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Loyal Opposition: Minorities and State Law

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SHARAFI, MITRA. 2014. *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*. New York: Cambridge University Press, also 2017 Ranikhet, India: Permanent Black. Pp. xxiii + 343.

This essay on Mitra Sharafi's Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947 *(2014) focuses on the relationship between certain minorities and the law of the state. It seeks to expand the discussion found in Sharafi's book in three directions: first, by comparing the attitude of Parsis in South Asia to the law of the state with the attitude of German Jewish immigrants in mandatory Palestine and Israel to state law; second, by asking whether the Parsis' embracing of state law was linked to their economic success; and, finally, by pointing to the nature of law itself as a "minority discourse."*

The last decade or so has witnessed significant growth in the academic interest in the history of the law of the British Empire, generally, and the law of colonial South Asia, in particular (Sharafi 2015). Mitra Sharafi's *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* makes a significant contribution to that literature by combining a bottom-up, detailed history of the attitude of one specific minority, the Parsis, to the law of the British colonial state, together with a discussion of broader questions about the nature of the relationship between minorities and the law.

Sharafi analyzes the relationship of the Parsi communities of South Asia to British colonial law during the century and a half of British rule, 1772–1947, showing how the Parsis were governed by the law of the British colonizers, but also used and, indeed, manipulated this law for their own ends. She notes the remarkable, multifaceted relationship of Parsis to British colonial law. Here was a minority that, unlike many others, thrived without having its own laws and courts; instead, they enthusiastically embraced British law. Parsi judges and lawyers were disproportionately represented in British colonial courts, and Parsi litigants frequently used these courts. The Parsis, however, were not merely passive consumers of colonial law. Over time, Parsi lobbyists and judges carved their own legal niche, working within (rather than outside) the British system to create a unique set of Parsi legal norms and institutions dealing with topics such as marriage, inheritance, and trusts. The Parsis thus used state law to craft and maintain an autonomous enclave within British colonial law.

In this brief essay I use Sharafi's insights to further explore three important facets of the relationship of minorities—especially small entrepreneurial minorities—to

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the law of the state: comparative, economic, and jurisprudential. First, I would like to place the Parsi story within a broader comparative framework by looking at the attitude of other minorities similar to the Parsis to state law, to ascertain the extent to which Parsi legal history is unique. I then argue that Parsi legal history allows us to rethink the relationship between entrepreneurial minorities, state law, and economic success. Finally, I claim that one of the most important contributions of Sharafi's book lies in the jurisprudential insights it provides into the nature of law as a minority discourse—a loyal but also critical servant of political power.

THE COMPARATIVE ANGLE: PARSI LEGAL UNIQUENESS

Sharafi argues that the intensity of Parsi involvement in colonial law made the Parsis somewhat unique (316). A number of other minorities with ties to state law are mentioned in the book (7–8, 118–23), including Jews, and, indeed, there are several places in the book where Sharafi explicitly compares Parsis and Jews. For example, she discusses the disproportionately high number of Parsi lawyers and judges in Bombay in the early twentieth century, and compares this situation to the disproportionate number of Jewish lawyers in Berlin and Vienna (7–8).[1]

There are other striking similarities linking Parsis and Jews, the most interesting of which is, perhaps, what might be called Parsi Zionism. This term refers to the early-twentieth-century attempts by some Parsi intellectuals to envision a return to Persia, or the establishment of a Parsi colony somewhere else, for example, in East Africa—the very place where Jews were contemplating the establishment of their own state (306–11).[2]

Sharafi also points to differences between Parsis and Jews. She notes that "unlike Parsis, Jews had a well-developed body of religious law and institutions to resolve inside disputes, as well as clear prohibitions on taking Jewish disputes to non-Jewish adjudicators" (98–99). This difference is certainly relevant, although by the early twentieth century, at least in the West, the power of Jewish communities had waned and many disputes between Jews were litigated in ordinary state courts.

Sharafi shows how the Parsis used the legal system of the British colonial state to create communal autonomy. One example is the way the Parsis used their knowledge of colonial law to lobby for legislation that ultimately resulted in their own separate personal laws (85–98). Another example is the disproportionate Parsi presence in the legal profession, a presence that enabled the Parsis to carve out a niche of their own within the legal system of the colonial state (98–120).

One can also find echoes of this approach in the Jewish context. Some Jews in British-ruled Palestine sought to create autonomous Jewish court systems. However,

1. For a recent collection of essays dealing with Jews and the legal profession, see Mermelstein et al. (2014). Earlier discussions include Levinson (1992–1993) and Galanter (1998–1999). On Jews and the legal profession in Europe, see also Nathans (2002, 311–66) and Slezkine (2004, 50, 125, 244, 318).

2. There is a growing interest in comparing varieties of South Asian nationalism and Zionism (Devji 2013; Walzer 2015). Similarly, there is a growing interest in comparing aspects of the Israeli and South Asian legal history, such as the history of personal law (Galanter and Krishnan 2000); colonial lawyering (Sharafi 2007); constitutional law (Jacobson 2003; Barak-Erez 2010; Lerner 2011); or the impact of postcolonial partitions on property and citizenship laws in both places (Berda 2013; Kedar 2014).

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at least in the 1930s and 1940s, the majority of the Jews in Palestine, and certainly of Jewish lawyers, endeavored to infiltrate the British legal system by working *within* rather than *outside* the system to further their communal goals. These Jews actively sought to have members of their community appointed as judges; they also pressured the British to import parts of English law to Palestine, such as the law of trusts, and employed this imported law to advance Jewish objectives. For instance, they used trusts to bypass British regulations that sought to prevent Jews from buying Arab land (Hofri-Winogradow 2012).

One interesting subgroup within the Jewish community of mandatory Palestine was that of German Jews, who were often derogatorily called *yekkes* by East European Jews. This term probably originated in the German word for jacket (*jacke*) and referred to the tendency of German Jews to wear European dress—a formal jacket and a tie—even in the warm climate of Palestine. But an unusual dress code was not their only characteristic. They also had an odd (from the point of view of the majority of Jews of Palestine) attitude toward the notion of the rule of law. In an article on these German Jews, cultural studies scholar Rakefet Sela-Sheffy mentions the following anecdote, provided by an Israeli journalist in the late 1940s:

> I was going in a taxicab with a tourist down Herzl Street [in Tel Aviv] . . . suddenly an ambulance siren shrieked. None of the drivers were impressed, including our cab driver. There was only one little car that seemed very obedient—it immediately turned to the side; the driver parked it and gestured to the ambulance to pass. Everyone else kept on driving without any effort to clear the way. . . . The tourist commented: "I have never seen anything like this . . . only one person stopped their car." To which the driver instantly replied: "Look at him and you can immediately see that he's a *yekke*. Only the *yekkes* are such idiots." (Sela-Sheffy 2006, 37)

Many *yekkes* were lawyers in Germany, but stopped practicing law when they immigrated to Palestine in the 1930s. Linguistic and cultural barriers prevented their integration in the local legal arena and forced many of them to choose new, nonlegal, careers. Nevertheless, some *yekke* lawyers continued to practice law in Palestine, and the upper echelons of the Israeli legal profession in the first years after Israeli Independence were dominated by *yekke* lawyers. Nine of the twenty-five judges of the Israeli Supreme Court appointed between 1948 and 1978 were German Jews. Israel's first Minister of Justice, Pinhas Rosen, was also a German Jew, and so were many other leading officials of the Israeli Ministry of Justice (Oz-Salzberger and Salzberger 1998). German Jews did not enjoy such prominence in any other related sphere. For example, in the first decades after Israeli Independence, Israeli politics were dominated not by German but by East European Jews.

How did German Jewish lawyers come to play a disproportionate role in the legal sphere? These lawyers, claimed Sela-Sheffy, employed a strategy of "integration through distinction." They became identified with professionalism, objectivity, and aloofness from politics, and these characteristics made them attractive in the eyes of politicians such as Israel's first Prime Minister, David Ben-Gurion, born in Russia. Ben-Gurion used them as a "loyal opposition," allowing them to man the highest

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positions in Israel's new legal system while maintaining their ethnic cohesion and distance from the Israeli political system (Sela-Sheffy 2006).

Comparing the German Jewish elite lawyers of Palestine and Israel of the 1950s with the Parsi lawyers of South Asia during the colonial period raises some interesting questions. For example, the success of German Jewish lawyers in Israel was (at least partly) attributed to the fact that they had a very specific, positive cultural image—they were seen as law-abiding noncorrupt professionals. What about the Parsis? Sharafi discusses a particular cultural trait that was strongly associated with the Parsis: their "pathological litigiousness." However, other aspects of the Parsi relationship to law remain less clear. What did Parsis think about compliance with criminal or tax law, for example? Sharafi mentions taxation as an area in which Parsis clashed with the state (39–40), and the second chapter of the book opens with an anecdote about a fraud case involving a young Parsi con-man in London (84). Were there many other similar cases? Were Parsis seen as more or less law abiding than other minorities in Bombay?

Moving beyond the specific comparison between Parsis and German Jews, Sharafi's book hints that the comparative study of law and minorities, especially entrepreneurial ones, is a fruitful topic for further exploration. There is a large body of literature discussing entrepreneurial minorities (e.g., Chua 2004; Slezkine 2004). Usually, the factors emphasized when discussing these minorities are cultural and sociological in nature. By contrast, Sharafi's book points to state law as an additional interesting arena for studying the formation and preservation of minority identity.

THE ECONOMIC ANGLE: PARSI SUCCESS AND THE LAW

Interest in entrepreneurial minorities is often focused on their economic success. Returning to the case of German Jewish immigrants to mandatory Palestine, these Jews were also very successful economically, creating a number of Israeli multinational conglomerates that are now global leaders in their fields.[3] In this sense, too, the German Jews of Palestine were similar to the Parsis, some of whom became extremely wealthy during the period of British rule in the Indian subcontinent.

One might ask what role the relative wealth of the Parsi community played in their intensive use of colonial law. Did the Parsis use colonial law so often because some of them were relatively wealthy and could therefore afford litigation in British colonial courts (41)? Or did the Parsi use of colonial law *contribute* in some way to the wealth of certain Parsi individuals?

One way to explore these questions is to link the story told in Sharafi's book to the work of economic historian Timur Kuran on non-Muslim minorities—Greeks, Armenians, and also Jews—in the late Ottoman Empire. Non-Muslim

3. For example, Teva Pharmaceutical Industries, the largest generic drug manufacturer in the world, which was created from the merger of three Israeli firms one of which was established by a German Jewish immigrant to Palestine (Eshhar and Ashkenazi 2009), or Iscar, one of the world's largest manufacturers of industrial cutting tools (Wertheimer 2015).

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minorities came to dominate the economy of the Ottoman Empire in the nineteenth century, in a trajectory not dissimilar to that of Parsi business magnates who came to play a major role in the economy of India at about the same time. According to Kuran, the unique form of legal pluralism prevalent in the Ottoman Empire—which enabled Christian and Jewish businessmen (but not Muslim ones) to litigate both in Muslim state courts and in the consular courts of European powers—was a major factor in the success of these minorities. The consular courts provided legal norms that were better-suited to new commercial demands—norms that were unavailable to businessmen belonging to the Muslim majority (Kuran 2011, 169–208).

The economic success of the Parsis may also have been connected with their use of the British colonial courts (although other groups in British-ruled India could also use them). As Sharafi shows, however, Parsis were far from passive in their relationship to British colonial law. Indeed, they actively shaped and de-anglicized certain aspects of the British legal system applicable to them, even creating their own inheritance and marriage laws. The result of their activity in the inheritance and marriage law realms was a legal system that, at first glance, may not appear conducive to economic success. For example, when Parsis created their inheritance laws, they rejected the English notion of primogeniture and instead insisted on the division of estates among the family members of the deceased. According to Kuran, such a division (also found in Muslim law) was not beneficial to economic development because it hindered the accumulation of capital and was one of the reasons that the economy of the Ottoman Empire lagged behind the economy of the West (Kuran 2011, 78–96). Parsi economic success may therefore show that legal rules, even if they hinder capital accumulation, may not prevent economic success, which is perhaps less dependent on law than some scholars have argued.[4]

Comparison between the use of law by minorities in the Ottoman Empire and in South Asia thus raises interesting questions about the relationship between minorities, state law, and the economy, and allows us to challenge or refine current theories such as those found in Kuran's work. More broadly, these questions might be used to further explore the role of state law in the success of other entrepreneurial minorities, such as the Jews in Europe, the Armenians in Persia, the Chinese in South East Asia, and the Lebanese in Africa.[5]

THE JURISPRUDENTIAL ANGLE: PARSIS (AND LAW) AS INTERMEDIARIES

Sharafi provides a fascinating account of the relationship between a specific minority, the Parsis, and state law. Her book raises thought-provoking questions, worthy of further study, about the relationship of minorities, state law, and

4. For the argument that law and economic development are connected see, for example, the articles collected in Deakin and Pistor (2012). For a discussion and critique, see also Klerman (forthcoming). For a specific argument about the impact of Hindu and Muslim inheritance rules on capital accumulation in late British India, see Kuran and Singh (2013).

5. See, e.g., Chirot and Reid (1997) and Slezkine (2004, 5–39). On the darker side of this success, see Chua (2004).

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economic success, but I believe its most important theoretical contribution is jurisprudential.

One major jurisprudential lesson provided by Sharafi's book is that we have to rethink our conventional assumptions about the relationship between legal pluralism and communal identity. Sharafi shows that state law and communal identity are not antagonistic entities. Although history shows us that communal identity can be forged by relying on autonomous nonstate legal systems, Sharafi illuminates the fact that such an identity can also be created using state law, working within rather than outside the state.

Another jurisprudential lesson has to do with the nature of law. Parsis were successful lawyers partly because they were outsiders who could serve as intermediaries between the state and its subjects. Other colonial lawyers played a similar role. As Sharafi noted in a previous work, colonial lawyers were often "intellectual middlemen who reconfigured colonized cultures for common-law use" (Sharafi 2007, 1061; see also Sharafi 2014, 117–20, 239).

This role as intermediary is not something that was unique to Parsi lawyers, or indeed to other groups of colonial lawyers. Law itself is, in a sense, a middleman: modern positive law is produced by the state, but it is also partly autonomous, as are its agents, judges. While judges in modern systems are often appointed by the state, they are expected to serve as objective and neutral umpires in disputes in which the state is involved. State law is, to use the term mentioned earlier in this essay when talking about German Jewish lawyers, a "loyal opposition," existing in an intermediate zone between the state and its subjects.

Sharafi analyzes the idea of lawyers (and judges) as intermediaries by exploring the tension between two possible models of judging that competed for prominence in British India. One model was based on the ideal of intimacy and local knowledge, as exemplified by the *panchayats*, the Indian community councils (and also outside India—e.g., in the old English jury system). The other model was the modern "rule-of-law" approach to adjudication, in which the judge and jury are supposed to be objective and therefore not have any prior knowledge about the litigants or the case they are deciding (257–58). A related theme in the book is the nature of the judge as anthropologist. For example, in her discussion of the judgment of the Parsi judge D. D. Davar in the case of *Petit v. Jijibhai*, Sharafi talks of the role of Parsi judges as experts and translators of local customs—familiar yet distant intermediaries between local customs and British law (263).

The middleman role (and its associated problems) is, of course, not unique to law. We also find it when analyzing another occupation concerned with the discovery of truth: history. The debate about the desirable qualities of the ideal judge can be translated into the realm of the historian: Should the ideal historian belong to the community she studies, or should she be an outsider able to translate peculiar local customs to a foreign audience?

On this spectrum between familiarity and distance, where does Sharafi position herself? It is hard to know, for while the book is extremely rich and detailed, one thing I miss is a reflexive autobiographical element. An explicit discussion of how and why Sharafi became the intermediary telling the story of Parsi legal history would, to this reader, have made this book even better.

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