Frozen frontier: uti possidetis and the decolonization of South Asia

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Acknowledgements

1 Introduction

Is there something peculiar about modern nation-states that implicates their creation in a definitive process of forced migration? Arendt [1951: 294] 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. Haddad [2008] extends her argument, asserting that the successful establishment of a state hinges on its ability to draw a *bounded* national identity; 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*" [2008: 59]. Zolberg [1983] echoes this sentiment, warning that the creation of new states in coming years will also be marked by the forced migration of 'misfits'. Yet, none of the three points to a *specific feature* of modern nation-states that demands the fabrication of a 'misfit'; that unavoidably compels some to be 'thrown out' of 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 [Shaw 1996]. 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 [Pellet 1992]. 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 *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 [Castellino and Allen 2003]. 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 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 [Chatterji 1999], 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 [Chester 2009]: 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 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: **Section 2** provides an overview of the *uti possidetis* rule, examining its creation and outlining the criticisms raised against it. In doing so, the impact of South Asian practice on the efficacy of each critique is, in particular, emphasized. **Section 3** 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. **Section 4** furthers the central argument of this paper, analysing the impact of *uti possidetis* on identity formation 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 [1983] *Transfer of Power* collection 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 [Carr 1961].

2 Lines etched in sand: the creation and critique of *uti possidetis*

This section begins by analysing the content of *uti possidetis*, outlining its creation as a rule of customary international law [2.1]. It then examines and responds to legal critiques that challenge its foundation in international law [2.2]. The section concludes by discussing the functional critique of *uti possidetis* [2.3].

2.1. The crystallization of *uti possidetis*

When colonial empires crumbled into nation-states, the fissures along which they cracked were pre-determined. 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 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*" [Shaw 1996: 97]. As such, when a colony was partitioned into multiple states, the "*principle…upgraded former administrative delimitations, established during the colonial period, to international frontiers*" [*Burkina Faso v Republic of Mali* (1986) ICJ Rep 554: 566].

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 [Moore 1913]. In this context, *uti possidetis* was a remedy that sought to preserve the status quo; it granted the litigant holding the disputed property a legal right to continue such possession during the pendency of the litigation, thereby preventing forcible eviction [Castellino and Allen 2003]. Crucially, the right granted to the possessor was always a *temporary* one. *Uti possidetis* always preceded a more detailed determination of the property claim on merit, and only operated until the dispute over legal title was finally settled [Ratner 1996].

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 [Ghebrewebet 2005]. Spanish boundaries drawn for Viceroyalty provinces, Captaincies-General, *alcaldias mayors*, *intendencias*, and court districts (*audiencia*) provided the foundation for the borders of Mexico, Peru, Honduras, Guatemala, El Salvador, Nicaragua, Colombia, Venezuela, Chile, Uruguay, Bolivia, and Costa Rica [Dennis 1967; Hyde 1947].

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 [Lalonde 2002]. The rule was subsequently applied in boundary delimitation disputes between successor states: the Colombia-Venezuela arbitration over Carácas and Santa Fé [Hackworth 1940], the Honduras-Nicaragua dispute over the Poteca and Coco rivers [Woolsey 1931], the Bolivia-Peru arbitration over the Viceroyalties of Buenos Aires and Lima [*Bolivia-Peru Arbitral Award in Boundary Dispute* (1909) 3 Am. J. Int'l. L. 1029], the El Salvador-Honduras-Nicaragua dispute over the Gulf of Fonseca [*Land, Island and Maritime Frontier Dispute* (1992) ICJ Rep. 351], and the Argentina-Chile dispute over the Beagle Channel [*Beagle Channel Arbitration Award* (1977) 52 ILR 94].

The decision to apply *uti possidetis* was prompted by two factors: *first*, to avoid territorial disputes between newly formed successor States by using a clear, certain rule to allocate boundaries; and *second*, to inhibit claims of *terra nullius*, which would enable foreign States to occupy Latin American territory were it not exhaustively apportioned to successor States [Antonopoulos 1996]. Notably, in the 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 [Ratner 1996]. Returning the principle to its roots by interpreting it as an interim remedy, as was done under private law, 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 them [Akweenda 1997]. The territorial units forged from these 'spheres of influence' were used by colonial powers and local elite to draw the borders for modern African states on independence [Mutua 1995]. 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 [*Border Disputes Among African States*, OAU AHG/Res.16(1) 1964]. In doing so, they helped cement the rule of *uti possidetis* in international law. In the *Guinea/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* [Award of 14 February 1985, 77 ILR 657: 673].

In the *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, the ICJ further held that:

> *The 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* [1986 ICJ Rep. 554: 565].

This position was subsequently reiterated by the arbitral tribunal in the *Guinea Bissau v. Senegal* case [Award of 31 July 1989, (1991) ICJ Rep. 53] and by the ICJ in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* [1999 ICJ Rep. 6], the *Land and Maritime Boundary case (Cameroon v. Nigeria)* [2002 ICJ Rep. 303] and the *Case Concerning the Frontier Dispute (Benin v. Niger)* [2005 ICJ Rep. 90]. 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 the literature outlined above 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 19th and 20th centuries [Ferguson 2004; Olson 1996] makes this omission noteworthy. While Kaikobad [1984] and Mahmud [2010] 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 so by referencing the *Rann of Kutch Arbitration Award* [Ratner 1996; Nesi 2012; Antonopoulos 1996; Crawford 2012], a decision that explicitly recognised the inapplicability of *uti possidetis* to its facts [(1968) Vol. XVII RIAA 1: 527]. 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.

Before examining these claims, however, it is necessary to address a final concern. One may well ask why the study of *uti possidetis* holds any relevance today. Indeed, several decades have passed since the decolonization process was completed: surely the rule is now a relic of the past; one with little utility or application to the modern world? To this there are three responses. First, there remain territories where decolonization has not yet been completed. This was acknowledged in the current year by the ICJ, in connection with the Chagos Islands [*Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, February 25 2019]. Similarly, the transition of Palestine from a mandate territory to an independent state has not yet been completed [Silverburg 1977; Bell and Kontorovich 2016]. *Uti possidetis* is likely to play a role in determining the territorial confines of the states that emerge from these territories. Second, there remain other States where the *political act* of decolonization has been concluded, yet its *legal consequences* continue to be disputed, as evinced by border disputes between Costa Rica and Nicaragua or Malaysia and Singapore, both of which hinge on *uti possidetis* [Ahmed 2015]. Finally, and perhaps most crucially, *uti possidetis* has now been applied outside the context of decolonization, in the dissolution of the USSR, Czechoslovakia and Yugoslavia, to determine the boundaries of successor states [Peters 2014]. As recognized by the Badinter Arbitration Commission tasked with overseeing the dissolution of Yugoslavia, this implies that *uti possidetis* is no longer a norm restricted to decolonization, but one that governs the delimitation of boundaries in *all cases* of state-formation today [Pellet 1992]. The formal status of the Badinter award, and, indeed, the extent of state practice relied on to broaden the application of *uti possidetis* beyond decolonization, can, theoretically, be contested for their value as sources of international law [Cassese 1995]. Nonetheless, widespread concurrence on the broadened application of this principle in academic and judicial opinion makes such critique moot [Crawford 2012]. *Uti possidetis* will determine the territorial future of Kashmir, Kosovo and Kurdistan, as it did the future of Cameroon, Colombia and Costa Rica. An analysis of its legal foundation and functional utility continues to be relevant.

2.2. 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 [2.2.1]; and *second*, that the rule conflicts with the right of self-determination, which supersedes it by virtue of its peremptory status in international law [2.2.2]. Each limb will be examined in turn, discussing the impact of South Asian state practice on the merit of the argument.

2.2.1. The customary status of *uti possidetis*

In order to acquire the status of a norm of customary international law, the application of a rule must be "*extensive and virtually uniform*" [*North Sea Continental Shelf Cases* 1969 ICJ Rep. 3: 43], such that "*the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule*" [*Case Concerning Military and Paramilitary Activities In and Against Nicaragua* 1986 ICJ Rep. 14: 98]. In addition, the requirement of *opinio juris sive necessitatis* must be met: "*(n)ot only must the acts concerned amount to a settled practice, but (there) must also be…evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it*." [*North Sea Continental Shelf Cases* 1969 ICJ Rep. 3: 44]. It is only when widespread state practice is combined with the subjective belief of States that such practice is legally obligatory that the practice evolves into a rule of custom [Mendelson 1998].

Akweenda [1997] and Murphy [1999] argue that *uti possidetis* lacks sufficient state practice to constitute a norm of custom. Sarvarian [2015] and Castellino & Allen [2003] 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 [1997] builds on such critique to argue that *uti possidetis* ought to be considered a general 'principle' of international law which guides the interpretation of other rules, rather than a rule itself. Lalonde [2002] 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 [2014] 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 [1996] 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 [1984] uses the Organization of African Unity's Cairo Declaration [*Border Disputes Among African States*, OAU AHG/Res.16(1) 1964] and the Non-Aligned Summit Conference Declaration [IJIL 4 (1964) 610] 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, 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.

2.2.2. *Uti possidetis* and self-determination

The right to self-determination, progressively developed through UN Resolutions [U.N.Doc. A/RES/25/2625; U.N.Doc.A/RES/15/1514; U.N.Doc.A/RES/15/1541] and codified in treaties [International Covenant on Civil and Political Rights, 999 UNTS 171 (1976); Art.1, International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1976)], grants a 'people' the right to control their future – whether economic, social, political or cultural [Raic 2002]. Self-determination is considered a peremptory norm of international law [Cassese 1995; Orakhelashvili 2005; Brownlie 2008], such that a conflict between this right and any other norm of international law must be resolved in favour of the former [Art.53, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969)].

Much effort has been spent discussing the potential conflict between *uti possidetis* and self-determination. Shaw [1996] 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 [1995] highlights how such boundaries often prioritized geographic and geometric considerations over human ones. Mutua [1995] posits that the 1890 Anglo-French Convention partitioned West Africa to ensure an equitable distribution of natural resources between the two empires, with little regard for the people inhabiting its territory. Similarly, Mahmud [2010] 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.

Saxena [1978], Gayim [1995] and Kolodziej [2000] discuss how *uti possidetis* in Nigeria, Eritrea, Ethiopia, Rwanda and Burundi forced ethnically and culturally fractured communities into artificial units. Bartos [1997] 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. 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.

Several responses to this critique may be noted. Ratner [1996] argues that this division may be justified if the rights of the fractured community are sufficiently protected *within* the states to which they are allocated, thus guaranteeing their right to *internal* self-determination. Peters [2014] warns that a more 'contextualized' boundary-drawing process might proceed on ethnically or religiously divisive lines, violating the prohibition on discrimination and endangering the stability of the region. Brilmayer [1991] argues that *uti possidetis* and self-determination operate in different temporal periods: the former rule is used *first* to determine the territorial confines of a political unit, *following which* the right of self-determination is conferred on the people who occupy the unit. Consequently, any conflict between the two is illusory, since self-determination lacks any territorial scope. This position seems to have been endorsed by the Badinter Commission which asserted that "*whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence*" [Pellet 1992].

However, these responses contradict important pronouncements of the ICJ on self-determination. In the *Palestine Wall Advisory Opinion*, the Court found Israel's attempts to encroach on Palestinian territory through the construction of a wall and settlements a violation of their right to self-determination, implying that the Palestinian people had a right to control the *entirety* of their territory [2004 ICJ Rep. 136]. That self-determination has a territorial scope was reiterated succinctly by J. Dillard in the *Western Sahara case*: "*It is for the people to determine the destiny of the territory and not the territory the destiny of the people*" [1975 ICJ Rep. 12: 122]. In the *Chagos Advisory Opinion*, the ICJ reiterated that:

> *...the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination* [Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, February 25 2019: ¶160].

More crucially, perhaps, these responses presume 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 [Van Houtum 2011], and the impact of bordering as a process on peoples' identity [Lamont and Molnar 2002]. While Castellino and Allen [2003] allude to the crystallization of artificial identities through *uti possidetis*, they stop short of a full exposition of this process. 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 [Chatterji 1999]. 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. As a result, Ratner's claim 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. The extended argument also responds effectively to Peters by demonstrating that the constitutive effect of *uti possidetis* may well be as divisive as the 'contextualised' boundaries she alludes to, justifying the need for a more inclusive alternative to border-formation in new states. The *constructive effect* of *uti possidetis* on identity will be examined in the third section of the thesis.

2.3. 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 international stability [*Burkina Faso v Republic of Mali* (1986) ICJ Rep 554: 565; Brownlie 2008]. This functional utility is, however, disputed. *First*, as Castellino and Allen [2003] highlight, internal administrative lines are rarely demarcated physically, as international frontiers are, and hence their precise location is ambiguous. As a result, even with *uti possidetis*, there is scope for border-disputes in the process of demarcation. *Second*, per Peters [2014] and Shaw [1996], *uti possidetis* is intrinsically ambiguous, since different administrative lines often overlap, and the rule offers little clarity on which is to be prioritised. This ambiguity was highlighted by the ICJ in the *Land, Island and Maritime Frontier* case:

> *To apply this principle is not so easy when, as in Spanish Central America, there were administrative boundaries of different kinds or degrees; for example, besides "provinces", there were Alcaldias Mayores and Corregimientos and later on, in the 18th century, Intendencias, as well as the territorial jurisdictions of a higher court (Audiencias), CaptainciesGeneral and Vice-Royalties…[f]urthermore, the jurisdictions of general administrative bodies such as those referred to did not necessarily coincide in territorial scope with those of bodies possessing particular or special jurisdictions, e.g., military commands. Besides, in addition to the various civil territorial jurisdictions, general or special, there were the ecclesiastical jurisdictions.* [1992 ICJ Rep. 351: 364].

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 [Bartos 1997].

However, the empirical veracity of such arguments is highly contested. While Mazrui [1995] asserts that *uti possidetis* successfully prevented international conflict in Africa, Neuberger [1986] and Akweenda [1997] point to its contribution to border conflicts in Somalia, Morocco and Namibia. Malanczuk [1997] and Dominguez [2003] assert its success in Latin America, while Kacowicz [1994], Zacher [2001] and Bartos [1997] argue that it played a role in conflicts in Peru and Ecuador. Franck [1995] asserts that the doctrine fuelled 'post-modern tribalism' and led to irredentist conflicts, but Hensel and Allison [2004] counter that *uti possidetis* produced less conflict than instances of departure from administrative boundaries.

Notably, this literature evaluates the success of *uti possidetis* by focusing almost exclusively on *interstate* violence. Discussions on *intrastate* violence are occasionally referenced [Bartos 1997; Castellino and Allen 2003] 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 conflict [Chester 2009]. 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 [UNHCR 2000; Shahabuddin 2019]. By broadening the discussion on *uti possidetis* to South Asia, the link between such cases of forced migration and the *destructive* and *constructive* effect of *uti possidetis* on identity can be examined. 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 thesis will seek to do this.

3 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 [3.1]. It then confirms that the international frontier in Punjab is, indeed, etched upon pre-drawn colonial boundaries [3.2]. The section concludes by unearthing the role these boundaries played in the social upheaval that transpired post-partition [3.3].

3.1. 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* [3.1.1]; *second*, that they sought to portray the line itself as a *judicially determined* settlement [3.1.2]; and *third*, that there was scant evidence to challenge such representations at the time *uti possidetis* was debated in legal scholarship [3.1.3]. Each will be examined in turn.

3.1.1. 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 [Hodson 1986]. 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 [Metcalf and Metcalf 2002]. That Radcliffe was chosen by local leaders, and his appointment was based on his impartiality and legal expertise [White-Spunner 2017]. 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 [Das 1995]. 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 [Moon 1961]. Understandably, this account leaves little scope to consider the Radcliffe Line a product of *uti possidetis*. However, each component of this narrative rests on unsound footing.

Jalal's [1985] revisionist work on partition history demonstrates in detail that the division of Punjab was not a demand that emerged from the Muslim League. Rather, "*the idea of Pakistan…was inextricably linked with an undivided Punjab*" for the League and for Jinnah, its leader [Gyanesh 2001: 12]. Instead, the decision to partition the province came from Mountbatten, the Viceroy of India, as part of his '3rd June Plan' [Tunzelmann 2007]. 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 Second World War [Chester 2009]. 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 [Menon 1957]. 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 [Chester 2002]. This was why they agreed to the British proposal to partition Punjab.

Additionally, as Chatterji [1999] 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. Yet, the vote was used to confer legitimacy on the decision to divide Punjab, portraying it as a local decision when, in fact, it was based entirely on the interests of the British administration and the Indian political elite [Khan 2007].

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 [Chester 2002]. The sub-section 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 [Virdee 2018]. The transcripts of Mountbatten's meetings explicitly record him stating that "*[w]ithout question, the earlier it was published, more the British would have to bear the responsibility for the disturbances which would undoubtedly result*" [Singh 1991: 192]. 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 [Chester 2008].

3.1.2. 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 [Rai 1965]. However, more critical pieces have picked apart this presumption. French [1997: 321] deems him the "*ultimate Establishment figure*", deeply embedded in the British imperialist project. 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 [Tan 1997]. Chester [2002] provides a comprehensive analysis of Radcliffe's life to further this point: hailing from a military family, Radcliffe's father and brothers were professional soldiers in the British army – one brother even died whilst serving the Empire in India. Radcliffe was educated in Haileybury, an elite public school that Chester terms "*the training ground for aspirants to the East India Company*" [Chester 2002: 76]. 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 [Mansergh 1983]. 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 [Chester 2002].

In addition, while the Punjab Boundary Commission was comprised of four South Asian judges, it was only the decision of the chairman, Radcliffe, that constituted the final legally binding award [s.4(3), The Indian Independence Act 1947]. That Radcliffe distrusted his colleagues is well-documented [Chatterji 2007]. Indeed, Radcliffe himself notes that the final award was written with negligible contribution from the other judges, whom he rejected as 'partisan' [Mansergh 1983]. 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 [Spate 1991]. Although transcripts of such proceedings were dispatched to Radcliffe, Mosley [1962: 198] 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. 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 the Second World War [Chester 2009]. 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 [Gyanesh 2001]. 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*" [Mansergh 1983: 733].

3.1.3. 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 [Gyanesh 2001]. He even later acknowledged that the absence of justification was intentional, to ensure the legitimacy of the award could not be questioned [Virdee 2018]. *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 [Heward 1994]. *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 [Mansergh 1983]. 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 [2002], Chatterji [2007] and Gyanesh [2001] 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 [Nesi 2012]. 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.

3.2. *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 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 sub-units *within* the province of Punjab. Nevertheless, as Peters [2014] and Shaw [1996] point out, *uti possidetis does* encompass the use of such sub-units as well; indeed, this was precisely how the ICJ applied the rule in the *Land, Island and Maritime Frontier* dispute [(1992) ICJ Rep. 351].

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 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 [Appendix A, Punjab Boundary Commission Award 1947]. The map below (Figure A), 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 [Mansergh 1983]. 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 [Appendix A, Punjab Boundary Commission Award 1947]. That this award was simply a selection of administrative lines is also confirmed by Chester [2009] and Chatterji [2007], who appropriately critique Radcliffe for adopting flawed colonial boundaries instead of re-drawing more natural, defensible boundaries as was proposed in the submissions made to the commission.

Shaw [1996] points out that the legal foundation of *uti possidetis* is usually secured through domestic legislation, as done in Latin America and Africa. In Punjab, Chester [2002] demonstrates how this was done using the Indian Independence Act of 1947, drafted by the British government. 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*" [Ministry of External Affairs 1947: 7]. Although the words "*uti possidetis*" do not appear in the legislation or the award, Akweenda [1997] and Lalonde [2002] 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 [ICGJ 479 (2014)] 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. Mahmud [2010], too, confirms the use of this doctrine in the partition. As such, there can be little doubt that *uti possidetis was* applied to fashion the international frontier that fragmented Punjab.

Figure A. The Radcliffe Line drawn on colonial administrative boundaries [Mansergh 1983: 856]
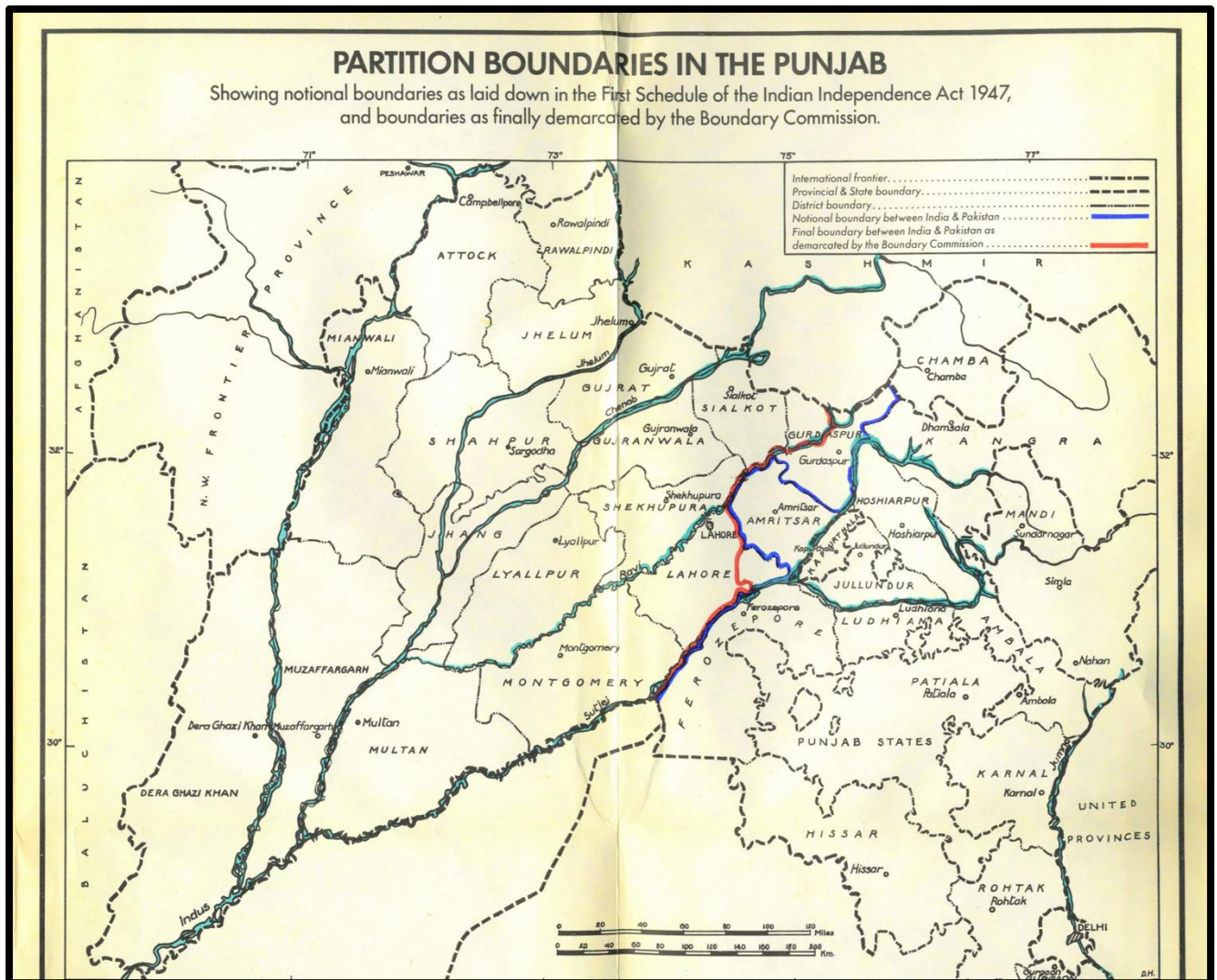
3.3. Colonial lines and social upheaval

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 [2.3.1]; *second*, the boundaries employed had no physical existence on the ground [2.3.2]; and *third*, the criteria used to select these lines were deeply misguided [2.3.3]. 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.

3.3.1 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, but simply echoed the gaze of the colonizer and their ideology [Huggan 1989]. This was certainly true in British India. The maps with which Radcliffe drew his line were all produced by the Survey of India, an imperialist institution

[Harley 2001]. These maps were produced to serve British colonial interests: military expansion and revenue collection [Madan 1997]. This was reflected in their content.

Wolffhardt [2017] describes how the Survey's maps only accurately depicted those features that were of concern to the colonial government. 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 prioritising geometric considerations over human ones [Wolffhardt 2017]. 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 [Edney 1997]. Moreover, as Chester [2002] 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. 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 [Mosley 1962].

3.3.2 Invisible boundaries

The primary benefit offered by *uti possidetis*, according to its advocates, is the stability and predictability it provides in periods of transition [Crawford 2012]. Ratner [1996], 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. 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 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 [Castellino and Allen 2003]. Such 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 only existed for administrative convenience [Chatterji 2007]. 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 [Edney 1997]. 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 [Times of India 1947; Pakistan Times 1947]. 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 [Chester 2009]. 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 [Mansergh 1983]. 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.

3.3.3. 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 sub-units would lend their boundaries to the international frontier. The only criteria 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*" [Brass 2010]. 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 [Mansergh 1983]. Although Radcliffe was given some leeway to consider "*other factors*", he opted to use this sparingly, and then too only to preserve the integrity of colonial infrastructure projects [Chester 2009]. As a consequence, Punjab was divided *solely* on identity. More distressingly, it was divided solely on an *artificial* identity [Tharoor 2016]. 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 [Brass 2010]. Crucially, the commission's terms of reference also misunderstood the *priority* of religion as an identity in Punjab: Khan [2007] points out that caste, class and linguistic criteria were far stronger markers of identity than religion in the province. 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 [Virdee 2018]. The final section of this paper will examine this process in greater detail.

4 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 [4.1]. 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 [4.2]. 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 [4.3].

4.1. 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*" [Darling 2011: 69]. Indeed, it is difficult to come across writing on 19th or early 20th century Punjab that does not comment on its shared, composite culture [Bigelow 2009]. This despite the zealous attempts of Indian and Pakistani nationalist historiographies to paint the province as one historically fractured on religious lines [Pandey 2010]. Recent scholarship has even attempted to uncover traces of this

pluralist identity, titled '*punjabiyat*', that survive through contemporary Punjabi art, music and literature [Malhotra and Mir 2012].

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 [Virdee 2018]. 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 [Singh and Gaur 2009]. Punjab shared a rich history of folk music [Bedi 1971] and a remarkable oral narrative custom, called *qisse* [Mir 2012], 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 [Ibbetson 1881]. Secular agrarian festivals like *basant* and *baisakhi*, celebrated across religions, also paved the way for a distinct provincial identity [Bhasin-Malik 2007].

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 [Maclagan 1891], with the shrines of Sakhi Sarwar Sultan or Pak Pattan attracting enormous crowds of Hindus and Sikhs, in addition to Muslim ones [O'Brien 1911]. 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 illustration of the shared piety that permeated Punjab [Singh & Talbot 1996]. 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 [Bhasin-Malik 2007]. 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*" [Ibbetson 1881: 101]. 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 [Dalrymple 2015]. Remarkably, the *dasam granth*, a Sikh religious scripture, contains an entire section composed in Persian and derived directly from Islamic texts, titled *Zafar-namah* [Fenech 2012]. The participation of 'non-Hindus' in festivals like Holi, as well as that of 'non-Muslims' in Muharram processions is also well-recorded [Butalia 1998]. Prominent spiritual leaders in the province, such as the Gulabdasi Piro, drew on Hindu Vedanta philosophy, Sikh ideals as well as Sufi ideas in their sermons and writings [Malhotra 2012]. Singh & Talbot [1996: 10] 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*".

The existence of *punjabiyat* does not, admittedly, negate the possibility of cleavages within Punjabi society. Indeed, such cleavages did exist; however, as Tharoor [2016] points out, the divisions were *local*, based on *jati* (caste) or *biradri* (clan/tribe), not religion. As Anderson [1991] demonstrates, pre-colonial Punjab lacked the technological capacity necessary to enable a province-wide mobilization based on religious identity. Moreover, relying on the instances of cross-communal practices highlighted above, Kaviraj [1992] 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 Punjab. 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.

4.2. The carving of a communal consciousness

No identity is *inherent* or *naturally occurring*; it must be constructed [Hall & Du Gay 1996]. 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' [Elwert 1995]. 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 [Barth 1969]. 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 [Schlee 2010]. So it is with identities.

That the creation of a communal, religious identity in Punjab began with the British is well documented [Thapar 1990]. While some consider this the product of an intentional colonial 'divide and rule' policy [Tharoor 2016], others believe the British accidentally projected their own social divisions upon the Indian subcontinent [Bhasin-Malik 2007]. 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 root these laws within religion [Bhattacharya-Panda 2007]. 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 interpretations of a 'priest' class, which the colonial administration selected from Brahmin *pandits* and Muslim *ulema* [Giunchi 2010]. Dispute resolution that had earlier resided within the *jati* and *biradri* was now abruptly brought within religion [Kishwar 1994]. 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 religious elite [Cohn 1996]. It was only through the rigid uniformity imposed by such codes that the *possibility* of a common inter-provincial religious consciousness ever arose [Tharoor 2016].

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' [Said 1978]. 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 [Bhasin-Malik 2007]. As Metcalf [1994: 132] 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*". However, this neat separation of groups in the census was far from an accurate depiction of the syncretic Punjabi society, described above. As Ibbetson [1881: 101], 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*". 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*" [Ibbetson 1881: 101]. Nonetheless, Kaviraj [1997] explains that by dividing society into discreet 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. By creating a perception of vulnerability in the communities it classified as 'minorities', the census played a pivotal role in their subsequent political mobilization [Jones 1981; Appadurai 1993].

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 [Pandey 2006]. 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 [Thapar 1990]. In truth, Islamic practices entered Indian society far before the Delhi Sultanate and the Mughal empire, through trade with the Arab world [Eaton 1978]. 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 [Chandra 1984].

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 [Gottschalk 2012]. Recruitment to the British-Indian army, as well as employment in the Civil Services, was carried out through reservations based on religion [Singh & Talbot 1996]. 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 [Pandey 2006]. 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 [Gould 2004]. Leaders such as Bhai Parmanand and Swami Shraddhanand readily co-opted British histories of the subcontinent, calling for a return to the golden Vedic period in Punjab [Singh and Talbot 2009]. 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 [Oberoi 1994]. 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' [Bhasin-Malik 2007]. 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 [Talbot 1982]. 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.

4.3. A line drawn in blood

Despite all 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 [Singh and Talbot 2009]. It won over 75 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* [Gilmartin 1992]. 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 [Oren 1974]. 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 inter-communal appeal of the Unionists that ultimately resonated most strongly with Punjab's population [Talbot 1980]. Remarkably, while the rest of the subcontinent began to erupt in communal violence, leading to the imposition of central rule in most provinces, Punjab remained strikingly tranquil in this period with the Unionist government at the reigns [Virdee 2018]. 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 isn't difficult to establish: Aiyar [1995], 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. Despite such conspicuous timing, little scholarship directly examines the contribution of the boundary-drawing process to the ensuing violence [Chester 2009]. 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 [Khan 2007]. 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 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 *meaning* and *significance* in the eyes of the people of the province [see Barth 1969]. 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* [see: Elwert 1995]. By constructing an international territorial boundary based on faith, by doing so through highly contested and widely followed public hearings, and by publically 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 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 for the survival of *punjabiyat*. It

cut off inter-communal access to *sufi pirs*, Sikh *gurudwaras* or Hindu shrines, precluding the common celebration of *holi* and *muharram*, *basant* and *baisakhi* [Bhasin-Malik 2017]. Poetry, folk-music and *qisse* were forestalled from travelling across the province, as were the sermons and writing of *sufi* and *gulabdasi* leaders [Malhotra 2012]. Local deities fell into obsolescence because their territorial remit was no longer meaningful, having been carved up between two States [Malhotra & Mir 2012]. 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 [Singh & Talbot 2009]. 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 [Fenech 2012]. 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 [2010] 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 [Singh and Talbot 2009]. The violence itself was also of a fundamentally distinct character than 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 [Aiyar 1996]. 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* [Singh and Talbot 2009]. 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 [Virdee 2018]. These differences are vital to understanding the nature and purpose of the violence.

Barth [1969] famously argued that the construction and revision of new identities is carried out at their notional boundaries. Violence plays an integral role in creating these boundaries, helping transform previously unstable identities into secure ones by eradicating 'cross-cutting ties' that link its members to others [Bowman 2003; Kriesberg and Dayton 1998; Fearon and Latin 2000]. As such, the 'contact hypothesis' is flawed: deeper inter-communal 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 only be achieved through force [Schlee 2010; Vernon and Esses 2008]. In this fashion, violence is leveraged to play a constructive social role: as Harrison [1993] reasons, "*groups don't make war, war makes groups*".

The post-partition violence in Punjab can be understood through this framework as an attempt to unwind the cross-cutting ties of *punjabiyat* and demarcate the social boundaries of the new communal identity, once this transformation had been triggered by the construction of a new territorial boundary. Brass [2010: 82] 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*". Kaldor [2007] 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. 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 [Kaldor and Chinkin 2017]. Remarkably, Butalia [1998] 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. Menon and Bhasin [1998] 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 peoples' minds that matched the geopolitical ones constructed by the Radcliffe Award. Virdee [2018] 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 Sheikhupura, which witnessed some of the worst massacres during partition. Butalia [1998] 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 inter-communal relationships or those who sought to retain their syncretic practices.

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% Hindu population and a 14.9% Sikh population that, through migration, had been reduced to zero by 1951 [Chester 2009]. Similarly, the Muslim population of the eastern territories shrank from 35% to 2% in the aftermath of partition [Chester 2009]. 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 [2009] and Virdee's [2017] study 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 [2002] notes that such princely states experienced remarkably low degrees of violence and migration than divided Punjab. Malhotra and Mir [2012] observe that Malerkotla remains one of the only 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.

5 Conclusion

Far from the 'objective', 'neutral' solution it is often proclaimed to be [Crawford 2012], this study of *uti possidetis* in South Asia demonstrates that the rule is little more than a series of *political choices* disguised in judicial garb.

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 the Second World War. 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 a 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 [Brass 2010]. The application of *uti possidetis* in Punjab *definitively shaped* its future.

Punjab's history offers a detailed insight into the role of *uti possidetis* in triggering identity-formation and intrastate violence that impels forced migration during state-creation; *however*, its experience also offers a *solution*. South Asian practice weakens the first legal critique of *uti possidetis* – that based on its customary status – by providing extended practice which establishes its position as a norm of *general* rather than *regional* character. Nevertheless, it significantly strengthens the second critique based on self-determination by demonstrating that *uti possidetis* can alter the very identity of the 'peoples' entitled to the right, indelibly shaping their future for them. As a result, Ratner's claim 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 [1991] argument 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 peoples' future 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 this paper's scope, a brief outline of the options available is apt. Cassese [1995] 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. For Mutua [1995], this implies the wholesale redrawing of artificial colonial boundaries that have been used to fracture national communities in Africa and the Middle East. Shaw [1996] 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. Ratner [1996], 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. Castellino and Allen [2003] 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. Mahmud [2010] 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. 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.

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, the Sino-Indian McMahon Line, as well as the colonial borders of Nepal, Bangladesh and Myanmar [Mahmud 2010]. Several of these have been the sites of calamitous forced migrations: during the secession of Bangladesh and, more recently, the Rohingya persecution in Myanmar [UNHCR 2000; Shahabuddin 2019]. Their examination offers promising opportunities for further research and will, undoubtedly, enrich the arguments forwarded and conclusions drawn in this paper.

6 References

Articles/Books/Reports

AHMED, Dirdeiry M. 2015. *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis*, Cambridge: CUP.

AIYAR, Swarna. 1995. 'August anarchy: the partition massacres in Punjab 1947', *Journal of South Asian Studies* 18: 13.

AKWEENDA, S. 1997. *International Law and the Protection of Namibia's Territorial Integrity*, The Hague: Kluwer Law International.

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

ANTONOPOULOS, C. 1996. 'The principle of uti possidetis iuris in contemporary international law', *Revue Hellénique de Droit International* 49: 29.

APPADURAI, Arjun. 1993. 'Number in the colonial imagination', in C. Breckenridge and P. van der Veer (eds), *Orientalism and the Post-colonial Predicament*, Philadelphia: University of Philadelphia Press.

ARENDT, Hannah. 1951. *The Origins of Totalitarianism*, New York: Meridian Books.

BARTH, Fredrik. 1969. *Ethnic Groups and Boundaries: The Social Organization of Cultural Difference*, Long Grove: Waveland.

BARTOS, Tomas. 1997. 'Uti possidetis, quo vadis', *Australian Yearbook of International Law* 18: 37.

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

BELL, Abraham and KONTOROVICH, Eugene. 2016. 'Palestine, uti possidetis juris, and the borders of Israel', *Arizona Law Review* 58: 633.

BHASIN-MALIK, Kamaljeet. 2007. *In the Making: Identity Formation in South Asia*, New Delhi: Three Essays.

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

BIGELOW, Anna. 2009. 'Saved by the saint: refusing and reversing partition in Muslim North India', *The Journal of Asian Studies* 68(2): 435.

BOWMAN, Glenn. 2003. 'Constitutive violence and the nationalist imagery', *Social Anthropology* 11(3): 319.

BRASS, Paul. 2010. 'The partition of India and retributive genocide in the Punjab, 1946-47: means, methods, purposes', *Journal of Genocide Research* 5(1): 71.

BRILMAYER, Lea. 1991. 'Secession and self-determination: a territorial interpretation', *Yale Journal of International Law* 16: 177.

BROWNLIE, Ian. 2008. *Principles of Public International Law*, Oxford: OUP.

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

CARR, Edward H. 1961. *What is History?*, Cambridge: CUP.

CASSESE, Antonio. 1995. *Self-determination of Peoples*, Cambridge: CUP.

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

CHANDRA, Bipin. 1984. *Communalism in Modern India*, New Delhi: Vikas.

CHATTERJI, Joya. 1999. 'The fashioning of a frontier: the Radcliffe line and Bengal's border landscape', *Modern Asian Studies* 33(1): 185.

CHATTERJI, Joya. 2007. *The Spoils of Partition: Bengal and India 1947-1967*, Cambridge: CUP.

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

CHESTER, Lucy P. 2008. 'Boundary commissions as tools to safeguard British interests at the end of empire', *Journal of Historical Geography* 34: 494.

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

COHN, Bernard S. 1996. *Colonialism and its Forms of Knowledge: The British in India*, Princeton: Princeton University Press.

COPLAND, Ian. 2002. 'The master and the maharajas: the Sikh princes and the East Punjab massacres of 1947', *Modern Asian Studies* 36(3): 657.

CRAWFORD, James. 2012. *Brownlie's Principles of Public International Law*, Oxford: OUP.

DALRYMPLE, William. 2015. 'The great divide: the violent legacy of the Indian partition'. *The New Yorker* [Online]. Available at <https://www.newyorker.com/magazine/2015/06/29/the-great-divide-books-dalrymple> (accessed June 2019).

DARLING, Malcolm. 2011. *At Freedom's Door*, Oxford: OUP.

DAS, Veena. 1995. *Critical Events: An Anthropological Perspective on Modern India*, New Delhi: OUP India.

DENNIS, William J. 1967. *Tacna and Arica: An Account of the Chile-Peru Boundary Dispute and of the Arbitrations by the United States*, Hamden: Archon.

DOMINGUEZ, Jorge I. 2003. *Boundary Disputes in Latin America*, Washington D.C.: United States Institute of Peace.

EATON, Richard. 1978. 'Approaches to the study of conversion to Islam in India' [Online]. Available at <https://pdfs.semanticscholar.org/21d4/c5d3eb8637486c05144eda9cf1dcf8eaede5.pdf> (accessed June 2019).

EDNEY, Matthew. 1997. *Mapping an Empire: The Geographical Construction of British India*, Chicago: The University of Chicago Press.

ELWERT, Georg. 1995. 'Boundaries, cohesion and switching: on we-groups in ethnic, national and religious forms', *Anthropologie & Développement* 10: 10.

FEARON, James and LATIN, David. 2000. 'Violence and the social construction of ethnic identity', *International Organization* 54(4): 845.

FENECH, LOUIS E. 2012. 'The history of the Zafar-namah of Guru Gobind Singh', in A. Malhotra & F. Mir (eds), *Punjab Reimagined: History, Culture and Practice*, Oxford: Oxford University Press.

FERGUSON, Niall. 2004. *Empire: How Britain Made the Modern World*, London: Allen Lane.

FRANCK, T.M. 1995. *Fairness in International Law and Institutions*, Oxford: OUP.

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

GAYIM, E. 1995. *The Eritrean Question*, Uppsala: Uppsala University Press.

GHEBREWEBET, Helen. 2005. *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.

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

GIUNCHI, Elisa. 2010. 'The reinvention of Sharia under the British Raj: in search of authenticity and certainty', *The Journal of Asian Studies* 69(4): 1119.

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

GOULD, William. 2004. *Hindu Nationalism and the Language of Politics in Late Colonial India*, Cambridge: CUP.

GYANESH, Kudaisya. 2001. *The Aftermath of Partition in South Asia*, New York: Routledge.

HACKWORTH, Green. 1940. *Digest of International Law*, Washington D.C.: Government Printing Office.

HADDAD, Emma. 2008. *The Refugee in International Society: Between Sovereigns*, Cambridge: CUP.

HALL, Stuart and Du Gay, Paul. 1996. *Questions of Cultural Identity*, London: SAGE Publications.

HARLEY, J.B. 2001. *The New Nature of Maps: Essays in the History of Cartography*, Baltimore: JHU Press.

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

HENSEL, Paul R. and ALLISON, Michael E. 2004. 'The colonial legacy and border stability: uti possidetis and territorial claims in the Americas' [Online]. Available at <http://paulhensel.org/Research/io05.pdf> (accessed May 2019).

HEWARD, Edmund. 1994. *The Great and the Good: A Life of Lord Radcliffe*, Chichester: Barry Rose Publishers.

HODSON, H.V. 1986. *The Great Divide*, Oxford: OUP.

HUGGAN, Graham. 1989. 'Decolonizing the map: post-colonialism, post-structuralism and the cartographic connection', *Ariel: A Review of International English Literature* 20(4): 115.

HYDE, Charles C. 1947. *International Law Chiefly as Interpreted and Applied by the United States*, Boston: Little Brown.

IBBETSON, Denzil. 1881. *Outlines of Panjab Ethnography*, New Delhi: Superintendent of Government.

JALAL, Ayesha. 1985. *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan*, Cambridge: CUP.

JONES, Kenneth W. 1981. 'Religious identity and the Indian census', in N.G. Barrier (ed.), *The Census in British India: New Perspectives*, New Delhi: Manohar.

KACOWICZ, Arie. 1994. 'The problem of peaceful territorial change', *International Studies Quarterly* 38(2): 219.

KAIKOBAD, Kaiyan H. 1984. 'Some observations on the doctrine of continuity and finality of boundaries'. *British Yearbook of International Law* 54: 119.

KALDOR, Mary. 2007. *New and Old Wars: Organized Violence in a Global Era*, Palo Alto: Stanford University Press.

KALDOR, May and CHINKIN, Christine. 2017. *International Law and New Wars*, Cambridge: CUP.

KAVIRAJ, Sudipta. 1992. *Religion, Politics and Modernity*, Staffordshire: University of Staffordshire.

KAVIRAJ, Sudipta. 1997. 'Religion and identity in India', *Ethnic and Racial Studies* 20(2): 325.

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

KISHWAR, Madhu. 1994. 'Codified Hindu law: myth and reality', *Economic and Political Weekly* 29(33): 2145.

KOLODZIEJ, Edward A. 2000. *The Great Powers and Genocide: Lessons from Rwanda*, Urbana: University of Illinois.

KRIESBERG, Louis and DAYTON, Bruce. 1998. *Constructive Conflicts: From Escalation to Resolution*, Lanham: Rowman & Littlefield.

LALONDE, Suzanne. 2002. *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, Montreal: MQUP.

LAMONT, Michele and MOLNAR, Virag. 2002. 'The study of boundaries in the social sciences', *Annual Review of Sociology* 28: 167.

MACLAGAN, E.D. 1891. *Census of India Vol. 20* [Online]. Available at <https://archive.org/details/in.ernet.dli.2015.196109/page/n7> (accessed June 2019).

MADAN, P.L. 1997. *Indian Cartography: A Historical Perspective*, New Delhi: Manohar.

MAHMUD, Tayyab. 2010. 'Colonial cartographies, postcolonial borders, and enduring failures of international law: the unending wars along the Afghanistan-Pakistan frontier', *Brookes Journal of International Law* 36(1): 1.

MALANCZUK, Peter. 1997. *Akehurst's Modern Introduction to International Law*, New York: Routledge.

MALHOTRA, Anshu and MIR, Farina. 2012. *Punjab Reimagined: History, Culture and Practice*, Oxford: OUP.

MALHOTRA, Anshu. 2012. 'Panths and piety in the nineteenth century', in A. Malhotra & F. Mir (eds), *Punjab Reimagined: History, Culture and Practice*, Oxford: OUP.

MANSERGH, Nicholas. 1983. *The Transfer of Power 1942-47*, London: Her Majesty's Stationery Office.

MAZRUI, Ali A. 1995. 'The African state as a political refugee: institutional collapse and human displacement', *International Journal of Refugee Law* 7:21.

MENDELSON, Maurice. 1998. 'The formation of customary international law', *Collected Courses of The Hague Academy of International Law* 272: 155.

MENON, Ritu and BHASIN, Kamla. 1998. *Borders and Boundaries: Women in India's Partition*, New Jersey: Rutgers University Press.

MENON, Vapal P. 1957. *Transfer of Power in India*, Princeton: Princeton University Press.

METCALF, Barbara and METCALF, Thomas. 2002. *A Concise History of India*, Cambridge: CUP.

METCALF, Thomas R. 1994. *Ideologies of the Raj*, Cambridge: CUP.

MIR, Farina. 2012. 'Genre and devotion in Punjabi popular narratives', in A. Malhotra & F. Mir (eds), *Punjab Reimagined: History, Culture and Practice*, Oxford: OUP.

MOON, Penderel. 1961. *Divide and Quit: An eye-witness account of the Partition of India*, London: Chatto and Windus.

MOORE, John B. 1913. *Costa Rica – Panama Arbitration: Memorandum on Uti Possidetis*, Rosslyn: Commonwealth.

MOSLEY, Leonard. 1962. *The Last Days of the British Raj*, New York: Harcourt, Brace and World.

MURPHY, S.D. 1999. 'Democratic legitimacy and the recognition of states and governments', *International and Comparative Law Quarterly* 48(3): 545.

MUTUA, Makau. 1995. 'Why redraw the map of Africa: a moral and legal inquiry', *Michigan Journal of International Law* 16: 1113.

NESI, Giuseppe. 2012. 'Uti Possidetis Doctrine', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: OUP.

NEUBERGER, Ralph B. 1986. *National Self-determination in Postcolonial Africa*, Boulder: L. Rienner.

O'BRIEN, Audrey. 1911. 'The Mohammedan saints of the western Panjab', *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 41: 509.

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

OLSON, James S. 1996. *Historical Dictionary of the British Empire*, Westport: Greenwood Press.

ORAKHELASHVILI, Alexander. 2005. *Peremptory Norms in Public International Law*, Oxford: OUP.

OREN, Stephen. 1974. 'The Sikhs, Congress and Unionists in British Punjab', *Modern Asian Studies* 8(3): 397.

PAKISTAN TIMES. 1947. 'Radcliffe Award Announced', 19 August 1947: 1.

PANDEY, Gyanendra. 2006. *The Construction of Communal in Colonial North India*, Oxford: OUP.

PANDEY, Gyanendra. 2010. *Remembering Partition: Violence, Nationalism and History in India*, Cambridge: CUP.

PELLET, Alain. 1992. 'The opinions of the Badinter arbitration committee: a second breath for the self-determination of peoples', *European Journal of International Law* 3: 178.

PETERS, Anne. 2014. 'The principle of uti possidetis juris: how relevant is it for issues of secession?', in C. Walter *et al* (ed.), *Self-determination and Secession in International Law*, Oxford: OUP.

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

RAIC, David. 2002. *Statehood and the Law of Self-determination*, London: Kluwer Law.

RATNER, Steven R. 1996. 'Drawing a better line: uti possidetis and the borders of new states', *American Journal of International Law* 90(4): 590.

SAID, Edward W. 1978. *Orientalism*, London: Penguin Books.

SARVARIAN, Arman. 2015. 'Uti possidetis iuris in the twenty-first century: consensual or customary?', *International Journal of Minority and Group Rights* 22: 511.

SAXENA, J.N. 1978. *Self-determination: From Biafra to Bangladesh*, Delhi: N.M Tripathi.

SCHLEE, Gunther. 2010. *How Enemies are Made: Towards a Theory of Ethnic and Religious Conflict*, Oxford: Bergahn.

SHAHABUDDIN, Mohammad. 2019. 'Postcolonial boundaries, international law, and the making of the Rohingya crisis in Myanmar', *Asian Journal of International Law* 9(2): 334.

SHAW, Malcolm N. 1996. 'The heritage of states: the principle of "uti possidetis juris" today'. *British Yearbook of International Law* 67: 75.

SILVERBURG, Sanford R. 1977. 'Uti possidetis and a pax Palestiniana: a proposal'. *Duquesne Law Review* 16: 757.

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

SINGH, Gurharpal and TALBOT, Ian. 2009. *The Partition of India*, New York: CUP.

SINGH, Kirpal. 1991. *Select Documents on the Partition of Punjab*, New Delhi: National Bookshop.

SINGH, Surinder and GAUR, Ishwar D. 2009. *Sufism in Punjab: Mystics, Literature and Shrines*, New Delhi: Aakar.

SPATE, Oskar. 1991. *On the Margins of History: From the Punjab to Fiji*, Canberra: ANU.

TALBOT, Ian. 1980. 'The 1946 Punjab elections', *Modern Asian Studies* 14(1): 65.

TALBOT, Ian. 1982. 'The growth of the Muslim League in Punjab', *Journal of Commonwealth and Comparative Politics* 20:1.

TAN, Tai Yong. 1997. 'Sir Cyril goes to India: partition, boundary-making and disruptions in the Punjab', *International Journal of Punjab Studies* 4(1): 1.

THAPAR, Romila. 1990. 'Communalism and the historical legacy: some facets', *Social Scientist* 18(6): 4.

THAROOR, Shashi. 2016. *Inglorious Empire: What the British did to India*, London: C. Hurst & Co.

TIMES OF INDIA. 1947. 'Partition of the Punjab', 19 August 1947: 7.

TUNZELMANN, Alex Von. 2007. *Indian Summer: The Secret History of the End of an Empire*, New York: Henry Holt.

UNHCR. 2000. *Report on the State of the World's Refugees* [Online]. Available at <https://www.unhcr.org/3ebf9bab0.pdf> (accessed May 2019).

VAN HOUTUM, Henk. 2011. 'The mask of the border', in D. Wastl-Walter (ed.), *Ashgate Research Companion to Border Studies*, Abingdon: Routledge.

VERNON, Richard and ESSES, Victoria. 2008. *Explaining the Breakdown of Ethnic Relations: Why Neighbours Kill*, Hoboken: Wiley-Blackwell.

VIRDEE, Pippa. 2018. *From the Ashes of 1947: Reimagining Punjab*, Cambridge: CUP.

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

WOLFFHARDT, Tobias. 2017. *Unearthing the Past to Forge the Future: Colin Mackenzie, The Early Colonial State and the Comprehensive Survey of India*, New York: Bergahn.

WOOLSEY, L.H. 1931. 'Boundary disputes in Latin America', *American Journal of International Law* 25(2): 324.

ZACHER, Mark W. 2001. 'The territorial integrity norm: international boundaries and the use of force', *International Organization* 55(2): 215.

ZOLBERG, Aristide R. 1983. 'The formation of new states as a refugee-generating process', *The ANNALS of the American Academy of Political Science* 467(1): 24.

Cases

Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, February 25, 2019 [Online]. Available at <https://www.icj-cij.org/en/case/169/advisory-opinions> (accessed May 2019).

Bay of Bengal Maritime Boundary Award ICGJ 479 (2014).

Beagle Channel Arbitration Award (1977) 52 ILR 94.

Bolivia-Peru Arbitral Award in Boundary Dispute (1909) 3 AM. J. INT'L. L. 1029.

Burkina Faso v Republic of Mali (1986) ICJ Rep 554.

Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia) (1999) ICJ Rep. 6.

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986) ICJ Rep. 14.

Case Concerning the Frontier Dispute (Benin v. Niger) (2005) ICJ Rep. 90.

Case Concerning the Frontier Dispute (Burkina Faso/Mali) (1986) ICJ Rep. 554.

Guinea Bissau v. Senegal (1991) ICJ Rep. 53.

Guinea/Guinea-Bissau Maritime Delimitation Arbitration (1985) 77 ILR 657.

Land and Maritime Boundary case (Cameroon v. Nigeria) (2002) ICJ Rep. 303.

Land, Island and Maritime Frontier Dispute (1992) ICJ Rep. 351.

North Sea Continental Shelf Cases (1969) ICJ Rep. 3.

Palestine Wall Advisory Opinion (2004) ICJ Rep. 136.

Rann of Kutch Arbitration Award (1968) VOL. XVII RIAA 1.

Western Sahara case (1975) ICJ Rep. 12.

Others

Border Disputes Among African States, Organization of African Unity AHG/Res.16(1) 1964.

Declaration on the Granting of Independence to Colonial Countries U.N.Doc. A/RES/15/1514 (1960).

Declaration on the Principles of International Law U.N.Doc. A/RES/25/2625 (1970).

Indian Independence Act 1947.

International Covenant on Civil and Political Rights 999 UNTS 171 (1976).

International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (1976).

Ministry of External Affairs, National Archives of India: File No. 3-8/47 OSV (1947).

Non-Aligned Summit Conference Declaration IJIL 4 (1964) 610.

Principles on obligation to transmit information U.N.Doc.A/RES/15/1541 (1960).

Punjab Boundary Commission Award 1947.

Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).