 1994. Hayek advocated for a decentralized system of information as opposed to State planning, since ‘nobody can consciously balance all the considerations bearing on the decisions of so many individuals.’ It was consumers and producers, not the planner or bureaucrat who knew which commodity was needed when, and since ‘all the details of the changes constantly affecting the conditions of demand and supply of different commodities can never be fully known...what is required is some apparatus of registration which automatically records all relevant effects of individual actions’. Hayek believed that ‘this is precisely what the price system does under competition, and which no other system even promises to accomplish’. p. 304.

‘the risk the lender was running of losing not only interest but principle’. ‘What I desire to point out’, he asserted, ‘is that neither a Judge nor any one else could say that the agreed rate of interest was unconscionable, unless he had before him the circumstances under which the loan was applied for and made.’⁶³⁹ The Subordinate Judge of Sultanpur felt that the Amendment was laudable but regretted that ‘no criteria can be fixed as to the rate of interest, as it differs in different districts.’ Reflecting on similar complications, the Divisional Judge of Amritsar, T.A. Troward argued that ‘two courts would seldom think alike and the element of chance [in decisions] would be too great’. Though many agreed that credit markets were for all purposes ‘unfree’, the majority treated it as an honest and equitable index for setting interest rates. So, the grounds for modifying or regulating its operations were treaded upon lightly. A precedent was set by Justice Mahmood and Justice Straight in *Lalli vs. Ram Pershad* (1886) for reducing the rate of interest in accordance with the laws of Equity. The Registrar of the Judicial Commissioner’s Court (Lucknow), C.J Hoskins, however, remained unconvinced by the lower court’s ability to reproduce the Judges’ reasonings faithfully.⁶⁴⁰ The mistrust harbored against native judicial officers convinced a majority of British Judges that tampering with private contracts would cause irrevocable damage to channels of rural credit. Once more, the buck was passed onto the Legislature, which showed limited enthusiasm in passing a new Usury Act. Instead, they circled to a familiar and occupying concern, that of land. Certain law makers were eager to assume the paternalist mantle that they denied the landed gentry and which the judiciary was unwilling to accept. Neeladri Bhattacharya notes that within the colonial versions of

⁶³⁹ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶⁴⁰ *Ibid.*

patriarchal power, ‘the father’s right over children and the male’s right over women—remained interconnected’.⁶⁴¹ We may safely expand this version to also include the father’s custody over property.

Paternal and utilitarian ideologies arrived to the colony coterminously but worked on different registers. Eric Stokes identified the first wave of paternalists as the ‘romantic generation’; officials who tempered Cornwallis’ authoritarian reforms with Burke’s calls for cultural relativism and historical continuity.⁶⁴² Ironically, even as paternal impulses peaked in the provinces settled under the ryotwari system, figures like Malcolm and Munro reserved mixed feelings regarding the ryot’s proprietary rights over land. While Locke had placed private property’s normative claims within the domain of natural rights, Munro held this entitlement as the product of political power itself.⁶⁴³ In this sense, first the Company and then the Crown were the real owners and the supra-landlords of the subcontinent. The position was periodically re-asserted through the nineteenth century and naturally bled into the question of land alienation. Before Malcolm Darling stated the argument boldly, some officials had already sensed that proprietary and tenurial titles had expanded the prosperity and creditworthiness of cultivators, which in turn contributed to their indebtedness.⁶⁴⁴ Its most cited iteration came from 1852, when the Superintendent of the Revenue Survey in

⁶⁴¹ Neeladri Bhattacharya, *The Great Agrarian Conquest; The Colonial Reshaping of a Rural World*, Delhi: Permanent Black, 2019, p. 49

⁶⁴² Eric Stokes, *The English Utilitarians and India*, Delhi: Oxford University Press, 1959. Apprehensive of convoluted procedures and a tiered bureaucracy, their own preference lay in centralizing authority in the hands of a few officials like the Collector, who could be entrusted with both judicial and revenue responsibilities. This form of ‘discretionary government’ maintained continuity from the time of the Mughals and was believed to be better suited for the ryot. p. 15.

⁶⁴³ Sartori, *Liberalism in Empire* p. 96.

⁶⁴⁴ Malcolm Darling, *The Punjab Peasant in Prosperity and Debt*, New Delh: Manohar Book Service, 1977.

Southern Mahratta, Captain G. Wingate, ‘advocated exempting immovable property from attachment or sale for debt.’⁶⁴⁵ In 1873, Sir Raymond West, described the cultivator’s right to alienate property as a ‘fatal boon’ since it ‘it gave the peasant too much access to credit’, which ‘he or she was not capable of handling appropriately.’⁶⁴⁶ The Deccan riots highlighted the prescience of these warnings and the chorus to limit transferability grew significantly amongst the rank and file of the bureaucracy by the 1890’s. These officials identified the ryot’s eagerness to mortgage land for short term loans as the primary reason for the fragmentation of large estates and pullulation of small holdings. However, as Partha Chatterji argues in the case of Bengal, land fragmentation itself was precipitated by the increasing gap between the rental and revenue rates; the former having outpaced the latter once wastelands were reclaimed and settled. More importantly, peasants who had been newly settled on *khas* (government) land often lacked the means to cultivate large holdings through either family or hired labour. As a result, the process of transfers, sale and sub-infeudation of land had turned common even amongst the nonproprietary tenurial class.⁶⁴⁷ The concern regarding fragmentation and alienation had notably and problematically peaked in the Punjab’s canal colonies. Many felt that the government’s investment in irrigation had converted previously arid land into a newly minted asset for the cultivators

⁶⁴⁵ Charlesworth, “Myth of the Deccan Riots, 1875” p. 417.

⁶⁴⁶ Roy and Swamy, *Law and Economy*, p.59. While discussing of the Punjab Land Alienation Act of 1899 in the Governor General’s Council, Sir Charles Rivaz spoke at length of West’s pamphlet, stating: ‘although the British Government had, for the most part, divested itself of that exclusive ownership in land which had been recognized as existing under native rule, still it had retained a right of protective ownership, as experience had proved that the principle of free trade in land, which had been allowed to spring up, was not adapted to the present condition of the agricultural population of India. The government ought, in the exercise of its protective right, to impose limitations on the further application of this principle and to pronounce all land to be inalienable except with its assent.’ *Extract from the Proceedings of the Governor General’s Council*, 27th September, 1899, in *Agricultural Indebtedness*, p. 198.

⁶⁴⁷ Chatterjee, *Bengal 1920-1947*, pp. 12-22.

of the region. L.W. Dane, the Settlement Collector of Peshawar, also held the government's decision to limit revenue demand to half of the total assessment and its choice to impose collection in cash 'at rates specially designed to favor the cultivator' responsible for the inflating the market.⁶⁴⁸ Such interventions had piqued the interest of the non-cultivating commercial classes who were eager to acquire land that now generated sizable quantities of cotton, sugar and wheat. Dane believed he had struck two birds when he advised the Government to 'make alienated land subject to reassessment as to put on a full land revenue', a portion of which could then be remitted 'on all fields and holdings in the possession of old agriculturalists'. Though his recommendation did not see legislative light, the Punjab Land Alienation Act of 1900, an ineffective yet paternalist intervention made on behalf of the cultivators of Punjab, did build on other suggestions made in the discussions regarding the Amendment to the Contract Act.⁶⁴⁹ E.W Parker, the Divisional Judge of the Jhelum division, had for example, recommended that 'the best way to protect the agriculturalist would be to take away their power of alienating their land without the sanction of the Collector', which was 'in accordance with the original land law of India, which *regarded the Government as the ultimate proprietor*'.⁶⁵⁰ Justice Channing of the Chief Court of Punjab, proposed that the 'alienation of ancestral landed property should not be binding for more than 14 years or for the life of the alienor... unless sanctioned by

⁶⁴⁸Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶⁴⁹ The Act restricted the transfer of land amongst 'agricultural tribes', decided through a new nomenclature that separated 'cultivators' from 'non-cultivators'. The Act was a direct response to the political dangers that land alienation had begun manifesting for the Government of Punjab.

⁶⁵⁰ Remarking on the ubiquity of alienation, J.R Maconachie, the Deputy Commissioner of Gurdaspur, cautioned against a blanket ban on mortgaging as it would enrage ryots and spark unrest. Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

the Collector'. These proposals made it to the Land Alienation Act in Punjab and were later included in the Amendment to the Bengal Tenancy Act in 1928.⁶⁵¹

The thrust of these arguments placed land ownership within the state's custody and viewed its alienation, transfer and distribution as questions that were to be determined politically. Such paternal outlooks, however, operated alongside liberal theories of private property. The latter was tied to an equally firm ideological pole and drew sentimental sustenance from the image of the 'English yeoman'. In finding his colonial equivalent, liberal ideologues conflated ritual authority with proprietary claims, and thereby fabricated a lineage of private proprietorship in the subcontinent. Bhavani Raman deftly narrates the translative maneuvers that rendered the *mirasidar* in the Madras Province into the homolingual idiom and the historical landscape of English feudal proprietorship.⁶⁵² Mahmood Mamdani and Karuna Mantena's works regarding 'indirect rule' in Africa and India further demonstrate how a 'customary proprietary regime' enabled colonial governments to selectively elevate custom when it complimented colonial liberal requirements. In his close reading of the Permanent Settlement in Bengal, Sartori notes a shift from the 1860s when 'custom's enduring capacity to establish prescriptive rights' in property was worked into the discourse of political economy in order to produce an autochthonous 'agrarian civil

⁶⁵¹ Note by Justice Channing, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶⁵² Starting with H. Wilson's *Glossary of Judicial and Revenue Terms*, Raman notes how 'Patrimony had been encapsulated in the word mirasi that was fixed as equivalent to Tamil word, 'kaniyatchi.'" Building on Wilson, a Madras Collector and Orientalist scholar, Francis Whyte took kaniyatchi to be a form of allodial tenure, persuading him to conclude that the *mirasidar* was both the cultivator and proprietor of his land, and was thus deserving of legal rights to alienate his property. Bhavani Raman, "Sovereignty, Property and Land Development: The East India Company in Madras", *Journal of the Economic and Social History of the Orient*, 61 (2018) 976-1004.

society'.⁶⁵³ Impetus was provided by 'enlightened paternalists' like George Campbell, who in his 1869 essay titled *The Irish Land*, defended the 'tenant's customary right to value of improvements made at their own expense, and to a right of occupancy at a fair rate'.⁶⁵⁴ The argument was extended to India, and its application, claims Sartori, was embedded in the provisions of the Bengal Tenancy Act of 1885, an Act that fostered a class of 'raiya capitalists with tenurial rights over occupancy holdings'.⁶⁵⁵ The elevation of the ryot's status from a 'mere laborer' to a capitalist farmer was accompanied by the gradual elision of the zamindar within the colonial political and economic framework. Sartori claims that the ryot's newly won capitalist title emerged from within a distinct, albeit marginal liberal tradition, that he traces to *The Second Treatise*, in which Locke had established the normative property constituting powers of labour.⁶⁵⁶

Missing in Sartori's thesis are the tensions and reciprocities that developed between custom and capital under the umbrella of commercial agriculture. In the end, the 'liberal

⁶⁵³ Sartori, *Liberalism in Empire* p. 90.

⁶⁵⁴ *Ibid.* p. 92.

⁶⁵⁵ *Ibid.* p. 85.

⁶⁵⁶ In the *Second Treatise*, Locke argues that the labour invested on agricultural improvement over land creates a proprietary right over that land for the one responsible for its improvement. For Locke, the proprietary right that emerges from labour inputs is the natural right of the laborer. Following Locke, Sartori suggests that "we read the politics of raiya rights as an ideological framework through which specific normative potentialities of participation in commodity production could be articulated in the form of demands for the legal constitution of occupancy raiyas as a definite economic class of independent producers." (p.110). Liberal doctrines of political economy enabled this by grasping that 'social relationships of interdependence in modern capitalist society are themselves abstract' and could therefore be translated into an ever-expanding liberal idiom. (p.196) By centering the ryot as the target of the colonial liberal project, Sartori illuminates the suppling effects of liberal abstractions, which rendered even 'concrete institutional entailments' within its lexicon. So, the normative claims of proprietorship the 'Bengali Muslim peasants' asserted over their land received institutional force from tenets of political economy, although it was expressed through an ethical discourse of 'piety' with no liberal discursive equivalent. A more contemporary example may be gleaned from the ongoing farmer's movement in North India, where the rights of small holding cultivators and their ability to market produce is expressed through the concrete, communitarian yet distinctly "illiberal" institution of the 'khap', which at present provides the movement with its organizational force.

abstractions' that Sartori treats as the ideological expressions of capital, were bound to collide with the concreteness of custom. The latter drew force from substantive and locationally bound practices, as opposed to capital, whose nature remained unbound. This abstract and de-territorial quality of capital had made George Simmel remark that 'the stranger everywhere appears as the trader, or the trader as the stranger'.⁶⁵⁷ It was also what dressed the moneylender as the 'outsider', one who clashed with landed local communities. How were liberal doctrines to translate this disembodiment within bounded social relations that presented themselves as customs? An iteration of the incompatibility was evidenced by the real-world operation of *damdupat*, the Hindu customary law that forbid the collection of interest that exceeded the principle. As the *munsif* of Ghazipur, Sris Chandra Bose, asked for the usury laws existent prior to 1855 be reinstated, he admitted that these laws were 'opposed to theories of political economists [but] are consistent with all the customs and traditions of Indian people'.⁶⁵⁸ How accurate was his assessment? Though ubiquitous on paper, concrete examples of *damdupat* were hard to come by. A Judge from the Calcutta High Court, John Edge candidly admitted that while the custom may have been cited in a few cases in Bombay, '[i]n eight years' experience in this High Court I cannot call to my recollection any case in which that rule of Hindu law has been held to apply in these Provinces, although several of the Judges... have wished that we could apply that rule.'⁶⁵⁹

⁶⁵⁷ George Simmel, "The Stranger" in *Georg Simmel: On Individuality and Social Forms*, ed. Donald Levine, Chicago: Univ. of Chicago Press, 1971, pp. 143–50, p.143.

⁶⁵⁸ Response by Sris Chandra Bose to the High Court of Judicature, N.W.P., Allahabad, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶⁵⁹ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

While the Tenancy Act of 1885 gave legal sanction to rights that were earlier regarded as customary, it also gave peasants the ‘fatal boon’ of occupancy securities just ten years after the deleterious fallout of the Deccan riots. The ostensible aim may have been to safeguard the smallholder’s economic and legal rights over his/her land but the consequences of the Act exceeded political concerns alone. As British ideologues grew increasingly disheartened with the prospects of developing a class of capitalist landlords, some believed that the only way to attract capital to agriculture was to make property freely transferable.⁶⁶⁰ As it is, the ‘right of occupancy and use of land became a salable commodity’ towards the late nineteenth century and by strengthening this trend, the Tenancy Act of 1885 inflated the value of the land market in Bengal.⁶⁶¹ Owing to the firm protest of zamindars these rights were not made formally salable, although they did act as collateral for private loans.⁶⁶² This is confirmed by Ashton’s note from 1893, in which he regretted that the Tenancy Act had ‘failed to check the transfer of occupancy right to the trading and money-lending classes’. In fact, the transfers in occupancy holdings was ‘very much greater than have been officially admitted’ and that there were many ryots ‘who have already succumbed or may hereafter succumb to the temptation to mortgage their “occupancy right” for short loans or for ancestral debts’.⁶⁶³ The *Report of the Indian Irrigation Commission* (1903) further noted that occupancy ryots were effecting transfers

⁶⁶⁰ Baird Smith for example wrote in 1860 that freely transferable property in land would both serve as a means of attracting capital to agriculture, as well as acting as famine insurance. Stokes, *Peasant and the Raj*, p.9.

⁶⁶¹ Bose, *Agrarian Bengal*, p. 149.

⁶⁶² Chatterjee, *Bengal 1920-47*, p. 14.

⁶⁶³ Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

in the form of sub-leases and added 'if the subleases be valid as legal security for private advances, *takavi* might also be advanced on the strength of some similar form of conveyance to a government officer.'⁶⁶⁴ The Government attempted to stop these transactions through the Bengal Act II in 1918. Finding the law unsuccessful in its purpose, it gave legal recognition to these transactions in the Amendment to the Tenancy Act in 1928. The genealogy demonstrates, however, that legislation did not create the conditions for this property market as much as formalize exchanges that were already taking place.⁶⁶⁵

Why did the state itself not become a creditor, especially when it found regulating private credit from the outside so challenging? It tried, but it was too removed and informationally ill equipped to understand the relations that structured rural credit.⁶⁶⁶ As a result, its attempts appeared insincere. In spite of the underdevelopment in public banking, tentative forays were made into agrarian lending through the Land Improvements Act in 1871. The Act sanctioned advances with an interest rate of 6.25 for the purposes of land improvement, particularly irrigation works and for the reclamation of wasteland. The plan for these loans drew on the Mughal system of *taqavi* (*takavi*), which were advances authorized by Mughal revenue officers for meeting the peasant's seed and cattle costs.⁶⁶⁷ Eleven years into its working, Sir Charles Crosthwaite, declared the Act a complete failure, as 'the total advances under the Act for the whole of India do not come to more than four and half or

⁶⁶⁴ *Extracts from the Irrigation Commission's Report, 1903*, in Ray *Agricultural Indebtedness*, p. 85.

⁶⁶⁵ Bose, *Agrarian Bengal*, p.150.

⁶⁶⁶ Jack for instance stated that in Faridpur in 1916 that 'the Registrar of Co-operative Credit Societies has no information of a comprehensive kind and no means of estimating the total amount of debt amongst the cultivators of the province which it is the business of his department ultimately to relieve.' J. C Jack, *The Economic Life of a Bengal District*, Oxford: Oxford University Press, 1916, p. 96.

⁶⁶⁷ Usury in Medieval India, p. 397.

five lakhs at the outside during the year.’⁶⁶⁸ According to the *Famine Commission’s Report* in 1880, apart from procedural problems, it was the recalcitrance of Collectors to lend without security that led to its inefficiency.⁶⁶⁹ Act 26 of 1871 was followed by the Northern India Takkavi Act (1879), the Land Improvements Loans Act of 1883 and eventually by the Cooperative Credit Societies Act of 1904. None of these proved to be effective competition against private usury, and by beginning of the twentieth century the Government had almost completely withdrawn itself from financing improvements or funding agrarian production.⁶⁷⁰ The Government, on its own part, provided a list of reasons for its failures. The Bengal Banking Report remarked that ‘moneylenders are willing to make loans for even unproductive purposes’, like social ceremonies, subsistence costs and capital required to meet a separate loan, which the Government was unwilling to do.⁶⁷¹ While reviewing the workings of the Land Improvements Loans Act of 1883, Sir Stuart Bayly claimed that the Government’s operations were severely impeded by the lack of securities against which an advance could be made. This was particularly true for Northern India, where ‘the ryot has no transferable interest in his land which he can offer as security, and the only interest he can offer—his crops—are previously hypothecated to the

⁶⁶⁸ *Extracts from the Proceedings of the Governor General’s Council, 26th October, 1882*, in Ray *Agricultural Indebtedness*, p.54.

⁶⁶⁹ *Famine Commission Report, 1880*, in Ray, *Agricultural Indebtedness*, p. 53. The report also stated that ‘occupancy tenants to effect land improvements without requiring sanction from landlord, and without endangering the security of his tenure.’ The Tenancy Act of 1885 had capped the revision of rental rates on occupancy holdings, provided that the proprietor did not make productive improvements in the form of irrigation or embankments in those holdings. As Partha Chatterjee has shown, improvements in productivity were rarely seen as a reason for revising the rental rates in Bengal. *Bengal 1920-47*.

⁶⁷⁰ *RBPBEC: Vol. 2*, p. 119. ‘The part played by Government in agricultural finance in normal times is practically nil.’

⁶⁷¹ *RBPBEC: Vol. 1* p. 90.

landlord.’⁶⁷² These problems were alien to *mahajans* and zamindars turned usurers who were deeply embedded in rural society. The *RBPBEC* estimated that by 1928 in Bengal ‘about 80 percent of the numbers of loans advanced by moneylenders is unsecured and 20 percent secured’, although ‘the value of the secured loans bears to that of the unsecured loans would be nine to ten’.⁶⁷³ Again, in the context of the Loans Act of 1883, the Commissioner of Berar, Mr. Jones, claimed that private usurers saw the Government as competition and denied advances to peasants who borrowed from it.⁶⁷⁴ While the *RBPBEC* admitted that cooperative societies were gaining some traction amongst rural borrowers, ‘a great many people are still lured to the moneylender’ because he would lend in secret, without security, without enquiring about the purpose of the loan and without demanding punctual repayment.⁶⁷⁵ This, however, was an incomplete assessment. To chalk the success of private usury to coercion, social dominance or to informational superiority would be a narrative disservice, since it was also the cultural reputation of the *baniya* and the symbiotic

⁶⁷² *Extracts from the Proceedings of the Governor General’s Council, 26th October, 1882*, in S.C Ray, *Agricultural Indebtedness*, p.57-58.

⁶⁷³ *RBPBEC* Vol. 1, p. 197. The report also stated that ‘whenever any member of a rural society requires a loan, he has to furnish a full statement of his indebtedness to village moneylenders and others. The debts of each member must be carefully checked by other members who have in most cases full and accurate information before he is allowed to borrow, for such members have unlimited liability and they cannot afford to take the risk of introducing borrowers, who may for all practical purposes be insolvents... Amounts borrowed by members from rural society are mostly against personal security, while amounts borrowed from outside are mostly against mortgages.’ p.67-69. The data also indicates that while the volume of debt increased with the rising valuation of land prices, when it came to unsecured loans, the increase in volume were reflective not of land but the rise in the valuation of agricultural commodities. As Neeladri Bhattacharya observes in the case of the Punjab from the late nineteenth century, the increase in the total volume of debt in the region in the late nineteenth century was connected more to the increase in the value of commodities than land itself. ‘Lenders and Debtors’ pp. 338-340.

⁶⁷⁴ ‘The ryot— if he borrows from the Government, cannot also borrow from the village moneylender...the moneylender turns upon him and says:—‘No, you have already borrowed from the Government, the Government has been ruining my business by charging a lower rate of interest than mine; the Government have already got the first lien on your land, now you can go to the Government for the other money that you want.’ *Agricultural Loans Act, Extracts from the Governor General’s Council, 26th October, 1882 in Agricultural Indebtedness*, p. 56.

⁶⁷⁵ *RBPBEC*, p. 150.

relationship he shared with his borrowers that became compelling reasons for the faith reposed on his capital. The fact was acknowledged by officials like R.S Aikman in 1893, who reminded the Government that ‘all moneylenders aren’t village shylocks...many fulfill useful functions.’⁶⁷⁶ In fact, in reconstructing the figure of the ‘Paternal *Sheth*’, David Hardiman insists that we read the peasant-*baniya* relationship beyond a transactional exchange; the *Sheth* was ‘expected’ to provide peasants with subsistence loans in times of crisis.⁶⁷⁷ The characterization is corroborated by the relative absence of widespread anti-moneylender uprisings in late colonial and even post-colonial India. When they did occur, they threw up two demands. One was the destruction of accounts and ledgers, and the other was the continuance of subsistence loans. For Bose, this ‘entitlement to food grains was precisely what inequitable credit relations were meant to assure.’⁶⁷⁸

Was the rate of land dispossession enough to generate the kind of concern it did in the closing decade of the nineteenth century? Indeed, the threat of political instability was serious enough for the Government of Punjab to pass the Land Alienation Act in 1900 and for the Government of India to amend the Contract Act in 1899. Was this fear empirically grounded? Bengal, for example, did see rapid movements in the land market, especially in transfers in occupancy tenures. B.B Chaudhari, characterizes the period following the Tenancy Act as undergoing a ‘process of depeasantization’, where a large number of ryots mortgaged their occupancy rights as securities for advances and continued cultivation as

⁶⁷⁶Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁶⁷⁷ Hardiman, *Feeding the Baniya*.

⁶⁷⁸ Bose, *Agrarian Bengal*, p 26.

sharecroppers and *bargadars*.⁶⁷⁹ Rajat and Ratnalekha Ray, however, feel this to be an overestimation, as the majority of agricultural production remained in the hands of tenurial cultivators.⁶⁸⁰ It is true that the activity in the land markets of Eastern India peaked only in the 1920's, yet dispossession remained an occupying concern for the provincial government even during the late nineteenth century. Eventually, the socio-economic changes in agrarian production witnessed at the end of the nineteenth century were more to do with establishing monopoly over agricultural commodities than land. Given that usurers were not interested in evicting peasants or repurposing their land for non-cultivating purposes, it made little sense for them to keep capital idle by entering into direct purchases. It was only during exceptional periods of crisis, when the lender feared that loans were irrecoverable, did he take actual possession. This was witnessed, for example, during the period between 1893-1903 when 'droughts, floods and famine that swept the Narmada valley'⁶⁸¹ or when raw jute prices collapsed following the Depression in the 1930's and a large section of Bengali ryots slipped into the dispossessed category.⁶⁸² It was more common for peasants who mortgaged their proprietary or occupancy tenures to continue possession and cultivation with inferior rights, which usually translated as higher effective rents collected in produce.⁶⁸³ In fact, by the twentieth century in Bengal, the

⁶⁷⁹ B.B. Chaudhuri, "The Process of De-peasantization in Bengal and Bihar, 1885-1947", *Indian Historical Review*, 21, 1(1975), pp. 105-65.

⁶⁸⁰ Rajat and Ratnalekha Ray, "The Dynamics and of Continuity in Rural Bengal under the British Imperium", *IESHR*, 10, 2 (1973), p. 107.

⁶⁸¹ Stokes, *Peasant and the Raj*, p. 74.

⁶⁸² Jairus Banaji, *A Brief History of Commercial Capitalism*, Chicago: Haymarket Books, 2020, p.123.

⁶⁸³ Chatterjee, *Bengal 1920-47*, p.60. Sugato Bose writes 'where the moneylender already held the zamindari or talukdari right, it was a matter of taking the holding of the indebted raiyat into *khas* (directly cultivated by the zamindar) possession and resettling it at a high produce rent, or by a stroke of reverse commutation from kind to cash known take khaki, charging an extraordinarily high, new cash rent.' *Agrarian Bengal*, p.155

annual collections of interest payments were much heavier than the payments made in rent.⁶⁸⁴ As already argued, such interest was often secured in produce instead of cash (like in the case of paddy loans). In fact, the *RBPBEC* acknowledged that even when the borrower had not taken a *dadān* loan, he was virtually bound to sell his produce to his creditor, ‘especially when the creditor was a trader.’⁶⁸⁵ It is also undeniable that the fear of land alienation and its political fallout was more than spectral for many within the colonial administration.⁶⁸⁶ For those looking to restore the balance of power between the usurer and peasant, the disparity in social and economic status and more crucially, in intelligence between the two, appeared overwhelming. The only solution to a real or lasting protection, they felt, lay in the drastic reformulation of the law of contract itself. Ashton was one such officer, whose paternal concern was expressed through stadial rhetoric, one that characterized peasants as minors who were yet to come of age:

[N]ative cultivators, who are mere *children* in many respects compared with the moneylenders and traders with who they have to deal, are entrusted with unlimited power to alienate they occupancy right, and palliatives are offered for criticism when these cultivators act in the very manner that they may be expected to act in the situation in which they are placed.⁶⁸⁷

⁶⁸⁴ Bose, *Agrarian Bengal* p.107

⁶⁸⁵ *RBPBEC* Vol. 1, p. 82, 108-110

⁶⁸⁶ Syed Ali also furnished his note with the following anecdote to emphasize the validity of the land market, ‘Two Marwari brothers who have been exploiting the Bhaugulpur District have recently acquired considerable landed property; but I understand that they themselves are beginning to be involved in the toils of other *Mahajans*.’ Judicial, November 1897, Proc. Nos. J & P. 2241/97, IOL

⁶⁸⁷ Judicial, November 1897, Proc. Nos. J & P. 2241/97, IOL

Dead Letters

So far, the argument has covered the discussions conducted from 1892-94 regarding the Amendment to the Contract Act. On the basis of these discussions, a draft bill was prepared in 1898 that addressed questions regarding the borrower's 'simplicity', 'ignorance' and 'necessity' as well as the lenders ability to 'dominate', 'act in good faith' or be 'on equal footing' visa vis the borrower. Though the bill covered a majority of the concerns raised in the correspondence from 1892-94, it was met with general disapproval when it was circulated in 1898. Clauses regarding the lender's ability to 'dominate' the borrower or whether the lender and borrower 'contract on equal footing' were dismissed as being vague or procedurally unenforceable. The Rangoon Chamber of Commerce could not imagine a situation in which a lender did not hold some sort of leverage over the borrower - 'Any person who has money to lend is in a position to dominate anyone in need of money.'⁶⁸⁸ If every lender was in a position to 'dominate' the borrower, contracting on 'equal footing' was also impossible. The question of 'simplicity' and 'ignorance' were dropped entirely. The final assessment of the reviewing officers was that as a principle of law, 'undue influence' was 'excessively difficult, probably impossible to state in a language that may not be misunderstood.'⁶⁸⁹ While still in agreement with the principles and sentiments that called for the Amendment in the first place, a majority remained convinced that the Government of India ran the risk of 'spoiling the Contract Act and produce results in regions beyond the sphere of question of agricultural indebtedness.'⁶⁹⁰ Specifically

⁶⁸⁸ Rangoon Chamber of Commerce, 19th July 1898, Legislative Department, 1898, Proc. No. 137, BL.

⁶⁸⁹ Legislative Department, 1898, Proc. No. 137, BL.

⁶⁹⁰ *Ibid.*

targeted laws like the DARA or the Sailors and Merchants Shipping Act were deemed more effective, since they targeted vulnerable groups without jeopardizing the overall system. As a result, the Amendment was watered down to banality. Its only notable inclusion was the changes made to Section 74, in which relief would be provided against ‘penalty’ for ‘breach of contract’, where ‘penalty’ was construed as a new and ‘unconscionable’ rate of interest imposed on money loans after the date of default.⁶⁹¹ Regarding the term ‘domination’, it was decided that ‘when a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears... to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.’ This clause specified, however, that the relation between the lender and borrower was not fiduciary and that the onus to prove adequate ‘consideration’ in a contract was not something that the lender had to prove. Crucially, the Amendment of 1899 provided two examples through which the law was to be interpreted. The second example or ‘example *d*’, was particularly telling:

A. applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A. accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.⁶⁹²

⁶⁹¹T.V. Sanjiva Row, *The Indian Contract Act, 1872*, Trichinopoly: St. Joseph’s College Press, 1906. p. 329. — A borrows Rs 100 from B at an interest rate of 10%, to be paid after a year. After a year, A is bound to pay B Rs 110 as per the conditions of the contract. If, however, he is unable to pay B the sum on that date, he has defaulted on the contract. If B were to impose a new rate of interest at 75%, applicable from the day of default, this could be construed as a ‘penalty’. This condition was later revised by the Privy Council during *Balkishan Das vs Run Bahadur Singh*, in which the Council decreed that if the revised interest rate was not ‘unreasonable’ it should not be viewed as a penalty.

⁶⁹² *Ibid.* p. 75.

It sapped the Amendment from effecting the radical protection it had promised in its decade long contemplation. It became a historical footnote—a ‘dead letter’ which the *RBPBEC* described as ‘halfhearted’ and one that ‘did not touch a fringe of the problem’.⁶⁹³ This verdict held for the Usurious Loans Act of 1918, which extended to the whole of India as well. Following the Depression and based on the recommendations of various Banking Enquiry Reports, Provincial governments took the initiative of passing targeted laws to relieve borrowers.⁶⁹⁴ It is generally agreed, however, that the situation had changed quite drastically in the 1930’s: The First World War and the Depression forced several European Managing Houses to withdraw their buying and shipping operations, while the price of commercially cultivated crops like jute and cotton either crashed or fluctuated wildly in global markets. The rise of nationalist political parties like the Congress and the *Krishak Praja Party* in state legislatures also impacted the general direction of government policies. Though credit-based cultivation continued, its heydays that extended from the 1860’s to the 1920’s, were now behind it.

The failures of the Amendment to the Contract Act and the subsequent laws attempting to provide relief and protection to small holding borrowers need to be assessed vis a vis the success of commercial farming as a mode of production and expropriation. Over a series of publications, Jairus Banaji has urged readers to treat commercial farming as an instance

⁶⁹³ *RBPBEC*, Volume. 1, p. 164, See also Bipasha Raha, “Moneylenders and Peasants in Bengal”, *Proceedings of the Indian History Congress, 2007*, Vol. 68, Part 1. pp. 640-647, p. 642.

⁶⁹⁴ The Government of Bengal passed the Bengal Moneylenders Act of 1933 and then the Bengal Agricultural Debtors Act of 1936. They also set up debt conciliation boards that were charged with revising the amounts in outstanding debts in the region.

of a well-developed system commercial capitalism.⁶⁹⁵ For Banaji, commercial capital was not subservient to or an agent of industrial capitalism, since its role exceeded that of the circulation of wealth generated by industry.⁶⁹⁶ This was even truer for the distinctly colonial system of commercial farming. Banaji builds on Henry Bernstein's arguments regarding the exploitation of peasant household labor and A.V Chayanov's concept of 'vertical concentration' of producers.⁶⁹⁷ Chayanov, and later Bernstein were the first to show how 'trading and finance capitalism' integrated small peasant farms within a capitalist commodity market and 'established the domination of capital over sections of the peasantry, with no necessary effects on the organization of production.'⁶⁹⁸ As has already been argued, cash crops like poppy, indigo, jute, sugar and cotton, were not cultivated in plantations (like tea or rubber) where the process of primitive accumulation had divested peasants of the means of production and converted him/her into hired wage labor. Instead, even as the smallholding peasant retained control over the means of production and the

⁶⁹⁵ Banaji, *Theory as History; A Brief History of Commercial Capitalism*; "Merchant Capitalism", and 'Merchant Capitalism, Peasant Households and Industrial Accumulation: Integration of a Model.' in *Journal of Agrarian Change*, Vol. 16, No. 3, July 2016, pp. 410-431.

⁶⁹⁶ Banaji, *A Brief History of Commercial Capitalism*, p. 3.

⁶⁹⁷ Henry Bernstein "Notes on Capital and Peasantry", in *Review of African Political Economy*, 4 (10): 60-77, 1977 and A.V Chayanov, *Peasant Farm Organization*, "stressed on the 'pattern of exploitation' of small peasant household labor, by arguing that 'peasant subsistence remained inextricably bound to the market, in the sense that a large part of the peasantry had to meet its subsistence requirements through cash crop production.' So, even as these peasants retained control over the means of production, their cycle of reproduction was tied firmly to 'commodity relations'. Bernstein defined Chayanov's concept of 'vertical integration of producers', in the following manner: "Vertical concentration refers to the coordination, standardization, and supervision of the production of numerous small producers through a central agency whether this represents productive capital directly (as in out-grower arrangements), forms of merchant capital which thereby actively intervene in the organization of production, or whether the agency is that of a cooperative or other state-managed scheme'. Banaji pays particular attention to Chayanov's observation that 'we should not necessarily expect the development of capitalist influence and concentration in agriculture to take the form of the creation and development of latifundia. More probably, we should expect trading and finance capitalism to establish an economic dictatorship over considerable sectors of agriculture.' Cited in 'Merchant Capitalism, Peasant Households and Industrial Accumulation: Integration of a Model.', pp. 411-413.

⁶⁹⁸ *Ibid.* p. 412.

way in which it was organized (household form), the ‘aggregate labor of the household’ was exploited through a system of price domination, where monied capital appropriated the peasant’s produce at an extremely undervalued price. According to Banaji this system of appropriation represented the ‘formal (if not real) subsumption of labour by capital’,⁶⁹⁹ and the debt relations produced through ‘advances’ should be read as the wages earned by laborers in conventional systems of capitalist farming. The reason it has not, argues Banaji, is due to the tendency of several Marxist historians to mistakenly conflate the ‘relations of production’ with ‘forms of exploitation’, although:

[...]the deployment of labour is correlated with modes of production in complex ways. Not only are modes of production not reducible to forms of exploitation, but the historical forms of exploitation of labour (relations of production in the conventional sense) lie at a completely different level of abstraction from the numerous and specific ways in which labour is or can be deployed.⁷⁰⁰

By drawing a distinction between the two categories, Banaji’s formulation resists historical teleology; mercantile or commercial capital that was organized through a putting-out system was not simply the ‘pre-history’ of an industrial mode of production, nor was it a ‘pre-capitalist’ form of appropriation.⁷⁰¹ Even in the absence of plantations or industrial scale enterprises (like the latifundia), cash crops were produced through smallholding

⁶⁹⁹Banaji, *Theory as History*.

⁷⁰⁰ *Ibid.* p. 4.

⁷⁰¹ *Ibid.* p. 3. Accordingly, ‘the widespread use of slaves in the early middle ages certainly implies a continuance of slavery as a form of exploitation but surely not the survival or persistence of slave mode of production, however, that is construed.’ So, ‘the historical forms of exploitation of labor (slavery, serfdom, wage labour is the usual trinity in most discussions; Marx ended to add ‘Asiatic production’) cannot be assimilated to the actual deployment of labor, as if these were interchangeable levels of theory. Since the latter is defined by immensely greater complexity, a conflation of these levels would mean endless confusion in terms of a strictly Marxist characterization.’

peasant labor for a global commodity market. In this system, middlemen like the *baniya*, the *mahajan*, *arhatiyas*, *beparis* and *goladars* were:

[...] scarcely extraneous, dispensable elements of a system that could have worked just as easily without them. *They were the system*. They were how the chains of commercial capitalism straddling the world's main commodity markets were structured.⁷⁰²

Importantly, the system was cost effective. Till the 1920s most Managing Houses acquired raw commodities from *bazaar* intermediaries at exceptionally low prices. As a result, the commercial cultivation of crops like sugar or cotton never transitioned to slave/indentured-plantation forms as they had existed in America (cotton) and the Caribbean (sugar). Several testimonies affirm this fact, the earliest of them coming from B.B Chaudhuri who quotes an indigo planter in the 1850's as saying 'No European farmer could produce either sugarcane or tobacco or any raw material as cheaply as the ryots.'⁷⁰³ Banaji himself draws attention to the observations of Samuel Smith, the founder of Smith, Edwards and Co., one of the largest cotton broker firms in Liverpool in the early twentieth century, to make a similar point regarding cotton.⁷⁰⁴ Krishna Bharadwaj claims that the labor intensive jute crop was mostly cultivated through the household labour of Bengali ryots who held 1.25 acres of land on average.⁷⁰⁵ While speaking of the cost efficiency of this system, Omkar Goswami argues that 'subjugating peasants to a capitalistic wage labour system was not

⁷⁰² Banaji, "Merchant Capitalism, Peasant Households and Industrial Accumulation", p. 417.

⁷⁰³ B.B Chaudhuri, 'Growth of Commercial Agriculture in Bengal', p. 130.

⁷⁰⁴ Samuel Smith, *Cotton Trade of India*, cited in Banaji, *Theory as History*, p. 416, The difficulties of dealing with the ryots are so great that most Europeans at first would find it impracticable...[I]t is the custom of the ryots almost universally to sell their crops in anticipation and receive a large payment in advance, but this is a business which can never sit a European House in Bombay....Insurmountable difficulties present themselves to Europeans contracting with the ryots...But with native dealers the case is different.

⁷⁰⁵ Cited in Banaji, *A Brief History of Commercial Capital*, p. 126.

necessary for procuring jute at low prices...*Small wonder, then, that the mills never considered it necessary to eliminate middlemen and radically transform the structure of upcountry trade.*⁷⁰⁶ The case was similar for sugarcane growers in Western Uttar Pradesh who remained perpetually indebted to the *khandsaris* who provided them with subsistence loans which they recovered through the undervalued purchase of their crops. By doing so, they were able to ‘maintain a firm grip upon them [cultivators] and prevent the delivery of cane to the sugar factory’, where the peasants would have received a fairer price for their produce.⁷⁰⁷ More recently, Fahad Bishara has documented a similar phenomenon amongst smallholding Arab Pemba farmers in Zanzibar in the early twentieth century. The cultivators were under the sway of Gujarati mercantile capital and survived off subsistence loans that were recovered through the acquisition of cloves and coconuts.⁷⁰⁸ Given the centrality of mercantile credit to agrarian production and the importance of its networks in acquiring, storing, trading commodities, Bishara admits that ‘any legislation that targeted the moneylender, was doomed to lifeless existence in the books itself.’⁷⁰⁹ By 1933, after almost 2.3 million coconut and clove trees had been directly acquired by Indian moneylenders and as the threat of a nativist backlash seemed imminent, the British Government in Zanzibar passed the Land Alienation Decree in 1934. Bishara claims that in official discourse, the Indian usurer was referred to as a ‘rent seeking parasite’ and a

⁷⁰⁶ Goswami, *Industry, Trade and Peasant Society*, pp. 50-51, Italics mine.

⁷⁰⁷ Amin, “Small Peasant Commodity Production and Rural Indebtedness”.

⁷⁰⁸ As the overall debt amongst the cultivators ballooned in the early twentieth century, British officials debated the need of passing usury laws to check interest rates and pass land alienation laws to restrict credit.

⁷⁰⁹ Fahad Ahmed Bishara, *A Sea of Debt Law and Economic Life in the Western Indian Ocean, 1780-1950*, Cambridge: Cambridge University Press, 2017, p. 226.

‘profit motivated miser’; quite hypocritical for a state that greatly valued this class’ importance for the purposes of wealth extraction and the movement of commodities.⁷¹⁰

Eventually, the paternal concerns regarding smallholding peasants dissipated once demands of commercial cultivation were confronted. It was the efficiency of relative costs, both for the production and acquisition of crops that won out at the end.⁷¹¹ Crucially, it was a distinctly colonial legal and economic framework that actively produced and maintained the peasant’s indebted condition. These smallholders bore great affinity to the ‘weaker sections’ who were indebted to the rain gambling houses, bucket shops and spot betting circles in Bombay, Calcutta and Delhi. They were also described as being ‘simple’, ‘ignorant’, ‘children’. However, while the debt of the petty gambler was viewed and mediated as a social problem, the peasant’s debt was considered economically productive, especially because of his ‘ignorance’, which was functionally determinant. Even though material gains may have driven governmental policy, in discourse, it was the rationality of political economy on which the system was justified. When documenting the reasons for the failure of the Usurious Loans Act of 1918, the *RBPBEC* admitted that it was the:

[...] baffling effects of the decisions of the High Courts and Privy Council which have practically made the Act a dead letter. The trend of rulings is to impress on subordinate courts that they have no power to interfere with contracts solemnly entered upon; discretion of courts is fettered by judicial decisions which are tending in favor of creditors; rulings of the Privy Council stand in the way of reducing rate of interest unless certain things can be proved etc.⁷¹²

⁷¹⁰ *Ibid.* p. 229.

⁷¹¹ It was not a particular commercial class of moneylenders, like the Marwaris, who were being protected. The moneylending operations in Bengal, for example, was mostly concentrated in the hands of zamindars and *patnidars* by the twentieth century.

⁷¹² *RBPBEC* Vol. 1.

This was a repetition of Justice Ameer Ali's assessment from 1892, when the question regarding the Amendment to the Contract Act first arose. At the time, Ali had criticized the overzealous defense of 'freedom of contract' and 'free bargaining' in a country like India. Excited by the first draft of the Amendment bill, he went against the opinions of his fellow colleagues regarding the inclusion of the terms 'domination' and 'equal footing':

I fail to see why a Court of Equity dealing with a contract between persons, one of whom is in a position to dominate over the other, should avoid, and how it can avoid dealing with the two questions together [...] The theory of free contract does not appear to be wholly beneficent in its consequences even in England, where people deal with each other more or less on terms of equality. That theory, however, is wholly unsuited to the social and economic conditions of India.⁷¹³

Pleased by the promise of the draft bill, he returned it with a message conveying his approval and deprecated any changes 'which would detract from its usefulness.'⁷¹⁴ It is more than likely he was disappointed by the Amendment as it came to pass.

⁷¹³ Minute by Justice Ameer Ali, June, 1898, Legislative Department, 1898, Proc. No. 137, BL.

⁷¹⁴ *Ibid.*

CHAPTER 5

The Ignorant Student

Eventually, the Amendment to the Contract Act did not elide the question of inequality. Instead, the discussions held from 1892 to 1898 concluded that the contract generated equivalence in the absence of equality. The contract was an agent of colligation, one that stitched together asymmetrical relations faultlessly; it produced a relation amongst heterogenous individuals in a manner that mediated their unequal positions without annulling them. It explained inequality as a social and economic reality and understood the contract as an agent for organizing both market society and the practices of government around it. It was only when social and economic heterogeneity—inequality—was taken as a pre-given that the principles of contract made sense. In fact, two Justices of the Chief Court of the Punjab were amused that many had only just uncovered this truth. Justice Roe felt that ‘taking advantage of another’s necessities is the principle of most persons engaged in business, and not merely of moneylenders dealing with agriculturalists’.⁷¹⁵ Justice Channing elaborated further:

In the vast majority of non-commercial contracts, the parties are not on equal terms with reference to the contract: the experienced horse dealer, the retail tradesman, the professional jeweler are not usually on equal terms with those with whom they deal, but so long as they are not guilty of fraud or misrepresentation complete fairness is not required to make their bargains binding.⁷¹⁶

⁷¹⁵ Opinion of Mr. Justice Roe, Judge, Chief Court Punjab, 21st September 1894, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁷¹⁶ Opinion of Mr Justice Channing, Judge, Chief Court, Punjab, 2nd October 1894, Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

To tamper with this principle amounted to disassembling the Act entirely, so felt the Inspector General of Registration in Madras. His note addressed the objective of the bill, which was to provide relief to ryots by declaring a contract void when ‘a rich and powerful zamindar induced poor and ignorant ryots holding under him to grow certain produce and deliver it to him at an inadequate price to which no independent ryot would have consented.’ He felt, however, that:

The power proposed to be given to the courts might doubtless enable them to afford relief against really hard bargains in some cases, but it would, at the same time, introduce an element of uncertainty in regard to the enforcement of legitimate contracts and hamper the operations of legitimate trade, *where superior knowledge and skill, so essential to success, cannot be treated as disqualifying circumstances.*⁷¹⁷

The Lt. Governor of the Punjab, Dennis Fitzpatrick, staged a reasoned battle on both sides of the principle. He drew out the benefits and drawbacks of intervention and non-interference in a credit market where ‘simple’ and ‘ignorant’ peasants were ‘dominated’ by the moneylender. He even wondered whether the introduction of ‘some sort of *laesio enormis* into the substantive law’ was the key to balancing political and the economic needs of the Government. The principle of *laesio enormis* was an obscure and poorly cited Roman legislative principle that voided a contract if the price of purchase was well below the actual

⁷¹⁷ From the Inspector General of Registration to the Chief Secretary to Government, dated Madras, 27th August 1894, Np. 2475-G, Amendment to the Contract Act, Judicial Department, 21st October, 1897, Proc. No. 2241/97, IOR. Emphasis mine.

value of a commodity. This principle, however, went against conventional Roman jurisprudence that acknowledged the right of contracting parties to outwit one another in bargains. Fitzpatrick's passing invocation of *laesio enormis* ascertains his awareness of commercial farming and the peasant's inability to command the market price for his/her produce. However, despite the sympathy he felt for the ryots of his province, he found it difficult to insert his substantive concerns within the formal procedure of law without making the terms of contracting vague and therefore defunct. There was also the question of maintaining consistency in equivalent spheres of commercial activity—'the law does not protect a vendor who sells his property for an inadequate value in order to meet some pressing necessities, [then] what equity is there in protecting a debtor who borrows money at a very high rate of interest for meeting a similar demand.'⁷¹⁸ Burdened by these considerations, he sublimated his protectionist sentiment as an unenforceable ideal and concluded:

I am not prepared to go too far as to set aside a contract merely because one of the parties to it is so feeble or simple minded as to enter into an unequal contract, and the other... *takes advantage of his weakness or simplicity.*⁷¹⁹

⁷¹⁸ Note on modification in general law relating to interest, by Babu Lulal Chandra Deb, Government Pleader, Sylhet, 19th July 1894. Judicial, November 1897, Proc. Nos. J & P. 2241/97, BL.

⁷¹⁹ *Ibid.*

As a tool for only mediating and not homogenizing difference, the contract became synecdochic for a market whose logic was ‘strategic’.⁷²⁰ This logic pivoted on the abstractions of political economy, one that replaced concrete social identities (peasant/landlord) with abstract economic identities (borrower/lender). Clearly, as Ritu Birla argues, the function of the ‘globalization of contract law’ was to recode political subjects ‘first and foremost as economic agents’. This abstracted individual was then projected onto a collective called ‘civil society’, which came to be seen as ‘an arrangement of economic men.’⁷²¹ Birla’s use of ‘economic men’ comes from her informed use of Foucault’s *Homo economicus* or the ‘subjects of interest’. ‘Subjects of interest’ were the atoms of civil society and their ‘interest’ was both non-transferable and irreducible.⁷²²

⁷²⁰ Michel Foucault, *Birth of Biopolitics*, p. 42. Foucault makes a difference between *strategic logic* (market logic) and *dialectical logic*: ‘Dialectical logic puts to work contradictory terms within the homogeneous. I suggest replacing this dialectical logic with what I would call strategic logic. A logic of strategy does not stress contradictory terms within a homogeneity that promises their resolution in a unity. The function of strategic logic is to establish the possible connections between disparate terms which remain disparate. The logic of strategy is the logic of connections between the heterogeneous and not the logic of the homogenization of the contradictory.’

⁷²¹ Birla, ‘Jurisprudence of Emergence’, 467-472. Foucault himself phrases it in the following manner: ‘*Homo economicus* is, so to speak, the abstract, ideal, pure economic point which populates the real density, fullness and complexity of civil society; or alternatively, civil society is the concrete ensemble within which these abstract points, economic men, need to be positioned in order to be made adequately manageable.’ *Birth of Biopolitics*, April 4th, 1979.

⁷²² In seeing the logic of the market unfold in the practice of liberal governmentality, Foucault makes a differentiation between two kinds of contracting subjects: *Homo Economicus* and *Homo Legalis*. The former he describes as the ‘subject of interest’, where the interest of the individual is both non-transferable and irreducible. It is irreducible because the ‘interest’ of the subject cannot be subject to further logical scrutiny (why do you want what you want is not a rational question). Nor can it be transferred or replaced by invoking the needs of anyone else but the subject in question (you should reformulate your interest because of social good is not a rational position). Importantly, within the discourse of political economy and the ‘truth’ (*veridiction*) that emerges through it, only when individuals act on their personal interests do they appear as rational market actors. These individuated interests synchronize with the logic of the market and give market’s their equilibrium. *Homo Legalis*, or the ‘subject of right’ is different from the ‘subject of interest’. *Homo Legalis* is also a contracting subject, but he is a political subject who contracts with the juridical and political sovereigns. *Homo Legalis* functions through a mechanism of ‘division, negativity, renunciation and limitation’. He starts as the possessor of a set of ‘natural rights’, which he has to barter and renunciate in order to live in a ‘society’. As opposed to the ‘subject of interest’, whose interests are not reducible or transferable to the interests of another individual, the ‘subject of rights’ must reduce or limit a set of ‘natural rights’ he originally possessed. When

Importantly, *homo economicus* was not a natural category; it was laboriously produced through political economy and its attendant regime of truth (*veridiction*).⁷²³ So, having reduced the ‘ignorant peasant’ to the irreducible—a borrower—the rationale of liberal governmentality demanded that the Government wash its hands off further intervention that contradicted the logic of the credit market itself.

A substantive contradiction still remained, one that engaged the moral rhetoric of Empire. The universalist logic of Empire had converted difference—cultural, spatial, racial—into temporal difference corresponding to a stadial thesis. So, if European Enlightenment represented the final stage of civilization—modernity—non-European cultural and political forms were to be understood in terms of the temporal distance they maintained to the former. When difference was coded as time, races, cultures, practices and communities could be categorized as ‘backward’, ‘medieval’ and ‘primitive’. The justification of colonial violence was maintained through this discourse, where conquest became the ‘white man’s burden’ and colonial violence introduced the non-European ‘other’ to modernity. While the civilizing rhetoric of Empire partly dissipated in the period of ‘indirect rule’, the temporal ordering of cultures remained active, nonetheless. Dipesh Chakrabarty sees the influence of this rhetoric in the post-colonial contemporary too, where temporal monikers like ‘developing’ consign non-European cultural and political forms to

these atomized ‘subjects of interest’ were arranged collectively, they came to represent market society. So, the technique of liberal governmentality both individuated and totalized simultaneously.

⁷²³ ‘*Verediction* is not a law (*loi*) but the set of rules enabling one to establish which statements in a given discourse can be described as true or false.’ Foucault, *Birth of Biopolitics*, p. 35.

languish in the ‘waiting room of history’.⁷²⁴ This developmentalist rhetoric keeps the time of the post-colonial as ‘belated’, one that is still ‘catching up’ to the West.⁷²⁵

If colonialism was a vehicle of transition (from the non-modern to the modern) then its mode of expansion and its tools of transformation involved the dissemination of the principles of political economy. Though harsh, these doctrines were valued as pedagogical. So, the moral or substantive goal of political economy was not to simply mediate an existent heterogeneity, but to homogenize this difference through the promise of a shared modernity. Prathama Banerjee’s *The Politics of Time* is perhaps one of the best expositions of this discourse. In the context of the Santhal *Hul* rebellion in the mid-nineteenth century, Banerjee argues how usury was considered a necessary tool for ‘civilizing’ the ‘primitive’. Refracting Simmel’s arguments regarding the ‘civilizing force of money’ through her narrative, Banerjee demonstrates the efficacy of this belief amongst both British officials and the newly educated Bengali middle class. For the latter, the Santhals were the ‘primitives within’— an internal marker of difference from where modern autochthonous (Bengali) history writing could begin. For the primitive to overcome their temporal condition, the abstracting quality of money was considered instructive since it replaced the goals of immediate desire with long term accumulation.⁷²⁶ Money therefore cultivated the habits of saving, thriftiness and non-material consumption. As a result, the terribly unequal

⁷²⁴ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton: Princeton University Press, 2008.

⁷²⁵ Dipesh Chakrabarty, “Belatedness as Possibility: Subaltern Histories, Once Again”, in *The Indian Postcolonial: A Critical Reader*, ed. Rosinka Chaudhuri; Elleke Boehmer; New York: Routledge, 2011.

⁷²⁶ Prathama Banerjee, *Politics of Time: "Primitives" and History-writing in a Colonial Society*, New York: Oxford University Press, 2006.

terms of usury the Santhal's were subject to were justified by members of the Bengali intelligentsia, like Soshee Chunder Dutt, who believed that 'it was moneylenders rather than missionaries who could civilize the aborigine.'⁷²⁷ His assessment was not very different from that made by Robert K Pringle, the architect of the land settlement and revenue policy of the Deccan, who described the *vani* or the village moneylender as the only link between 'civilization' and 'barbarianism'.⁷²⁸ The historical trajectory of these arguments lead back to one of the architects of the discipline itself, Adam Smith, who famously advocated against government regulation in grain prices even during periods of extreme inflation, since high prices would cultivate practices of thrift and frugality amongst consumers during lean seasons.⁷²⁹ The manifest agents of political economy—money, contracts, markets—were the agents of transformation through which the pre-modern learnt the rationalities required to be seen as modern.

Along with fulfilling its historical objective—transforming the 'bazaar' into the market—the principles of political economy also imparted a new morality. Much like Dutt and Pringle, officials were keen to identify the moral benefits of usury on agrarian society at large. Here, it is important to acknowledge David Graeber's observation that the moral and theological force behind the statement 'one should pay one's debts' was gradually converted to an ethic of personal responsibility during the early period of finance capitalism.⁷³⁰ This was blueprint of a secular morality, a 'Protestant ethic' where financial

⁷²⁷ *Ibid.*, p. 103.

⁷²⁸ Ravinder Kumar, "The Deccan Riots of 1875", p. 617.

⁷²⁹ Adam Smith, *Wealth of Nations*, Vol. 1, London: Dent, 1981, pp.524-543.

⁷³⁰ David Graeber, *Debt: The First 5000 years*, New York: Melville Press, 2011, pp. 11-13.

and economic practice were signs of virtue. A similar language of duty and ethic is found in the correspondence regarding the Amendment to the Contract Act. The instructional value of the contract and the progress it generated were included in the notes of several officers. The Settlement Collector of Peshawar warned that ‘it is a dangerous course to pursue to set aside the general rules of evidence as to contracts in writing’.⁷³¹ A *munsif* in Lucknow, Bharat Singh stated that ‘It is more desirable to bind people to the terms of written agreements entered into by them and not to encourage them by special provisions to go behind what they ought to know was their *duty* to consider thoroughly before committing themselves to it.’⁷³² Such was the fidelity of these officers for the sanctity of writing and the commercial ‘progress’ it evidenced that they eagerly overlooked the fact that in many of these contracts the borrower was illiterate and could not read or understand the terms to which he had agreed. Some, like Justice Channing, were unwilling to consider illiteracy as a justifiable excuse for hampering the commercial development of a society, and with it, the moral progress of its people:

[The peasant] knows perfectly what he is doing but he thinks that perhaps he may be able to beg off performance of his promises...it hardly needs to be pointed out that the character of almost any people would deteriorate under such a system.⁷³³

For K.J L Mackenzie, the Commissioner of Hyderabad, usury and its crippling debt were uncomfortable necessities that introduced the ‘ignorant peasant’ to the ethics of modernity.

⁷³¹ L.W Dane, Settlement Collector, Peshawar, 14th August 1894, Judicial Department, 21st October, 1897, Proc. No. 2241/97, IOR.

⁷³² From Kunwar Bharat Singh to Registrar, Judicial commissioners Court, Oudh, Lucknow. No. 162, 25th September 1894, Amendment to the Contract Act, Judicial Department, 21st October, 1897, Proc. No. 2241/97, BL.

⁷³³ Opinion of Mr. Justice Channing, Judge, Chief Court, Punjab, 2nd October 1894, Judicial Department, 21st October, 1897, Proc. No. 2241/97, IOR.

Similar to the official discourse regarding the hedonistic ‘primitive’ that Prathama Banerjee reports in the Santhal Parganas, Mackenzie also believed that peasant debt was ‘frequently most recklessly incurred’ and that, ‘self-denial and thrift’ amongst peasants ‘are seldom practiced.’⁷³⁴ Progress therefore connoted a realization of personal (commercial) responsibility, which also translated as ethical agency—‘a hermeneutics of the self.’⁷³⁵ In the Statement and Reasons regarding the Amendment to the Bombay Gaming Act (1890), the drafting members were careful to include that ‘All gambling contracts ought to be suppressed by Courts of Equity, since they are not only prohibited by Statute, but may be justly found to be *immoral*, as the practice tends to idleness, dissipation and the ruin of families.’⁷³⁶ The efficacy and influence of these ideas are also witnessed in Sartori’s discussion of A.F.M Abdul Hai Bhawali’s influential pamphlet, *Usman, Adarsha Krishak* (Usman, the Ideal Farmer), published in Mymensingh 1920.⁷³⁷ ‘Usman’s financial position is very good, and he is free of debt’, Bhawali tells us, which he attributes to his religious piety. Piety and religiosity, argues Sartori, led to building a better commercial self, one that was shaped by everyday personal habits like— ‘giving up tobacco and pan, hygiene, thriftiness, agricultural self-sufficiency, commercial savvy, unremitting diligence and, of course, religious discipline.’⁷³⁸ The ethical development of Usman was made possible through reform of his personal (commercial) self; as he allowed the lessons of political

⁷³⁴ Note From Colonel K.J.L. Mackenzie, Commissioner, Hyderabad Assigned Districts to the Secretary for Berar to the Residents at Hyderabad, Amraoti, 13th August 1894, Judicial Department, 21st October, 1897, Proc. No. 2241/97, IOR.

⁷³⁵ Michel Foucault, “About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth” *Political Theory*, Vol. 21, No. 2 (May, 1993), pp. 198-227.

⁷³⁶ Legislative, October 1889, File Nos. 41-45, NAI.

⁷³⁷ For a wider discussion, see Sartori, *Liberalism in Empire*, p. 145-150.

⁷³⁸ *Ibid.* p. 145.

economy to act through him, he gained recognition as pious Muslim and as a rational, 'modern' agent.

The contradiction between the strategic logic of the market and the substantive rhetoric of Empire therefore generated a diachronic discourse. For Empire, the tenets of political economy facilitated the transition of the pre-modern to the modern and the technologies of political economy - money, contracts etc. - homogenized the differences between pre-capitalist and capitalist society through the medium of instruction. Within the internal logic of political economy, however, this difference was productive, and it was the function of the contract to mediate without annulling them. So, as a pedagogical device, political economy looked to instruct the ignorant without alleviating his ignorance; the subject remained perpetually ignorant and perpetually a student. One amongst several insightful observations in Banerjee's monograph was that the 'primitive' was introduced to commerce and usury in a manner where the 'experience of exchange [w]as necessarily unequal'.⁷³⁹ It would appear, however, that since a majority of contracts already assumed that exchange *was* unequal, they also rendered one of the transacting parties as 'primitive', or more accurately, 'ignorant' or 'simple'.

What was the nature of this simplicity? B.B Chaudhuri cites the testimony of an indigo planter as early as the 1850's who claimed that 'No European farmer could produce either sugarcane or tobacco or any raw material as cheaply as the ryots.'⁷⁴⁰ As has been already

⁷³⁹ Banerjee, *The Politics of Time*, p. 104.

⁷⁴⁰ B.B Chaudhuri, 'Growth of Commercial Agriculture in Bengal', p. 130.

argued, small proprietorship was the key to the cheap production of several cash crops like jute, sugar, oilseeds, cotton and grains. This system was deemed more manageable and cost effective than extensive cultivation carried out through a plantation mode. So, when it came to the production of commodities, the peasant was anything but a commercial simpleton. His 'ignorance' kicked in during the post-production process which involved the sale of his produce; far from ontological, his 'belatedness' began at the doors of the market. Therefore, one of the many gifts of political economy was to render the commercially savvy into the commercial simpleton. It is also important to acknowledge the force of Banaji's arguments once more. By putting the entirety of colonial capitalist expropriation on trial, he demonstrates that the discourse that appeared eager to parse systems and communities into non-coeval temporalities - pre-capital and capital - relied quite significantly on the former for building global commodity markets and the industries that relied on them in the first place. In the words of Bentham, the '*agenda*' was cost efficiency, not systemic transformation; the goal was the large-scale production of cash crops and their cheap acquisition, not the arrangement of a mode of production that would see small holdings turn to *latifundias* or see labour intensive production move to machine managed cultivation. Sabyasachi Bhattacharya labeled this attitude as 'pragmatic', where even theoretically inconsistent philosophies served an 'identical economic interest.'⁷⁴¹ So, the rationalities and practices deemed pre-capitalist remained central to the strategic logic of political economy, not something it needed to overcome. Titles of heterogeneity—pre-capitalist, pre-modern etc.—were both produced and then mediated by this discourse,

⁷⁴¹ Sabyasachi Bhattacharya, 'Laissez Faire in India', *IESHR*, Vol. 11 No.1, Jan, 1965, p. 15.

rationally. Importantly, these temporal bifurcations harbored a long shelf life which continued into the post colonial period. Commenting on the Nehruvian period of planning, Ron Inden gives evidence of the lament of planners like S. Ambirajan who felt that ‘even today, there is not one homogenous economy in the country, but a *medieval rural economy*, and alongside of it, a *half heartedly modern economy*.’⁷⁴² Quite rightly, Inden clarifies that the ‘medieval here is not an unwanted past that survives into the present but an unwanted condition of modernism that modernists dispose of by projecting it onto the past.’⁷⁴³

Only that the ‘medieval’ is *not* an unwanted condition at all. Quite the opposite, categories like ‘pre-modern’ and ‘medieval’ offers potential for expropriation in the name of mediation and modernization. To paraphrase Dipesh Chakrabarty, the discourse of political economy was successful in generating ‘backwardness as a historical advantage’ for globally distributed commodity markets.⁷⁴⁴ When nationalist politics harnessed this same pre-capitalist ‘backwardness’ for their own ends in the early twentieth century, they had employed a strategic reversal.⁷⁴⁵

From *Homo Ludens* to *Homo Economicus*

Why did the fidelity of the colonial government, which refused to entertain questions of intelligence, simplicity, or weakness in the context of commercial contracts, slip when it

⁷⁴² Ron Inden, *Text and practice : Essays on South Asian History*, Oxford : Oxford Univ. Press, 2006, p. 294

⁷⁴³ *Ibid.*

⁷⁴⁴ Chakrabarty, “Belatedness as Possibility”, p. 169

⁷⁴⁵ Graham Burchell; Colin Gordon, *Foucault Effect: Studies in Governmentality*, London : Harvester Wheatsheaf, 1991, p.32

came to gaming contracts? Why were the principles of political economy, which promoted free contracting with the aim of building a market society in the colony, stop short of extending the same weight to contracts struck in the rain betting houses and the spot betting bucket shops in Calcutta and Bombay? In spite of the efforts made by the Marwaris to demonstrate the similarity between the practices of rain betting and commercial practices like *teji mandi*, options and derivative trading, it was maintained that the former were not to be treated as commercial practices. During a review meeting regarding the Rain Gambling Bill in 1897, a member of the Council of the Lt. Governor of Bengal, Mr. Wallis, complained that bill was pushed through without consulting the ‘commercial bodies and Trade Associations’ of Calcutta. To this, S.N Banerjee provided the following response.

His chief grievance seems [to be] that particular Associations representing particular interests were not consulted. Suppose the government were to introduce a Bill relating to *mercantile matters*, would it be any answer to the Bill being proceeded with that to the British Indian Association and the Indian Association or the two distinguished Muhammadan Associations which are so ably represented here, had not been consulted? I do not suppose the Honorable Member in charge of the Bill would waste his time in sending such a Bill round the consideration of bodies who could not be presumed to have any particular knowledge of the matter.⁷⁴⁶

⁷⁴⁶ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

Banerjee statement sequestered and sealed arguably resemblant practices into digestible categories—social and commercial. It was, in all effect, a ‘distribution of the sensible’ and the Marwari’s attempts to highlight the similarities between rain gambling and betting conducted in the options markets of opium (*teji mandi*) was their attempt at redistribution, or *dissensus*.⁷⁴⁷

Banerjee was not the first and certainly not the last to lay down this distinction. The need to delimit gambling as a ‘wasteful’ social activity grew when commodity, equity and share/stock speculation began attracting people from non-commercial and non-mercantile backgrounds. Correspondingly, as the burgeoning leisure industry of gaming expanded its footprints amongst the working class, the discursive contours between what is ‘work’ and what is ‘play’ also grew deeper. The distinction was largely impressionistic since the legal definitions regarding the two practices continued to result in a fair bit of slippage and showed hints of clarity only after an event or rupture. Let me provide a contemporary example of this. During the financial crash of 2007-08, where predatory lending and the collapse in the value of mortgage-backed securities effected a crash in global markets, analysts were quick to point out that the practices of certain bankers, especially from the Lehman Brothers, was ‘nothing but gambling’. When did the switch occur; when did prudent and legitimate commerce turn to risky and illegitimate play? If the housing bubble had not burst as explosively as it did, would the actions of the bankers still be described as gambling? The answer to this neoteric Sorites paradox is still awaited.

⁷⁴⁷ Jacques Ranciere, *Aesthetics and its Discontent*, Cambridge: Polity, 2014, p. 25.

While the legal and technical differences between gambling and speculation is difficult to articulate in the sphere of market activity, the difference between trading in futures and rain betting appeared more obvious. It was the latter that became the object of representation, one in which gambling was depicted as a social malaise and a wasteful activity that trapped the weak, turned them to crime and destroyed their industrious potential. The vague rhetoric of this discourse appears marked in comparison to the detail furnished by the *Banking Enquiry Reports* that elaborated the problem of small peasant debt. Yet, statistics and named cases were not required to convey the dangers of gambling; the discourse assumed that the facts and faults of the practice were so well known that they did not require formal substantiation. Importantly, in narrating the effects of gambling (crime, suicide, prostitution) the discourse also produced a subject of reform—the gambler. The gambler was to be distinguished from the informed speculator, the cautious market actor, the compiler of capital. As a result, the human sciences, especially psychoanalysis and sociology, began understanding this subject differently. From being a universal practice, something everyone indulged in once in a while, gambling and betting was mapped onto an individual with propensities. In line with the broader trajectory of modern criminological discourse, here too, the question had shifted from ‘what have you done’ to ‘who are you’.⁷⁴⁸

⁷⁴⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1977.

For psychoanalysis, the answer to the question ‘who are you’ was ‘a neurotic’; more specifically, a masochistic neurotic. It was Freud who first made the observation in 1928, in his influential article titled ‘Dostoevsky and Parricide’.⁷⁴⁹ He used Dostoevsky’s life and novel, *The Gambler*, to illustrate the point.⁷⁵⁰ According to Freud, Dostoevsky’s self-destructive gambling sprees were signs of a neurosis marked by guilt and shame and followed by remorse and loathing. The masochist in Dostoevsky motivated him to lose, and by doing so, validated his superego’s punishment and triumph over the ego. Freud thus paved a disciplinary path that other analysts would follow, which viewed the ‘neurotic’ gambler’s *real* intention as loss.⁷⁵¹ It was impossible for this figure to be ‘rational’, for his motivations were antithetical to the spirit of accumulation.

While psychoanalysis cordoned off the gambler from the field of legitimate and ‘rational’ market behavior, sociology, and its attendant disciplines, furthered this distance. For scholars like Erving Goffman, Girda Reith, George Simmel and Roger Caillos, gambling represented an escape from the repetitive and constricting life in (industrial) capitalist

⁷⁴⁹ Sigmund Freud, ‘Dostoevsky and Parricide’ in Peter Fuller and Jon Halliday, *The Psychology of Gambling, The History of Gambling in England*. London: Duckworth, 1975, pp. 157-174. The crux of Freud’s argument was that Dostoevsky had been particularly influenced by his own father’s death. The trauma that the death caused, however, was not a result of Dostoevsky’s fondness for his father. The fact that Dostoevsky had hated his father and his oppressive behavior triggered within him the wish for parricide. However, the instinct was accompanied by a sense of fear- the fear of castration. Freud believed Dostoevsky to manifest the second fear, which accounted for the latter’s latent homosexuality. According to Freud, the death wish directed towards the father, if not resolved in the oedipal stage of development, could take on the form of neurosis. In Dostoevsky’s case, this neurosis appeared as bouts of epilepsy. In Freud’s opinion (though he could not prove it) Dostoevsky’s illness was a neurotic, and not a physiological condition. The neurosis itself was a manifestation of Dostoevsky’s masochistic tendency which involved his superego (his father) constantly punishing his ego (Dostoevsky) for having wished his father’s death.

⁷⁵⁰ Fyodor Dostoevsky, ‘The Gambler’, in *The Great Short Works of Fyodor Dostoevsky*, Perennial Classics, 2004

⁷⁵¹ Robert Linder, Peter Fuller, Jon Halliday and Edmund Bergler were some notable analysts who pursued the path that Freud laid out.

society. These theorists understood and represented gambling as a form of experience that was removed from the everyday. The task, therefore, was to uncover the broad structures common to this experience. Gambling came to be marked by risk, thrill, excitement, and transcendence, as well as by tension, dizziness and boredom. Simmel felt that much like the ‘adventurer’, the gambler’s temporality was removed from work time.⁷⁵² For Goffman, gambling was a variant of the experiential quotient-‘*action*’, and one of its salient features was its ability to generate tension through its premise (to square off), which was then resolved through the conclusion (settlement).⁷⁵³ For Caillois, gambling produced the feeling of *ilinx* (whirlpool), which temporarily distorted how the individual perceived the ordinary.⁷⁵⁴ Reith described this feeling as ‘vertigo’; a disorientation created by the uneasiness and pleasure that only risk and thrill could provide. Broadly, gambling was the way a worker/citizen seized control of his/her destiny by experiencing the thrill of risk, an experience that was progressively disappearing in the ‘iron cage’ of modern capitalism.⁷⁵⁵ Even J Huizinga’s extensive study titled *Homo Ludens: A Study of the Play Element in Culture*, understood ‘play’ as generating a productive agonism within the ‘cultural’ sphere of human activity, expressed through poetry, sport, music, literature, and art.⁷⁵⁶

⁷⁵² Georg Simmel, “The Adventurer: 1911.” In *The Sociology of Risk and Gambling Reader*. James F. Cosgrave. ed. New York: Routledge, 2006. pp. 215-225.

⁷⁵³ Erving Goffman “Where the Action Is.” In *Sociology of Risk and Gambling Reader*. pp. 225-255, p. 226.

⁷⁵⁴ Cited in Reith, Gerda. *The Age of Chance: Gambling in Western Culture*. London: Routledge, 1999, p. 260.

⁷⁵⁵ Max Weber, *Protestant Ethic and the Spirit of Capitalism*, London: Routledge, 1992.

⁷⁵⁶ Johan Huizinga, *Homo ludens: A Study of the Play Element in Culture*. London: Routledge and Kegan Paul, 1949.

These epistemological boundaries erected between work and play were challenged, notably in the works of Walter Benjamin and Edward C. Devereux Jr. In a short article titled 'On Some Motifs in Baudelaire' Benjamin drew an unlikely connection between work and play.⁷⁵⁷ Instead of viewing gambling as an antonym or an ancillary to capitalist ethics regarding money, work or time, Benjamin drew his attention to how the worker and gambler were victims of a similar anomaly inflicted by industrial capitalism.

The latter [the factory worker], to be sure, lacks any touch of adventure, of the mirage that lures the gambler. But it certainly does not lack the futility, the emptiness, the inability to complete something which is inherent in the activity of a wage slave in a factory. Gambling even contains the workman's gesture that is produced by the automatic operation, for there can be no game without the quick movement of the hand by which the stake is put down or a card is picked up.⁷⁵⁸

While Benjamin's observations remained limited to the phenomenological and aesthetic similarities between the factory and the gaming house, it was Edward C. Devereux Jr.'s structural-functionalist analysis of the betting industry that attempted to holistically disclose the role of gambling within the capitalist system of early nineteenth century America.⁷⁵⁹ In 1949, the year that Devereux completed his thesis, finance capital had expanded its demographic grounds in America. Most exchange markets, such as the Chicago Board of Trade, the Chicago Mercantile Exchange and Wall Street had abandoned their exclusivist policies which earlier prevented public access.⁷⁶⁰ As a result, pedigree or business standing were dropped as criteria for those who wanted to trade in commodity

⁷⁵⁷ Walter Benjamin, 'On Some Motifs in Baudelaire', in James F. Cosgrove ed. *The Sociology of Risk and Gambling Reader*. New York: Routledge, 2006.

⁷⁵⁸ Benjamin, Notes, pp 143-144.

⁷⁵⁹ Edward Clifton Devereux Jr. *Gambling and the Social Structure; Vol. 1 and II*. New York: Arno Pr., 1980.

⁷⁶⁰ Lambert, *The Futures*.

exchanges. Besides, the Protestant ethic, that Weber had identified as central in attributing validity to the principles surrounding industrial capital, faced a significant challenge when it encountered the amplified proliferation of everyday risk embodied in the discourse of finance and speculation. The tension between two alternate philosophies surrounding work and thrift on the one hand and spending and risk on the other, provided Devereux with an entry point to understanding and explaining why this discordance in the social and economic structure was only an apparent one.

Instead of pleasure, Devereux approached gambling as a means for generating *strain* or tension for players. Importantly, he believed that this *strain* was emblematic of similar strains that existed within the larger system. He was aware that certain principles of industrial capitalism, also woven into the doctrines of Protestantism, had become antagonistic to the logic that drove speculation and investment in the age of ‘consumer capitalism’ which the New Deal had inaugurated. He expressed these contradictions as value conflicts, witnessed in the tension between thrift and budgeting v. consumption, or in prudence and discipline v. risk. According to him, some of the ‘Protestant vocabulary of motives’ began losing ground during the period.⁷⁶¹ Let me focus on two particular contradictions that appear particularly applicable for the current argument regarding colonial gambling.

The first concerns the conflict between work and reward. That gambling had eroded native industriousness (including that of children) was littered in every government report,

⁷⁶¹ Downes, David M. et al. eds. *Gambling, Work and Leisure: A Study Across Three Areas*. London: Routledge & K. Paul, 1976, p.23.

whether in Burma, Punjab, Bengal or Bombay. Addressing the Punjab Legislative Council in March 1929, Sir Fazl-i-Husain reiterated that ‘people who took to [gambling] were being misled’ and that ‘the way to get rich was by putting in honest work and not by putting in money into a *ghara* out of which they expect to get a 1000 rupees.’⁷⁶² However, as the discussions regarding the Amendment to the Contract Act attest, government officials were equally aware of this inconsistency in commercial agriculture; they knew that it was the merchant and usurer who benefitted off the ryot’s toil. How could an important moral lesson of capitalism—the work ethic—be kept relevant when it was inconsistently observed and was in many cases absent in the system as a whole? When the discourse regarding ‘work ethic’, however, was shifted to the disavowal of ‘luck’ or ‘chance’ in economic practice, it was possible to have one’s cake and eat it too. While neither ‘chance’ nor ‘luck’ generated active hostility in the sphere of commercial speculation, their presence in gambling were taken as values that apparently contradicted the ethics on which a capitalist society was to be built. As the editors of the volume *Gambling, Work and Leisure* argue:

Since these values cannot be attacked in their relation to the latter [financial speculation], it is only with regard to gambling, where the same values crop up in segregated contexts [that] they can safely be attacked, thus safely ‘grounding’ the tensions and ambivalences they produce, and simultaneously reinforcing and bolstering the dominant system.”⁷⁶³

Telescoping the argument back to the question of ‘free contracting’, the discourse on native gambling created a similar field for State action. Crucially, it allowed the colonial

⁷⁶² Legislative, 1929, File No. 50/II No. 1-3, NAI

⁷⁶³ Downes, David M. et al. eds. *Gambling, Work and Leisure: A Study Across Three Areas*. London: Routledge & K. Paul, 1976, p. 23.

government to hold diachronic positions; that the colony—inhabited by ‘weak’, ‘ignorant’ and ‘simple’ subjects—was ill suited and ill prepared for the principle of ‘free contracting’, while also maintaining that ‘free contracting’, when witnessed in the field of commercial agriculture, was necessary for commercial progress and education.

The second value conflict emerges in the field of thrift v. spending. The moral and ethical values of thrift, saving and restraint from conspicuous consumption (touted regularly in the colony) were contradicted by the values of consumption, where both government and market forces sought to liberate the capital and savings of ordinary citizens. The importance placed on ordinary consumption was fully elaborated during the Keynesian era of economic reconstruction that followed the Great Depression. Its contemporary relevance is gleaned from the stimulus checks provided by the Biden administration following the economic disruptions caused by the Covid 19 pandemic. The money was given with the idea that it would be spent and not saved. If the nineteenth century liberal motto was to ‘live dangerously’, then its economic counterpart in the early twentieth was to ‘spend frivolously’.⁷⁶⁴ It was only through spending could the petty consumer’s capital enter ‘the market’, lead to its expansion and nourish the sectors of industry and employment.

The ethical and utilitarian conflict between consumption and thrift is again observed in the discourse concerning colonial gambling. Gambling amongst the ‘weaker sections’

⁷⁶⁴ *Birth of Biopolitics*, p. 66. “Live dangerously,” that is to say, individuals are constantly exposed to danger, or rather, they are conditioned to experience their situation, their life, their present and their future as containing danger.’ Foucault continues, “That is why the incitement to “live dangerously” entails the establishment of multiple mechanisms of security”. p. 329.

invoked moral rebuke because it was taken as a sign of reckless, wasteful and unethical expenditure. This money could be saved or spent more judiciously. However, as various commodity markets grew in the late nineteenth and early twentieth century in India, their exchanges required the capital of small investors as well as their security; ‘market makers’ and sellers could only hedge when they had a large pool of people who acted as intermediary holders of a speculative contract, thereby minimizing the sellers risk and stabilizing the price of the commodity. So, for newly formed associations like the *EICA* (East India Cotton Association), market expansion meant attracting petty capital to derivative markets (in futures, but also in options). How did a discourse that valued thrift and attacked chance pivot effectively?

An interesting epistemological process was underway in the early twentieth century that responded to these very needs. A body of astro-meterological texts that predicted the chances and quantity of rain fall and was earlier employed by rain gamblers in the nineteenth century, had shifted their content to predicting the price of commodities for *teji mandi* markets at the beginning of the twentieth century. In doing so, they were instrumental in turning a class of bettors off the rain gambling houses of Calcutta and Bombay and onto the speculative markets of cotton, grain and silver. This demographic relocation was matched by a change in legal and economic discourse which saw the wasteful ‘petty gambler’ make way for the useful ‘small speculator’. The following sections reconstructs the path to this transition.

Rain to Grain

The Marwaris of Calcutta employed an unexpected defense when the ban on rain gambling was first contemplated in 1896. Rain gambling aided in the study of weather, they argued, and if turned into a discipline, it could even advance the study of meteorology. Ostensibly, the aim of the argument was to present the practice as ‘game of skill’, like horse racing, or whist or bridge. This would have earned it legal legitimacy as well as dispelling the unsavory reputation it had accrued. In a “Letter to the Editor” of *The Statesman*, a Marwari author claimed that through regular play, a gambler would soon transform into a ‘weather prophet’, and that “maritime disasters would be less excessive if the weather was part of the curriculum of study imposed on shipmasters.”⁷⁶⁵ The “Members of the Marwari Community” stated that “rain gambling conduces to the promotion of science” and even offered to share their methods of prognostication with the government, given that they were “more highly valued and relied on than the reports of the Meteorological Department”.⁷⁶⁶ Even if the actual practices strayed far from the methods deemed ‘scientific’, rain gamblers took their epistemic claims and offers seriously. To that end, the Chief Secretary of the Government in Bengal, C.W. Bolton, wrote to the Secretary to the Government of India in April 1897, informing him that:

[...] so systemized and general has rain gambling become that a guide to it was published in the past year, which professed to instruct the public in the study and forecast of the weather, and to furnish tips for the rainy season.⁷⁶⁷

⁷⁶⁵ “Letter to the Editor” by “Humanitarian”, *The Statesman*, March 23rd, 1897.

⁷⁶⁶ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

⁷⁶⁷ Legislative Department, Proceeding No. 26-54, May 1897, NAI.

How did the British press respond to these proposals? Unequivocally dismissive, *The Englishman* derisively regarded the plea “set up for it by its apologists that it further[ed] the interests of science by directing attention to the state of the weather [had] only to be mentioned to be mentioned to be laughed out of court.”⁷⁶⁸ The contrast of the rational space of the courtroom amplified just how ludicrous the claim sounded. British observers like Major Henry Hobbs continued in a jocular vein:

They (the Marwaris) had little faith in barometers or other scientific instruments that were dear to the Western mind, but they had their own gadgets such as certain plants, which, like seaweed, were supposed to know all about it. The most popular of their prophets were ordinary leeches which they kept in a bottle of water. When the leeches floated to the top, it was a sure sign of rain.⁷⁶⁹

In an era of instruments, the sensory had little place or authority, a fact that was apparent to an avid meteorological enthusiast back as early as the 1830s, who exclaimed, ‘nothing is more deceitful than the testimony of the senses: we can judge of the difference of climates only by numerical calculations’.⁷⁷⁰

It is worth pursuing the claims of the rain gamblers and hunting down their texts. The veracity of their claims—were their methods as accurate as meteorological predictions—is not what is at stake. Instead, their relevance is gleaned through their function. They indicate the presence and circulation of a parallel episteme, which in turn offers us a window into the influences, motivations and world views of the gamblers who visited these

⁷⁶⁸ *The Englishman*, September 16th, 1896.

⁷⁶⁹ Major Henry Hobbs, *The Romance of the Calcutta Sweeps*, Calcutta: 1930, p. 45.

⁷⁷⁰ Colonel William Henry Sykes, “On the Atmospheric Tides and Meteorology of Dukhun,” *Philosophical Transactions* 1 (1835):195.

rain betting houses in the late nineteenth and early twentieth centuries. Accordingly, effort should be directed in unearthing the foundations of these knowledge forms and tracing their evolving genealogy.

Oral Texts and Weather Proverbs

Bolton mentioned the publication of ‘a guide’ to rain gambling, for which he provided no name. Regrettably, this singular text remains in the secret depths of the archive and will be hopefully revealed through further dredging. For now, it acts as the lodestar for the following reconstruction that interrogates a similar body of literature.

What we do know is that a body of astro-meteorological oral texts like the *Bhaḍalīvākyo*, *Ghāgha aura Bhaḍḍarī*, *Khanār vacana* and *Ḍāker vacana*, were in circulation since at least the late nineteenth century. Amongst other information, these texts contained a sizable number of weather proverbs, sayings (*vacanas*) and wisdoms, written in an accessible language, mostly as couplets. Such literature was printed and available as pamphlets and small textbooks and as researched studies during the early twentieth century.⁷⁷¹ It is arduous to establish set paths of circulation or the volume in readership of such literature, a fact that Projit Mukharji signals in his study of grimoire ‘occult’ market literature in the

⁷⁷¹ Charu Singh, *Science, Hindi Print and Agricultural Improvement in Colonial North India*, Unpublished PhD Dissertation, Centre for Historical Studies, School of Social Sciences, Jawaharlal Nehru University, 21st July 2015.

early nineteenth century.⁷⁷² Still, one may reasonably assume that such texts populated the epistemic landscape of the rain gamblers in question.

A certain variety of astro-meteorological texts extended from Gujarat in the West to Assam in the East, with only some variation in their content and lineage. Published in 1949, Ramnaresh Tripathi's *Ghāgha aur Bhaḍḍarī* attempted to sort out these differences and impose proper nomenclature on this promiscuous genre.⁷⁷³ Tripathi starts his introduction with several caveats. First, like other publications on this theme, he reminds the reader of the functional importance of monsoon literature in an agrarian and unevenly irrigated country like India. He then revealed his method of study, which involved talking to various astrologers (*jyotiṣa*), visiting several Pundits and scouring the countryside of Northern India to hunt down local weather-related proverbs. In all this, Tripathi confesses, he cannot tell where myths end and history begins. So, he advises his readers to consume the legends, albeit with a pinch of salt.

While both *Ghāgha* and *Bhaḍḍarī* are described as famous astrologers (*jyotiṣa*) by Tripathi, he treats their lives and sayings separately. He sees the former's influence more forcefully in Bihar, Uttar Pradesh, Bengal and Assam while the latter crops up in the West, most notably in Gujarat, Rajasthan and Punjab. *Ghāgha*'s sayings are mostly to do with rural life, farming techniques, descriptions of caste and how to maintain caste order, everyday

⁷⁷² Projit Mukharji, "The Magic of Business: Occult Forces in the Bazaar Economy" in *Rethinking Markets in Modern India: Embedded Exchange and Contested Jurisdiction*, eds. Ajay Gandhi, Barbara Harriss-White, Douglas E. Haynes, Sebastian Schwecke, New York: Cambridge University Press, 2020.

⁷⁷³ Ramnaresh Tripathi, *Ghagh aur Bhaḍḍarī*, Allahabad: Hindustan Academy, 1949.

village wisdoms as well as jokes and signs of foolishness. On the other hand, Tripathi ascribes all monsoon and weather-related proverbs to the sayings of *Bhaḍḍarī*. But this is where his rigor ends. In all other respects, the legends of both *Bhaḍḍarī* and *Ghāgha* display quite a bit of overlap. For example, Tripathi tells us that oral histories and faded genealogies trace the lineage of both figures to a mixed heritage—brahmin astrologer and *ahir* (low caste) woman—and locate them at nearly the same place (in some cases Champaran in Bihar and Kannauj in Uttar Pradesh). Tripathi also claims that *Ghāgha* was referred to as *Khanā* and *Ḍāk* in Bengal and Assam respectively; in both regions, the figure is a woman. This is the same for *Bhaḍḍarī*, who in Rajputana in particular, is thought to be a woman too.

However, Tripathi may have overlooked a more fundamental difference in the epistemic worlds of the texts that circulated in Western India (Rajasthan, Gujarat and Punjab) as opposed to those originating in the East (Bengal, Bihar, Assam). The Western body of texts—*Bhaḍalīvākyo*, *Bhaḍalī tārī varṣāvāṇī*, *Meghamālā*—refer back to astral texts like the *Gargasamhitā* and omen or *Śakuni* literature like the *Vasantarājaśakuna*, composed in the 11th century in Rajasthan. Unknowingly, even Tripathi admits that, to the best of his knowledge, the only ‘book’ attributed to *Bhaḍḍarī* was the *Śakuna vicāra*.⁷⁷⁴ Given his association with rain and monsoon literature, *Bhaḍḍarī* demands closer scrutiny.

The Sayings of *Bhaḍalī*

⁷⁷⁴ *Ibid.* p. 27.

In the texts originating from Gujarat and Rajasthan, *Bhaḍḍarī*, is popularly referred to as *Bhaḍalī*. Here too, his/her status remain contested and debatable. Most texts refer to him/her as a weather prophet, a relative of Varahamira and the son of an unnamed but prodigious woman astrologer, in the court of the Chalukya King Jaysimha Siddharaja (11th century Patan). However, Tripathi, once again places Bhaḍalī in North India, more specifically in Benares. The commonly circulating story, he reports, involves Varahamira, who, having foreseen the birth of a great *jyotiṣa* on a particular day of the year, desired to father the child himself. Accordingly, he set forth from Benares to his native home in Ujjain to copulate on that particular day. He miscalculated the time of the journey, however, and was therefore compelled to stop at a village on route, where he made love to a *ahir* woman who then birthed *Bhaḍalī*. Gujarati oral histories differ entirely. Again, with all caveats in place, both *Bhaḍalīvākya* and *Bhaḍalī tāṛī varṣāvēṇī*, claim *Bhaḍalī* to be the offspring Ughad or Hudadh, a famous astrologer from Gurjeshwar in Marwar.⁷⁷⁵ Other oral histories describe *Bhaḍalī* as the son of a dacoit, while several claim that she was a woman, born in a Bhangi or Chandali family. What all of this indicates is that despite minor variations, each story builds on certain identifiable tropes. It comes as no surprise that in spite of the spatial range of *Bhaḍalī* sayings, Tripathi also noticed a pronounced influence of both Maithali and Marwari in the linguistic structure of the couplets.⁷⁷⁶

What about the Eastern set of texts - the *Khanār vacana* and *Ḍāker vacana*? Here, the lineage is drawn to the *Kṛṣiparāśara*, whose origins Ryosuke Furui ascribes to Bihar and

⁷⁷⁵ Jethalal Narayan Trivedi, *Bhaḍalīvākya*, Ahmedabad: Tribhuvandas Co. 1964.

⁷⁷⁶ *Ibid.* p.26.

Bengal in the early 12th century.⁷⁷⁷ While also an instance of the ‘astral sciences’, Furui makes no mention of the *śakuni* literature that influenced the *Bhaḍalī* corpus. Quite impressively, he reconstructs the lineage of the *Kṛṣiparāśara* by pulling apart its multiple influences. Some of it, especially knowledge regarding rainfall and wind patterns, he draws to the *Bṛhatsamhitā*. However, while the *Bṛhatsamhitā* bases its predictions regarding signs of rainfall to theories of the womb (*garbha*), no such knowledge is found in the *Kṛṣiparāśara*. Instead, the text builds on a different set of astrological literature which he is hesitant to locate with certainty. This uncertainty lingers regarding the question of authorship too. His informed conjecture bears affinity to the mixed lineages of the *Bhaḍalī* canon, as he takes the evidence of the *Bṛhaddharmapurāṇa* to suggest that the text was the work of a social group called the *gaṇaka* (calculators), who themselves were produced from the union of *vaiśyā* women and *śākadvīpī brāhmaṇas*.⁷⁷⁸ According to Katerina Guenzi, the *śākadvīpī* themselves were ‘outsiders’, most probably from Iran who were associated with ‘the cult of the Sun (Surya) and the occupations of astrologer (*jyotiṣa*), Ayurvedic doctor (*vaidya*), and tantric priest (*tāntrika*).’⁷⁷⁹ Furui accordingly reads the functional importance of the *Kṛṣiparāśara* as one of establishing lineage for an etic community amongst the agriculturalists in Bengal and for producing hegemonic power for migrants gifted with *brahmadeya* land grants. In her detailed study of *Khanār vacanas*, Rita Chaudhari also notes affinities in content between the sayings of *Khanā* and the *Kṛṣiparāśara*, apart from finding philological similarities in these texts as well. This pushes

⁷⁷⁷ Ryosuke Furui, “The Rural World of an Agricultural Text: A Study on the *Kṛṣiparāśara*”, *Studies in History*, 21, 2, n.s. (2005), Sage Publication.

⁷⁷⁸ Furui, “The Rural World of an Agricultural Text” p. 155.

⁷⁷⁹ *Words of Destiny: Practicing Astrology in North India*, New York: SUNY Press, 2021, p.7.

her to place this set of oral literature in 12th century Bengal, around the same time as the *Kṛṣiparāśara*.

Knowledge forms of *Kṛṣi* and *Śakuni* Texts

An impressionistic survey falls short of generating fixed categories for this body of literature. Barring small differences in lineage, style and specificities of content, the sayings of *Bhaḍalī* and that of *Khanā* and *Ḍāk* appear similar. The texts layer their claims through two discernible categories—astral knowledge and the observations regarding local cultivating practices and natural weather phenomena. In the case of the *Kṛṣiparāśara*, Furui suggests an intermingling of local and supralocal knowledge forms, which he then map onto the cycles of rainfall. So, long *durée* predictions of rainfall, or signs of weather related calamities like draught and floods are based on the astral signs gleaned from lunar cycles, planetary movements and wind directions, while short term predictions are indicated by observable natural phenomena. In terms of stated intentions, the audience of these texts appear to be the average cultivator. Apart from direct reference to the *kheḍut* and *chāṣi* that the couplets call out to, support for this hypothesis also comes from the simple rhyming language of the proverbs themselves.

It is also difficult establish a hierarchy of authority in terms of knowledge forms. Furui argues that while the lineage of *phalit* (prognostic) astral literature provided such texts with epistemic legitimacy, one should not discount the value of the observed phenomena either. The latter concerned itself with practical information on how to spot signs of imminent

rain; signs like snakes climbing trees, insects evacuating their nests, frogs croaking etc. In the context of omen or *Śakuni* literature, Ron Inden insists that the intermingling of cosmological and terrestrial knowledge forms should be viewed through a sliding scale of importance; the cosmological and planetary signs being more portentous than natural or observable phenomena.⁷⁸⁰ Then again, from the sayings that emanating from Rajputana, we find proverbs such as these:

सूरज तेज सतेज झाड बोले अनियाली
मही माट गल जाये, पवन फिर बैठे छाली
कीडी मैले ईड, चीटी रेत पे नहावै
काँसो कामन दौड़, आम लीलो रंग आवे
डेडरो डहक बाड़ा चढ़ै, बिसहर चढ़ बैठे बड़ा
पंडिया ज्योतिस झूठा पड़ै, धन बरसै इतरा गुणा

‘If the heat of the sun increases suddenly, if the ducks start quacking, if *ghee* begins to melt, if the goats turn their backs to the wind, if ants start leaving with their eggs, if sparrows bathe in mud, if the flowers of the khas grass turn dull, if the color of the sky turns dark blue, if frogs retreat into their holes and if snakes start climbing trees, then it will rain heavily.’⁷⁸¹

These were the signs of the imminent rain. However, it is the last line that really stands out - ‘the words of *jyotiṣa*-s are often false, but these signs never are.’⁷⁸² Even within a corpus that drew authority from astral sciences, in parts, such authority cedes to practical and natural wisdoms.

⁷⁸⁰ Ronald Inden, *Text and Practice*, p. 182.

⁷⁸¹ Tripathi, *Ghāgha aur Bhaddri*, p. 121.

⁷⁸² *Ibid.*

This is not to suggest that astral signs only indicated portentous phenomena or long *durée* trends. There are several couplets, based on lunar calculations that also predicted the possibility of rain, if not on that day itself, but in the coming days. For example:

नौमी माह अँधेरिया, मूल रिच्छ को भेद।
तौ भादौ नौमी दिवस, जल बरसै बिन खेद।।

If on the ninth day of *māgha badī*, the *mūla* constellation is visible, then on the ninth day of *bhādaum*, it shall certainly rain.⁷⁸³

We may assume that this corpus of texts informed and inspired modern compilations and publications in the field of *jyotiḥ-śāstra* (astral sciences), like the ones identified by Charu Singh in her unpublished dissertation.⁷⁸⁴ In mapping the publication and circuits of transmission of Hindi ‘scientific’ literature in the early twentieth century north India, Singh pays close attention to the boom in *phalit jyotiṣa* texts like the *Vṛṣṭiprabodha*. Composed by Mithilal Vyas and published in Ahmedabad in 1908, the *Vṛṣṭiprabodha* provided its readers with astral prognostic wisdoms for detecting rainfall, improving agriculture and for watching out for signs (*śakuna*) of both plenty (*subhik*) and famine (*durbhik*).⁷⁸⁵ Like the above mentioned *Ghāgha*, *Bhaḍālī*, *Khanā* and *Ḍāk* literature, such modern nineteenth-century texts moulded their knowledge on *jyotiḥ-śāstra* literature, while specifying the ‘modern’ aspects of their work, which were suited for practical and everyday use. It could

⁷⁸³ *Ibid.* p. 62. *Magha* refers to the tenth month of the Hindu calendar; *Badī* refers to the waning half of the lunar month; *Mūla* refers to the nineteenth lunar mansion containing 11 stars; *Bhādaum* refers to the fifth month of the Hindu calendar.

⁷⁸⁴ Charu Singh, *Science, Hindi Print and Agricultural Improvement in Colonial North India*, Unpublished PhD Dissertation, Centre for Historical Studies, School of Social Sciences, Jawaharlal Nehru University, 21st July 2015.

⁷⁸⁵ *Ibid.* p. 8.

be therefore be described as an instance of ‘useful knowledge’, a category that Maxine Berg discovers in pre-capitalist networks of circulation and which she describes as the combination of ‘tacit’ and ‘codified’ knowledge deployed for practical use.⁷⁸⁶ Interestingly, while the contents of the *Vṛṣṭiprabodha* claimed to disclose and systematize rural and agrarian knowledge forms, Singh argues that the text gained maximum popularity in Bombay and Calcutta, while its influence was also witnessed in a few North Indian small towns too.⁷⁸⁷ Importantly, Marwari Hindi periodicals like the *Marwari* and *Bharatmitra* reprinted Mithalal’s preface so that his work could reach a wider audience.⁷⁸⁸

While the proverbs and couplets in such agrarian and weather manuals did not speak of commerce in particular, some of them did provide indications related to the price of commodities, especially during times of *akāla* or distress.

माघ उज्यारी दूज दिन, बादर बिज्जु समाय।
तो भाखैं यो भड्डरी, अन्न जु महँगो लाय।।

If on the day of māgha dūja, lightning gathers in the clouds, then, says Bhaḍḍari, the grain shall surely be dear.⁷⁸⁹

माघ छठी गरजै नहीं, महँगो होय कपास।
सातें देखा निर्मली, तो नहीं कछु आस।।

If there is no rain on the sixth day of māgha, cotton shall be dear. If the skies remain clear on the seventh, then there is no hope.⁷⁹⁰

⁷⁸⁶ Maxine Berg, ‘Useful Knowledge, Industrial Enlightenment’, p. 118

⁷⁸⁷ *Ibid.* p. 11

⁷⁸⁸ Singh, p.12

⁷⁸⁹ *Ibid.* *Duja* refers to the second day of a Lunar fortnight.

⁷⁹⁰ *Ibid.*

Notable changes, however, began occurring by the end of the nineteenth century as some ‘weather’ proverbs directly addressed the concerns of traders, *arhatiyas* and commercial agents instead of cultivators. For example, in a compilation of Marwari weather proverbs by Pandit Lalchandra in 1892, we find sayings directly related to rainfall, like—‘If it is cloudy on Friday and remains so till Saturday next, Dunk says to Bhadli that it must rain’.⁷⁹¹ But peppered amongst them are proverbs that provide price information too. For example:

सांवनमास सुरियो बाजै
भादरवे परवाई आसूमास
समंट्रो बाजै काती साख
सवाई

When North-East wind blows in sāwana (August) Eastern wind in bhādaun (September) and the sea wind in āsoja (October) the crop is 20 annas in kārtika (November).⁷⁹²

Or:

माहा महाने पडे न सीत
मेंगा अनाज जानियै मात

If the month of Māhā (January) is not cold, know friend that grain will be dear.⁷⁹³ Or the saying रोहिणी रेली रूपये री अधेली — ‘Rain in Rohiṇī and the crop is eight annas or reduced by half’.⁷⁹⁴

⁷⁹¹ Vidya Bhashkar Pandit Lalchandra, ‘Marwari Weather Proverbs’, *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, April, 1892, pp. 253-57, p.253.

⁷⁹² *Ibid.*, 254.

⁷⁹³ *Ibid.*

⁷⁹⁴ *Ibid.*, p.256.

While modeled on the couplets attributed to Bhaḍalī and Khanā, the inclusion of price information indicates either a shift in audience or a repurposing of such literature for a different context.

Tejī-Mandī: Astral Prognostication for Small Speculators

It is on the back of such literature that by the early twentieth century, we begin to see books and pamphlets like *Tejī-mandī Prakāśa*, *Tejī-mandī Darpaṇa* and *Tejī-mandī Vigyāna* come into circulation. As mentioned, *Tejī-mandī* or options trading was a derivative trade on the futures markets of commodities (first in opium and then later in cotton). *Tejī* was the bullish ‘put’ option and *Mandī* was the bearish ‘call’ option, and *Tejī-mandī* was a double option. A lucid example of its operations was documented by a retired judge of the Bombay High Court, Faiz B Tyabji in 1919.

On the 1st of January B pays to A Rs. 20, and, in consideration of this payment, A agrees to sell to B the double option (of becoming on the first of June either the purchaser or the seller of the goods) at Rs 100. (i) On the 1st of June, if the market rate of the goods is Rs 120, B will decide to purchase; he will then get the goods at Rs, 100 from A and (having already paid Rs 20 for acquiring the option) the goods will cost in all Rs. 120 and he will therefore neither lose nor gain by the transaction. (ii) If, on the other hand, the market price on 1st June is Rs 80, B will decide to be the seller, and A will have to purchase the goods from B paying to B Rs. 100 for them. So that B will again neither gain nor lose by the whole transaction. (iii) B will however gain should the price be above 120, or below 80. (iv) He will lose should the price be between 81 and 119.⁷⁹⁵

⁷⁹⁵ Faiz B Tyabji, *Indian Contracts Act*, (1919), p. 158, cited in *Law of Pakki and Katchi Adat and Tejī Mandī Contracts*, p. 173. The Committee headed by Gilbert Wiles, tasked with reviewing the operation of the Cotton Contracts Act of 1918, defined the practice as “a right to buy or sell cotton at some tie in the future when a fall or rise in the market price makes it profitable for the buyer too the option to do so. A Tejī or call option is an option to buy cotton. A Mandī or put option covers the right to sell cotton. And a Tejī Mandī or Double option gives the buyer the right to buy or sell as the market may suit him.” Dholakia, *Futures Trading and Futures Markets in Cotton*.

If seen through the logic of betting, the seller of *Tejī-mandī* essentially backed the stability of the market while the buyer backed its volatility; if the market was stable then the seller would profit, and if the former was volatile, it was the other way around. The practice apparently dated to the last decade of the 18th century, where contracts of this nature were drawn on Malwa opium, a business known as *Nazarānā* (premium) transactions.⁷⁹⁶ According to Ramniklal Mody, the author of *The Law of Pucci and Katchi Adat and Teji-Mandi Contracts*, these speculations ‘appear to have been carried on to an immense extent and as ordinary branch of their usual business, by most of the great banking houses in India.’⁷⁹⁷ While the *Tejī-mandī* contract enjoyed informal existence in India during the 19th century, it attracted legal attention of the Bombay High Court in 1912 through *Jessiram Jagannath vs. Tulsidas Damodhar*.⁷⁹⁸ After passing through a period of legal liminality it was granted formal recognition in 1926 through the ruling of the Privy Council in *Shobhagmal Gianmal vs Mukundchand Birla*⁷⁹⁹ and was officially recognized in the Bombay Cotton Contract Act of 1932.

Options trading differed from the more conventional trade in futures. In the latter, the contract promised to deliver a traded commodity in the future. These contracts, however, were ‘broad’, which meant that it traded in a ‘standardized’ commodity (cotton) and not a specific variety (oomra cotton). The fact that the futures trade remained agnostic to the ‘gradual differences in harvest quality’ indicates to Lubinski and Rischbieter that such

⁷⁹⁶ *Ibid.* p. 219.

⁷⁹⁷ *Law of Pakki and Katchi Adat and Teji Mandi Contracts*, p. 169.

⁷⁹⁸ *Ibid.*, p. 174.

⁷⁹⁹ *Ibid.*

contracts were ‘in theory always deliverable and thus fungible.’⁸⁰⁰ Importantly, as established through the episode concerning the Shree Mahajan Association and the EICA, unlike spot or forward contracts, futures did not insist on actual delivery of the commodity and were often settled through negotiating the difference in the contract price and the market price of the commodity on the day on which the contract expired. Options contracts drawn in *Tejī-mandī* markets functioned similarly, in the sense that the exchange of actual commodities was seldom, if at all, practiced. Players could, by paying the cost of premium, purchase the ‘option’ - or the right to buy or sell a commodity at some time in the future when a fall or rise in the market price of that commodity would make the purchase profitable; when the actual date arrived, the purchaser of *Tejī-mandī* could settle through the difference between the contract and market price.

A majority of the *Tejī-mandī* texts of the early twentieth century were either written in Gujarati or in Hindi and drew on the same epistemic universe of the weather texts discussed previously. Given the novelty of options trading, such texts did not make hang their professional claims on ‘ancient’ or ‘traditional’ authorities. Gujarati texts like the *Tejī-mandī Darpaṇa*, however, asserted that the knowledge it shared with its readers were to be believed because the writer was a ‘Jain’ *jyotiṣa*—well versed in astral sciences, and having had five or six years of real trading experience.⁸⁰¹ Written by Pandit Prahladat Sharma and published in Lucknow in 1913, the *Tejī-mandī Prakāśa*, drew a more direct connection to the authority of the previously discussed weather texts. In it, the author claims that:

⁸⁰⁰ Sound Speculators, p. 815.

⁸⁰¹ *Tejī-mandī Darpan*, B.S Shah

हम जो अपने ग्राहक को सुचना देते हैं, वो शकुनो द्वारा सुचना मिलती है. शकुनो को आप टेलीग्राफ की खबर समझ लीजिये. शकुनो का प्रभाव रुई, कपास, चाँदी, गुर वस्तुओ पर पड़ता है. इनके व्यापारी सौदे करने के समये हमारे गए ज़रूर पूछ लिया करे ताकी उनको विशेष लाभ होने की आशा है.

‘The information we give our clients come to us through śakuna (signs or omens). Consider these śakunas our telegraph. These signs spread their influence over cotton, yarn, silver and *gud*. Investors looking to make a deal in these items should consult with us before doing so.’⁸⁰²

Importantly, the model of knowledge in these texts made it easy and accessible lay speculators and small investors. Many of the texts were dialogic; they encouraged their readers to write back to the authors and confirm whether their tips actually worked. A database was thus being collated. Information flowed both ways, allowing both the authors and brokerage houses to construct an inductive model that charted the movements of derivative markets and the practices of small investors who entered them blindly. As a modular form, induction naturally lent itself to the epistemic claims and rhetorical strategies of astro-meteorological knowledge. This is best exemplified in a book published in 1949 titled *Market Forecasting: a Scientific Exposition of the Movement of Heavenly Bodies on Fluctuations of Value*. The author, Fakir Chandra Dutt intended his study to be ‘scientific’, a term he highlighted in the title itself. Importantly, this is one of the first books of this genre to be written in English, thus allowing the author to expand his epistemic footprint. Other strategies went in this direction as well. For example, Dutt drew on Jevon’s sunspot theory and its relation to weather and crop cycles to show how cosmic observations were crucial in determining terrestrial price movements. Unaware of the oncoming

⁸⁰² Pandit Manoharlal Mishra, *Tc̥j̥-mandī Prakāśa*, Kanpur: 1913. p. 19

discourse on the anthropocene, Dutt remained convinced that it was planetary and cosmological laws that impacted the course of day to day human activities, not the other way round:

It is reasonable to infer that certain phenomena in nature and in human life will recur at regular periods in accordance with the movements of heavenly bodies, just as day and night and summer and winter follow the course of the sun.⁸⁰³

He continues:

The chief aim of the present work is to show that the laws of planetary influence can be equally employed in forecasting the rise and fall in prices of commodities, stocks and shares...It is possible, examining the records of market prices in bygone years and compare them with the then relative positions of the planets, to formulate an empirical law by which we may predict when certain celestial configurations shall recur and certain effects on the Market will immediately follow.⁸⁰⁴

The model was again inductive—much like astrological laws that were discovered through long durée observations, laws of the market were also revealed only by observing temporal patterns in the movement of prices. Dutt claimed that his book was an exploration in discovering these ‘basic laws’. Following through, he claimed that ‘cotton for example has a price period of up to 10-11 years...iron follows a periodicity of about the same years’.⁸⁰⁵ These, he argued, coincided with the periodic cycle of the appearance and disappearance of sunspots that Jevons had noted. Dutt was careful to forewarn his readers that his predictions may not always be accurate. However, since he was gifted at reading price

⁸⁰³ Fakir.Chandra Dutt, *Market Forecasting: a Scientific Exposition of the Movement of Heavenly Bodies on Fluctuations of Value*, Calcutta: A. Basu, 1949. p. 3

⁸⁰⁴ *Ibid.* p. 6.

⁸⁰⁵ *Ibid.* p. 4.

movements in accordance with the ‘movement of the moon’s North node’ as per ‘the signs of the zodiac’, he assured them of general profitability.

Such inductive models were useful ways of establishing epistemic authority and in encouraging the participation of a new class of speculators onto budding commodity exchanges. Crucially, such ‘formally irrational’ models remain as influential today as they were during Dutt’s time, even as trading practices move towards a dazzling point of sophistication. As Arjun Appadurai argues, while the models for financial risk management grows more technical, such models are still unable to negate the fundamental ‘uncertainty’ in market movements. As a result, market actors continue to use:

[...] detailed charts, which are regarded by others as entirely unscientific, [but] have very good standing in financial markets and in reality, are no different from the charts of astrologers, psychics, or tarot card operators or other diagrammatic formats for prognostication. In short, they are mechanical techniques of prediction with no interest in causal or explanatory principles.⁸⁰⁶

Reconstructing an Audience

Certain clues help image exactly who these texts on commodity speculation were both addressing and attracting to the exchanges. For example, the *Tejī-mandī Prakāśa* includes a full-page address to its readers, one that was clumsily inserted within the main body of the text. From them, we can assume that the book was either published by or held some connection with a brokerage house, as it informed its readers that if they found the book’s prognostic tips useful, they should correspond with the author directly and wire him

⁸⁰⁶ Arjun Appadurai, “The Ghost in the Financial Machine”, *Public Culture*, (2011) 23 (3 (65)): 517–539. p. 528.

money which would be then invested productively. As further reassurance, the author informed his readers that - जिस वख्त विशेष तेजी मंदी का शकुन हो जाये, उसी वख्त तार के जरिये आपका सौदा बदला दिया जायेगा [the second a particular sign for *Tejī-mandī* is detected, we will change your position in the market that very moment]. Accordingly, the author implores his readers to ‘have belief’ and ‘just send one rupee’ following which, ‘you yourself will praise us’ [‘एक रुपैया भेज कर विश्वास कर लीजिये फिर आप खुद ही प्रशंसा करेंगे’].⁸⁰⁷

While reviewing the workings of the Cotton Contracts Act (1922) in 1930, the reviewing committee headed by Sir Gilbert Wiles asked notable figures of the cotton trade, like Sir Purshotamdas Thakurdas, on their opinion of *Tejī-mandī* contracts. At the time, it was Thakurdas’ opinion that ‘because of the peculiar genius of the few operators who ‘eat’ teji mandi’ that it ‘is a valuable asset to the cotton trade’.⁸⁰⁸ He further stated that teji mandi transactions:

[...] help the building and carrying of cotton to later months by bringing into the cotton trade the resources of the *small traders and merchants* and this mass selling or buying act as a brake on violent fluctuations in cotton prices. Incidentally, this large pooling of resources of small men also helps to fetch better prices for the cotton growers.⁸⁰⁹

In emphasizing its useful function, Thakurdas specified how *Tejī-mandī* attracted ‘small traders and merchants’ to the trade. But was the petty capital entering these markets really

⁸⁰⁷ Mishra, *Tejī-mandī Prakāśa*, p. 41.

⁸⁰⁸ Madhu Pavaskar, ‘Options Trading in Commodities’ *Economic and Political Weekly*, Jul. 22-28, 2006, Vol.41, No. 29 (Jul. 22-28, 2006), pp. 3150-3154, p. 3150.

⁸⁰⁹ *Ibid.* Emphasis mine.

that of ‘traders and merchants’? In *Tejī-mandī*, players were told that their liability was limited to the cost of the premium required to purchase the option. This was akin to the price of a lottery ticket. They were also promised non-linear payments in return for their investment, much like the ‘bucket shops’ promised its players in the early decades of the twentieth century.⁸¹⁰ As per his survey in 1948, M.L. Dantwala believed that ‘in no other cotton market of the world are the premium for the option business as low as those in Bombay’.⁸¹¹ Judging from *Tejī-mandī Prakāśa*, the amount invested could be as low as one rupee, while the promised returns were exceptionally high.

It would be impetuous to assume that all those who indulged in options betting were either traders or merchants, albeit of small capital. While a Gujarati text from 1927, *Tejī-mandī Vigyāna* (the Science of Teji-mandi) refers to its readers as *vyāpārīs* or traders, its pedagogical form and mode of addressal reveal that the *vyāpārī* in question was a class of casual investor rather than an established commercial agent. In fact, the language of instruction appears to be directed at novice speculators, even gamblers: ‘કેટલાક વાયદાનો વ્યાપારીઓ એવા હથગઢી હોય છે કે ‘બસ, એ વાયદાના વ્યાપારમાં પછસા ખોયા છે તો હવેજ વ્યાપારમાથહી પછસા લેવવા છે’ [some speculators are so stubborn that they think that ‘if I have lost money in the futures of X commodity, then I must recover it from that very business’]. ‘એમ કહી વાયદાના વ્યાપારમાં તન ધન અને જીવન સર્વસ્વ ખર્ચી નાખે છે’ [having decide so, they expend money, effort, their lives and everything in this losing business].⁸¹²

⁸¹⁰ A non-linear payment is where the amount spent, and the amount earned is on an unequal scale.

⁸¹¹ Dantwala, *A Hundred Years of Indian Cotton*, p. 103.

⁸¹² Mooldas Mondas Nibhavat, *Tejī-mandī Vigyāna*, Ahmedabad: 1923, p. 7.

This is usually the sort of diagnosis reserved for habitual gamblers or ‘sentimental’ bettors; players who having lost a significant amount of money on a slot machine remain determined to win back their money from the very same machine.

The final, and possibly most telling clue comes from the previously discussed case of *Emperor vs. Thavarmal Roopchand*. What finally convinced the judges that the operations of the the Shree Mahajan Association were not legitimate, rather were in the nature of pure gambling, was to do with the class of players involved in the Association’s practices. The evidence for this came to the judges through a plant by the police itself. They noted:

But in this case, we have also the instance of Akbar bhai, a pan seller, who was given a marked note by the police for the purpose of betting on Teji Mandi. The accused admits this contract and the market note was found in his shop. The entry appears in accused’s books at p. 63... Owing to the police raid this transaction was not carried through. Akbar is a pan seller and not a dealer in cotton. He says himself he knows nothing of cotton dealings. No enquiry was made as to his solvency. He went there on January 21st (Friday) and was told to come on Monday to see if he had made profits. The learned Magistrate admits at p. 48 of his judgment that Akbar who, it is evident, entered into a transaction in Kacha Khandi for forty bales, neither contemplated giving nor taking delivery, but he holds that the accused is a broker and placed the transaction with his other constituents.⁸¹³

While Akbar bhai, the pan seller, may not have read the *Tejī-mandī* literature being discussed, he fell within the class that such exchanges were targeting. Perhaps he was also the kind of person who such texts were trying to reach.

The Incitement to Capital: From Petty Gamblers to Small Speculators

⁸¹³ *Emperor vs. Thavarmal Roopchand*, BLR, Volume 53, 1929.

In *Emperor vs. Thavarmal Roopchand*, Sir Purshotamdas Thakurdas was directly pitted against the Shree Mahajan Association and their practices, which at the time, he described as gambling. This, however, did not prevent him from defending the benefits and useful needs of *Tejī-mandī* to the Wiles Committee just a few years later. How do we read his defense? Perhaps, it points to a phenomenon that has passed unnoticed in the scholarship regarding Indian capitalism. Studies that have focused on the role of big business houses, individual industrialists and the role of post-colonial state planning, have partly ignored the everyday processes that drew petty capital into the emergent markets of the twentieth century; technologies that redirected small capital away from ‘savings’ and redeployed them as investments. The process entailed the refashioning of an instinct for risk, one that was often embodied hysterically in the discourse of improvident gambling. But this same gaming instinct, one that leeched out risk, had now turned useful.

In an article titled ‘Ghost in the Financial Machine’ Arjun Appadurai is struck by the fact that Max Weber, a pillar in the field of law and economy, had almost completely overlooked the question of chance and risk management in his writings. This, however, is not entirely correct. In his twenties, Weber wrote two pieces on the function and operation of futures markets in commodities and equity. Reacting to the ban imposed on grain trading following the price crash in Germany in 1893, a young Weber came out with a robust defense of the futures markets in 1896. He listed the many useful functions of futures speculation, which he claimed *balanced* the market by arresting violent swings in commodity prices, allowed people with limited capital to enter the market (as buyers) and

thus provide it with liquidity and facilitated *market expansion* by elongating the chain of intermediary holders of a contract. But the most crucial function of futures speculation, thought Weber, was its ability to offset risk by allowing producers and sellers to hedge their deals, which he demonstrated through the use of the ‘millers’ example.⁸¹⁴ The points raised were similar to the defense presented by Thakurdas before the Wiles Committee. Options, however, carried an added advantage because the capital required to enter the market and the liability that the speculator took upon themselves was even lesser than the one in futures.

Unlike ‘spot’ or ‘cash and carry’ transactions, a speculator in futures did not have to produce the money at the time of contracting. All that was required was the ‘margin’, a smaller amount that clearing houses took as collateral.⁸¹⁵ Also, since most transactions did not end with actual delivery of the hypothetically purchased commodity and were settled only through price differences, such speculation attracted a large class of people who in all

⁸¹⁴ ‘A miller who, for example, has purchased a great quantity of grain “cash and carry” for the purpose of milling it, is exposed to the danger that grain prices will sink even as he is grinding the grain. This naturally has a direct and rapid effect back on grain prices, an effect that is so swift that, when it comes to selling the flour prepared from that grain supply, the miller would suffer income losses. He guards himself against that by arranging, at the same time that he purchases his grain, to sell grain for the very same terminal date at which he hopes to bring his flour to the market. If the grain prices fall, he will be sure to sell his flour at a loss, but he gains a corresponding amount back, in that he can buy the grain that he is selling as a futures trade for a correspondingly cheaper price. If grain prices, on the contrary rise, the futures trade he has made, and which he must now cover with more expensive purchases, bring him a loss, but he gains from the increased sale price of flour. Although from the outset the specific intent was in any case to arrange a compensatory deal, and not to furnish some goods out of one’s own supply, and, although clearly a speculation is being made that there will be a difference between the two, nonetheless the business goal of securing oneself against the danger of fluctuations in prices is surely a highly realistic and prudent one. And neglecting the insurance that comes from this form of futures trading would be just as little prudent as would be, for example, neglecting to take out insurance against the danger of fire.’ Max Weber, ‘Commerce on the Stock and Commodity Exchanges’, *Theory and Society*, Vol. 29, No. 3 (Jun., 2000), pp. 339-371, p. 357.

⁸¹⁵ For ‘options’, the amount was less, referred to as the ‘premium’.

other respect, were illiterate of market movements. Weber was aware of this and even pointed it out:

Trading in futures is easily susceptible to an artificial manipulation of prices, in the egoistic interests of great banking houses or individual speculators. The whole horde of *small speculators* armed with practically nothing [...] realizes very clearly that this rise in prices will at some point make way for the opposite, but they hope that this will occur after they have realized their dealings at a profit.⁸¹⁶

He therefore concluded:

The general charges that can really be made against trading in futures as such almost all lead back to the way they facilitate an attraction of speculators to the market *who are incapable of good judgement and without financial resources*.⁸¹⁷

Weber thus acknowledged how futures speculation held the propensity to draw in ‘people incapable of good judgement’—the ignorant. However, for him this was only the ‘reverse of the expansion of the market’ argument; it was only by drawing in novice and ignorant laymen could the market expand. In his review of Weber’s writings on speculation, Steven Lestition notes Weber’s unease regarding this aspect of the trade, which increased the public’s ‘mania for gambling.’ Still, given its importance, Weber felt that a complete ban on futures speculation involved throwing the baby out with the bathwater. Instead, it was easier to regulate ‘the kind of person who traded on the exchanges.’⁸¹⁸

Still, the desire to regulate the ‘kind of person’ was more idealistic than practical. As realized by the paternalist administrators of the nineteenth century, who had similarly

⁸¹⁶ *Ibid.* 367.

⁸¹⁷ *Ibid.* 368, Emphasis mine.

⁸¹⁸ Steven Lestition, ‘Historical Preface to Max Weber, “Stock and Commodity Exchanges”’, *Theory and Society*, Jun., 2000, Vol. 29, No. 3 (Jun., 2000), pp. 289-304, p.300.

wanted to shield the ‘ignorant’ peasant from ‘intelligent’ moneylenders, it was the very ‘ignorance’ of the peasant that made the contract profitable and therefore furthered the needs of commercial agriculture. Again, it was a similar ‘ignorance’ of the small speculator and the petty capitalist that propelled the expansion of markets and commodity exchanges in the early twentieth century. Condensed to bare bones, for the market to function and more importantly, for it to expand, it required a critical mass of people who were just along for the ride; who for all purposes were ignorant of its ‘real’ mechanism, its ‘real’ operation, its ‘real’ function. Yet, since they distributed risk, hedged liability, stabilized prices and, most crucially, formed a ready pool buyers onto whom sellers and market makers could offset derivatives, their participation was necessary. Bluntly put, in a zero sum game like the market such speculators were cannon fodder. This is why Appadurai also feels the true essence of the market is the bearish instinct of short selling, an instinct laced with pessimism that always looks towards an impending crash.⁸¹⁹

Appadurai’s observations indicates just how little things have changed. Much like Weber observed for Europe, Indian analysts in the early twentieth century also noted the moral and political contradictions of having an ‘ignorant’ class of investors, who *because* of their ignorance were crucial to market operations. While appreciative of the need for *Tejī-mandī*, Dantwala asserted in the context of the cotton trade that the ‘very limitation to risk brings in a large number of *gullible outsiders* who, more often than not, are the poorer for the

⁸¹⁹ Appadurai therefore asks: ‘Can outliers be model social types?’ My tentative answer is that in a historical moment when the exploitation of risk for the maximization of profit is the central feature of the reigning game, those who are willing to bet against the majority are even better exemplars of the general ethos.’ “The Ghost in the Financial Machine”, p. 534.

business.’⁸²⁰ Similarly, in his book titled *Futures Trading and Futures Markets in Cotton*, H.L Dholakhia reaffirms the merits of *Tejī-mandī*, which ‘widened the field of demand’ in commodities by bringing more people to the market. This he insisted increased the overall volume of business. On the other hand, he admitted that:

[...] teji mandi allures a layman to take a chance and thereby add to artificial transactions...From the standpoint of the buyer, the teji mandi business is both commercially healthy and economically sound. But the question whether it might not bring about the economic ruin of *small people* is a serious question demanding some deliberation from the authorities concerned, particularly from the government.⁸²¹

Dholakhia was one of the many writers who brought economic legitimacy to speculation during the early 1940’s when the government had banned speculation in cotton and food grains during the Second World War. In fact, his book on futures trading in cotton even carried an appreciative foreword by Purshottamdas Thakurdas, who hailed the study as ‘systematic’ and ‘impartial’, though not ‘exhaustive’. Thakurdas did hope, however, that research like Dholakhia’s would inaugurate a slew of other such studies. But such economic treatises, which grounded speculation as a fundamental economic practice, were cheerfully augmented by the proliferation of astrological literature that initiated small speculators into market practices. Not only did they target a different group of people, they also provided an easier pathway for such people to identify with risk and negotiate a technical world that they may not have otherwise understood. They brought ‘gullible’ and ‘small people’ to the doors of a market, which in turn benefitted from their ignorance. As

⁸²⁰ Dantwala, *A Hundred Years of Indian Cotton*, p. 103. Emphasis mine.

⁸²¹ H.L. Dholakia, *Futures Trading and Futures Markets in Cotton*, Bombay: New Book Company, 1942, p. 242.

seen in from the debates in the Amendment to the Contract Act (1899), at the cost of equality, it was the role of the contract to mediate, justify and produce equivalence for this ignorance. Since the market needed these small investors, the astro-metrological texts which previously advised the rain bettors in the gambling houses of Calcutta and Bombay, were now, by drawing a similar class of people to the *Tejī-mandī* markets in cotton, fulfilling their intended function. Alongside the prohibitory anti-gaming laws, they too were inciting capital.

CHAPTER 6

Conclusion

To make categorical distinctions between gambling and speculation in the period under study appears arduous. This, however, does not imply that efforts were not made to separate the practices both legally and conceptually. While sticking to the assertion that such divisions were more apparent than honest, the thesis has recounted the legal, normative and discursive strategies that attempted such sequestering. Accordingly, the thesis is divided into two distinct yet interconnected parts. The first covers the legal history of gambling and documents a governmental strategy that went from the point to of excessive detailing and definition to a more contingent and practical rule by executive order. Narrating this history, from Burma to Bombay and Calcutta to Delhi uncovers also reveals a historical process and a Statist imagination, since the legal definition regarding gambling as practice remained both muddled and trepidatious. In the early years, this ambivalence was spurred by the European interests in safeguarding leisures like whist, rummy, sweepstakes and most crucially, horse racing. By the early twentieth century, however, when rain betting and spot betting in bucket shops rose coterminously with commodity speculation through forward contracts and futures and options exchanges, the ability to distinguish between legitimate betting (speculation) and illegitimate speculation (gambling) through a legal definition was almost completely abandoned.

Thinking through the historical paradox raised by Radhika Singha— why did the period following the Revolt of 1857 result in the a spree of legislative codification instead of rule

through executive authority—the first part of this dissertation, quite conjecturally, drew a connection between the rise of analytical linguistics and analytical jurisprudence in the late nineteenth century. Accordingly, the decision to obsessively define, rather, the will to capture the world in words, was something that that jumped across in judicial, police and legislative files, particularly when gambling was strategically spoken of as an ‘object’ of criminalization (a common gaming house, or an instrument) rather than as an activity. By highlighting the demands made by the executive and judicial branches for clear definitions regarding categories of gambling—‘place’, the ‘common gaming house’ ‘instruments of gambling’—the dissertation narrates a conceptual bedrock of colonial policing; a belief in the ability to transform forms of native practice into objective and therefore controlled varieties of description. Further, I link this legal imagination to the spree of colonial codification following the transfer of power in 1858. Accordingly, the decision to define, limit and criminalize gambling through the spaces in which it was practiced or through the instruments that were used in its conduct was animated by an implicit faith in the Legislature’s ability to descriptively capture practice before it was enacted. This emblemized in the context of ‘space’, where the term ‘place’ was fine-tuned through out the nineteenth century and even in the early twentieth, especially in while criminalizing the game of *ti* in British Burma. As the dissertation explicates, however, gambling could not be spoken of ‘objectively’ as its practitioners used legal loopholes to manipulate the practice beyond legal descriptions.

By the late nineteenth century, when rain gambling first made its appearance in Bombay and Calcutta, this regime of classification and definition finally hit its limits. It started with

a case from Bhooleshwar, Bombay, where Justice K.T. Telang ruled that even clocks and liminal objects used for the purposes of betting were to be classified as ‘instruments of gambling’. As the definition of what could be considered an ‘instrument of gambling’ began expanding, the policing powers of state authorities moved from a regulative to constitutive regime; instead of regulating an existent practice of gambling, the government could constitute certain practices as gambling when the need arose. By highlighting the role of Justice Telang and later S.N. Banerjee, I have also shown how it was an early class of nationalist legislators and officials who identified and targeted native gambling as an object of internal reform. So, unlike their British counterparts, the targeted attacks on games of chance, especially rain gambling came from native members of Legislative Councils, whether S.N. Banerjee in Bengal or Madan Gopal in the Punjab. Ironically, these legislators steered clear of criminalizing or even criticizing British games and horse racing in particular, even when they were presented with evidence of their greater popularity and chances of risk.

The strategy of executive overreach, one that began with the case of rain gambling, was finally operationalized as a pan Indian policy by the first decade of the twentieth century, which I demonstrate by narrating the history of early commodity speculation and the rise of bucket shop betting in Delhi, the Punjab and in parts of Bombay. As argued in the thesis, the rise of bucket shops presented the government with a conceptual problem regarding betting in general; was it a form of gambling, or, especially in the case of actuary and forward trading, a form of hedging and speculation? The question was complicated by a recurring and overlapping cast of characters, *arhatiyas*, *goladars*, *amdawalas*, *seths* and

baniyas, often from the Marwari community, who ran spot and commodity speculation, rain betting houses and the procurement and trade of agricultural commodities—bringing them from the hinterlands to the ports of trade. Accordingly, the question of separating legitimate from illegitimate, legal from criminal and stated from the subterranean became a question of political contingency and was determined through historically contextual needs. Going against an established grain of Indian economic historiography, I have shown through this dissertation that the trajectory of Indian commerce needs to be decoupled from both the law and the State, especially when the latter are considered as fixed points of authority or as agents of standardization or modernization. Instead, by employing a genealogical method of reconstruction, the thesis places weighted emphasis on forms of motivations that leave the faintest historical trace; envy, rivalry, thrill and deception.

From this perspective, for the historian pursuing the question ‘what is gambling’, at least in the commercial context, is likely walk off the edge of a cliff and into an endless abyss. As suggested in the introduction, the question inches towards a Sorites paradox, one where the addition or subtraction of a particular element does not change the essential nature of the descriptive predicate. This is not to say, however, that there exists no putative differences in practices that are easily distinguishable, such as futures trading and horse racing or rain betting. However, as this dissertation argues, the impressionistic differences in such practices, which appear natural and commonplace, are the product of the discursive maneuvers and normative strategies that helped parse a common field of risk, chance, prognostication and profitability into distinct yet promiscuous categories.

An understandable frustration may have stirred in readers who encounter a conclusion on colonial gambling and speculation that hesitates from defining or committing to a settled description of either practice. That however, is not the intention and would therefore be a misreading. Instead, what the dissertation has argued is that the putative impressions regarding gambling or speculation remains contingent (when was speculation useful and gambling harmful and vice versa) and structured by personal rivalries, interests of monopolies and most crucially, on the extra legal/political normative and discursive tactics that grew around the practices over the late nineteenth and early twentieth centuries. Importantly, none of these inspire a settled point of difference and are therefore independently inconclusive in defining either gambling or speculation. Essentially, the scholastic aesthetic and the argumentative method is influenced significantly by Foucault's oeuvre, one that attentive readers may have noted due to its consistent references. While I remain hesitant in attributing 'method' or coherence to Foucault's body of work, one that speaks outside of constant discordance, I do believe that his historical process paid particular care to hints, conjectures and the arrangement of discursive technologies whose efficacy are not measured through their popularity as much as their occurrence in the first place. Accordingly, if the study of madness and its discursive constitution indicated the technologies that structured what it meant to be sane, or if the disciplinary regime of the prison system were refracted back upon ideas of childhood, schooling and the industrial labour force, if the contingent and volatile emotions of pettiness and jealousy forged the weapons of reason, then, in that vein, this study elaborates the discursive and historically contingent manner in which native gambling and speculation evolved in parallel in the late

nineteenth and early twentieth centuries, never to be separated and only to refine and feed off their common instincts. Accordingly, it is my contention that it would be misleading to understand the history of commercial speculation by understanding *when* it was separated from a social history of gambling, just as it would be erroneous to see gambling as the pre capitalist remnants of a practice that was rationalized for the purposes of commerce.

Undeniably, however, gambling and commercial speculation continue to imply separate practices that circulate in different realms of discourse. To that end, the second part of the dissertation draws out the normative factors that sequestered gambling from speculation in the absence of a settled legal definition. Again, the intentions behind this separation remains doubtful as the instincts for play and the structure of bucket shop betting were carried over to the options markets in commodities in the early twentieth century. So, the relationship between gaming and speculation remained that of a ‘parasitical economy’, not one of categorical and perpetual barriers. Gaming contracts relating to rain betting, spot betting on commodities and horse racing were spoken of in terms of their clientele, their function in society, the harm they precipitated and their moral and ethical standing in civilized discourse. The process was aided by constituting gambling discursively, not as a category in law. Accordingly, this discourse was inflected by silence, anecdote, scandal and phobia. As argued, it was the silence regarding gambling, the non-instantiation of its particular harms that implicated it as a constantly circulating scandal. As opposed to this, I drew the example of commercial contracts as exemplified in the discussion surrounding the Amendment to the Contract Act (1899), which sought to provide relief to indebted peasants from the hands of rural moneylenders. While nowhere near exhaustive of the

varied dimensions in which the contract operated in the colony, I used this juxtaposition for two reasons. First, it showed the differences that were built into a common objective of building a universally legible ‘contracting society’ in the colony. While in the context of gaming and spot betting, contracts were attacked for being incomprehensible and therefore exploitative of an ‘ignorant’ working class population, this same paternalist protections went missing when the contracting ability of a similar set of ‘ignorant’ agents, the small peasant, was being discussed. Crucially, I used the third and fourth chapter to demonstrate the manner in which a common discourse covering the subjects of risk, liability, ignorance and political unrest were parsed by the operationist concerns of colonial policing and the discourse of political economy. Crudely then, the discourse on gambling allowed Empire to admit that ‘free contracting’ was unsuitable to colonial subjects and therefore required legal curtailment. This allowed the tenets of political economy to endorse the stadial thesis where ‘free contracting’ was epitomized as a pedagogical goal towards building a market society.

Moving past the differences in the attitudes presented towards gaming and commercial contracts, we arrive to an interesting set of similarities. While the thesis has been unable to stitch these together as a coherent argument, it has laid a trail of bread crumbs that may be followed in the future. Sensitive to these connections, the dissertation consciously compared the distinctions between the betting contracts in rain gambling houses and spot betting bucket shops to the contracts extended by rural usurers to small holding agriculturalists. The similarity here does not start and end with the clientele; an ‘ignorant’ and vulnerable class of contracting subjects. Rather, it shows a process which acted on a

more organized and monied class of native agents and entrepreneurs, dividing their practices between social and therefore criminal practices (gambling) and useful and therefore commercial practices like usury and exchange trading. Here, we witness a history of an overlapping class of nameless and therefore shadowy market agents who remained central to the commodity trade; financing, procuring, transporting, storing, marketing, trading and gambling in commodities. These mid-level *arhaityas*, *mahajans*, *goladars* and *muccadams*, were crucial intermediaries to the commodity trade. What I have indicated through the thesis is the layered regime of legal, political and social technologies that acted haphazardly upon these agents, sorting and slotting their practices as useful and wasteful, legal and illegal. Again, unlike the established scholarship in this field, I insist that we move away from a legalist or statist imagination in configuring the trajectory of these agents. Instead, as suggested, I have focused more on the personal rivalries, the intracommunity disputes and the prospects of monopoly to see the ways in which at times gambling and speculation were talked of as separate practices, even while the distinctions mostly remained unclear. To understand both commodity production and its speculation, a deeper and more exhaustive study on the role of these middle men is required. I aim to do so as when taking this thesis further.

Again, what remains common to this set of actors is a shared epistemological field, one that I have indicated in my study on astro-meteorology, which I have linked to corpus of *jyotish* texts informed both by the *Kṛṣiparāśara* in the east and *śakuni* literature in the west of India. As argued, such literature was instrumental in informing a class of bettors and

gamblers in both the rain betting houses of Calcutta and Bombay and the bucket shops of Delhi and the Punjab. It is this kind of literature that was retooled and repurposed for options and commodity trading in the early twentieth century, when established exchanges threw open their trade to small investors in the trade of commodities like cotton, jute, sugar, grains and silver. Importantly, as I have shown both through publications like the *Tejī-mandī Prakāśa* and by the admissions of small exchanges like the Shree Mahajan Association, these texts targeted a novice and inexperienced class of speculators and were often published by brokerage houses or were commissioned by large speculators themselves.

The thesis also lays weighted emphasis on understanding astrology as more than ritualistic, especially when it came to the prognostication on commodity prices or for other betting practices. The influence of such astrologically informed and determined thinking is constantly encountered in present day Indian commercial ventures. Its most recent iteration came when the shadowy influence of by a ‘mysterious baba’ from the Himalayas was discovered on the CEO and Managing Director of the National Stock Exchange, Chitra Radhakrishna, in February this year. It is also common to hear stories of entrepreneurs and businessmen, who on the advise of an astrologer, have added syllables to their names, inaugurated a venture on a particular date or changed the location of both their business and residence.

It would not be an overestimation to see the presence and influence of astrology on almost every mundane practice in colonial South Asia. I would argue, in fact that this ubiquity has contributed significantly to its under theorization, where its presence is noted as an

instantiation of colonial modernity, akin to breaking a coconut before the launch of a satellite or garnishing the recently purchased Dassault Rafale aircrafts with lemon and chillis to ward off the evil eye. Let me provide a more topical example. It is rumored that the Home Minister of India and the erstwhile chief political strategist of the Bharatiya Janata Party, Amit Shah, abandoned his plush fifth floor office in the party headquarters and chose to relocate to the ground floor during the 2019 parliamentary elections on the advice of a prominent astrologer.⁸²² Apparently, the decision to hold the recently concluded West Bengal state elections in eight rather than the traditionally five phases was prompted similarly. Though unconfirmed, many attribute similar astrological and numerological motivations to the new parliamentary building in Delhi holding 888 legislators, a number that is considered similarly auspicious. What is important to note, is that all this operates *alongside* a discourse that describes the BJP as a political juggernaut and Amit Shah as a political mastermind who has transformed the Indian political scene by fine-tuning electoral campaigns into a science and the party into a political machine. The evidence of these parallel descriptive forms arouses natural curiosity regarding the status and function of astrology within the newly developing *science* of psephology: Is astrology some ritualistic fluff, or to paraphrase Appadurai, is it the 'ghost' in the political machine that is the BJP?

⁸²² *The Telegraph*, Wednesday, 20th July 2022.

The answer appears more straightforward when placed within the realm of commerce and market activity. While it is impossible to comprehensively account for the reason why an actor takes the position that they do in the market, it is safe to assume that the decisions are not always purely motivated from a standard or rational financial reading of the market. Astrological literature regarding *Teji-mandi* was therefore functional in rehabilitating a class of ‘gamblers’ as speculators in commodity exchanges. Just as the gambler’s bet is often determined by a horse is named after his/her daughter or a number that corresponds to a birthday, similarly, the formal yet irrational system of astrology made market movements legible to an untrained class of people. In fact, it is precisely the energy, the reasonings and these epistemological universes of a gambler that were exploited by early options markets to bring in a class of petty and small investors. As the dissertation has argued, the reasons that morally denigrated and legally criminalized the practice and aesthetics of petty gambling were reworked when it came to options and futures trading in the commodity markets of the early twentieth century. Markets needed liquidity, it needed people to hold intermediary contracts against whom sellers and market makers could hedge and it needed the a volume of traders to stabilize the price of a commodity in the long term. More importantly, it needed suckers; the ignorant, the untutored, the impulsive and the unaware. Eventually, every market needed a large class of ‘gamblers’. Accordingly, these markets targeted a small investors by tapping into the same energy, epistemic universe and possibly the same fantasies that they may have reserved for gambling; short cuts and get rich quick.

It is important to be mindful of this history, a history of capital that goes beyond the history of capitalists, entrepreneurs and state planning. It accounts for the ways in which the money of the non-commercial and traditionally non-market actor came into the market in the first place. In its final tabulation and in its most abstract form, the market is where everyone's money is. Crucially, the market maintains a studied indifference to how that money came in in the first place. In fact, as this dissertation argues, alongside building its own 'rationalist' discourse through a disciplinary study of economics, the market accommodates and even actively encourages a certain 'ignorance' amongst its members. As I have suggested in the fourth and fifth chapters, the market mediates inequality without seeking to annul it because the market grows through such inequality. While the idea may seem common enough, what I stressed upon was the market's ability to mediate almost any kind of inequality, even that of temporality. Accordingly, in seeing the growth of a pan-Indian market in commodities during the colonial period, one needs to reconcile what I have called the strategic logic of the market with the substantive political and legal claims of empire. When understood strategically, It is unclear whether the logic of the market placed as much emphasis on the political discourse of colonialism that saw law, governance, education, infrastructure as part of a modernizing project. It is unclear whether it would be apt to describe 'the market' as modern at all, given that it is a forum that abstracts and therefore mediates between practices that are otherwise parsed as 'pre-modern' 'pre-capitalist', 'irrational', 'rational' and 'modern'. Therefore, as an agent of abstraction, it is not law or politics but only the market that has the ability to take a social and 'pre-capitalist' practice like gambling and produce equivalence with hedging and

speculation. In doing so, it retains the ability to transform the gambler and her/his rationale, epistemic world, emotions and cultural proclivities, into a final abstraction—the bearer of capital.

APPENDIX A: LEGISLATION

Below is a selected list of the key laws, and their provisions that were enacted to criminalize gambling in India. Apart from Section 294 A of the *Indian Penal Code*, the listed Acts were applied in the province in which they were enacted. The Public Gaming Act (Act III of 1867) applied in the United Provinces, East Punjab, Delhi and the Central Provinces.

THE CALCUTTA POLICE ACT, (Act IV of 1866)

s. 52: "Gambling on public streets" (repealed by Bengal Act II of 1867)

THE PUBLIC GAMING ACT (Act III of 1867)

s.1: "**Common gaming-house** .Common gaming-house means any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure, room or place or otherwise howsoever.

s.3: **Penalty for owning or keeping, or having charge of a gaming-house** .Whoever, being the owner or occupier, or having the use, of any house, walled enclosure, room or place, situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and whoever, being the owner or occupier of any such house,

walled enclosure, room or place as aforesaid, knowingly or willfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and whoever has the care or management of, or in any manner assists in conducting, the business of any house, walled enclosure, room or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid; and whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, walled enclosure, room or place; shall be liable to a fine not exceeding two hundred rupees, or to imprisonment for any term not exceeding three months.

s.13: **Gaming and setting birds and animals to fight in public streets** .A police officer may apprehend without warrant any person found playing for money or other valuable thing, with cards, dice, counters or other instruments of gaming, used in playing any game not being a game of mere skill, in any public street, place or thoroughfare situated within the limits aforesaid, or any person setting any birds or animals to fight in any public street, place, or thoroughfare situated within the limits aforesaid, or any person there present aiding and abetting such public fighting of birds and animals.

Such person when apprehended shall be brought without delay before a Magistrate, and shall be liable to a fine not exceeding fifty rupees, or to imprisonment, either simple or rigorous, for any term not exceeding one calendar month;

Destruction of instruments of gaming found in public streets .And such police officer may seize all instruments of gaming found in such public place or on the person of those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed.

BURMA GAMING ACT (Act XVI of 1884)

s. 2: Taking part in the game of “*ti*,” or in any other game or pretended game of a like nature, shall be deemed gaming and playing within the meaning of Act III of 1867.

s.6: In section 13 of Act II of 1867—

a) for the words ‘public street, place or thoroughfare,” where they first occur, the words “street or thoroughfare or place to which the public access” shall be substituted; and

b) in the last clause for the words “such public place” the words “such place shall be substituted.

BOMBAY PREVENTION OF GAMBLING ACT 1887 (Act IV of 1887 applied to Bombay Province and Gujarat)

s. 3 "**Gaming**" **defined.** - [In this Act "*gaming*" include wagering or betting except wagering or betting upon a horse-race when such wagering or betting takes place-

(a) on the day on which such race is to be run, and

(b) in an enclosure which the licensee of the race course, on which such race is to be run, has set apart for the purpose under the terms of license issued under section 4 of the [Bombay Race Courses Licensing Act, 1912], in respect of such race course.

Any transaction by which a person in any capacity whatever employs another in any capacity whatever or engages for another in any capacity whatever the wager or bet whether with such licensee or with any other person shall be deemed “gaming”.

BENGAL RAIN GAMBLING ACT OF 1897

s. 2: (1) To the definition of “common gaming house” in section 3 of the Calcutta Police Act, 1866, the following shall be added, namely:— “or in which rain gambling, that is to say wagering on the occurrence or non occurrence of rain is carried on for the profit or gain of any such persons as aforesaid.”

(2) After the said definitions the following shall be inserted, namely:—

“Gaming shall include rain gambling;”

“‘Instruments of gaming’ shall include books or registers in which rain gambling wagers are entered, all other documents containing evidence of such wagers and any thing used as a means of rain gambling.”

BENGAL PUBLIC GAMING ACT (ACT II OF 1867 as Amended in 1913)

s. 2: For the definitions of “common gaming-house,” “gaming” and “instruments of gaming” in section 59 of the Howrah Offences Act, 1857, section 3 of the Calcutta Police

Act, 1866, and Section 1 of the Bengal Public Gambling Act of 1867, the following shall be substituted, namely:—

“gaming” includes wagering or betting [*except wagering or betting upon a horse race, when such wagering or betting takes place]

- a) on the day on which such race is to be run
- b) in an enclosure which the Stewards controlling such race have, with the sanction of the Local Government, set apart for that purpose]

BOMBAY COTTON CONTRACTS ACT (Act IV of 1932)

s. 3: **Definitions.** - In this Act, unless there is anything repugnant in the subject or context,-

- (a) "Bombay" means the City of Bombay and the Island of Salsette;
- (c) "Board of Directors" means a board of directors of a recognized cotton association constituted under section 5 and acting through at least a quorum of their members at a meeting of that board duly called and constituted;
- (d) "Certified godown" means a godown maintained by a cotton association for storing cotton Certified under the by-laws of the association;
- (e) "Contract" means a contract made or to be performed in whole or in part in Bombay relating to the sale or purchase of cotton and includes options in cotton, but does not include

such contracts as the [Provincial Government] may, by notification in the [*Official Gazette*] declare to be excluded from the provisions of this Act;

(f) "Cotton Association" means any association, organisation or a body of individuals, whether incorporated or not, established or formed for the purpose of "regulating and controlling business in the sale, purchase or other transactions in cotton;

(g) "Forward contract" means a contract for the delivery of cotton at some future date;

(h) "Option in cotton" means a contract made or to be performed in whole or in part in Bombay for the purchase or sale of a right to buy, or a right to sell or a right to buy or sell cotton in future, and includes a *teji*, a *mandi* or a *teji-mandi* in cotton;

(i) "Ready contract" means a contract in which immediate delivery of cotton is contemplated;

(j) "Recognized cotton association" means-a cotton association which is for the time being recognized by the [Provincial Government] , as provided in section 4.

s.4: **Recognition.** - (1) A cotton association, desirous of being recognized for the purposes of this Act, shall make an application in writing to the [Provincial Government] for such recognition and shall submit by-laws for the regulation and control of transactions in cotton and furnish such information in regard to such recognition as the [Provincial Government] may from time to time require.

(2) The [Provincial Government] may give or refuse such recognition.

(3) The [Provincial Government] shall refuse recognition unless-

- (a) it is provided in the by laws submitted by the cotton association under sub-section (1) that not less than one-fourth of the total number of the Board of Directors of the cotton association applying for recognition shall be growers of cotton to be appointed in the manner prescribed in the said by-laws and approved by the [Provincial Government]; and
- (b) the [Provincial Government] is satisfied that the sole possession and effective management, control and regulation of the markets of the cotton association applying for recognition and of the market places of the said cotton association are vested in the said cotton association.

(4) The [Provincial Government] shall also refuse recognition unless the bye-laws Submitted by the cotton association under sub-section (1) shall have been published in the [*Official Gazette*] at least one month before the date of such recognition:

Provided that when, in the opinion of the [Provincial Government], the conditions precedent to recognition specified in sub-clauses (a) and (b) of sub-section (3) are satisfied in the case of a cotton association applying for recognition under subsection (1) and the bye-laws of the said cotton association are similar in all other material respects to the articles and by-laws of the East India Cotton Association, Limited, deemed or which have been deemed under the provisions of sub-section (7) to be bye-laws of a recognized cotton association the [Provincial Government] may dispense with the publication, required under this sub-section of the bye-laws of the cotton association applying for

recognition and may give recognition to such association and the bye-laws of such association shall then be deemed to be bye-laws published under the provisions of this sub-section.

(5) When the [Provincial Government] has dispensed with the publication of the bye-laws of a cotton association and has given recognition to such association under the provisions of the proviso to sub-section (4), such bye-laws shall be published in the [*Official Gazette*] next following the giving of recognition to such association.

(6) The [Provincial Government] may, at any time after having given to a cotton association an opportunity to explain why recognition should not be withdrawn, withdraw the recognition given to the said cotton association and such cotton association shall thereupon cease to be a recognised cotton association.

(7) It is hereby declared that the East India Cotton Association Limited, is a recognised cotton association for the purposes and subject to the provisions of this Act and the articles and bye-laws of the said Association shall, so far as they relate to matters for which bye-laws may be made under the provisions of sections 5 and 6, be deemed to be bye-laws of a recognized cotton association:

Provided that, if, within such time after the coming into operation of this Act as the [Provincial Government] shall by order in writing specify, the said Association shall

not have complied with the conditions precedent to recognition specified in clauses (a) and (b) of sub-section (3), the said association shall cease to be a recognized cotton association and the said articles and bye-laws of the said association shall cease to be by-laws of a recognized cotton association:

Explanation. - A grower of cotton shall not include a person who deals in forward contracts.

s.5: Recognized association to have Board of Directors: power to make bye-laws. -

(1) In every recognized cotton association there shall be a Board of Directors. Subject to the sanction of the [Provincial Government] , a recognized cotton association may make and may from time to time add to, vary or rescind bye-laws providing for -

(a) the constitution of the Board of Directors,

(b) the powers and duties of the Board of Directors and the manner which its business shall be conducted,

(c) the number and constitution of electoral panels and the representation upon such panels, and

(d) the method of appointment of members to the Boards of Directors.

(2) By-laws made, added to, varied or rescinded under sub-section (1) shall be Laid [before each of the Chambers of the Provincial Legislatures] at the session [thereof] next

following and shall be liable to be modified or rescinded by a resolution [in which both Chambers concur] If any by-law is so modified or rescinded, the [Provincial Government] may sanction such modified by-law and re-publish the same accordingly or may sanction such rescission.

S.6: Power of Board of Directors to make bye-laws. - (1) The Board of Directors may, subject to the sanction of the [Provincial Government], make and from time to time, add to, vary or rescind by-laws for the regulation and control of transactions on cotton.

(2) In particular and without prejudice to the generality of the foregoing provision such by-laws may provide for-

- (a) The admission of various classes of members of a recognized cotton association and the exclusion, suspension, expulsion and re-admission of such members;
- (b) the opening and closing of markets in cotton and the times during which such markets shall be opened or closed and regulating the hours of trade;
- (c) a clearing house for the periodical settlement of contracts or differences thereunder and for the passing on of delivery orders and for any purpose in connection with options in cotton, and the regulation and maintenance of such clearing house;
- (d) the number and classes of contracts in respect of which settlements shall be made or differences paid through the clearing house;

- (e) fixing, altering or postponing settling days;
- (f) determining and declaring the market rates for cotton of any and every description;
- (g) the terms, conditions and incidents of contracts and the forms of such contracts as are in writing;
- (h) regulating the making performance and cancellation of contracts, including contracts between a commission agent and his constituent, or between a broker and his constituent, or between a jethawala or muccadum and his constituent, or between a member and a non-member of a recognized cotton association, and the consequences of insolvency on the part of a seller or buyer or intermediary, the consequences of a breach or omission by a seller or buyer and the responsibility of commission agents, muccadums and brokers not parties to such contracts;
- (i) the prohibition of specified classes or types of dealings in cotton by a member of a recognized cotton association;
- (j) the settlement of claims and dispute by arbitration and appeals against awards;
- (k) the levy and recovery of subscriptions, fees, fines and penalties;
- (l) disciplinary measures against members of a recognized cotton association, including suspension, expulsion, fines and non-monetary penalties, for breach of any bye-law made by the Board of Directors;
- (m) regulating the course of business between parties to contracts in any capacity;
- (n) the institution, maintenance and control of certified godowns; and

(o) regulating the making, performance and cancellation of option in cotton.

(3) If any person committing a breach of any bye-law of a recognized cotton association is a company, every director and officer of such company shall also be deemed to have committed such breach, unless he proves that the breach was committed without his knowledge and control

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