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Broken Boundaries: Border and Identity Formation in Post-Colonial Punjab

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Abstract
The study of *uti possidetis* in international law has proceeded without any detailed examination of its application to South Asian borders. Yet, the consequences of *uti possidetis* in the Indian subcontinent offer critical insight into the legal and functional critique levied against the doctrine. The South Asian experience provides evidence that *uti possidetis* cannot be considered a norm of regional customary international law, confined to Latin America and Africa. Simultaneously, it provides compelling proof of this doctrine's ruinous impact on self-determination, pointing to its potential for identity-alteration and intrastate violence: consequences that have received scarce attention in legal scholarship. By undertaking a detailed study of the Radcliffe Line in Punjab, this paper makes a prudent attempt to commence filling this gap in the literature by re-centring South Asia in the debate on *uti possidetis*.

Is there something peculiar about modern nation-states that implicates their creation in a definitive process of forced migration? Arendt posits that the exhaustive apportionment of international territory between states causes those "thrown out of one of these tightly organized closed communities" to find themselves without protection altogether.[1] Haddad extends her argument, asserting that the successful establishment of a state hinges on its ability to draw a bounded national identity;[2] the "other", in opposition to whom the nation defines itself, must be evicted from the state's borders in order to bring this process of identity formation to conclusion. This, to Haddad, indicates that forced migration is the "inevitable … consequence of the nation-state system".[3] Zolberg echoes this sentiment, warning that the creation of new states in coming years will also be marked by the forced migration of "misfits".[4] Yet, none of the three point to a specific feature of modern nation-states that demands the fabrication of a "misfit"; that unavoidably compels some to be "thrown out" of

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1. Hannah ARENDT, *The Origins of Totalitarianism* (New York: Meridian Books, 1951) at 294.
2. Emma HADDAD, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008).
3. *Ibid.*, at 59.
4. Aristide R. ZOLBERG, "The Formation of New States as a Refugee Generating Process" (1983) 467 Annals of the American Academy of Political and Social Science 24.

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the community; or that precipitates the formation of bounded, exclusionary identities. Until such features are singled out, one cannot conclude whether forced migration truly is an unavoidable trait of state-formation. Further, even if some migration is inevitable, this practice of identification is vital to discern which parts of it can be mitigated. This paper will identify and examine one feature of state-formation that may be implicated in the identity-building process that impels forced migration: the doctrine of *uti possidetis*.

Uti possidetis is a rule of customary international law that is applied to delimit the borders of newly formed states. Wherever a previously unified territory is to give way to two or more states, this rule dictates that the international frontiers of such states cannot be drawn *de novo*; instead, their borders must be selected from pre-existing administrative boundaries that run through the territory.[5] Originally formulated to enable safe, predictable transitions to statehood for former colonies, the rule was extended to all types of state-formation by the Badinter Commission supervising the dissolution of Yugoslavia.[6] As a result, the rule is now an intrinsic, constitutive feature of the modern nation-state system.

Much ink has been dedicated to picking apart the *uti possidetis* claim of guaranteeing peaceful relations during territorial transitions. However, almost all such literature examines the claim exclusively through the lens of interstate violence.[7] The role of *uti possidetis* in producing intrastate violence has been entirely overlooked. Critically, it is the latter form that is linked to the forced migration of state-creation, per Arendt, Haddad, and Zolberg. It is this gap in the literature that this paper seeks to plug. By examining how the construction of international borders impacts identity formation in the territories so divided, this paper examines *uti possidetis* as a contributory trigger for intrastate violence and forced migration.

In order to make this argument, the paper will focus on the application of *uti possidetis* in South Asia, particularly the Radcliffe Line used to divide Punjab. This is for three reasons: first, a significant body of writing on identity formation through the Radcliffe Line is readily available,[8] making the task of linking it to *uti possidetis* simpler. Second, although the Radcliffe Line has witnessed extreme intrastate violence, it has eluded any form of interstate armed conflict:[9] this renders it the ideal candidate to test the paper's hypothesis. Third, perhaps most crucially, scholarship on *uti possidetis* has entirely neglected its application in South Asia. The reasons for this will be examined below. However, extending the study of *uti possidetis* to South Asia has compelling consequences for the legal arguments raised to challenge this rule. Studying these

5. Malcom N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today" (1996) 67 British Yearbook of International Law 75.

6. Alain PELLET, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples" (1992) 3 European Journal of International Law 178.

7. Joshua CASTELLINO and Steve ALLEN, *Title to Territory in International Law: A Temporal Analysis* (Aldershot: Ashgate, 2003).

8. Joya CHATTERJI, "The Fashioning of a Frontier: The Radcliffe Line and Bengal's Border Landscape, 1947–52" (1999) 33 Modern Asian Studies 185.

9. Lucy P. CHESTER, *Borders and Conflict in South Asia: The Radcliffe Boundary Commission and the Partition of Punjab* (Manchester: Manchester University Press, 2009).

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consequences enables one to understand how the application of this doctrine can be curbed; i.e. if *uti possidetis* is found to be implicated in producing forced migration during state-creation, the study of its practice in South Asia holds the key to understanding how such migration can be mitigated through legal alternatives.

In order to successfully assemble its argument, the paper will proceed as follows: Part I provides an overview of the *uti possidetis* rule, examining its creation and outlining the criticisms raised against it. In this, the impact of South Asian practice on the efficacy of each critique is, in particular, emphasized. Part II offers an explanation for the conspicuous absence of South Asian practice in scholarship on *uti possidetis*. It also provides evidence for the application of this rule in the Indian subcontinent, directing its attention to the process by which the Radcliffe Line was drawn. Part III furthers the central argument of this paper, analyzing the impact of *uti possidetis* on identity formation and self-determination in Punjab, probing its role as a trigger for the intrastate violence and forced migration that ensued.

Much like any piece of respectable writing, this paper is haunted by its limitations. The space permitted to it does not allow for a detailed examination of other boundaries in South Asia that have also been drawn via *uti possidetis*. They exist and will be listed in the final section as opportunities for further research. Although conclusions drawn in this paper are sought to be made generalizable, their veracity will undoubtedly be enriched by such expanded study. Further, a detailed exposition of legal alternatives to *uti possidetis* is also not feasible, given the paper's bounded length. A brief outline of the literature on such alternatives will, however, be offered in the concluding section to indicate how the role of *uti possidetis* in forced migration could be mitigated. Finally, any project that seeks to critically engage with the process of state-formation must invariably confront the villainy of nationalist and imperialist historiographies. To minimize this impact, the paper has attempted, wherever possible, to rely on primary sources to draw its conclusions on questions of history. Mansergh's *Transfer of Power* collection[10] has proved instrumental in this task. Where secondary sources have been relied on, the paper has sought to be reflexive about the institutional and personal predilections of their authors. An interpretivist understanding of history suggests that subjectivity can never truly be eliminated; yet explicit bias has been expunged as far as possible.[11]

I. LINES ETCHED IN SAND: THE CREATION AND CRITIQUE OF *UTI POSSIDETIS*

This section begins by analyzing the content of *uti possidetis*, outlining its creation as a rule of customary international law. It then examines and responds to legal critiques that challenge its foundation in international law. The section concludes by discussing the functional critique of *uti possidetis*.

10. Nicholas MANSERGH, Esmond W. R. LUMBY, and Penderel MOON, eds., *The Transfer of Power 1942–47* (London: Her Majesty's Stationery Office, 1983).

11. Edward H. CARR, *What is History?* (Cambridge: Cambridge University Press, 1961).

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A. *The Crystallization of* Uti Possidetis

When colonial empires crumbled into nation-states, the fissures along which they cracked were predetermined. To ensure a predictable and safe transition to independence, it was mandated that nascent states could emerge only along existing colonial administrative boundaries. Freedom from foreign rule was attained, yet only within the confines of lines drawn by the foreign ruler. And so, the empire continued to rear its ugly head from beyond the grave to haunt the political entities that took its place. This, in essence, is the unhappy history of *uti possidetis*.

The rule of *uti possidetis* prescribes that "new States will come to independence with the same boundaries they had when they were administrative units within the territory … of a colonial power".[12] As such, when a colony was partitioned into multiple states, the "principle … upgraded former administrative delimitations, established during the colonial period, to international frontiers".[13]

The origins of this rule can be traced to the Roman private law edict of *uti possidetis ita possidetis* ("As you possess, so may you possess"), an interim remedy granted in the initial stages of litigation over immoveable property.[14] *Uti possidetis* commenced its metamorphosis into a rule of international law with the Spanish withdrawal from Latin America in the nineteenth century. When Latin American successor states proclaimed their independence from Spain, they invoked *uti possidetis* and agreed to accept colonial administrative divisions as the basis for their frontiers.[15] *Uti possidetis* was embedded into the constitutions of these states, which defined the territorial scope of their sovereignty by reference to the Spanish administrative units that predated their creation.[16] The rule was subsequently applied in boundary delimitation disputes between successor states. Notably, in this transformation of *uti possidetis* from a norm of private law to one of international character, it lost the provisional status it held under Roman law: it was no longer a temporary measure that preceded further deliberation, but a final, binding disposition of territorial title.[17] Indeed, returning the principle to its roots by interpreting it as a provisional allocation of borders has been recommended in academia and will be discussed in this paper's "Conclusion" as a means to more effective and stable border delimitation.

The second precedent that helped crystallize *uti possidetis* into custom is the decolonization of Africa. While the entirety of African territory was never subject to colonial administration, the continent had been carved up into "spheres of influence" assigned to different colonial powers to prevent armed conflict between

12. Shaw, *supra* note 5 at 97.

13. *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali),* Judgment [1986] I.C.J. Rep. 554 at 566 [*Burkina Faso v. Republic of Mali Judgment*].

14. John B. MOORE, *Costa Rica-Panama Arbitration: Memorandum on Uti Possidetis* (Rosslyn: Commonwealth Co., 1913).

15. Helen GHEBREWEBET, *Identifying Units of Statehood and Determining International Boundaries: A Revised Look at the Doctrine of Uti Possidetis and the Principle of Self-determination* (New York: Peter Lang, 2005).

16. Suzanne N. LALONDE, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal: McGill-Queen's Press, 2002); Steven R. RATNER, "Drawing a Better Line: Uti Possidetis and the Borders of New States" (1996) 90 American Journal of International Law 590.

17. Ratner, *supra* note 16.

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them.[18] The territorial units forged from these "spheres of influence" were used by colonial powers and the local elite to draw the borders for modern African states on independence.[19] Through the Cairo Declaration, Member States of the Organization of African Unity pledged themselves to respect these colonial borders, hoping that by doing so they could forestall territorial disputes that might arise between them.[20] In doing so, they helped cement the rule of *uti possidetis* in international law. In the *Guinea v. Guinea-Bissau Maritime Delimitation Arbitration*, the tribunal ruled that the principle which was

> solemnly proclaimed in Cairo on 21 July 1964, when the Heads of State and Heads of Government of the Organization of African Unity declared that all Member States pledged to the boundaries existing at the time they reached their independence … [is] held to reflect customary rules of international law.[21]

In the *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, the International Court of Justice [ICJ] further held that:

> [t]he fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.[22]

The state practice and jurisprudence described above is collectively relied on in legal scholarship to assess the status of *uti possidetis* as a rule of customary international law. Conspicuous in this literature is the absence of any discussion on decolonization and boundary formation in South Asia. That British India was one of the largest and most important imperial projects of the nineteenth and twentieth centuries makes this omission noteworthy.[23] While Kaikobad[24] and Mahmud[25] acknowledge the application of the *uti possidetis* rule in the Indian subcontinent, neither examines the manner of its application or the ensuing consequences in any detail. Other jurists, too, allude to the application of *uti possidetis* in the Indian subcontinent, but they do

18. Sakeus AKWEENDA, *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claims* (The Hague: Kluwer Law International, 1997).
19. Makau MUTUA, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 Michigan Journal of International Law 1113.
20. *Border Disputes Among African States,* OAU Doc. AHG/Res. 16(I) (1964) [*Border Disputes Among African States*].
21. *Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau (Guinea v. Guinea-Bissau),* Award of 14 February 1985, [1985] 77 I.L.R. 635 at 673.
22. *Burkina Faso v. Republic of Mali Judgment*, *supra* note 13 at 565.
23. Niall FERGUSON, *Empire: How Britain Made the Modern World* (London: Allen Lane, 2003); James S. OLSON, *Historical Dictionary of the British Empire* (Westport, CT: Greenwood Press, 1996).
24. Kaiyan H. KAIKOBAD, "Some Observations on the Doctrine of Continuity and Finality of Boundaries" (1984) 54 British Yearbook of International Law 119.
25. Tayyab MAHMUD, "Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier" (2010) 36 Brooklyn Journal of International Law 1.

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so by referencing the *Rann of Kutch Arbitration Award*,[26] a decision that explicitly recognized the inapplicability of *uti possidetis* to its facts.[27] The sections that follow will examine possible reasons for this omission in academic literature, and will seek to plug this gap as best they can.

At this point, however, it is important to note that any study of *uti possidetis* is incomplete without examining its application in South Asia. This is for two reasons: first, if the claim that *uti possidetis* was applied in South Asia is found to be true, it significantly impacts the legal arguments used to critique the foundation of this rule; second, the consequences that *uti possidetis* precipitated in South Asia are different from those studied in Africa and Latin America, and thus play a critical role in widening the functional critique currently levied against the rule. Each of these claims is examined in the sections below.

B. *The Legal Status of* Uti Possidetis

Arguments that challenge the foundation of *uti possidetis* in international law do so through two limbs: first, that the rule lacks sufficient basis to constitute a rule of customary international law; and second, that the rule conflicts with the right of self-determination, which supersedes it by virtue of its peremptory status in international law. Each limb will be examined in turn, discussing the impact of South Asian state practice on the merit of the argument.

1. *The customary status of* uti possidetis

The customary status of *uti possidetis* has been the subject of heated debate in legal scholarship. Akweenda[28] and Murphy[29] argue that *uti possidetis* lacks sufficient state practice to constitute a norm of custom. Sarvarian,[30] and Castellino and Allen,[31] argue that, while global practice is insufficient to constitute a norm of *general* custom, *uti possidetis* does constitute a norm of regional custom in Latin America and Africa. Bartos[32] builds on such critique to argue that *uti possidetis* ought to be considered a general "principle" of international law which guides the interpretation of

26. See Ratner, *supra* note 16; Constantine ANTONOPOULOS, "The Principle of *Uti Possidetis Iuris* in Contemporary International Law" (1996) 49 Revue Hellénique de Droit International 29; James CRAWFORD, *Brownlie's Principles of Public International Law,* 8th ed. (Oxford: Oxford University Press, 2012); Giuseppe NESI, "Uti Possidetis Doctrine" in Rüdiger WOLFRUM, ed., *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), para. 6.

27. *The Indo-Pakistan Western Boundary (Rann of Kutch) Case,* Award of 19 February 1968, [1968] XVII Reports of International Arbitral Awards 1 at 527.

28. Akweenda, *supra* note 18.

29. Sean D. MURPHY, "Democratic Legitimacy and the Recognition of States and Governments" (1999) 48 International and Comparative Law Quarterly 545.

30. Arman SARVARIAN, "Uti Possidetis Iuris in the Twenty-First Century: Consensual or Customary?" (2015) 22 International Journal on Minority and Group Rights 511.

31. Castellino and Allen, *supra* note 7.

32. Tomas BARTOS, "Uti Possidetis. Quo Vadis" (1997) 18 Australian Yearbook of International Law 37.

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other rules, rather than a rule itself. Lalonde[33] posits that there is sufficient state practice that applies the rule, referencing instances of its application in the Middle East and Europe in addition to the Latin American and African practice outlined above. However, she argues that there is little direct evidence of *opinio juris* supporting the customary status of *uti possidetis*.

Peters[34] correctly points to instances of *opinio juris* ignored by the above critics, referencing written submissions of thirty-seven intervening states in the Kosovo Advisory Opinion proceeding before the ICJ that concur on the customary status of *uti possidetis*. Antonopoulos[35] examines written submissions by states in Latin American boundary dispute cases, as well as provisions in their boundary treaties and constitutions to establish *opinio juris* in support of the rule. Kaikobad[36] uses the Organization of African Unity's Cairo Declaration[37] and the Non-Aligned Summit Conference Declaration[38] as further instances of *opinio juris*. Yet, all such attempts to establish the customary status of *uti possidetis* remain restricted in the breadth of state practice they draw on; indeed, their ability to respond effectively to the regional custom critique is critically inhibited by the fact that they largely rest on Latin American and African practice to draw their conclusions. Were such arguments to draw on South Asian practice, they could broaden their scope, relying on the Afghan-Pakistan Durand Line, the Iran-Pakistan Goldsmith Line, the Indo-Pakistani Radcliffe Line, and the Sino-Indian McMahon Line, as well as the colonial borders of Nepal, Bangladesh, and Myanmar to establish the general customary status of *uti possidetis* more effectively.

2. Uti possidetis *and self-determination*

Much effort has been spent discussing the potential conflict between *uti possidetis* and self-determination. Shaw[39] argues that the lines *uti possidetis* transforms into international borders were drawn to benefit colonial authorities in administration, carving up territories for revenue-collection, legal-jurisdiction, or resource-extraction purposes; they were drawn without any consultation with the people they divided, and often cut through communities with deeply entrenched economic, cultural, and linguistic ties. Mazrui[40] highlights how such boundaries often prioritized geographic and geometric considerations over human ones. Mutua posits that the 1890 Anglo-French Convention partitioned West Africa to ensure an equitable distribution

33. Lalonde, *supra* note 16.
34. Anne PETERS, "The Principle of 'Uti Possidetis Juris': How Relevant is it for Issues of Secession?" in Christian WALTER, Antje von UNGERN-STERNBERG, and Kavus ABUSHOV, eds., *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), at 112–13.
35. Antonopoulos, *supra* note 26.
36. Kaikobad, *supra* note 24.
37. *Border Disputes Among African States, supra* note 20.
38. *Non-Aligned Summit Conference Declaration*, IJIL 4 (1964) 610.
39. Shaw, *supra* note 5.
40. Ali A. MAZRUI, "The African State as a Political Refugee: Institutional Collapse and Human Displacement" (1995) 7 International Journal of Refugee Law 21.

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of natural resources between the two empires, with little regard for the people inhabiting its territory.[41] Similarly, Mahmud argues that the Durand Line was used to create a buffer zone for the British Empire but split the Pashtun community of Afghanistan across an international border.[42]

Saxena,[43] Gayim,[44] and Kolodziej[45] discuss how *uti possidetis* in Nigeria, Eritrea, Ethiopia, Rwanda, and Burundi forced ethnically and culturally fractured communities into artificial units. Bartos extends this critique to the post-colonial period, describing the division of communities in South Ossetia, Abkhazia, Nagorno-Karabakh, and Transdniestria due to the freezing of boundaries drawn by the Soviet Union.[46] Such arguments highlight the destructive effect of *uti possidetis* on identity, reasoning that the forced division of a culturally, linguistically, and ethnically homogenous people across international borders inhibits their ability to collectively determine their future in a single political unit, thereby inhibiting their right to self-determination.

Critically, this literature presumes that identities remain stable and unaltered by the freezing of colonial boundaries. Indeed, legal scholarship on *uti possidetis* ignores developments in the social sciences that discuss the social-constitutive effects of borders,[47] and the impact of bordering as a process on a peoples' identity.[48] While Castellino and Allen allude to the crystallization of artificial identities through *uti possidetis*, they stop short of a full exposition of this process.[49] This constructive effect of borders on identity is well studied in the literature that discusses the impact of colonial boundaries on identities in Bengal and Punjab.[50] Consequently, broadening the study of this rule to South Asia plays an important role in extending the legal critique of *uti possidetis*. This extension demonstrates that *uti possidetis* alters the very "peoples" entitled to self-determination, indelibly shaping their future for them. This constructive effect will be examined in the third section of this paper.

C. *The Functional Critique of* Uti Possidetis

The principal utility offered by *uti possidetis* is that, by providing a clear and foreseeable territorial outcome in the process of state-formation, it prevents "fratricidal struggles" over border disputes by nascent successor states and, in doing so, preserves

41. Mutua, *supra* note 19.
42. Mahmud, *supra* note 25.
43. Jagdish N. SAXENA, *Self-determination: From Biafra to Bangla Desh* (Delhi: University of Delhi, 1978).
44. Eyassu GAYIM, *The Eritrean Question* (Uppsala: Iustus Förlag, 1993).
45. Edward. A. KOLODZIEJ, *The Great Powers and Genocide: Lessons from Rwanda* (Urbana, IL: University of Illinois, 2000).
46. Bartos, *supra* note 32.
47. Henk van HOUTUM, "The Mask of the Border" in Doris WASTL-WALTER, ed., *The Ashgate Research Companion to Border Studies* (Abingdon: Routledge, 2011), at 50–4.
48. Michéle LAMONT and Virág MOLNÁR, "The Study of Boundaries in the Social Sciences" (2002) 28 Annual Review of Sociology 167.
49. Castellino and Allen, *supra* note 7.
50. Chatterji, *supra* note 8.

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international stability.[51] This functional utility is, however, disputed. First, as Castellino and Allen highlight, internal administrative lines are rarely demarcated physically, as international frontiers are, and hence their precise location is ambiguous.[52] As a result, even with *uti possidetis*, there is scope for border disputes in the process of demarcation. Second, per Peters[53] and Shaw,[54] *uti possidetis* is intrinsically ambiguous, since different administrative lines often overlap, and the rule offers little clarity on which is to be prioritized. Third, where boundaries divide communities, as detailed in the preceding section, *uti possidetis* fuels irredentist desires to "reclaim" the community's territory, contributing to the possibility of conflict.[55]

However, the empirical veracity of such arguments is highly contested. While Mazrui asserts that *uti possidetis* successfully prevented international conflict in Africa,[56] Neuberger[57] and Akweenda[58] point to its contribution to border conflicts in Somalia, Morocco, and Namibia. Malanczuk[59] and Dominguez[60] assert its success in Latin America, while Kacowicz,[61] Zacher,[62] and Bartos[63] argue that it played a role in conflicts in Peru and Ecuador. Franck asserts that the doctrine fuelled "post-modern tribalism" and led to irredentist conflicts,[64] but Hensel and Allison counter that *uti possidetis* produced less conflict than instances of departure from administrative boundaries.[65]

Notably, almost all such legal scholarship evaluates the success of *uti possidetis* by focusing exclusively on interstate violence. Discussions on intrastate violence are occasionally referenced[66] yet rarely form the crux of the functional critique. Curiously, however, the colonial boundaries of South Asia have largely eluded the form of interstate violence discussed above, with such borders rarely serving as the basis for armed

51. *Burkina Faso v. Republic of Mali Judgment*, *supra* note 13 at 565.
52. Castellino and Allen, *supra* note 7.
53. Peters, *supra* note 34.
54. Shaw, *supra* note 5.
55. Bartos, *supra* note 32.
56. Mazrui, *supra* note 40.
57. Ralph B. NEUBERGER, *National Self-determination in Postcolonial Africa* (Boulder, CO: Lynne Rienner, 1986).
58. Akweenda, *supra* note 18.
59. Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997).
60. Jorge I. DOMÍNGUEZ, *Boundary Disputes in Latin America* (Washington, DC: United States Institute of Peace, 2003).
61. Arie M. KACOWICZ, "The Problem of Peaceful Territorial Change" (1994) 38 International Studies Quarterly 219.
62. Mark W. ZACHER, "The Territorial Integrity Norm: International Boundaries and the Use of Force" (2001) 55 International Organization 215.
63. Bartos, *supra* note 32.
64. Thomas M. FRANCK, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).
65. Paul R. HENSEL and Michael E. ALLISON, "The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the Americas", *Paul R. Hensel* (2004), online: <http://paulhensel.org/Research/io05.pdf>.
66. See Bartos, *supra* note 32; Castellino and Allen, *supra* note 7.

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conflict.[67] However, the borders are heavily implicated in some of the largest and most calamitous instances of forced migration of the past century: during the Partition of India, the secession of Bangladesh and, more recently, the Rohingya persecution in Myanmar.[68] By broadening the discussion on *uti possidetis* to South Asia, the rule can be examined through the dual lenses of forced migration and identity construction and destruction. Through this, the functional critique of *uti possidetis* can be expanded to encompass its role in producing intrastate violence and contributing to forced migration. The third section of this paper will seek to do this.

II. FROZEN FRONTIER: THE RADCLIFFE LINE

This section provides evidence for the application of *uti possidetis* in South Asia by examining the partition of Punjab through the Radcliffe Line. It begins by explaining why this boundary has been overlooked in legal scholarship. It then confirms that the international frontier in Punjab is, indeed, etched upon pre-drawn colonial boundaries. The section concludes by unearthing the role these boundaries played in the social upheaval that transpired post-partition.

A. *The Duplicity of the Radcliffe Line*

The delimitation of the Radcliffe Line has never been examined as an application of *uti possidetis*. This is the consequence of three factors: first, that the colonial government sought to depict the boundary-drawing process as one driven by locals; second, that they sought to portray the line itself as a judicially determined settlement; and third, that there was scant evidence to challenge such representations at the time *uti possidetis* was debated in legal scholarship. Each will be examined in turn.

1. *The boundary-drawing process as a local undertaking*

The popular narrative on the construction of the Radcliffe Line proceeds as follows: that the partition of Punjab was a local demand emanating from the Muslim League, accepted by the Indian National Congress (the two prominent political parties operating in British India), and confirmed by a vote in the provincial assembly;[69] that this local demand led to the constitution of the Punjab Boundary Commission, composed entirely of native judges, but chaired by an eminent British lawyer, Cyril Radcliffe;[70] that Radcliffe was chosen by local leaders, and his appointment was based on his

67. Chester, *supra* note 9.

68. United Nations High Commissioner for Refugees (UNHCR), "UNHCR Report on the State of the World's Refugees" (2000), online: UNHCR <https://www.unhcr.org/3ebf9babo.pdf> [*UNHCR Report*]; Mohammad SHAHABUDDIN, "Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar" (2019) 9 Asian Journal of International Law 334.

69. Harry V. HODSON, *The Great Divide* (Oxford: Oxford University Press, 1986).

70. Barbara D. METCALF and Thomas R. METCALF, *A Concise History of India* (Cambridge: Cambridge University Press, 2002).

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impartiality and legal expertise;[71] that the Boundary Commission drew the partition line collectively and from scratch; and they did so to best suit local needs, surmised from submissions made in public hearings.[72] Finally, that the Commission's award bore little responsibility for the violence that followed partition; instead, such violence was the consequence of deeply entrenched communal hatred that could not be checked by the newly formed governments of India and Pakistan.[73] Understandably, this account leaves little scope to consider the Radcliffe Line a product of *uti possidetis*. However, each component of this narrative rests on an unsound footing.

Jalal's revisionist work on partition history demonstrates in detail that the division of Punjab was not a demand that emerged from the Muslim League.[74] Rather, "the idea of Pakistan … was inextricably linked with an undivided Punjab" for the League and for Jinnah, its leader.[75] Instead, the decision to partition the province came from Mountbatten, the Viceroy of India, as part of his "3rd June Plan".[76] Moreover, this decision was driven largely by British interests. Maintaining British rule in India was proving to be a costly exercise for the debt-ridden colonial government after the World War II.[77] This was why Mountbatten was tasked with unwinding Britain's involvement in India as swiftly as possible. Any alternative to partition, however, would have required a time-consuming negotiated settlement that the British government could ill afford.[78] A speedy transition of power was also favourable to the local elite: Jinnah, who was in the terminal stages of tuberculosis, and Nehru, mentally exhausted after multiple rounds of imprisonment, were eager to take over the reins.[79] This was why they agreed to the British proposal to partition Punjab.

Additionally, as Chatterji demonstrates, the vote in the provincial assembly was a farce: the assemblies were artificially divided on religious lines for the vote, to impress the inevitability of partition upon its members; the assembly members were not informed on whether their constituency would fall within India or Pakistan if partition were to occur; and, notably, the West Punjab assembly voted for accession to Pakistan only if the province remained undivided.[80] Yet, the vote was used to confer legitimacy on the decision to divide Punjab, portraying it as a local decision when, in

71. Barney WHITE-SPUNNER, *Partition: The Story of Indian Independence and the Creation of Pakistan in 1947* (London: Simon & Schuster. 2017).

72. Veena DAS, *Critical Events: An Anthropological Perspective on Modern India* (Delhi: Oxford University Press, 1996).

73. Penderel MOON, *Divide and Quit: An Eye-Witness Account of the Partition of India* (London: Chatto and Windus, 1961).

74. Ayesha JALAL, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge: Cambridge University Press, 1985).

75. TAN Tai Yong and Kudaisya. GYANESH, *The Aftermath of Partition in South Asia* (London & New York: Routledge, 2001) at 12.

76. Alex V. TUNZELMANN, *Indian Summer: The Secret History of the End of an Empire* (New York: Henry Holt and Co., 2007).

77. Lucy P. CHESTER, *Drawing the Indo-Pakistani Boundary During the 1947 Partition of South Asia* (Ann Arbor, MI: ProQuest, 2002).

78. Vappala P. MENON, *Transfer of Power in India* (Princeton, NJ: Princeton University Press, 1957).

79. Chester, *supra* note 77.

80. Chatterji, *supra* note 8.

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fact, it was based entirely on the interests of the British administration and the Indian political elite.[81]

Further, even though Radcliffe's name, as head of the Boundary Commission, was proposed by the British administration, Mountbatten manipulated records of meetings to make it appear that the name had been proffered by Jinnah.[82] The subsection below demonstrates why Radcliffe was far from an impartial arbiter in this process. Finally, even though the Boundary Commission's award was completed well in advance of the independence days of India and Pakistan, its publication was delayed specifically to ensure that the outcome would appear to be a local decision, and responsibility for it would be borne by the successor governments.[83] The transcripts of Mountbatten's meetings explicitly record him stating that "[w]ithout question, the earlier it was published, [the] more the British would have to bear the responsibility for the disturbances which would undoubtedly result".[84] As a result, the narrative of the construction of the Radcliffe Line as a locally driven process was intentionally fabricated by the British government to confer greater legitimacy on it.[85]

2. *The Radcliffe Line as a judicial decision*

A critical element in the attempt to legitimize the partition of Punjab was its depiction as a judicially determined settlement. The chairman of the Boundary Commission, Cyril Radcliffe, was pivotal to this end. Much writing on the Commission justifies his appointment based purely on his legal expertise and neutrality.[86] However, more critical pieces have picked apart this presumption. French deems him the "ultimate Establishment figure", deeply embedded in the British imperialist project.[87] Radcliffe had little knowledge of India, and no expertise in boundary delimitation; he was chosen largely to protect British interests while cloaking politically motivated choices under the garb of judicial neutrality.[88] Chester provides a comprehensive analysis of Radcliffe's life to further this point: he hailed from a military family; his father and brothers were professional soldiers in the British army – one brother even died whilst serving the Empire in India.[89] Radcliffe was educated in Haileybury, an elite public school that Chester terms "the training ground for aspirants to the East

81. Yasmin KHAN, *The Great Partition: The Making of India and Pakistan* (New Haven, CT: Yale University Press, 2007).

82. Chester, *supra* note 77.

83. Pippa VIRDEE, *From the Ashes of 1947: Reimagining Punjab* (Cambridge: Cambridge University Press, 2018).

84. Kirpal SINGH, *Select Documents on the Partition of Punjab* (Delhi: National Bookshop, 1991) at 192.

85. Lucy P. CHESTER, "Boundary Commissions as Tools to Safeguard British Interests at the End of Empire" (2008) 34 Journal of Historical Geography 494.

86. Satya RAI, *Partition of the Punjab: A Study of its Effects on the Politics and Administration of the Punjab 1947–56* (Bombay: Asia Publishing House, 1965).

87. Patrick FRENCH, *Liberty or Death: India's Journey to Independence and Division* (New Delhi: Penguin Books, 1997) at 321.

88. TAN Tai Yong, "Sir Cyril Goes to India: Partition, Boundary-Making and Disruptions in the Punjab" (1997) 4 International Journal of Punjab Studies 1.

89. Chester, *supra* note 77.

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India Company".[90] He went on to serve in the British Admiralty and the Ministry of Information, and much of his writings betray a strong imperialist leaning. During Radcliffe's sojourn in India to partition Punjab, he met with and wrote to Mountbatten extensively.[91] Mountbatten's secretary during this period, Christopher Beaumont, confirms that Radcliffe's award was directly influenced by Mountbatten to suit British interests through these communications.[92]

In addition, while the Punjab Boundary Commission comprised four South Asian judges, it was only the decision of the chairman, Radcliffe, that constituted the final legally binding award.[93] That Radcliffe distrusted his colleagues is well documented.[94] Indeed, Radcliffe himself notes that the final award was written with negligible contribution from the other judges, whom he rejected as "partisan".[95] Similarly, while the Commission held public hearings to receive arguments from interested parties, Radcliffe perplexed litigants and judges alike by choosing not to attend any hearing.[96] Although transcripts of such proceedings were dispatched to Radcliffe, Mosley highlights the suspicion with which he treated them; he was recorded alleging that the "two sides were always up to their tricks" in the hearings.[97] More unsettlingly, while parties were expected to make submissions to the Commission on the future boundary line, they were not given access to any official government maps, which remained classified following World War II.[98] It is not surprising, therefore, that Radcliffe ultimately drew his line with little insight from locals, by consulting British officials, British maps, and British census figures.[99] As Liaquat Ali Khan, the first Prime Minister of Pakistan, noted in his letter to Lord Ismay, the British Chief of Staff at the time, the Radcliffe award was "a political decision, and not a judicial one".[100]

3. *The paucity of proof*

The narrative of the Radcliffe Line as a locally driven judicial outcome could only be cemented by concealing all evidence that betrayed its true nature. This was accomplished through three principal means: first, Radcliffe provided no reasoning to support his decision in the award, and insisted on refusing explanations of the award for the rest of his life.[101] He even later acknowledged that the absence of justification was

90. *Ibid.*, at 76.
91. Mansergh et al., *supra* note 10.
92. Chester, *supra* note 77.
93. S. 4(3), The Indian Independence Act, 1947.
94. Joya CHATTERJI, *The Spoils of Partition: Bengal and India, 1947–1967* (Cambridge: Cambridge University Press, 2007).
95. Mansergh et al., *supra* note 10.
96. Oskar H.K. SPATE, *On the Margins of History: From the Punjab to Fiji* (Canberra: Australian National University Press, 1991).
97. Leonard MOSLEY, *The Last Days of the British Raj* (New York: Harcourt, Brace and World, 1962) at 198.
98. Chester, *supra* note 9.
99. Tan and Gyanesh, *supra* note 75.
100. Mansergh et al., *supra* note 10 at 733.
101. Tan and Gyanesh, *supra* note 75.

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intentional, to ensure the legitimacy of the award could not be questioned.[102] Second, all documents he relied on to make the final award were destroyed, so there was little scope to piece together his reasoning through them.[103] Third, all other official documents and communications concerning the Boundary Commission were withheld as "classified" until 1983, when a select few were published in the *Transfer of Power* collections.[104] Much of the critical historical writing on the Boundary Commission, therefore, could only emerge after this period. By relying on these declassified documents, as well as on submissions made in the Commission's hearings and interviews with surviving members of the Boundary Commission, the British colonial administration and Radcliffe's family, writers like Chester, Chatterji, and Gyanesh were able to uncover much of the reasoning underlying the final award. It is only through their writing that the possibility of critiquing the Radcliffe Line as an application of *uti possidetis* emerged. However, the bulk of legal scholarship on *uti possidetis* was produced in the 1960s, following the decolonization of Africa, and the early 1990s, following the Badinter Commission's decisions on Yugoslavia.[105] Understandably, as a consequence of the colonial narrative built on the Punjab Boundary Commission and the absence of evidence to challenge it, such scholarship had little opportunity to examine the Radcliffe Line.

B. Uti Possidetis *in Punjab*

Most cases of *uti possidetis* examined in the first section of this paper relied on boundaries from the largest administrative units available whilst drawing the international frontier. The method of applying *uti possidetis* in Punjab, however, was peculiar; the international frontier was not drawn using the boundaries of the "province", the primary unit in the federal structure of British India. As the preceding section revealed, committing to the boundaries of the unified Punjab province would have required rejecting its partition, which did not suit the interests of the British government. As a result, the international border between India and Pakistan was drawn on the boundaries of administrative subunits within the province of Punjab. Nevertheless, as Peters[106] and Shaw[107] point out, *uti possidetis* does encompass the use of such subunits as well; indeed, this was precisely how the ICJ applied the rule in the *Land, Island and Maritime Frontier Dispute*.[108]

Even a perfunctory reading of the Punjab Boundary Commission award reveals that it is little more than a straightforward selection of *tehsil* (revenue collection unit) and district (administrative unit) boundaries. A brief section of the Radcliffe

102. Virdee, *supra* note 83.
103. Edmund HEWARD, *The Great and the Good: A Life of Lord Radcliffe* (Chichester: Barry Rose Publishers, 1994).
104. Mansergh et al., *supra* note 10.
105. Nesi, *supra* note 26.
106. Peters, *supra* note 34.
107. Shaw, *supra* note 5.
108. *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, Judgment, [1992] I.C.J. Rep. 351.

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Line in the Kasur region of Lahore does deviate from the district and *tehsil* boundaries, but this section, too, is drawn using colonial administrative boundaries: those of *thanas* (criminal jurisdiction units) and villages.[109] The map in Figure 1, recovered from declassified British Foreign Office documents, illustrates how the final border was drawn. The orange line, representing the Radcliffe award, is etched entirely on colonial administrative lines. Within the Lahore district, the Radcliffe award deviates from the district border but follows a faintly dotted line representing *thana* boundaries.[110] In places where the boundary closely follows natural features, such as rivers, Radcliffe plainly states that it is the pre-existing administrative boundary and not the natural feature that constitutes the international frontier.[111] That this award was simply a selection of administrative lines is also confirmed by Chester[112] and Chatterji,[113] who appropriately critique Radcliffe for adopting flawed colonial

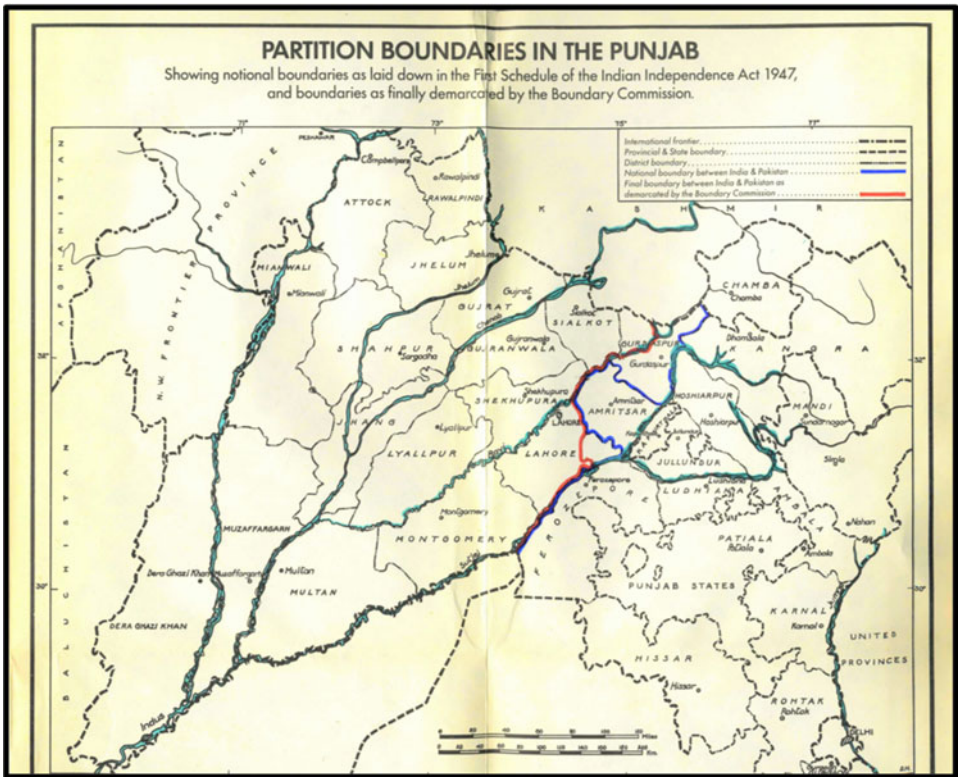


Figure 1 The Radcliffe Line Drawn on Colonial Administrative Boundaries[114]

109. Appendix A, Punjab Boundary Commission Award (1947).
110. Mansergh et al., *supra* note 10.
111. Appendix A, Punjab Boundary Commission Award (1947).
112. Chester, *supra* note 9.
113. Chatterji, *supra* note 94.
114. Mansergh et al., *supra* note 10 at 856.

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boundaries instead of redrawing more natural, defensible boundaries as was proposed in the submissions made to the Commission.

Shaw points out that the legal foundation of *uti possidetis* is usually secured through domestic legislation, as done in Latin America and Africa.[115] In Punjab, Chester demonstrates how this was done using the Indian Independence Act of 1947, drafted by the British government.[116] The provisions of this Act made the administrative boundaries used in the Radcliffe award legally binding on the successor states, leaving the leaders of India and Pakistan with few options to redraw the border. The governments even set up committees to mount legal challenges to the border but were informed by their respective lawyers that the selected colonial boundaries were "legally unassailable".[117] Although the words "*uti possidetis*" do not appear in the legislation or the award, Akweenda[118] and Lalonde[119] list several instances where this doctrine has been applied without directly referencing it by name—most notably in the Organization of African Unity's Cairo Declaration. Moreover, the Tribunal in the *Bay of Bengal Maritime Boundary Arbitration* subsequently acknowledged the Radcliffe Line as a product of *uti possidetis*, though it neglected to provide any direct examination of the delimited boundaries, as carried out above.[120] Mahmud, too, confirms the use of this doctrine in the partition.[121] As such, there can be little doubt that *uti possidetis* was applied to fashion the international frontier that fragmented Punjab.

C. *Colonial Lines and Social Upheaval*

The application of *uti possidetis* contributed to the social upheaval that followed the partition of Punjab. It did so for three reasons: first, it was based on flawed colonial cartography; second, the boundaries employed had no physical existence on the ground; and third, the criteria used to select these lines were deeply misguided. Each will be examined in turn. It is pertinent to note that, while the first two critiques have been levelled against *uti possidetis* before, the third arises only in the context of its application to South Asia.

1. *The cleavages of colonial cartography*

The map is a well-documented tool of imperialism that bears the biases of its maker: when used in imperialist projects, it carried little semblance to local realities, and simply echoed the gaze of the colonizer and their ideology.[122] This was certainly true in

115. Shaw, *supra* note 5.
116. Chester, *supra* note 77.
117. Ministry of External Affairs, National Archives of India: File No. 3-8/47 OSV (1947) at 7.
118. Akweenda, *supra* note 18.
119. Lalonde, *supra* note 16.
120. *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v. India)*, Award of 7 July 2014, [2014] I.C.G.J. 479.
121. Mahmud, *supra* note 25.
122. Graham HUGGAN, "Decolonizing the Map: Post-Colonialism, Post-Structuralism and the Cartographic Connection" (1989) 20 A Review of International English Literature 115.

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British India. The maps with which Radcliffe drew his line were all produced by the Survey of India, an imperialist institution.[123] These maps were produced to serve British colonial interests: military expansion and revenue collection.[124] This was reflected in their content.

Wolffhardt describes how the Survey's maps only accurately depicted those features that were of concern to the colonial government.[125] Roads, railways, forts, canals, oil pipelines, and revenue-collection units were all well marked; human settlements, religious sites, farmlands, local markets, and industries were glaringly omitted, represented only as blank space on the map's canvas. As a consequence, the administrative boundaries for *tehsils*, districts, villages, and *thanas* were largely drawn by prioritizing geometric considerations over human ones.[126] In order to reduce the territory to an ordered, mathematized space, the British administration relied on the Survey's maps to blithely draw boundaries that cut through individuals' farmlands and homes, split villages in half, divided industries from the sources of their raw material, parted religious communities from their shrines, and cut irrigation channels off from their headworks.[127] Moreover, as Chester points out, the maps provided to Radcliffe were drawn at far too small a scale (1:1,000,000) to deduce even a hint of the local social, economic, cultural, and religious ties that inhabited the spaces they depicted.[128] As a result, it is hardly surprising that Radcliffe's use of colonial maps and administrative boundaries to partition Punjab contributed materially to the social upheaval that ensued. His award transformed imagined cleavages that previously existed only on the sheets of British charts into lived reality for twenty-eight million individuals.[129]

2. *Invisible boundaries*

The primary benefit offered by *uti possidetis*, according to its advocates, is the stability and predictability it provides in periods of transition.[130] Ratner, however, offers an apt response to this claim: the internal administrative boundaries used by *uti possidetis* to draw an international border are rarely demarcated physically, on the ground, prior to partition.[131] Indeed, demarcation offers little functional utility while such boundaries remain internal administrative divisions. As a consequence, the belief that such boundaries offer stability or predictability is misguided; by lacking a

123. John B. HARLEY, *The New Nature of Maps: Essays in the History of Cartography* (Baltimore, MD: Johns Hopkins University Press, 2001).

124. P.L. MADAN, *Indian Cartography: A Historical Perspective* (New Delhi: Manohar Publishers and Distributors, 1997).

125. Tobias WOLFFHARDT, *Unearthing the Past to Forge the Future: Colin Mackenzie, the Early Colonial State and the Comprehensive Survey of India* (New York: Berghahn Books, 2017).

126. *Ibid.*

127. Matthew H. EDNEY, *Mapping an Empire: The Geographical Construction of British India* (Chicago, IL: University of Chicago Press, 1997).

128. Chester, *supra* note 9.

129. Mosley, *supra* note 97.

130. Crawford, *supra* note 26.

131. Ratner, *supra* note 16.

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physical existence they provide local populations and government agencies as much support in predicting the future border as a freshly drawn line with no historical basis.[132] Such a critique is borne out by the experience in Punjab.

District and *tehsil* boundaries were rarely demarcated in the province, since they were abstract constructs that existed only for administrative convenience.[133] As such, these boundaries were of little significance to the people they divided. Moreover, even when such boundaries were marked out, there were discrepancies between their physical location and their notional delimitation on the map, rendering the true location of the administrative boundary unclear.[134] Consequently, when the Radcliffe Line was announced, it offered anything but a stable, predictable outcome. Newspaper reports from the period describe perilous confusion, as people scrambled to make sense of the award and understand which state they had been parcelled off to.[135] Border forces were unable to prevent the looting and mass violence that followed partition since they, too, were uncertain about the location of the boundaries they were tasked to defend.[136] As Jenkins, the Governor of Punjab at the time, noted in numerous communications to Mountbatten, false rumours and speculation on the location of the boundary were often triggers that precipitated violence following the award's announcement.[137] One can conclude that the application of *uti possidetis* in Punjab, far from offering a predictable outcome, contributed to the instability and violence of partition by relying on invisible lines that carried little meaning to those they sought to separate.

3. *The criteria for division*

Since the "province" did not serve as the basic unit for *uti possidetis* in Punjab, the drawing of the partition line involved a choice: Radcliffe had to pick which administrative subunits would lend their boundaries to the international frontier. The only criterion he was offered to guide him in making this choice was religion: the Boundary Commission's terms of reference explicitly required Radcliffe to partition Punjab by drawing a line between "contiguous Muslim and non-Muslim majority areas".[138] Moreover, he was specifically instructed by the British government not to consider the defensibility of the line, natural features, or administrative convenience while delimiting his final boundary.[139] Although Radcliffe was given some leeway to consider "other factors", he opted to use this sparingly, and then only to preserve the

132. Castellino and Allen, *supra* note 7.
133. Chatterji, *supra* note 94.
134. Edney, *supra* note 127.
135. "Partition of the Punjab" *Times of India* (19 August 1947) at 7; "Radcliffe Award Announced" *Pakistan Times* (19 August 1947) at 1.
136. Chester, *supra* note 77.
137. Mansergh et al., *supra* note 10.
138. Paul R. BRASS, "The Partition of India and Retributive Genocide in the Punjab, 1946–47: Means, Methods, and Purposes" (2003) 5 Journal of Genocide Research 71.
139. Mansergh et al., *supra* note 10.

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integrity of colonial infrastructure projects.[140] As a consequence, Punjab was divided solely on identity. More distressingly, it was divided solely on an artificial identity.[141] Although religious cleavages existed within pre-independence Punjab, their content was more nuanced than the simplistic "Muslim and non-Muslim" formula employed by the Boundary Commission. Within "Muslims" the Ahmadiyyas and the Pashtun were seen as a distinct identity, while "non-Muslims" were internally fractured between Hindus, Christians, Mazhabi, and Ramdasia Sikhs.[142] Crucially, the Commission's terms of reference also misunderstood the priority of religion as an identity in Punjab: Khan points out that caste, class, and linguistic criteria were far stronger markers of identity than religion in the province.[143] By dividing Punjab on contrived religious grounds whilst relying on ill-conceived and poorly demarcated boundaries, the use of *uti possidetis* fuelled the destruction of pre-existing identities while moulding new, unfamiliar ones. It was this identity transformation that ultimately played a pivotal role in the violence and forced migration that followed the partition of Punjab.[144] The next section of this paper will examine this process in greater detail.

III. IDENTITY AND INTRASTATE VIOLENCE: THE CONSTRUCTION OF COMMUNAL CONSCIOUSNESS IN PUNJAB

This section begins by unearthing the syncretic spiritual and cultural identity of *punjabiyat* that pervaded Punjab prior to its partition. It then examines the corrosion of this identity, and the creation of a new communal consciousness, through colonial policies and local political opportunism in the lead-up to independence. The section concludes by postulating that the Radcliffe Line was pivotal in completing this identity transformation, unearthing its role in the violence and forced migration that followed partition.

A. *Identity in Pre-Partition Punjab*

When Malcolm Darling, the Assistant Commissioner of Punjab, travelled through the province on the eve of partition, he observed: "in crossing the Chenab we entered the central Punjab where Muslim and Sikh are as intermingled as barley and wheat sown together, where too the Muslim is for the most part a converted Hindu. There are many villages where Muslim and Sikh are of the same tribe, and both of Hindu ancestry with still some customs in common."[145] Indeed, it is difficult to come across

140. Chester, *supra* note 77.
141. Shashi THAROOR, *Inglorious Empire: What the British Did to India* (London: C. Hurst & Co., 2016).
142. Brass, *supra* note 138.
143. Khan, *supra* note 81.
144. Virdee, *supra* note 83.
145. Malcolm L. DARLING, *At Freedom's Door* (Oxford: Oxford University Press, 2011) at 69.

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writing on nineteenth- or early twentieth-century Punjab that does not comment on its shared, composite culture.[146] This despite the zealous attempts of Indian and Pakistani nationalist historiographies to paint the province as one historically fractured on religious lines.[147] Recent scholarship has even attempted to uncover traces of this pluralist identity, titled "*punjabiyat*", that survive through contemporary Punjabi art, music, and literature.[148]

A common *punjabiyat* was imbued across the province through several ingredients. The bedrock of the identity was laid upon language: Punjabi, written in both the *gurmukhi* and *shahmukhi* scripts, was spoken almost exclusively through the province, irrespective of class, caste, or religion.[149] This enabled the creation of common literary traditions. The Sufi poetry of Waris Shah, Baba Farid, and Bulleh Shah gained immense popularity even amongst Hindu and Sikh communities, transcending religious lines.[150] Punjab shared a rich history of folk music[151] and a remarkable oral narrative custom, called *qisse*,[152] which helped bind generations of Punjabis by shaping common social norms and nurturing a shared cultural imagination of the province. A unique cuisine and dress furthered Punjab's cultural divide from its surrounding provinces while bringing its residents together.[153] Secular agrarian festivals like *basant* and *baisakhi*, celebrated across religions, also paved the way for a distinct provincial identity.[154]

Central to this identity was a fused spiritual consciousness that cut across the confines of individual religions. The cross-communal worship of *sufi pirs* was a noted Punjabi practice,[155] with the shrines of Sakhi Sarwar Sultan or Pak Pattan attracting enormous crowds of Hindus and Sikhs, in addition to Muslim ones.[156] Famously, the Sakhi Sarwar shrine in Nigaha accommodated the tomb of a Muslim saint, a Sikh shrine for Baba Nanak, and a Hindu temple of Vishnu within its confines—an

146. Anna BIGELOW, "Saved by the Saint: Refusing and Reversing Partition in Muslim North India" (2009) 68 The Journal of Asian Studies 435.

147. Gyanendra PANDEY, *Remembering Partition: Violence, Nationalism and History in India* (Cambridge: Cambridge University Press, 2001).

148. Anshu MALHOTRA and Farina MIR, eds., *Punjab Reconsidered: History, Culture, and Practice* (Oxford: Oxford University Press, 2012).

149. Virdee, *supra* note 83.

150. Surinder SINGH and Ishwar D. GAUR, eds., *Sufism in Punjab: Mystics, Literature and Shrines* (Delhi: Aakar Books, 2009).

151. Sohinder S. BEDI, *Folklore of the Punjab* (New Delhi: National Book Trust, 1971).

152. Farina MIR, "Genre and Devotion in Punjabi Popular Narratives" in Anshu MALHOTRA and Farina MIR, eds., *Punjab Reconsidered: History, Culture, and Practice* (Oxford: Oxford University Press, 2012), at 221–3.

153. Denzil C.J. IBBETSON, *Outlines of Panjab Ethnography: Being Extracts from the Panjab Census Report of 1881, Treating of Race, Language, and Caste* (Calcutta: Superintendent of Government Printing, 1883).

154. Kamaljit BHASIN-MALIK, *In the Making: Identity Formation in South Asia* (New Delhi: Three Essays Collective, 2007).

155. Edward D. MACLAGAN, "Census of India, Vol. 20" *Internet Archive* (1891), online: Internet Archive <https://archive.org/details/in.ernet.dli.2015.196109/page/n7>.

156. Aubrey O'BRIEN, "The Mohammedan Saints of the Western Panjab" (1911) 41 Journal of the Royal Anthropological Institute of Great Britain and Ireland 509.

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illustration of the shared piety that permeated Punjab.[157] A critical element in the Punjabi spiritual identity was the local deity, as indicated by the prominence of Guga Pir, Sitala Devi, or the Panj Pir.[158] Such deities did not belong to a single religion or community; rather, their affiliation was geographically determined. As Ibbetson, the Commissioner of the Punjab Census, noted: "on the borderlands where these great faiths meet … the various observances and beliefs which distinguish the followers of the several faiths are so strangely blended and intermingled that it is often impossible … to decide in what category the people shall be classed."[159] Census reports of the period also record large numbers of Sikhs and Muslims who performed ostensibly "Hindu" life-cycle rituals, as well as Sikhs and Hindus who performed pilgrimages to Muslim shrines.[160] Remarkably, the *dasam granth*, a Sikh religious scripture, contains an entire section composed in Persian and derived directly from Islamic texts, titled *Zafar-namah*.[161] The participation of "non-Hindus" in festivals such as Holi, as well as that of "non-Muslims" in Muharram processions, is also well recorded.[162] Prominent spiritual leaders in the province, such as the Gulabdasi Piro, drew on Hindu Vedanta philosophy and Sikh ideals as well as Sufi ideas in their sermons and writings.[163] Singh and Talbot note that "such practices were not isolated pleas for religious toleration, but they emerged from a cultural milieu in which members of all communities shared in each other's celebrations".[164]

The existence of *punjabiyat* does not, admittedly, negate the possibility of cleavages within Punjabi society. Indeed, such cleavages did exist; however, as Tharoor points out, the divisions were *local*, based on *jati* (caste) or *biradri* (clan/tribe), not religion.[165] As Anderson demonstrates, pre-colonial Punjab lacked the technological capacity necessary to enable a province-wide mobilization based on religious identity.[166] Moreover, relying on the instances of cross-communal practices highlighted above, Kaviraj highlights that the religious marker, far from being a primary source of identity, only served as the basis for a "fuzzy consciousness" in pre-independence

157. Gurharpal SINGH and Ian TALBOT, *Punjabi Identity: Continuity and Change* (New Delhi: Manohar, 1996).

158. Bhasin-Malik, *supra* note 154.

159. Ibbetson, *supra* note 153 at 101.

160. William DALRYMPLE, "The Great Divide: The Violent Legacy of Indian Partition" *The New Yorker* (29 June 2015) online: The New Yorker <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple>.

161. Louis E. FENECH, "The History of the Zafar-namah of Guru Gobind Singh" in Anshu MALHOTRA and Farina MIR, eds., *Punjab Reconsidered: History, Culture, and Practice* (Oxford: Oxford University Press, 2012), at 65–74.

162. Urvashi BUTALIA, *The Other Side of Silence: Voices from the Partition of India* (New Delhi: Viking, 1998).

163. Anshu MALHOTRA, "Panths and Piety in the Nineteenth Century" in Anshu MALHOTRA and Farina MIR, eds., *Punjab Reconsidered: History, Culture, and Practice* (Oxford: Oxford University Press, 2012), at 190–5.

164. Singh and Talbot, *supra* note 157 at 10.

165. Tharoor, *supra* note 141.

166. Benedict ANDERSON, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1991).

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Punjab.[167] The process by which this "fuzzy consciousness", subsumed within a broader fluid *punjabiyat*, was transformed into a rigid foundation for identity will be examined below.

B. *The Carving of a Communal Consciousness*

No identity is inherent or naturally occurring; it must be constructed.[168] Once constructed, however, identities can be altered and reshaped. To enable such "switching" and provide individuals with a new frame of reference for self-perception, new signals of identity must be assembled and communicated until they eventually become embedded within social structures, i.e. the newly-shaped identity "takes".[169] The signals are rarely "objective" or "real" differences; rather, they are often artificial or imagined markers that actors choose to accept and, over time, emerge as significant.[170] Crucially, such signals must be emphasized iteratively, over time, in order to succeed: individual waves may only shift a few grains of sand, but collectively, and with time, they can carve entirely new coastlines.[171] So it is with identities.

That the creation of a communal, religious identity in Punjab began with the British is well documented.[172] While some consider this the product of an intentional colonial "divide and rule" policy,[173] others believe the British accidentally projected their own social divisions upon the Indian subcontinent.[174] An examination of the reasons that motivated this policy lies outside the scope of this paper; an exposition of its facets, however, does not.

The creation of communalism began through the codification of personal laws. The British wished to govern the subcontinent using local laws but, misguidedly, sought to unearth these laws within religion.[175] Unaware of how religion functioned within the subcontinent, the British imposed a Judeo-Christian structure upon it in order to derive workable moral norms—they applied unified Gentoo (Hindu) and Mohammedan Codes, which were written by and subject to the authoritative

167. Sudipta KAVIRAJ, *Religion, Politics and Modernity* (Staffordshire: University of Staffordshire Press, 1992). Also Sudipta KAVIRAJ, "Religion, Politics and Modernity" in Upendra BAXI and Bhikhu PAREKH, eds., *Crisis and Change in Contemporary India* (New Delhi: Sage Publications), 295.

168. Stuart HALL and Paul du GAY, eds., *Questions of Cultural Identity* (London: Sage, 1996).

169. Georg ELWERT, "Boundaries, Cohesion and Switching: On We-Groups in Ethnic, National and Religious Forms" (1995) 10 Anthropologie & Développement 10. Also Georg ELWERT, "Boundaries, Cohesion and Switching: On We-Groups in Ethnic National and Religious Forms" in Hans-Rudolf WICKER, ed., *Rethinking Nationalism and Ethnicity: The Struggle for Meaning and Order in Europe* (Oxford: Berg Publishers, 1997), paras. 64–70.

170. Fredrik BARTH, *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* (Boston.MA: Little, Brown and Company, 1969).

171. Günther SCHLEE, *How Enemies Are Made: Towards a Theory of Ethnic and Religious Conflict* (Oxford: Berghahn Books, 2010).

172. Romila THAPAR, "Communalism and the Historical Legacy: Some Facets" (1990) 18 Social Scientist 4.

173. Tharoor, *supra* note 141.

174. Bhasin-Malik, *supra* note 154.

175. Nandini BHATTACHARYA-PANDA, *Appropriation and Invention of Tradition: The East India Company and Hindu Law* (Oxford: Oxford University Press, 2007).

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interpretations of a "priest" class, which the colonial administration selected from Brahmin *pandits* and Muslim *ulema*.[176] Dispute resolution that had earlier resided within the *jati* and *biradri* was now abruptly brought within religion.[177] More worryingly, in codifying religion, the British imposed an inflexibility on it that had never existed before. Spirituality across India had always been highly diverse, subject to local customs that varied over time and space; now it was confined to strict criteria laid out by a small set of the religious elite.[178] It was only through the rigid uniformity imposed by such codes that the possibility of a common interprovincial religious consciousness ever arose.[179]

The census provides the next piece of the puzzle. An integral part of the colonial enterprise was the desire to classify and bring order to the conquered society, in order to produce knowledge about the "other".[180] Census operations were key to this process. The first British census of Punjab was conducted in 1868 and, predictably, relied on religion as the primary grouping to order Punjabi society.[181] As Metcalf observes, "the British came to believe that adherence to one or the other of these religions was not merely a matter of belief, but defined membership more generally in a larger community".[182] However, this neat separation of groups in the census was far from an accurate depiction of the syncretic Punjabi society, described above. As Ibbetson, the author of the second census reported, it is "difficult in many cases to draw the line between one Indian creed and another for the distinctions of faith, being based upon and attended by no deep spiritual conviction, are marked by a laxity of practice which would be impossible to a bigot or an enthusiast".[183] He elaborates on this observation, noting that "the Musalman peasantry of the Delhi territory are still in many ways almost as much Hindu as their unconverted brethren; that the Sikh of Sirsa is often a Sikh only in speech and habit; that the Hindu of Lahul is almost more of a Buddhist than a Hindu".[184] Nonetheless, Kaviraj explains that, by dividing society into discrete religious categories and by publicly enumerating the strength of those categories, the census played a vital role in creating communal consciousness in Punjab: it reduced a previously illusory notion into a quantifiable one.[185] By creating a perception of vulnerability in the communities it classified as "minorities", the census played a pivotal role in their subsequent political mobilization.[186]

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176. Elisa GIUNCHI, "The Reinvention of Sharī'a under the British Raj: In Search of Authenticity and Certainty" (2010) 69 Journal of Asian Studies 1119.
177. Madhu KISHWAR, "Codified Hindu Law: Myth and Reality" (1994) 29 Economic and Political Weekly 2145.
178. Bernard S. COHN, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1996).
179. Tharoor, *supra* note 141.
180. Edward W. SAID, *Orientalism* (London: Routledge & Keagan Paul, 1978).
181. Bhasin-Malik, *supra* note 154.
182. Thomas R. METCALF, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1994) at 132.
183. Ibbetson, *supra* note 153 at 101.
184. *Ibid*.
185. Sudipta KAVIRAJ, "Religion and Identity in India" (1997) 20 Ethnic and Racial Studies 325.
186. Kenneth W. JONES, "Religious Identity and the Indian Census" in Gerald N. BARRIER, ed., *The Census in British India: New Perspectives* (New Delhi: Manohar, 1981), at 85–8; Arjun

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The rewriting of Indian history was also a necessary step in the construction of communal identities. Writers such as Mill and Mueller divided the subcontinent's history into two periods, labelled "Hindu" and "Muslim", projecting their questionable newly fashioned categories into the past as monolithic, unchanging entities.[187] They portrayed the "Hindu" period as the golden phase of Indian history, tarnished by Muslim "foreign invaders" who used forced conversions "by the sword" to bring Islam to the subcontinent.[188] In truth, Islamic practices entered Indian society far before the Delhi Sultanate and the Mughal empire, through trade with the Arab world.[189] Past wars that were fought on political or economic grounds were repainted through a religious lens to portray the near-primeval incompatibility of these faiths, providing ideological fodder for communal antagonism in the present.[190]

Finally, the colonial government used the category of "faith" religiously in its day-to-day administration, embedding it into every structure and institution it built. Administrative divisions were publicly justified by pointing to the necessity of separating "incompatible" Hindu and Muslim populations—most famously, Curzon's separation of Bengal in 1905.[191] Recruitment to the British-Indian army, as well as employment in the civil services, was carried out through reservations based on religion.[192] Even whilst granting a limited democracy to the colonial provinces, the Minto-Morley and Montague-Chelmsford reforms carved out separate Hindu and Muslim electorates, reiterating that neither group could be trusted to represent the interests of the other.[193] It was through a combination of these policies that the British administration laid the groundwork for a communal consciousness in the subcontinent, and in Punjab.

Not all blame, however, can be borne by the British. Local political opportunism was also pivotal in formulating a communal identity in Punjab. The Hindu, Sikh, and Muslim local elite leveraged the religious cleavage created at the centre by the colonial government to derive political benefits within the province. Hindu outfits like the Arya Samaj and the Hindu Mahasabha orchestrated a "*shuddhi*" (purity) movement through the province that sought to challenge syncretic practices and "reconvert" Christians, Buddhists, and Muslims in the province back to their "native" Hinduism.[194] Leaders such as Bhai Parmanand and Swami Shraddhanand readily

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APPADURAI, "Number in the Colonial Imagination" in Carol A. BRECKENRIDGE and Peter van der VEER, eds., *Orientalism and the Post-colonial Predicament* (Philadelphia, PA: University of Pennsylvania Press, 1993), 314.

187. Gyanendra PANDEY, *The Construction of Communalism in Colonial North India* (Oxford: Oxford University Press, 2006).

188. Thapar, *supra* note 172.

189. Richard M. EATON, "Approaches to the Study of Conversion to Islam in India" in Richard M. MARTIN, ed., *Approaches to Islam in Religious Studies* (Tucson, AZ: University of Arizona Press, 1985), at 115–16.

190. Bipan CHANDRA, *Communalism in Modern India* (New Delhi: Vikas, 1984).

191. Peter GOTTSCHALK, *Religion, Science and Empire: Classifying Hinduism and Islam in British India* (Oxford: Oxford University Press, 2012).

192. Singh and Talbot, *supra* note 157.

193. Pandey, *supra* note 187.

194. William GOULD, *Hindu Nationalism and the Language of Politics in Late Colonial India* (Cambridge: Cambridge University Press, 2004).

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co-opted British histories of the subcontinent, calling for a return to the golden Vedic period in Punjab.[195] Sikh outfits like the Shiromani Akali Dal also called for an increasingly rigid interpretation of their faith, emphasizing ritualistic orthodoxy and recognizing only baptized *khalsa* Sikhs as its real members.[196] Its leader, Master Tara Singh, used census results to create the belief that the faith was under threat, whilst reminding followers of the faith's military and political prowess during the rule of Ranjit Singh, creating a competing Sikh version of Punjab's "golden period".[197] Wealthy Muslim *zamindars* (landlords) and capitalists such as Hayat Khan and Fazl-i-Hussain created the Punjabi Muslim League through which they called for supplanting the use of the Punjabi language in the province with *urdu*, a strict adherence to Islamic texts, and a removal of Hindu and Sikh icons from sufi *pirs*—all in an attempt to use the province's Muslim majority to consolidate their power.[198] It was through such iterative re-emphasis of religious attributes at the centre by the British, and in the province by local leaders, that a communal consciousness began to take shape in Punjab. However, the Radcliffe Line was vital in ensuring the success of this consciousness.

C. *A Line Drawn in Blood*

Despite all the efforts described above, the communal identity could not take full root in Punjab, even whilst it cut through the rest of British India. In the 1946 provincial assembly elections, widely regarded as a referendum on partition, the Muslim League obtained a resounding victory in the subcontinent.[199] It won over seventy-five percent of the Muslim vote, winning every seat reserved for Muslims in Bombay, Madras, UP, and Bihar, and forming the government in every Muslim-majority province but one.[200] Punjab, where Muslims constituted 57.1 percent of the population, voted emphatically for the secular Unionist and Congress parties, which had actively distanced themselves from the communal politics of the League, the Mahasabha, and the Akali Dal.[201] Although the Muslim League did, notably, increase its vote count in comparison to the 1937 elections—indicating a definite growth in communal consciousness within the province—it was the intercommunal appeal of the Unionists that ultimately resonated most strongly with Punjab's population.[202] Remarkably, while the rest of the subcontinent began to erupt in communal violence, leading to the

195. Ian TALBOT and Gurharpal SINGH, *The Partition of India* (New York: Cambridge University Press, 2009).

196. Harjot OBEROI, *The Construction of Religious Boundaries: Culture, Identity, and Diversity in the Sikh Tradition* (Chicago, IL: University of Chicago Press, 1994).

197. Bhasin-Malik, *supra* note 154.

198. Ian TALBOT, "The Growth of the Muslim League in Punjab" (1982) 20 Journal of Commonwealth and Comparative Politics 1.

199. Talbot and Singh, *supra* note 195.

200. David GILMARTIN, *Empire and Islam: Punjab and the Making of Pakistan* (Berkeley, CA: University of California Press, 1992).

201. Stephen OREN, "The Sikhs, Congress, and Unionists in British Punjab" (1974) 8 Modern Asian Studies 397.

202. Ian TALBOT, "The 1946 Punjab Elections" (1980) 14 Modern Asian Studies 65.

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imposition of central rule in most provinces, Punjab remained strikingly tranquil in this period with the Unionist government at the reigns.[203] Evidently, the syncretic identity remained resilient in the province even on the eve of partition. How, then, did Punjab become the site of the worst communal massacres in the subcontinent's history mere months after this election? A part of the answer lies in how the Radcliffe Line was drawn.

That the Radcliffe Line was implicated in the violence in Punjab is not difficult to establish: Aiyar, in examining historical records of such violence, notes that communal killings in Punjab began almost immediately after the boundary award was announced and continued well into the following months.[204] Despite such conspicuous timing, little scholarship directly examines the contribution of the boundary-drawing process to the ensuing violence.[205] This may well be a result of the success of subsequently written nationalist histories, which depicted the violence as an inevitable consequence of deeply embedded religious divisions in the province.[206] Yet, as shown above, communal consciousness had still not embedded itself into the Punjabi psyche at the time of partition. It was, in fact, the drawing of the boundary that sealed the fate for Punjab's pre-existing syncretic identity whilst bringing to the fore its communal one.

The Radcliffe Line constituted both a symbolic and practical impediment to the survival of *punjabiyat*. Prior to the construction of the line, communalism in Punjab remained a largely abstract notion that lived in British-penned histories and census books. In contrast, *punjabiyat* possessed numerous tangible markers in the lives of the province's residents: in the *pirs* and shrines they visited, the *qisse* and poetry they recounted, the clothes they wore, or the cuisine they consumed. As such, the syncretic identity was directly discernible; its perceptibility provided it with meaning and significance in the eyes of the people of the province.[207] By drawing a line on the ground exclusively on religious criteria, assigning one slice of territory to the *mussalmans* and another to the Hindus and Sikhs, building a literal fence between the two, and enabling the creation of entire state structures premised on this religious cleavage, the Radcliffe Line gave abstract communalism a corporeal manifestation.[208] By constructing an international territorial boundary based on faith, by doing so through highly contested and widely followed public hearings, and by publicly announcing the boundary award and publishing maps depicting the final line, the process of boundary delimitation opted for in the partition of Punjab made communalism a symbolically significant identity, on a par with *punjabiyat*.

In addition, by cutting an international frontier through the heart of a shared province, the Radcliffe Line created a concrete barrier to the cultural exchange necessary

203. Virdee, *supra* note 83.
204. Swarna AIYAR, "'August Anarchy': The Partition Massacres in Punjab, 1947" (1995) 18 Journal of South Asian Studies 13.
205. Chester, *supra* note 77.
206. Khan, *supra* note 81.
207. See Barth, *supra* note 170.
208. See Elwert, *supra* note 169.

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for the survival of *punjabiyat*. It cut off intercommunal access to *sufi pirs*, Sikh *gurudwaras*, or Hindu shrines, precluding the common celebration of *holi* and *muharram*, *basant* and *baisakhi*.[209] Poetry, folk music, and *qisse* were forestalled from travelling across the province, as were the sermons and writing of *sufi* and *gulabdasi* leaders.[210] Local deities fell into obsolescence because their territorial remit was no longer meaningful, having been carved up between two states.[211] Through this process of bordering, the shared cultural and spiritual imagination of Punjab broke down, leaving the fractured province and its fractured people vulnerable to the "pull forces" of nationalism and communalism exerted by the centre.[212] Ultimately, these forces succeeded in clipping away the *punjabi* language and the *gurmukhi* script, replacing it with *urdu* and the Persian script in the Pakistani half, and with *hindi* and the *devanagri* script in the Indian one.[213] With the bedrock of *punjabiyat* eroded and the very possibility of communication denied, the identity inevitably fell away into desuetude.

Understanding the delimitation of the Radcliffe Line as a trigger for identity transformation in Punjab enables us to better understand the nature of the violence that ensued, and to tease out the role of the boundary in the subsequent forced migration. Brass points out that, although nationalist histories describe partition violence as "sporadic", "disorganized", and "senseless", it was, in truth, a carefully orchestrated exercise, planned and executed by the leaders of communal outfits like the Akali Dal and the Hindu Mahasabha.[214] The violence itself was also of a fundamentally distinct character from that conducted during the communal riots that plagued the rest of the subcontinent in the lead-up to partition, even though writers have tried to portray the two as connected.[215] Riots in the rest of India had always required a local trigger, usually cow slaughter or overlapping festivals; crucially, they had always been restricted to public spaces, and had involved clashes between armed adult men.[216] Post-partition violence, by contrast, was externally orchestrated against unarmed individuals, was carried out within peoples' homes, and was perpetrated in equal, if not greater, measure against women and children.[217] These differences are vital to understanding the nature and purpose of the violence.

Barth famously argued that the construction and revision of new identities is carried out at their notional boundaries.[218] Violence plays an integral role in creating these boundaries, helping to transform previously unstable identities into secure

209. Bhasin-Malik, *supra* note 154.
210. Malhotra, *supra* note 163.
211. Malhotra and Mir, *supra* note 148.
212. Talbot and Singh, *supra* note 195.
213. Fenech, *supra* note 161.
214. Brass, *supra* note 138.
215. Aiyar, *supra* note 204.
216. Talbot and Singh, *supra* note 195.
217. Virdee, *supra* note 83.
218. Barth, *supra* note 170.

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ones by eradicating "cross-cutting ties" that link its members to others.[219] As such, the "contact hypothesis" is flawed: deeper intercommunal ties and relations exacerbate rather than diminish violence in periods where a new identity is being constructed, since the disentanglement of "cross cutting ties" and the creation of new, stable social boundaries, under such circumstances, can be achieved only through force.[220] In this fashion, violence is leveraged to play a constructive social role: as Harrison reasons, "groups don't make war, war makes groups".[221]

The post-partition violence in Punjab can be understood through this framework as an attempt to unwind the cross-cutting ties of *punjabiyat* and to demarcate the social boundaries of the new communal identity, once this transformation had been triggered by the construction of a new territorial boundary. Brass echoes this position, stating: "the deliberate use of violence was a principal mechanism … to carry the implications of partition itself to its logical conclusion, namely, the concentration of all peoples defined in categorical terms as belonging to particular religious groups on opposite sides of the partition line."[222] Kaldor argues that the purpose of such identity-constituting violence is not strategic but ideological: it aims to sow mutual fear, hatred, and mistrust within members of the identities to be constituted.[223] As a result, armed groups on both sides target civilians rather than one another—a feature of post-partition violence. Women, seen as biological reproducers of the identity, and children, seen as its legacy, are often singled out for these reasons in such violence.[224] Remarkably, Butalia points out how much of the slaughter of women during partition was carried out by members of their own religious community, to prevent their capture and preserve the "purity" of their identity.[225] Menon and Bhasin detail the brutal rape, forced impregnation, and sexual violence committed against members of the opposing faith during partition, highlighting that such violence was political because it sought to instil psychological boundaries in people's minds that matched the geopolitical ones constructed by the Radcliffe award.[226] Virdee successfully demonstrates how much of the violence was targeted specifically at sites of intercommunal harmony—the sources of "cross-cutting ties"—such as the *pirs* and shrines of

219. Glenn W. BOWMAN, "Constitutive Violence and the Nationalist Imaginary. Antagonism and Defensive Solidarity in 'Palestine' and 'Former Yugoslavia'" (2003) 11 Social Anthropology 319; Louis KRIESBERG and Bruce W. DAYTON, *Constructive Conflicts: From Escalation to Resolution* (Lanham, MD: Rowman & Littlefield, 1998); James D. FEARON and David D. LATIN, "Violence and the Social Construction of Ethnic Identity" (2000) 54 International Organization 845.

220. Schlee, *supra* note 171; Victoria M. ESSES and Richard A. VERNON, eds., *Explaining the Breakdown of Ethnic Relations: Why Neighbours Kill* (Hoboken, NJ: Wiley-Blackwell, 2008).

221. Simon J. HARRISON, *The Mask of War: Violence, Ritual, and the Self in Melanesia* (Manchester: Manchester University Press, 1993).

222. Brass, *supra* note 138 at 82.

223. Mary KALDOR, *New and Old Wars: Organized Violence in a Global Era*, 2nd ed. (Palo Alto, CA: Stanford University Press, 2007).

224. Christine CHINKIN and Mary KALDOR, *International Law and New Wars* (Cambridge: Cambridge University Press, 2017).

225. Butalia, *supra* note 162.

226. Ritu MENON and Kamla BHASIN, *Borders and Boundaries: Women in India's Partition* (New Brunswick, NJ: Rutgers University Press, 1998).

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Sheikhupura, which witnessed some of the worst massacres during partition.[227] Butalia also points out how individuals who challenged these notional boundaries were singled out for exemplary violence, focusing on the treatment meted out to individuals in intercommunal relationships or those who sought to retain their syncretic practices.[228]

Post-partition violence, consequently, was neither sporadic nor senseless. It served a very deliberate purpose: eliminating the cross-cutting ties that ran through the province due to the syncretic *punjabiyat* identity and building up psychological boundaries based on the newly forged communal one. The forced migration that followed reflected this intention. Prior to partition, the western territories of Punjab possessed a 29.1 percent Hindu population and a 14.9 percent Sikh population that, through migration, had been reduced to zero by 1951.[229] Similarly, the Muslim population of the eastern territories shrank from thirty-five percent to two percent in the aftermath of partition.[230] The artificial criteria on which the Radcliffe Line was drawn became a self-fulfilling prophecy; identity-violence and forced migration transformed an erstwhile syncretic Punjab into two territories divided by faith.

A small glimpse into what might have been without the Radcliffe Line is provided by Bigelow's[231] and Virdee's[232] studies of the princely state of Malerkotla. Host to a near-even distribution of Muslims, Hindus, and Sikhs, Malerkotla bordered Punjab but escaped any form of partition-based violence or migration. Notably, Punjabi princely states like Malerkotla were not subject to a division on *uti possidetis*, as British Punjab was, but were given the freedom to accede in entirety to a state of their choice. Copland notes that such princely states experienced remarkably low degrees of violence and migration than divided Punjab.[233] Malhotra and Mir observe that Malerkotla remains one of the few places in Punjab where one can still witness public signs in both *gurmukhi* and *shahmukhi*, where the Muslim *dargah* of Haider Sheikh is worshipped by Hindus and Sikhs, where Muslims pray to Guru Gobind Singh, and where some semblance of a syncretic *punjabiyat* lives on.[234]

IV. CONCLUSION

Uti possidetis in South Asia, far from the "objective", "neutral" solution it is often proclaimed to be,[235] has been shown in this study to be little more than a series of political choices disguised in judicial garb.

227. Virdee, *supra* note 83.
228. Butalia, *supra* note 162.
229. Chester, *supra* note 77.
230. Chester, *supra* note 77.
231. Bigelow, *supra* note 146.
232. Virdee, *supra* note 83.
233. Ian COPLAND, "The Master and the Maharajas: The Sikh Princes and the East Punjab Massacres of 1947" (2002) 36 Modern Asian Studies 657.
234. Malhotra and Mir, *supra* note 148.
235. See Crawford, *supra* note 26.

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In Punjab, this is demonstrated through four principal means: first, the choice to rely on district and *tehsil* lines to draw the border instead of provincial boundaries was one driven by British interests: to quicken independence and cut the costs of governing an exorbitant colony following the expenses of World War II. While the province itself voted against this choice of partition, seeking to preserve its unity, the provincial assembly's vote was mischaracterized as one conferring legitimacy on the decision to divide. Second, the choice over which district and *tehsil* lines to use to draw the international frontier was tainted by the colonial gaze, which misunderstood the province as one fractured on religious lines. By cutting through the province solely on religious criteria, the border disrupted its pre-existing syncretic identity and provided the ideological ground for communalism to lay its roots. Third, the lines themselves were originally drawn to serve British political aims: conquest and revenue collection. As such, they paid little heed to local interests, splitting up farmlands and homes, villages and towns, industries, spiritual communities, irrigation networks, and infrastructure. Fourth, the choice to delay the publication of the award was motivated by a desire to veil British responsibility for the award and pass off blame to the newly formed successor states. As a result, Punjab's boundary forces had little opportunity to pre-empt or prevent the massacres that took place in the border regions—a matter only exacerbated by the undemarcated nature of the boundaries.

While it would be impossible to determine whether violence in the subcontinent was an inevitable consequence of partition, it can certainly be deduced from this paper that *uti possidetis* contributed to and aggravated such state-formation violence in meaningful ways. By disrupting the local economy and infrastructure, corroding a unified provincial identity, fuelling a communal consciousness, and relying on undemarcated, unprotected boundaries, the application of *uti possidetis* triggered identity-based violence and forced migration in Punjab that rendered its two fractured halves ethnically homogenous, bringing to fruition the ill-conceived British vision of the province. From a province marked by a shared culture and spirituality with a history of secular governance, partition transformed Punjab into a hotbed of religious antagonism: identity has played a major role in every assembly election since partition, with the Sikh-based Shiromani Akali Dal emerging as a major player in the region; communal riots, a rare occurrence in the past, have been a regular part of post-partition Punjab's legacy; religious identities have become more rigid, with the complete elimination of syncretic practices, such as the reading of the *Zafar-namah* in Sikh gurudwaras; *urdu* and the *shahmukhi* script have become taboo for their perceived connection to Islam.[236] The application of *uti possidetis* in Punjab definitively shaped its future.

Punjab's history offers detailed insight into the role of *uti possidetis* as a contributory trigger to identity formation and intrastate violence that impels forced migration during state-creation; however, its experience also offers a solution. South Asian practice significantly strengthens the second legal critique levied against *uti possidetis*, based on self-determination. It demonstrates that the rule can alter the very identity

236. Brass, *supra* note 138.

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of the "peoples" entitled to this right, indelibly shaping their future for them. As a result, Ratner's claim[237] that these communities can be protected though legal guarantees following partition internally, within successor states, proves to be insufficient; the border itself refashions the identity of communities even before they can exercise such guarantees. Even if Brilmayer's argument[238] on self-determination as a right that only operates after the formation of states is accurate, the Punjabi experience demonstrates that the lasting impact of *uti possidetis* and its boundaries continues to shape people's futures long after the state-formation process has been completed. Such experience also responds effectively to Peters by demonstrating that the constitutive effect of *uti possidetis* on identity is as divisive as the "contextualised" boundaries she alludes to, justifying the need for alternative approaches to border formation which mitigate the possibility of forced migration.

While a detailed examination of such alternatives lies outside the scope of this paper, a brief outline of the options available is apt. Cassese correctly points out that, as a result of the peremptory status of self-determination in international law, any conflict of this right with *uti possidetis* would have to be resolved in favour of the former.[239] For Mutua, this implies the wholesale redrawing of artificial colonial boundaries that have been used to fracture national communities in Africa and the Middle East.[240] Shaw offers a more moderate alternative: applying the principle of equity *infra legem* to adjust administrative borders to better account for local interests, as is done with maritime boundaries, whilst still retaining *uti possidetis* as a default rule.[241] Ratner, too, recommends that *uti possidetis* be retained, but suggests that it be applied only as a temporary solution: freezing status quo while newly independent states negotiate their boundaries by consent, much like how the doctrine was applied in Roman law.[242] Castellino and Allen argue that all international boundaries ought to be judicially determined, based on rules and principles agreed upon by the states concerned: *uti possidetis* should simply be one of many rules that states can choose from.[243] Mahmud reasons that international law must also accommodate non-linear traditional frontiers, such as those that existed between Afghanistan and Pakistan, to better accommodate local practices.[244] Although this paper cannot provide a definitive answer on which alternative offers the most promising future, the arguments presented in the preceding sections clearly demonstrate why a closer examination of these alternatives is required: the lessons offered by *uti possidetis* extend beyond the rule. Any process of boundary formation will have a profound impact on the territories and people it divides. Its consequences must be comprehensively understood before it is applied.

237. Ratner, *supra* note 16.
238. Lea BRILMAYER, "Secession and Self-Determination: A Territorial Interpretation" (1991) 16 Yale Journal of International Law 177.
239. Antonio CASSESE, *Self-determination of Peoples* (Cambridge: Cambridge University Press, 1995).
240. Mutua, *supra* note 19.
241. Shaw, *supra* note 5.
242. Ratner, *supra* note 16.
243. Castellino and Allen, *supra* note 7.
244. Mahmud, *supra* note 25.

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The study of *uti possidetis* in South Asia is far from complete. While the Radcliffe Line provides a glaring example of this rule's impact on the subcontinent, there are other equally compelling instances to be studied: The Afghan-Pakistan Durand Line, the Iran-Pakistan Goldsmith Line, the Indo-Bangladeshi Radcliffe Line, and the Sino-Indian McMahon Line, as well as the colonial borders of Nepal, Bangladesh, and Myanmar.[245] Several of these have been the sites of calamitous forced migrations: during the secession of Bangladesh and, more recently, the Rohingya persecution in Myanmar.[246] Their examination offers promising opportunities for further research and will undoubtedly enrich the arguments forwarded and conclusions drawn in this paper.

245. *Ibid*.
246. *UNHCR Report*, *supra* note 68; Shahabuddin, *supra* note 68.

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