# Archives as Windows: A *Zamīndār*'s Records in a Colonial Court

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**Abstract**

Despite the welcome reflexivity produced by the 'archival turn' in history writing, the predominant image of the archive remains that of the serialized, indexed colonial repository, offering systematic information retrieval, creating a dominant form of knowledge aimed at social control. This article questions that impression, and reveals the ephemeral and derivative nature of colonial archives, especially those of law courts. It uses the voluminous records associated with a single important case decided by the Judicial Committee of the Privy Council (JCPC), the final court of appeal of the British Empire. The case of *Abul Fata Mahomed Ishak and Ors. v. Russomoy Dhur Chowdhry* (JCPC, 1894) was of great importance to the history of Islamic law in colonial India, especially with regards to *waqfs* or religious endowments. This article explores how parties to the case, mainly members of a land-owning Muslim family in nineteenth-century Bengal, raided their household store of records in order to create a temporary and purpose-built collection aimed at supporting their respective claims. In doing so, this article also uses colonial court archives as a window into the documentation practices of landed lineages in colonial Bengal, tracing patterns of change as well as continuity from earlier periods of time.

On 21 December 1868, two Sylheti Muslim brothers, Abdur Rahman and Abdul Kadir, executed a deed of *waqf* (Islamic charity, pl. *awqāf*), permanently dedicating substantial portions of their landed property to a religious and charitable cause.[1] Twenty-six years later, on 15 December 1894, four judges of the Judicial Committee of the Privy Council, the final court of appeal of the British empire, made a momentous decision for Islamic law in South Asia. They decided that this *waqf* – which was mainly intended to benefit family members and descendants of the two brothers, was not really dedicated to religious and charitable causes, and hence not immune to transfer. Therefore, loans taken by the brothers and their descendants using that very property as surety, could be legally recovered by seizure of those properties.[2]

This decision, which touched upon a vital institution of Muslim religious and social life, has been studied as part of the story of Islamic law in colonial South Asia. Scholars have

[1]R. Peters, Abouseif, Doris Behrens, D.S. Powers, A. Carmona, A. Layish, Ann K.S. Lambton, Randi Deguilhem, R.D. McChesney, G.C. Kozlowski, M.B. Hooker et. al., "Wakf" in *Encyclopaedia of* Islam, Second Edition (eds) P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs (Brill Online, 2012).

[2] For the text of the judgment, which consolidated two connected appeals, see *Abul Fata Mahomed Ishak and others v. Russomoy Dhur Chowdhry* (1894) UKPC 64, at https://www.bailii.org/uk/cases/UKPC/1894/1894_64.html.

shown how, both in arguing for and against the validity of *waqf*s that benefited family members, British and Indian judges and legal scholars applied a reified notion of Islam and Islamic law, which formed part of the longer story of political transformation of Islam in South Asia, and the modern world.[3] Others have seen this decision as symptomatic of the broader assault on Islamic institutions by European colonial powers.[4]

This paper looks at that legal dispute from a very different point of view; one less concerned with legal doctrines and more with paperwork. In coming to its decision, the Privy Council, and the two lower courts that heard earlier stages of the dispute, encountered a vast store of documents – mostly deeds, written in Persian and Bengali. These recorded the many transactions that took place around the properties in question – only some of which were refracted in the list of 125 defendants in the appeal before the Privy Council. Turning attention away from the story of law to the story of paperwork, this paper re-opens that temporary archive, created for the benefit of colonial courts.

Instead of focusing on the truth-making function of that collation, which was to judge the veracity of one single narrative about the doctrinal requirements of Islamic law, I propose to treat the law's archive as of temporary and specific relevance only. I suggest that we use that temporary archive, caught in history, to begin to understand other logics of gathering papers. I will attempt to show that, if we undertake the meticulous work of retracing the social relations that produced those papers in the first place, we can start reconstructing the various ways in which families and institutions created 'household archives' aimed at telling other stories – about themselves and their entitlements. Within such 'household archives', a legal event, even a major one such as the Privy Council's decision, would produce a flurry of fresh paperwork and lead to the culling of others. But the dossier so produced has to be recognized for what it is – a collation for a specific and temporary purpose, from a much wider domain of records. Applying that hypothesis, we can begin to make sense of the otherwise nearly meaningless deluge of documents, with their litany of names in the near-incomprehensible 'jargon of

[3] Gregory Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 2008).

[4] D.S. Powers, "Orientalism, Colonialism and Legal History: The Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History*, 31: 3 (1989), 535-71.

Hindostan'[5] which flowed towards the courts – of which a mere 570 were selected as admissible exhibits.

In taking such an approach, I am applying an idea and method that I have recently tried with relation to the reconstructed archives of a Mughal *zamīndār*'s family. In *Negotiating Mughal Law*, I proposed considering the thousands of Persian-language grants, orders, contracts and receipts that lie scattered in archives and personal collections all over South Asia and elsewhere, not only, or even principally as emanations of a transcendent Mughal state, but as efforts at documentation and self-narration by powerful lineages and corporations.[6] This approach is informed by the now-substantial scholarship on colonial archives. Ann Stoler's paradigmatic intervention criticized the tendency to extract evidence from colonial collations rather than question why these records had got there in the first place, or to '"mine" the *content* of government commissions and reports…[without attending] to their peculiar *form* or *context*.'[7] Following Stoler's recommendation, I tried to follow the 'move from archive-as-source to archive-as-subject.'

In doing so, my conceptual and methodological contribution in *Negotiating Mughal Law* was to look for the 'household archive.' Scholars have long lamented the loss of Mughal archives, possibly through repeated political changes and military encounters.[8] My suggestion is not that historians should therefore make do with the prolific family papers that remain (many historians have been doing so for several decades), but to reconceive the object of their search. I have suggested that the absent Mughal archive is the product of a misplaced search for a colonial-style centralised and serialised repository. The significance of the many collections of Mughal-era family papers, deposited in libraries and archives across South Asia and beyond, are inadequately understood because of an anachronous public-private distinction. The lineages gathering such records ranged from petty landlords and local officials to the highest imperial nobles and administrators; they did not simply work for the state, they constituted it. For immediate post-Mughal regimes, such as Hyderabad, and the Maratha Empire, we have clear

[5] Javed Majeed, " 'The Jargon of Indostan': An Exploration of Jargon in Urdu and East India Company English,' in Peter Burke and Roy Porters (eds.) *Towards a Social History of Language* (Cambridge: Polity, 1992), pp. 185-205.

[6] Nandini Chatterjee, *Negotiating Mughal Law: A Family of Landlords across Three Indian Empires* (Cambridge: Cambridge University Press, 2020).

[7] Ann Laura Stoler, 'Colonial Archives and the Arts of Governance,' *Archival Science*, 2 (2002), 87-109.

[8] Francis Robinson, *The Cambridge Illustrated History of the Islamic World* (Cambridge: Cambridge University Press, 1996), notes to Chapter 3, p. 314.

evidence that the highest records of state functioning were stored in the households of eminent officials, treated as valuable information property and guarded against undue sharing.[9] These households, and the records they kept, were perfect instances of the 'patrimonial-bureaucratic' form of governance[10]: powerful lineages, right up to the imperial households, formed the state; their records collectively constituted the Mughal archives.

Thus, my interest is less in uncovering and transcending the epistemologies that underlay colonial archives and more in understanding other logics of documentation that preceded colonial regimes, and in many cases, persisted alongside them. In doing this, I am inspired by another, more (literally) constructive suggestion by Stoler. In connection with her role as an external consultant on a project of creating a Palestinian archive, Stoler noted that archiving activity, in the sense of creating fresh archives, can be made into a 'dissensus', making 'visible that which had no reason to be seen.'[11] *Negotiating Mughal Law* did not create a new archive, but attempted to put one back together – in the form of a handlist and a partial digital archive. In doing so, it ignored the organizational, spatial and narrative logic of the repositories where the materials *currently* reside – in a small town in India, at the national capital in India and in an Islamic art museum in Kuwait. It demonstrated that all these documents had once resided in the household archive of a landed family, from where they had been dispersed within the last seventy years.

In this current article, I look at an already assembled colonial archive: the case records of a Privy Council appeal. But I take that temporary and purpose-made colonial archive apart

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[9] For Hyderabad, and the activities of the leading Kayasth ministers of this Muslim regime, see Karen Leonard, *Social History of an Indian Caste: The Kayasths of Hyderabad* (Berkeley: University of California Press, 1994). For the Maratha Empire and the central government records held in the Pune household of the top minister, Nana Fadnavis, see G.S. Sardesai, *Handbook to the Records of the Alienation Office, Poona* (Bombay: Government Central Press, 1913), pp. 1-2. Nana Fadnavis also maintained a separate archives, related to matters that centred upon his own lineage, in his households in Menavli (outside Wai), and in Benares. For the Phadnis's Menavali *daftar* (archive), see K.N. Chitnis, *Research Methodology in History* (New Delhi: Atlantic, 2006), p. 25; for his Benares *daftar*, see B.G. Kunte (ed.) *The Handbook of the Bombay Archives* (Bombay: Government of Maharashtra, 1978), p. 120. I thank Dominic Vendell for these detailed references.

[10] Stephen Blake, 'The Patrimonial-Bureaucratic Empire of the Mughals', *The Journal of Asian Studies*. 39:1(1979):77-94; the idea is also applied with relation to the princely household in Munis D. Faruqui, *The Princes of the Mughal Empire, 1504-1719* (Cambridge: Cambridge University Press, 2012), Blake cited on p. 92.

[11] Ann Laura Stoler, 'On Archiving as Dissensus,' *Comparative Studies of Asia, Africa, and the Middle East,* 38: 1 (2008), 43-56.

in order to understand the structure of the household archive that lay behind it. That household archive belonged to a Muslim landed family in eastern Bengal, whose family and property disputes got caught in the net of imperial law because of their use of a legal device that had become contentious in colonial India – the Islamic charitable endowment, or *waqf*. This work carries on from Gregory Kozlowski's suggestive sketches of intra-family disputes over *waqf* property in colonial India. Kozlowski correctly proposed that while public discussions of the most high profile of these cases – above all, of *Abul Fata v. Russomoy Dhar Chowdhury* – was cast as a sectarian conflict between ailing Muslim landlords and avaricious Hindu loan sharks, the disputes animating the legal trials were mostly *within* the families of landlords themselves. His larger point also is that the doctrinal discussion in colonial courts and legislative assemblies – about the validity of family *waqfs* or otherwise – misrepresented how Islam was really practiced in South Asia.[12] This article thus tells the story as that of a fractious landed family and the archive they produced in the process of their 'intra-mural' competition.

To recapitulate, then, this article makes two principal arguments. The first and principal one is about the ephemeral and derivative nature of colonial, especially judicial archives, being temporary collations of probative material aimed at sustaining competing claims. The second argument is methodological. It proposes that by looking through colonial archives (not just reading them against the grain), we can reconstruct other, more durable documentary collations that lay underneath, in order to recover other logics of documentation. In this article, applying that methodology leads to the finding that South Asian landed lineages continued to create and maintain household archives throughout the colonial period, just as they had done in pre-colonial times, but the structure and contents of such archives were transformed by colonial legislation and novel documentation rules. In this narrative and analysis, *waqf* is a large, but incidental presence, as a politically fraught legal device that happened to be mobilized by the principal protagonists of the story. The deployment of *waqf* by that landed family led to specific documentary and legal outcomes, the specifics of which have thus far been occluded by the larger history of *waqf* and Islamic law in South Asia.

## *Waqf* in South Asia: from pre-colonial absence to colonial *cause célèbre*

Systematic and visible piety requires resources. In all societies and cultures, people have devised institutional and legal devices that would allow the reliable flow of resources towards

[12] Kozlowski, *Muslim Endowments*, pp. 91-95.

specific pious activities, and towards people who undertook or managed such activities. In Islamic law, the principal and best known range of such provisions are encompassed by the tradition of *waqf*. Gradually evolving from the earliest days of Islam and taking various forms in various parts of the Islamicate world, *waqf* generally came to mean property dedicated towards the funding of religious and charitable activities. From the earliest days until the dispute this paper deals with (and later), the specific rules were refined by Islamic legal scholars – the cause could not be an illegal one (in Islamic law), the property dedicated had to be legal (in Islamic law) and the beneficiaries had to be in existence at the time of dedication. But many disagreements remained – whether the property dedicated had to be immovable or not, whether and until when the dedication was or remained revocable, and whether a *waqf* could benefit the endower's own family or not.[13]

Despite most parts of South Asia being under Muslim rule since the eleventh century, scholarship has not been able to demonstrate evidence for the use of a *waqf* as a specific legal device for creating pious and charitable endowments, until the nineteenth century. Clearly led by curiosity arising out of his work on colonial records, Kozlowski conducted an investigation of the possible existence of *waqfs* in the Mughal empire.[14] He discovered that the documentary record was too thin to be reliable. He was unable to find and view a single *waqf nāma* deed from Mughal India, and had to be satisfied with verbal assurances from other scholars that they had seen such deeds with relation to the principal mosques of Delhi and Lahore. The circumstances in both cases were such that the possibility of colonial-era production of those documents could not be ruled out.

From this, and from records that are indeed plentiful, such as documents of *madad-i maʿāsh* or livelihood support grants, Kozlowski proposed that Mughal patterns of charity built upon pre-existing Islamic royal styles in northern India, which focused more on the spiritually adept individual (and his lineage) rather than any institution. He also proposed, with less evidence, that such a focus was related to the greater dissipation of scholarly and especially juristic authority in the Mughal empire, with no single or even cluster of *madrasas* able to command the respect (and steady patronage) that their counterparts in the Ottoman empire were able to.

[13] R. Peters, et. al. "Waḳf".

[14] Gregory Kozlowski, 'Imperial Authority, Benefactions and Endowments in Mughal India,' *Journal of the Economic and Social History of the Orient* 38: 3 (1995), 355-370.

This hypothesis, of the Indo-Islamic royal charitable focus on the individual (and lineage) over the institution is worth exploring. Mughals did offer their largesse to large institutions, including many non-Muslim ones, but they wrote out their grants to individual grantees. The series of imperial grants made from 1565 CE onwards to the Mathura-Vrindavan temple complex – also termed *madad-i maʿāsh* and/or *ʿinām*[15] in the documents – were made to the various Vaishnava preceptors – Gopal Das, Jiva Goswami and so on.[16] Eventually, in 1633 CE, control of those properties was handed by imperial order to the pre-eminent Mughal noble (also a Rajput and a Hindu), Mirza Raja Jai Singh I. In effect, therefore, even if the individuals were named as grant holders, the institution or institutional complex did benefit from the grants, but more on that in a moment.

What is striking is that the same pattern is followed further down the social and political ladder. There are no extant pre-nineteenth-century records of small-scale *waqf*s, made by non-royal but significant individuals, supporting local institutions such as mosques, madrasas, caravanserais and so on. What we do see is once again are *madad-i maʿāsh* grants made by imperial nobles/officials, and also grants termed *sadaqa*, or *brahmatra*, *debatra*, or simply, *dān* (donation) – the last three pertaining to Hindu religious institutions such as monasteries and temples.[17]

One way of explaining this South Asian anomaly – of the absence of *waqf* – would be to propose that the difference was only one of form; that the imperial as well as sub-imperial grants made to named individuals, encompassed support for religious institutions. There are, however, crucial legal distinctions between *madad-i maʿāsh* grants and the legally mature form

[15] This Arabic-origin word literally means reward. In Mughal and post-Mughal usage, it is generally translated as a grant of 'tax-free' or 'rent-free' or 'revenue-free' lands. See H.H. Wilson, *A Glossary of Revenue and Judicial Terms* , ed. Ganguli and Basu (Calcutta: Eastern Law House, 1940), pp. 338-340. This entitlement, which, at its most general, included the right to take a share of the peasant's produce, and could be combined with a range of conditions, is typical of the kind of nested and relational rights that this book is concerned with.

[16] Irfan Habib, "From Ariṭh to Rādhakund: The History of a Braj Village in Mughal Times," *Indian Economic and Social History Review*, 38: 2 (2011), 211-23; Irfan Habib, "A Documentary History of the Gosā'ins (Gosvāmīs) of the Caitanya Sect at Vṛndāvana," in Margaret H. Case (ed.) *Govindadeva: A Dialogue in Stone* (Delhi: Indira Gandhi National Centre for Arts, 1993), pp. 131-160.

[17] For an example with image of the document, transcription and translation, see this grant from 1669 CE https://humanities-research.exeter.ac.uk/lawforms/text.html?id=lf_pDas_1669_dai_lns235ms_w The grant is referred to as '*taṣadduq-i firq-i mubārak*' which is a common Mughal formula and can be translated as 'charity on behalf of the blessed head (emperor).' The same formula is also used in Iranian documents, see this Qajar-era document https://ghani.macmillan.yale.edu/g-iii-8-0

of *waqf* – which made very substantial difference to the way in which these properties were managed and the institutions evolved. One major difference was the grantor's very real ability to withdraw the endowed property at will. To some extent, emperor Aurangzeb addressed this precarity when he made *madad-i maʿāsh* grants inheritable by an imperial order[18]; it is not clear to what extent this order was effective throughout the empire, and during the turbulent era that followed. The other difference was that grants to individuals, even when they were made inheritable, implied a focus on lineages. That is to say, rather than creating corporations, they created further lineages that were situated along the same social spectrum as other landed lineages – families of *zamīndārs* – who acquired their own entitlements through less spiritual routes.

What confounds matters is that we see an explosion of evidence for the use of *waqf*s from the nineteenth century, that is, in the colonial period. There are two possible explanations for this. The first is that *waqf* was adopted as an asset-shielding device by Muslim landholders, directly and indirectly in response to the fiscal drive of the colonial government. From the late eighteenth century, the East India Company government made repeated efforts to survey and evaluate inheritable claims of tax-exemption, and took draconian decisions to annul all those determined to be undocumented, fraudulent or undeserving for other reasons.[19] Such tax-exemption privileges could be derived from a number of sources – such as rewards or *inʿām* for administrative or other services – as much as *madad-i maʿāsh* grants. At some point, Muslim title-holders discovered that while other forms of title could be judged revocable or defunct, *waqf* property was relatively secure from resumption or taxation. Colonial fiscal pressures also led to mortgaging of property and their foreclosure on defaulting; the non-transferability of *waqf* offered protection against foreclosure, but also generated suspicion of fraud and debt evasion. Be that as it may, we have clear evidence of grants such as Mughal *altamgha ināʿms* (royal rewards)[20], which were used to make both religious and secular gifts, being claimed as *waqf* in the nineteenth century.[21] We also have studies that demonstrate clear

[18] Muzaffar Alam, *Crisis of Empire in Mughal North India: Awadh and Punjab, 1707-48* (New Delhi: Oxford University Press, 1986), p. 116.

[19] For one classic study of this process, but focused only on northern India, see Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon, 1959).

[20] G. Leiser, 'Tamgha', *Encylopaedia of Islam, Second Edition.*

[21] For the many different kinds of grants that were later classed together as *waqf*s, see Muhammad Zubair Abbasi, "Sharī'a under the English Legal System: Awqāf (Endowments) in the Making of Anglo-Muhammadan Law," Unpublished PhD thesis, University of Oxford, 2013, pp. 60-61; for detailed discussion of disputes over

rise in the making of *waqfs* among Muslim landholders in northern India at the start of the twentieth century, directly co-related to the stricter application of Islamic law of inheritance, which splintered large estates in every generation. Customary laws had previously shielded such aristocratic properties from being parceled out through inheritance; now *waqf* offered a legal solution.[22] The second, and related possibility, is that such increased usage was linked to greater percolation of Islamic legal concepts from beyond South Asia among the wealthier and literate Muslim public, and the popularization of such concepts through print and institutionalization of *fatwa* (Islamic legal opinion) -seeking and -dispensing.[23]

As far as the legal process is concerned, the history of Indian *waqf*s under colonial rule has both similarities and differences with other colonized Islamic regions, such as North Africa or Central Asia. Unlike in parts of French-ruled North Africa, the British colonial government in India made no effort to rescind *waqf*s in general, although there were drives to verify titles and resume those that were deemed to be inadequately supported by documentary proof. The crunch came over much more specific issues, which were: the legal definition of 'trusts', and the prohibition of 'perpetuity', both legal concepts with very specific English traditions associated with them. In English law, trusts, wherein property was managed (but not owned or enjoyed) by an individual or entity for the benefit of another individual or entity, could be public or private. Only public trusts, which were by definition religious or charitable, [24] could exist in perpetuity. In general, the statutes of 'mortmain' prohibited the perpetual ownership of land, except under special license from the Crown. This is because 'mortmain' (literally, the dead hand, a Roman legal concept implying the will of a dead person) was seen to place undue limits on the socially necessary division, inheritance and circulation of property. With the conjunction of these two legal principles, English law permitted religious trusts to exist in

Mughal-era grants to an important eastern Indian *khānaqah* (spiritual lodge), at Sahsaram, Bihar, see Mohiuddin v. Sayiduddin, *Indian Law Reports*, XX (Calcutta, 1893), pp. 810-25. In this case, the *khanaqah* was founded in the early eighteenth century, endowed by the Mughal emperor Farrukhshiyar, followed by various other grants in subsequent years. The first endowment to be explicitly called a *waqf* was one made by two Muslim women in 1833.

[22] Anantdeep Singh, "Zamindars, Inheritance Law and the Spread of the Waqf in the United Provinces at the Turn of the Twentieth Century," *Indian Economic and Social History Review*, 52: 4 (2015):501-532.

[23] Francis Robinson, 'Technology and Religious Change: Islam and the Impact of Print,' *Modern Asian Studies*, 27: 1 (1993), 229-51.

[24] 'Charity' itself was defined in English law by a series of statutes, starting with the Elizabethan Statute of Charitable Uses, 1601, which listed the kinds of uses of funds that could be deemed charitable.

perpetuity, but assumed them to be necessarily public, and increasingly, open to public scrutiny. Private religious trust, which is what a family *waqf* appeared to be in English legal terms, was an anomaly, and an appeared to English lawyers as an effort to bypass ordinary rules of succession, dodge taxes, or defraud creditors. This interpretation, which was developed through a series of cases in the Anglo-Indian legal system, was premised on a public-private division of socio-economic life, in which public religious trusts were expected complement private piety. This simply did not map on to the way in which Indian religions, including Islam, and indeed, Chinese religions were practiced. [25]

Despite this obvious mismatch, a series colonial statutes defined *waqf*s in India (and Hindu, Zoroastrian and other religious endowments) as public religious trusts. Key among these laws were the Indian Trusts Act 1882 (which defined secular private trusts), the Religious Endowments Act of 1860, Charitable Endowments Act 1890 (for all non-religious charitable trusts), and the Indian Income Tax Act 1886, which exempted religious and charitable trusts taxation. Such definition of *waqf*s as public trusts conflicted with the growing practice of creating *waqf*s to benefit one's own family members, and this is what came to a head with the case we are discussing in this article. Prominent Muslim leaders, among them the lawyer, judge and legal scholar Sayyid Amir Ali (1849-1928), campaigned from the bench, in the press, and through political lobbying for the validity, in Islamic law, of *waqf*s created to benefit family members, and for the admissibility of this principle of Islamic law in colonial courts. Amir Ali's reasoning was that such family *waqf*s provided the necessary social capital for an embattled and increasingly impoverished community (Indian Muslims), providing them with community-specific resources for education and other developmental purposes.[26] Eventually, with it becoming a *cause célèbre* in Indian Muslim politics, the decision of *Abul Fata* was reversed by explicit legislation in 1913.

Amir Ali's thinking seems to have been similar to those of Central Asian modernisers in Soviet Turkestan.[27] His frustrations were similar, and less resolved. The colonial government

[25] Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press, 2009), pp. 67-102; Stephanie Po-Yin Chung, "Chinese Tong as British Trust: Institutional Collisions and Legal Disputes in Urban Hong Kong, 1860s-1980s," *Modern Asian Studies*, 44: 6 (2010), 1409-1432.

[26] Nandini Chatterjee, 'Law, Culture and History: Amir Ali's Interpretation of Islamic Law,' in Shaunnagh Dorsett and John McLaren (eds) *Legal Histories of the British Empire: Laws, Engagements and Legacies* (London: Routledge, 2014), 45-59.

[27] Paolo Sartori, "Waqf in Turkestan: The Colonial Legacy and the Fare of an Islamic Institution in Early Soviet Central Asia, 1917-1924," *Central Asian Survey*, 26: 4 (007), 475-498.

in India, with its post-Mutiny caution,[28] left *waqf*s and other religious trusts to the management of community councils, for which each province made its own rules. In all these councils, there was a persistent conflict between the traditional religious figures who had thus far controlled, and in their view, owned such *waqf*s, and modernisers such as Amir Ali, who saw them as community property, to be transparently managed for public benefit.[29]

Against this *longue-durée* social and legal context, what we have in the dispute of 1894, is the record of one such landed lineage organising their properties, ostensibly for religious purposes, and then changing tack. We could say that here we have a glimpse of an archive underlying a *waqf*, but it is perhaps much more correct to say that we have access into the archive of a *zamīndār* family in Sylhet, who sometimes dabbled in religion.

**Islam and Muslims in Sylhet**

Sylhet is a culturally distinct region, currently part of Bangladesh, which, at the time of the dispute, formed part of the large and diverse province of Assam in British India. Known as Srihatta in ancient times, the region has a valued presence in the Bengal Vaishnavite tradition, being the ancestral home of the most important *bhakti* saint of Bengal, Caitanya. Although ruled by Muslim kings from the twelfth century, the region turned demographically towards Islam only from the sixteenth century.

The conversion of Bengal in general, and of Srihatta in particular, to Islam, is associated in scholarly literature as well as hagiographic traditions, with the advent and activities of Sufi saints. Richard Eaton proposed in his seminal book that Islam crossed the Bengal frontier through a combination of proselytization and agrarian pioneering, the latter facilitated by a Mughal policy of making grants of uncultivated forest or marshy land to Muslim religious leaders in particular.[30]

Sylhet's own Sufi leader was the fourteenth-century warrior saint, Shah Jalal, who along with his companions is said to have stormed the region and helped the Muslim kings of Bengal, stationed in Lakhnauti, to defeat their Hindu counterparts in Gaur, following religious

[28] Thomas Metcalf, *The Aftermath of Revolt: India, 1857-1880* (Princeton: Princeton University Press, 1964).

[29] S. Khalid Rashid, *Wakf Administration in India: A Socio-Legal Study* (New Delhi: Vikas, 1978); Zubair Abbasi, "Sharī'a under the English Legal System"; Nandini Chatterjee, *The Making of Indian Secularism: Empire, Law and Christianity, 830-1950* (Basingstoke: Palgrave, 2011), pp. 51-74.

[30] Richard Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (Berkeley: University of California Press, 1993).

oppression of pious Muslims by the latter. Shah Jalal's tomb is located in Sylhet and forms a major religious centre.[31]

Sylhet came under British control in 1765 with the military defeat of the Nawabs of Bengal and his allies, including the by then nearly powerless Mughal emperor. As a result of this defeat, the Mughal emperor Shah Alam II was compelled to formally appoint the English East India Company as his *diwān*, or chief revenue officer of the enormous province of Bengal, Bihar and Orissa put together. This 'appointment' was a hardly disguised handover of the province's treasury, revenues and ultimately, government to the East India Company.[32] For the first few years of British control in Bengal, the existing indigenous revenue administration and Indian personnel remained in place, being gradually replaced by British supervisors, and ultimately, a British system.[33] In those early years, Sylhet was noted to be a highly fertile and lightly taxed region, typical of an incompletely integrated border district. At the end of the eighteenth century, the district had few large *zamīndārs*, revealing relative peasant prosperity and autonomy, and low levels of sub-infeudation.[34] Because of the lack of large *zamīndārī*s, Sylhet was one of the few districts in post-Mughal Bengal to have regular officials permanently stationed; the *faujdārs* (military commanders) and *amils* (tax collectors) supervising the small *zamīndārs* closely.[35]

At the end of the eighteenth century, Sylhet suffered from a series of devastating floods, and the dislocation this caused was compounded by a very rapid and widespread failure of *zamīndārīs* in the early nineteenth century, leading to auctioning of estates and the arrival of new landlords. In 1874, Muslim-majority Sylhet was administratively removed from the province of Bengal and added to that of Assam. There it remained until 1947, as a Bengali-speaking, Muslim-majority district in a Hindu-majority, Assamese and tribal languages-speaking province. It was bordered the Hindu princely state of Tripura.

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[31] Syed Murtaza Ali, *Hazrat Shah Jalal o Sylheter Itihas* (Dhaka: University Press, 1965).

[32] For an overview of this political history, see Peter Marshall, *Bengal: The British Bridgehead: Eastern India 1740-1828* (Cambridge: Cambridge University Press, 1987).

[33] Abdul Majed Khan, *The Transition in Bengal, 1756-1775: A Study of Saiyid Muhammad Reza Khan* (London: Cambridge University Press, 1969).

[34] W.W. Hunter ed. *The Imperial Gazetteer of India* Vol. XIII (2nd edition, London: Trubner & Co., 1885), pp. 148-52.

[35] Ratnalekha Ray, "The Bengal Zamindars: Local Magnates and the State before the Permanent Settlement", *Indian Economic and Social History* Review, 12: 3 (1975), 263-92 at pp. 268-9.

As part of Assam, Sylhet developed as a major tea-growing area, but still with a very small migrant population. The 1901 census showed 52.7% of Sylhetis as Muslims, 46.8% as Hindus and the rest as 'animists', that is, the followers of various indigenous religions. The vast majority of people spoke Bengali. The Sylheti version of Bengali was practically unintelligible to people of other parts of Bengal (as it remains even today). People – both Hindus and Muslims – tended to marry off their daughters very young. [36]

All these historical, social and agrarian features were reflected in the family of Abul Fata, which was noted by a contemporary local scholar as one of the premier *zamīndār* families of Sylhet.[37] The family was said to have originated from the adjoining region of Tripura. This was another Bengali-speaking region with a distinct history; the Hindu Manikya dynasty ruled the region, dealing with occasional Mughal interference,[38] sometimes disastrous attacks by local Afghan dynasties and support from the Bengal Nawabs, until it became a princely state during British colonialism, and eventually merged with the Indian Union in 1948.[39]

Sometime in the nineteenth century, Maulvi Muhammad Idris Khan acquired the position of 'sub-judge' in Sylhet. As a side interest, he began buying up lands in auctions, building one of the most important *zamīndārī* estates Sylhet. The title of 'maulvi', enjoyed by the family, appears to indicate substantial religious learning, and there may have been some reverse movement in the education and employment trends of the family, because one of Idris Khan's sons, Abdul Kadir, worked in the local 'qazi adalat (court)' for some time. By reverse movement I mean that for a colonial judge's son to work in a semi-religious post was contrary to the general tendency of continued movement, once begun, towards colonial and modern systems of education and employment.[40] Colonial-era *qāẓīs* were not traditional Islamic judges, of course. In (colonial) law, they were just marriage registrars for Muslims, but they often

[36] B. C. Allen ed. *Assam District Gazetteers* (Sylhet), vol. 2 (Calcutta: 1905), pp. 49-50, 60-1, 68, 73.

[37] Achyut Charan Chowdhury, *Srihatter Itibritta* (Calcutta: Boiwala, 2006; 1st edition 1917), Parts III-IV, p. 123.

[38] For instance when Prince Shuja took refuge in Tripura in 1660, on way to Arakan. Dwijendranath Dutta and Suprasanna Bhandyopadhyay (eds) *Rājgī Tripurār Sarkārī Bānglā* (Agartala: Shiksha Adikar, 1976), pp. 2-3.

[39] Nalini Ranjan Roychoudhary, *Tripura Through the Ages: A Short History of Tripura from the Earliest Times to 1947 A.D.* (Agartala: Bureau of Research and Publications on Tripura, 1977).

[40] This is based on impression rather than a systematic survey; it refers to the family background and careers of nineteenth-century Indian Muslim lawyers and judges such as Sayyid Mahmud and Sayyid Amir Ali.

played an important role in the community.[41] All this may simply reflect the fluidity of the legal system at the lower end;[42] which also allows us to envisage a savvy set of actors, well-versed in the essentials of both Islamic law and colonial law.

The other son, Abdur Rahman, however, was known as a spendthrift and a profligate, and having lost a great deal of the estate's properties. After the death and the loss of the steadying hand of Abdul Kadir, the estate was temporarily under the control of the Court of Wards, which was a colonial government agency modelled on Tudor precedent, aimed at providing tutelage and protection to landed families above a certain taxpayer grade when they failed to produce suitable adult male heirs or were otherwise considered mismanaged.[43] It is not clear why such a situation arose, given the obvious presence, in 1894 of the Abdul Rahman's adult son, Abul Fata, but perhaps he subsequently died or was permanently alienated from the family, or perhaps debts encumbering the estate had led to this decision by the government. The local chronicler also noted, without comment, that, the family had secured government permission to keep firearms.

This little entry in an unofficial gazetteer offers us a wealth of information, which situates members of the Abul Fata family within the intensely braided cultural region of Sylhet, which remains still to be unpicked today, despite the rationalizing and ethnic cleansing drives of the postcolonial nation-states. They also show a typical profile of a colonial era *zamīndār* – recent arrivistes to rural eminence and landowning; using their positions within the colonial

[41] At the end of the eighteenth century, erstwhile *qazis* and *muftis* were co-opted into the incipient colonial legal system in India and expert advisers expounding the law in relevant areas to British judges and performing certain notarial functions. Following the translation of key texts to English and the building up of a sufficient body of Anglo-Muhammadan law, the posts were abolished by the Act XI of 1864. A much reduced position of the *qazi* as Muslim marriage registrar was created by the Act XII of 1880. 96), pp. 57-75; Michael R. And 'Islamic Law and the Colonial Encounter in British India' in David Arnold and Peter Robb, eds, Institutions and Ideologies: a SOAS South Asian reader (Richmond: Curzon Press, 1993), pp. 165-85; Robert Ivermee, "Shari'at and Muslim Community in Colonial Punjab, 1865-1885," *Modern Asian Studies*, 48: 4 (2014), 1068-95; Julia Stephens, *Governing Islam: Law, Empire and Secularism in South Asia* (New York: Cambridge Univesity Press, 2018).

[42] Lhost notes that many *qāẓī*s dismissed in 1864 were reappointed a deputy magistrates. Elizabeth Lhost, "From Documents to Data Points: Marriage Registration and the Political of Record-Keeping in Colonial India (1880-1950)," *Journal of the Economic and Social History of the Orient*, 62, 5/6 (2019), 998-1045, at 1007-8. Perhaps Idris Khan was such a re-deployed functionary.

[43] Benjamin Cohen, "The Court of Wards in a Princely State: Bank Robber or Babysitter?" *Modern Asian Studies*, 41: 2 (2007), 395-420.

system to acquire their property and prominence;[44] absentee landlordism; uneven to poor estate-management skills; familial fractiousness; occasional embarrassment and recovery by colonial safety-nets aimed to shore up landlords; and general 'royal' behaviour.[45]

## A family of *Muslim zamīndārs and their* disputes

In the printed papers of the two consolidated appeals heard by the Privy Council in 1894, there were printed copies of hundreds of documents enclosed as evidence at various stages of the dispute.[46] The star document was, of course a *waqf nāma*. We do not have this document in the original, but in its meticulous and literal English translation, enclosed as evidence in the Printed Papers of this case.[47] By this document, dated 21 October 1868, the two sons of a recently deceased wealthy Muslim gentleman constituted the family's lands and buildings in the district of Sylhet as a *waqf*. Their aims in doing so were explicit: they intended to benefit their own children and further descendants, and 'in their absence', 'the poor and beggars and orphans and widows of Sylhet', and to ensure that 'the properties may be protected against all risks, the name and the prestige of the family maintained…' They constituted themselves the *muṭawallīs*

[44] Strict revenue payment schedules and punitive auctions, imposed by the East India Company's colonial government, had led to a massive restructuring of land ownership in the Bengal Presidency from the 1770s. The new landholders were frequently non-traditional ethnic groups or castes; with sources of capital in trade or government service; and absentee from their rural estates. See Bernard Cohn, "The Initial British Impact on India: A Case Study of the Benares Region," *The Journal of Asian Studies*, 19: 4 (1960), 418–31; later scholarship suggested that the social bouleversement was less radical than initially imagined. Ratnalekha Ray, *Change in Bengal Agrarian Society* (New Delhi: Manohar Publications, 1979). For a fine-grained study of one such arriviste *zamīndār* family in Bengal, see Ratnalekha Ray, "The Changing Fortunes of the Bengali Gentry under Colonial Rule—Pal Chaudhuris of Mahesganj, 1800-1950," *Modern Asian Studies*, 21: 3 (1987), 511-19.

[45] Walter C. Neale, "Land is to rule," in Robert Eric Frykenberg, ed., *Land Control and Social Structure in Indian History* (Madison: University of Wisconsin Press, 1969), pp. 3-15.

[46] The procedure of the Judicial Committee of the Privy Council required the printing of two complete sets of papers, including the briefs for each party, proceedings in all the lower courts and copies of evidence admitted. These papers are a rich and still largely untapped source for the study of law in the British Empire. This paper utilises the Printed Papers for *Abul Fata Mahomed Ishak and others v. Russomoy Dhar Chowdhury and others*, digitized and available at http://privycouncilpapers.exeter.ac.uk. (Henceforth Printed Papers, *Abul Fata*).

[47] The Printed Papers lack continuous internal pagination; there are several sections within the collation, each of which restart the numbering of pages. The translation of the *waqf nāma* is in Exhibits filed on behalf of the plaintiffs, pp. 93-97; which corresponds to pages 221-225 of the entire PDF file downloadable from the website, from this address https://humanities-research.exeter.ac.uk/privycouncilpapers/public/trial/view/id/2345/order/id/direction/ASC

(managers or custodians) of the properties so endowed and pre-emptively refused any obligation to show accounts to the beneficiaries.

Even in this document, the brothers Abdul Kadir and Abdur Rahman promised to undertake an impressive amount of paperwork. They promised to remove themselves from lists of '*maliks*' that is, *zamīndārs* from all 'private, public and collectorate papers' and reinscribe themselves as '*muṭawallīs*' instead. They also envisaged a continuing swirl of transactions around the property, most of which would have carried on from their *zamīndārī* days (taking accounts from agents, collecting rents, leasing out lands in various tenures (sub-lets called *patni*[48] and *dar-patni*; some tenures permanent and others temporary), and others perhaps new, incumbent upon their novel status as *muṭawallīs* (depositing the net profits in the '*tehbil*' or treasury (of the *waqf*) , reinvesting such cash to buy further properties). Since the brothers possessed further lands that they did not endow in the *waqf*, they also continued to be *zamīndār*s, creating two parallel identities for themselves – that of the landlord and that of the trustee/manager. These two identities entailed theoretically parallel, but in reality, muddled, tranches of property and records thereof.

Through property and piety, the brothers and their *waqf* were also connected with other significant landholders and community leaders, most importantly, Khwaja Abdul Ghani (1813-96) and his son, Nawab Ahsanullah of Dhaka. This was also an immigrant and arriviste *zamīndār* family, but one that had achieved much greater social and political ascent. Originally a family of Kashmiri traders with Sufi leanings, the first pioneer in the family had tried his luck in the Mughal imperial court in the early eighteenth century and failed. He had then continued his journey to eastern Bengal, settling and setting up business in Sylhet. The pioneer's son moved to Dhaka, where he also benefited from the upheaval caused by the change of regime and transition to colonialism, buying up the estates of *zamīndārs* unable to keep up with the new rules and conditions. And so the family made its transition from trade to landholding. At the beginning of the nineteenth century, their reach extended further, and they began buying

[48] I have chosen not to add diacritics to the colonial-era terms that follow but instead retain the orthography in the Printed Papers. This is because any effort to impose a phonetic scheme on these Persian-Bengali synthetic terms is likely to be artificial and misleading. *Patni* was a tenure created in 1819 by one of the largest *zamīndārs* in Bengal, the Raja of Barddhaman. Shinkichi Taniguchi, "The Patni System – A Modern Origin of the the "Sub-Infeudation" of Bengal in the Nineteenth Century," *Hitotsubashi Journal of Economics*, 22:1 (1981), pp. 32–60. As such, it was an important instance of the colonial origins of the bewildering variety of intermediate tenures in Bengal, between the *zamīndār* who paid taxes to the government, and the peasant who tilled the soil. Each level entailed its own rights, obligations, transactions, and paperwork.

up estates all over eastern Bengal. With Abdul Ghani's succession to the estate in 1830, the transition to social respectability and eminence began in earnest. Abdul Ghani cultivated the friendship of the British on one hand and philanthropy on the other, all the while growing his estate and keeping the large and fractious family together. Having offered loyal support to the colonial regime during the uprising of 1857, he secured his position in the regime's good books, being nominated member of the (unelected) Bengal Legislative Council in 1866, later the Viceroy's Legislative Council. Many colonial honours followed, including the title of 'Nawab' in 1875. Meanwhile, he made many benefactions to religious and charitable causes in and around Dhaka, including the remarkably ecumenical one, given that he was a Sunni, of maintaining a Shīʿa *imāmbāṛa* (a building for gatherings to mourn and commemorate the martyrs of Karbala). A British official who spent many years in eastern Bengal noted how Abdul Ghani offered open audience every morning and afternoon, resolving disputes that then did not need to proceed to the law courts. The official said unequivocally, 'His will always remain one of the greatest and grandest figures in Eastern Bengal in the nineteenth century.' [49] It is thus no surprise that in 1906, Abdul Ghani's grandson Salimullah hosted the first meeting of the Muslim League, the most important Muslim political organization, later party, in British India and the principal force behind the formation of Pakistan.[50]

Thus Nawab Abdul Ghani was one of the biggest *zamīndārs* of eastern Bengal, and of a family that rose to wealth and prominence specifically by inhabiting and cultivating the conditions created by the colonial regime. With estates all over eastern Bengal, but a special family connection to Sylhet, where the family pioneer [51] was buried, it is unsurprising that Abdul Ghani had a *waqf* in Sylhet, adjoining the properties of Abdul Kadir and Abdur Rahman. Abdul Ghani's enormous prestige and power clearly extended to Sylhet, and exerted pressure over our principal protagonists. In their *waqf* deed, the brothers undertook to take Abdul Ghani's permission before making any changes to their *waqf*, and provided that in case of a failure of their own family line, Abdul Ghani or his family would appoint *muṭawallīs* to the *waqf* of the Sylheti brothers, preferably from their maternal line. After constituting the *waqf*, the brothers deposited their deed with the family of the Nawabs, who produced it in court

[49] Munshi Rahman Ali Tayesh, *Tawarikh-i Dhaka* translated to Bengali D.A. M.M. Sharuddin, (2nd edition, Dhaka: Dibya Prakashan, 2016), pp. 165-7; F. Bradley-Birt, *Twelve Men of Bengal* (4th edition, Calcutta: S.K. Lahiri & Co., 1910), pp. 173-83, at p. 183. Bradley-Birt was the Collector (District Magistrate) of Sylhet.

[50] M. Rafique Afzal, *A History of the All India Muslim League, 1906-1947* (Oxford: Oxford University Press, 2013), p.

[51] This ancestor was called Khwaja Abdul Hakim.

subsequently. Oddly enough, and in violation of *waqf* rules, the brothers took large loans from Abdul Ghani's son, Ahsanullah, secured on some of their *waqf* properties.

Things became complicated in the Sylheti family as Abdur Rahman's spending and borrowing escalated, and they began to find the *waqf* arrangement inconvenient. The brothers, acting together as patriarchs of a large extended family, arranged for Abdur Rahman's second son, Abul Fata Mahomed Ishak, also known as Fazlur Rahman, to marry a young girl called Fatima Banu, daughter of another *maulvi*. Until then, elders seemed well disposed towards the young man and his younger wife. Treating the endowed properties with considerable flexibility, they gifted some of them to the girl as her *mehr*, or dower. The first official step in revising the situation was in 1880, when the brothers agreed to exchange some of their un-endowed properties with those of the *waqf*; this was registered accordingly. The crux came, however, when in the following year, 1881, when the brothers decided that they had had enough of the *waqf* and decided to annul it. Later on, they argued that they had become aware of imperfections in the form of their endowment deed, especially the absence of the word '*sadqa'* (charity) in the deed itself. Here they drew on their fine-grained knowledge of the vagaries of Islamic law within the colonial legal system, specifically, that a recent High Court judgment had invalidated a *waqf* because of the absence of this particular word in the *waqf* deed. Citing that judgment, the brothers satisfied themselves that their own endowment was similarly void. The two brothers then proceeded to divide the estate into three parts, Abdur Rahman taking the first, Abdul Kadir the second, and the third retained as joint property.

And so this episode may have ended – considered a failed accounting exercise, relegated to the dusty record room of a *zamīndār's* household, and forgotten. However, the social dynamics that had led to the *waqf* effort in the first place refused to let it die. The two patriarchs may have abandoned their ambition of maintaining an undivided family estate for the benefit of their descendants, but their wives, sons and grandchildren had not. Moreover, Abdur Rahman became more and more careless with money; taking a series of large loans secured on the properties that had been endowed, and (at least in the brothers' view), divested. The largest loan was from Khwaja Abdul Ghani, the Nawab of Dhaka, also the safe-keeper of the *waqf-nāma* itself.[52]

Things came to a head by early 1888, when Abdur Rahman's son, Abul Fata, filed a case in the Court of the Subordinate Judge of Sylhet against his father, and against all those to whom Abdur Rahman had sold, mortgaged or transferred properties that had formed part of

[52] Kozlowski, *Muslim Endowments*, p. 91.

the short-lived *waqf*. Abul Fata argued that his father and uncle had no right to thus sell and squander property that had been made into a *waqf*, and that all the sales, mortgages etc. that he had undertaken were legally void. He also reminded his uncle, Abdur Kadir, that his 'share' of the estate was not his private property, but as *muṭawallī* of the waqf.

The old men said nothing in response, but one of the creditors, a Hindu woman called Parameshwari Chowdhurani, responded at this turn of events that the *waqf* was a sham and asserted that her transactions related to the property were all valid. Others similarly placed now piped up, in a rush to protect their purchases and loaned monies. They did not fare well; the judge decided that the *waqf* had been and remained a valid one, and that Abdul Kadir had misused properties that he had endowed, and those who had bought from or lent to him, had no claims on those properties. Naturally, all those people who had spent their money rushed to the Calcutta High Court to appeal against the judgment. Here they received better satisfaction. The judges considered the fact that the *waqf* had always been intended to primarily benefit members of the donors' own families, and on that basis, despite the activist judge Amir Ali's recent decision in another, similar case,[53] decided that the *waqf* invalid in the first place.

This was in 1891. Now the Abul Fata and his brothers decided to appeal to the highest court of the British Empire – the Judicial Committee of the Privy Council. They were given permission to do so since there was a substantial point of law involved (whether family *waqfs* were permitted in Islamic law) as well as a significant sum of money. In 1894, the Privy Council upheld the decision of the Calcutta High Court, deciding that *waqfs* in favour of one's own family were invalid. Abul Fata must have been left considerably out of pocket, since he failed to reverse his father's transactions, and was also directed to pay the considerable costs.

**The archives of the Judicial Committee of the Privy Council**

The decision made by the Privy Council entailed the production a complete set of 'Printed papers', containing the lawyers' written summary and arguments – the 'case' – for each party, the judgment, the royal order in council confirming the judgment, records of proceedings in all the lower courts, a list of exhibits and interrogatories admitted at those lower levels, and copies of the text of some of those exhibits. In the *Abul Fata* case, this amounted to a bound volume of 995 closely printed folio-sized pages.

This substantial record can be considered an archive unto itself, and it indeed was one, deliberately created for purposes of the legal event. As proposed in the introduction, this paper

[53] *Bikani Mia v. Sukh Lal Poddar* 20 ILR Cal (1893) 116.

considers that folio volume as a temporary archive, albeit one frozen in time, and derived from multiple living collections of records constantly produced and collated by lineage of the protagonists. In this section, however, we step in the other direction, in order to understand the broader archive of the Privy Council as a court within which the Printed Papers volume of the *Abul Fata* case is located.

The correct and full name of the Privy Council is the Judicial Committee of the Privy Council. The Privy Council was an irregular court, in the sense that it was a Tudor creation, consisting of the exercise of appellate judicial authority by the royal council of advisers. [54] While the jurisdiction of this ad-hoc committee expanded enormously with the formation of the British Empire in North America and later South Asia, the fact that it did not always include legally trained members caused much scandal in the nineteenth century. This eventually led to a protracted process of reform, creating a properly structured court, which consisted mainly of judges of the House of Lords, with the addition, first, of 'assessors' and later judges with colonial experience.[55] Statistically, undivided British-ruled India was the largest source of appeals to the JCPC, followed by Australia and Canada, but the final court of appeal of the British Empire was a genuinely global court, which jurisdictions stretching from Caribbean islands to a consulate court in Shanghai.[56]

The records produced by and for the Privy Council were various and voluminous. As far as India was concerned, appeals were received on an ad-hoc basis from the seventeenth century, until expressly permitted by Charter in 1726, for civil disputes of value over £400.[57] In those first fifty years, the records retained by the Privy Council in relation to the Indian cases are manuscript; they only consist of brief entries in registers recording the case and the

[54] David Swinfen, *Imperial appeal: the Debate on the Appeal to the Privy Council, 1833-1986*(Manchester, 1987); P. A. Howell, *The Judicial Committee of the Privy Council, 1833-1876* (Cambridge, 1979); G.C. Rankin, "The Judicial Committee of the Privy Council," *Cambridge Law Journal*, 7 (1939) 2-22. On law reform related to the JCPC, see Howell, *Judicial Committee*, pp. 23-71; R. Stevens, "The Final Appeal: Reform of the House of Lords and Privy Council 1867–1876," *Law Quarterly Review*, 80 (1964), 343–369; William Macpherson, *The Practice of the Judicial Committee of Her Majesty's Most Honourable Privy Council* (London, 1873).

[55] On assessors, see Howell, *Judicial Committee*, pp. 156-9.

[56] See the online catalogue of all Printed Papers of appeals between 1792-1998, https://privycouncilpapers.exeter.ac.uk/

[57] Mitch Fraas, "Making Claims: Indian Litigants and the Expansion of the English Legal World in the Eighteenth Century," *Journal of Colonialism and Colonial History*, 15: 1 (2014), online only.

decision, currently preserved at the National Archives in the UK in the PC2 series.[58] These registers continued into the 2000s as the Minutes of the Judicial Committee.

In the eighteenth century, the lawyers bringing the case before the Privy Council were required to print at their own expense their briefs of the case in a number of copies for distribution to the members of the Privy Council and the opposing counsel (these often included printed copies of evidence or judgments from earlier stages in the judicial process). Other scholars have digitized sealed copies of such proceedings, in relation to American appeals. [59] These Appellant and Respondent briefs seem to not have been retained centrally by the Privy Council until 1792 but individual judges of the Privy Council kept their copies and wrote notes on them (hence the Hardwicke collection of printed Privy Council briefs at the British Library and the Lee collection at Yale). It has been suggested that a clerk or some similar official began retaining copies of the submitted printed briefs around 1792 and binding them up later.[60] Thus the initial volumes of the 'Printed Papers' are minimalist – with only the lawyers' briefs of the two parties, the judgement and the confirmatory Order in Council. Statutory reforms of procedure between the 1830s and 1870s, standardized the paperwork, and included the transcript of proceedings, and vitally for us, record of exhibits at the previous stages.

A manual of procedure for Privy Council procedure, produced in 1900 summarized the rules for producing this paperwork from a host of statutes, regulations and Orders in council. Even in 1900, the rule that seemed to hold for producing the paperwork seemed to be the Order in Council of 1853. This provided that the Registrar or equivalent officer of the court from which the appeal was being sent, had to post a certified copy of the transcript of the proceedings, accompanied by a correct and complete index of all papers, documents and exhibits. This transcript could be printed 'abroad', i.e. in the colonies, and if so, two printed copies would be certified by the Registrar of the court sending the paperwork. Alternatively, the transcript could be printed in the UK by Her Majesty's printer or any other printer, the appellant or his agent paying the costs, which were capped. Clearly, the handwritten transcripts,

[58] Mitch Fraas, "The First Fifty Years of Privy Council Appeals from India," Anglo-Indian Legal History, http://angloindianlaw.blogspot.com/p/privy-council-cases-from-india-before.html

[59] For the American appeals, see Sharon Hamby O'Connor and Mary Sarah Bilder, *Appeals to the Privy Council from the American Colonies: An Annotated Digital Catalogue: Part 1* (Ames Foundation, 2014), *Law Library Journal*, 104 (1), at p. 86; and the website https://amesfoundation.law.harvard.edu/ColonialAppeals/

[60] Mitch Fraas, by email communication, 19 January 2021.

where received were also retained, because the Order also provided that the solicitors on both sides were permitted to have access to the original papers at the Council office.[61]

A large and continuous, if not complete set of these Printed Papers, ranging from 1792 until 1998, were, until 2011, housed in the Privy Council office and library at 10 Downing Street. Since then, with the creation of the UK Supreme Court and the re-location of the Privy Council to the new court building, these volumes, together with several other series of indexes, registers and minutes were in line to be acquired by the National Archives. Unfortunately, this process has remained incomplete. Meanwhile, incomplete sets of these Printed Papers were retained at various libraries in the UK, most importantly the British Library, which has a set running from 1862-1998, the Institute of Advanced Legal Studies and the libraries of the Inns of Court in London. In addition, there is a host of relevant materials scattered over libraries worldwide, such as the notes of judges who served on the Privy Council, privately printed reports of cases, and after the 1860s the various Law Reports (for the judgments). If we take a narrow, locational view, we should perhaps consider the Printed Papers and indexes housed at the court building itself until 2011 as the Privy Council's archive. In itself, this amounts to nearly 3 million pages, which forms a formidable narrative of the court itself. Looked at in this context, the Printed Papers of *Abul Fata's* case formed part of that story of imperial adjudication.

**The shape of a *zamīndār*'s archive**

Abul Fata's appeal to the Privy Council was simple; his father and uncle had made a *waqf* of their estate, but had subsequently violated the terms of that *waqf*, illegitimately treating it as their private property.[62] As such, the case his lawyer presented focused on one document – the *waqf nāma*. The argument of his father, uncle, and all those they owed money to or had sold properties to was more complex. Their lawyer argued that the brothers had never managed to make a valid *waqf*, that they had long abandoned the aspiration to do so, and that their actions subsequent to their change of heart demonstrated that they had always intended to continue to treat their properties as an ordinary *zamīndārī* estate. As such, a dizzying host of transactions and documents recording them were mentioned even in the necessarily brief statement of their case before the Privy Council. It appeared that already in 1874, i.e. within eight years of writing

[61] Thomas Preston and Robert Thomas Lattey, *Privy Council Appeals: A Manual Showing the practice and Procedure in Colonial and Indian Appeals* (London: Eyre and Spottiswoode, 1900), pp. 150-3.

[62] *Case for the Appellants*, in Printed Papers, *Abul Fata*, pages 1-13 of the PDF file.

the *waqf* deed, Abdur Rahman wrote out an *ijāra paṭṭa*, leasing out his share of lands to his brother Abdul Kadir, for a significant yearly rent, reciting in that document that the *waqf* had been revoked. This document was complemented by a document of acceptance or *kabuliyat*, signed by Abdul Kadir. Abdur Rahman then also pawned parts of his estate (or the *waqf* estate) to various individuals, including the Nawab of Dhaka, each such transaction generating a mortgage deed. In 1881, the brothers officially partitioned their estate with a partition deed. Further sales and mortgages followed, produced *iqrār nāmas* and mortgage deeds. As conflict within the family started boiling over, court cases and their records also started building up. [63]

Even in this short summary, the array of documents presented as evidence is bewildering, unless we step back from the legal dispute and examine the typical spread of documents in a *zamīndār's* archive. My book *Negotiating Mughal Law* provides an appendix of documents pertaining to a Mughal *zamīndār's* family from central India. It also offers two typologies of the documents – one formal, based on the emic nomenclature, often inscribed in the document itself, and the other functional, depending on what the document was intended to do. The book also proposes that each archive has its own documentary makeup, which depends on the social location (and connections) of the protagonists who created that archive.

Following that idea, and using data from that same appendix, we see that there were 20 types of documents in the Mughal *zamīndār* Purshottam Das's collection, if we group them just by their formal type, often written on the documents themselves. But in terms of what the documents did, they can be further grouped, as in the Table 1 below. Some glosses are necessary here – *farmāns*, *nishāns*, *parwānas*, and *dastaks* are imperial, princely, noble and lower official orders respectively. They are here functionally grouped with the much smaller number of petitions, letters and newsletters, for two reasons. The first is that the orders are indeed written in the form of letters to specific recipients, some of them creating specific entitlements but others confirming or revoking these, or indeed simply making other demands or giving other information related to the hierarchical relationship already established. They often refer to, and respond to petitions submitted. As such, those Mughal orders that acted as charters or deeds were of a piece with these other forms of communication, and that is why I have grouped them in the same functional category 'Orders and letters.' As for the category of 'tax contracts', the decision to treat them separately from other kinds of contracts rests of the special status of engaging with the state as opposed to individuals; on the simple matter of

[63] *Case for the Defendants*, Printed Papers *Abul Fata*, pages 15-23 of the PDF file.

enforcement, the procedures were for violation of tax contracts were different, more severe and swifter.

| **Orders and letters** | **Tax contracts** | **Contracts** | **Court Documents** | **Administrative** |
|---|---|---|---|---|
| Copies of *Farmān* | *Qaul qarār-i paṭṭā-yi ijāra* (Contract of tax) | *Hiba-nāma* (Gift deed) | *Sanad* recording *qāẓī's decision* | *Chak nāma* (Measurements of land) |
| *Nishān* | *Muchalka* (Agreement) | *Tamassuk* (Deed acknowledging a debt or other obligation) | *Maḥẓar nāma* (Written testimony) | Account books |
| *Parwāna* | *Qabuliyat* (Deed of acceptance of a contract) | *Fārigh-khaṭṭī* (Deed of emptying of obligations) | | |
| *Dastak* | | *Iqrār* or *iqrār-nāma* (Generic – binding declaration) | | |
| *Khaṭ/Kharīṭa* | | *Rāẓī-nāma* (Deed of agreement – of any kind) | | |
| *Iltimās* | | | | |
| *ʿArzdāsht* | | | | |
| *Akhbarāt* | | | | |

**Fig. 1 Typology of Documents in the Purshottam Das collection**

For a brief comparison, we can also look at the much smaller documentary collection of a Hindu religious institution in the Punjab, at a place called Jakhbar, which was endowed with

grants from the sixteenth century, starting with grants from emperor Akbar (r. 1556-1605 CE). This monastery of *nāth yogīs*, or rather, the head of the monastery, the *mahant*, were awarded various tax-free lands in the form of *madad-i maʿash* and *ināʿm* grants, at least from 1571 CE onwards. These grants were added to and confirmed by, not only subsequent Mughal emperors and nobles, but also, following the decline of Mughal control in Punjab, by Sikh *misldārs*.[64]

In the 1960s, the historians J.S. Grewal and B.N. Goswamy collected documents from the monastery in Jakhbar, transcribed, translated and published them. Looking through the small collection of 17 documents, we have the following types:

| **Orders and letters** | **Tax contracts** | **Contracts** | **Court Documents** | **Administrative** |
|---|---|---|---|---|
| Copies of *Farmān* | | *Rāẓī nāma* (Deed of agreement – of any kind) | | *Chak nāma* (Measurements of land) |
| *Farmān* | *Muchalka* (Agreement) | | *Maḥẓar-nāma* (Written testimony) | *Yad Dāsht* |
| *Parwāna* | | | | |

If we now compare the numerical distribution of these formal and functional document types across these two collections, we get this picture below.

[64] On the parcelling out of the Mughal Punjab province among Sikh *misldārs* in the eighteenth century, prior to the rise of the unified Khalsa kingdom of Ranjit Singh, see Purnima Dhavan, *When Sparrows became Hawks: The Making of the Sikh Warrior Tradition* (New York: Oxford University Press, 2011).

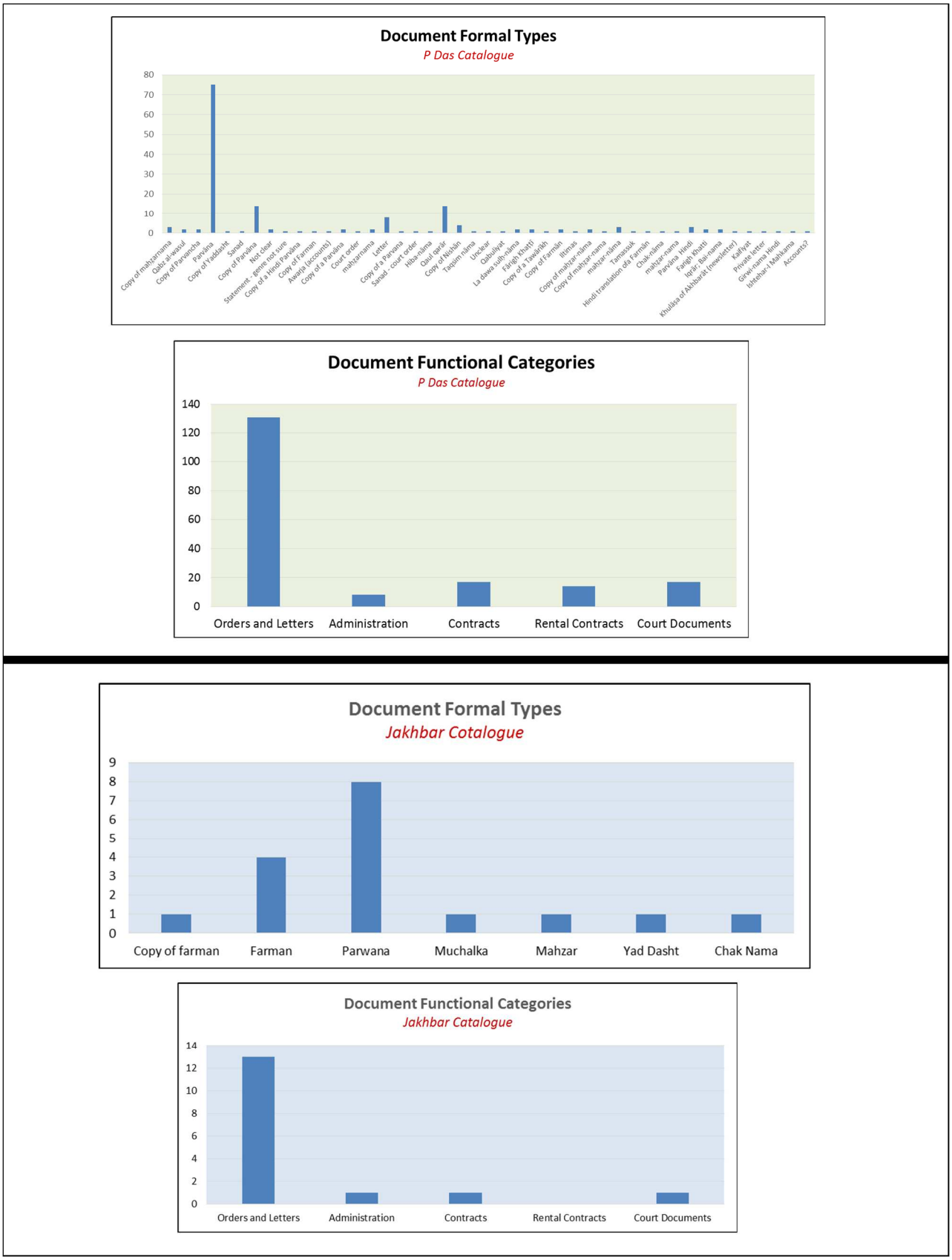


**Fig. 2 Comparison of types of documents in two Mughal-era collections**

What should be clear from these charts is the overwhelming preponderance of documents of order in these two Mughal collections. The orders included those from the emperor and from Mughal imperial nobles and later independent rulers, and were clearly preserved because they created titles to property and other entitlements for the recipients. The protagonists in these two cases may well have discarded many other documents that were produced and even preserved for a short while.[65] Letters of primarily inter-personal relevance are absent in these two collections, and may have not made the cut because of their limited probative value. However, this was not universally true of all household archives from the Mughal empire or beyond in South Asia: what we might call administrative correspondence survived in the form of prolific *khatut-i ahl-i karan*, written and received by employees of the most important Mughal Rajput nobles, those of the Kacchwaha lineage (later the Jaipur state).[66] Eighteenth-century Marathi Brahmin households with diverse portfolios in money-lending, revenue contracting and diplomatic negotiation, regularly preserved interpersonal correspondence, in addition to documents with clear probative value. However, much of this correspondence was with government officers or concerning fiscal or revenue matters. But since the same letter might touch on an impending battle, goods to be delivered, and the movements of family members, it is difficult separate out the personal from the professional.[67] Other obvious targets of such documentary weeding must have been the records of petty contracts, as well as routine administrative records. What was generally considered worth hanging on to consisted of the originary orders, creating entitlements. In any case, being at the severe end of the curating spectrum, the Mughal collections we have compared had the nature of reliquaries rather than archives,[68] museumising key high-value documents and looking upwards towards royal munificence, rather than downwards towards the routine and every day.

Let us now dive deep into the Abul Fata archive. Together, the two parties filed a total of 570 documents as exhibits. If we order these documents by their formal types, we

[65] As Marina Rustow has powerfully argued, to understand archives, we need to pay as much attention to the destruction of records as their creation and preservation. Marina Rustow, *The Lost Archive: Traces of a Caliphate in a Cairo Synagogue* (Princeton: Princeton University Press, 2020).

[66] A Descriptive List of the Khatoot Ahalkaran (Rajasthani) 1633 to 1769 (Bikaner: Rajasthan State Archives, 1992).

[67] Dominic Vendell, "Politics at a Distance: Diplomacy and Merchant Networks at Eighteenth-Century Maratha Courts" paper presented at the Conference "Professions in Motion: Culture, Power, and the Politics of Mobility in Eighteenth-Century India," Trinity College, Oxford, June 1-2, 2017.

[68] I thank the historian of English law, Paul Halliday, for suggesting this to me.

immediately see the very different documentary landscape, compared to Mughal times. Where collections derived from Mughal times were dominated by imperial and noble orders conferring grants of various kinds, the colonial *zamīndār's* collection was awash with *qabuliyats* (spelt in Anglo-Indian jargon as *kabuliyat*), which were contractual agreements between the *zamīndārs*/ *muṭawallīs* and their tenants. *Kabuliyats* are semi-recognisable from Mughal times, and there are several in the Purshottam Das collection. However, Mughal-era *kabuliyats* tended to be between the *zamīndār* and a noble or a state authority; in the Abul Fata archive the *kabuliyats* point downwards – they are all rental agreements with those that rented farming lands from the *zamīndārs*. There were also some usual contractual documents, such as *mukhtār nāmas* (letters of attorney); *iqrārs* (legally binding declaration, usually for sales) and partition deeds. We also see a much greater volumes of documents related to court processes, even if we could see plaints, statements and decrees having equivalents in the Mughal cases.

However, the Abul Fata archive presents a number of documents that have no equivalents in the Mughal collections. These include both individuated documents, as well as extracts from various kinds of registers and record series. With names such as *chittha*, *goshwara* and so on, the terms and the kind of materials and processes they represented would be completely incomprehensible unless one is immersed in the processes of landholding and *zamīndārī* administration in colonial India. Curiously enough, despite the tremendous importance of *zamīndārs* in the history of Bengal, no complete set of *zamīndārī* papers have been catalogued and made available for research. It is possible that the abolition of *zamīndārī* in India in 1950 and the tremendous dislocation incidental upon the partition of India (in 1947) and the Bangladesh war of independence (in 1971) has ensured thorough disposal of what must have been mountains of paperwork, if Abul Fata's archive is anything to go by. Fortunately for us, we have a manual from 1823, produced by a British colonial official, offering us a close look at the documents in a Bengali *zamīndār's* office. [69] The glosses this manual produces, together with the multiple sample documents, tell us of the kinds of administrative documents constantly produced and preserved in a *zamīndārī cutcherry* – the *chittha* a detailed account of all lands in the *zamīndār's* estate, organized village by village; the *goshwara* a summary of all the *chitthas*; the *khuttian* a record of the lower tenants and their tenures; the *terij* the same list as the *khuttian* but without the uncultivated lands; the *ekwal* a detailed measurement of the

[69] D. Carmichael Smyth, *Original Bengalese Zumeendaree Accounts, Accompanied with a Translation* (Calcutta, 1829), pp. 1-16.

lands under such tenures. On all of these was based the rental demand, called *jamaʿ bandī*, and the annual *zamīndārī* register probably kept track of all these demands, payments, and arrears.

The sample documents in the early nineteenth-century manual are in Bengali, replete with words derived from Persian, but all orthographically and phonetically modified, and often with very specific usage in Bengali revenue terminology. The documents in the Abul Fata archive must have been like those in the samples, but in this case we only have the English translations available to us.

| **Orders and letters** | **Tax contracts** | **Contracts** | **Court Documents** | **Administrative** |
|---|---|---|---|---|
| NONE | *Kabuliyat* (Deed of acceptance of a rental contract) | *Waqf nāma* (Endowment deed) | Court decrees | *Chittha* (Measurements of land) |
| | *Patni patta* | *Iqrār* or *iqrār nāma* (Binding declaration) | Written statement | *Goshwara* (summary of *chitthas*) |
| | | Sale deed | Copy of plaint | *Khuttian* |
| | | Partition deed | | *Terij* account |
| | | Mortgage deed | | *Lotbundi* |
| | | | | Annual *zamīndārī* register |
| | | | | *Dharat book* |
| | | | | *Dowl* |
| | | | | *Towzi* |
| | | | | Copy of notice of ejectment (of a tenant) |
| | | | | Various petitions |

**Fig. 3 Typology of documents listed as exhibits in the Abul Fata case**

If we now perform the same kinds of computation as on the Mughal *zamīndārs*' documentary collections, what emerges most obviously is the complete absence of royal and noble orders or

any equivalent of such in the colonial archive. Royal grace was no longer the source of property rights. Instead, the foundational document in the Abul Fata archive, if we can call it that, was the deed of *waqf* - a personal transaction.

Numerically, Abul Fata's archive was dominated by *kabuliyats*, or rental agreements with tenants. I have not seen a single such sub-*zamīndārī* rental contract from before the nineteenth century. While of course further research might reveal that such written agreements between *zamīndārs* and peasant tenants did exist even in Mughal times, I propose for now that this was a colonial innovation. What used to be a largely unwritten and customary system of nested rights in land, had been severely disturbed, if not decimated, the Permanent Settlement of 1793, by which the colonial government, looking to devise the simplest, stable and most extractive system of land revenue, had handed complete property rights to Bengal's *zamīndārs*, wiping out the many customary tenures that lay underneath.[70] Following a century of agrarian unrest, this had been partially reversed by the passing of the Bengal Tenancy Act and its several amendments, which created the requirement of administrative recording of tenants' tenurial rights.[71]

And so Abul Fata's archive was replete with copies of administrative records, produced at and beyond the *zamīndārī.* They bore names and lexicons that may have been Persian-derived, but which attested to the novel ways in which property and status were inscribed in documents of probative value. Given the requirements of the colonial judicial processes, and especially the Bengal Tenancy Acts, documentation of administrative processes were important for *zamīndārs* – we could say that administration itself produced right-bearing deeds. Abul Fata's archive was testimony to the active seeking of such administration-derived-documents by his father, uncle, and above all, their business agent, Hilaluddin Ahmad. Contrast this with the Mughal era, when *zamīndārs* focused on their own rights – their grants, their tax contracts with the state, and their most significant inter-personal contracts – rather than seek to record their relationship with their subordinates in writing, or to seek copies of portions of revenue rolls for their reference.

There must of course have been many other documents in the *zamīndārī* office of Abul Fata's father and uncle that did not make the cut for this particular collation. However, it is

[70] Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Paris: Mouton, 1963).

[71] The Bengal Tenancy Act VIII of 1885, The ideological of this legislation is discussed in Andrew Sartori, *Liberalism in Empire: An Alternative History* (Berkeley: University of California Press, 2014), pp. 86-9.

striking that neither Abul Fata nor his legal opponents – his father, uncle and their creditors – presented evidence of the original titles to the *zamīndārī* itself. In any dispute in the Mughal period, the first document that would be produced would be the royal or other grant whereby such a title had been acquired by a landholder. Of course, Abul Fata's family had acquired their estate through purchase. But even so, it is striking that in the enormous number of exhibits presented, those original deeds of purchase were not included. Instead, everybody looked horizontally and downwards, mapping the economic behavior of Abdur Rahman and Abdul Kadir, with each other, with their family members, with tenants, with creditors and towards buyers – to establish their intended and actual status in law.

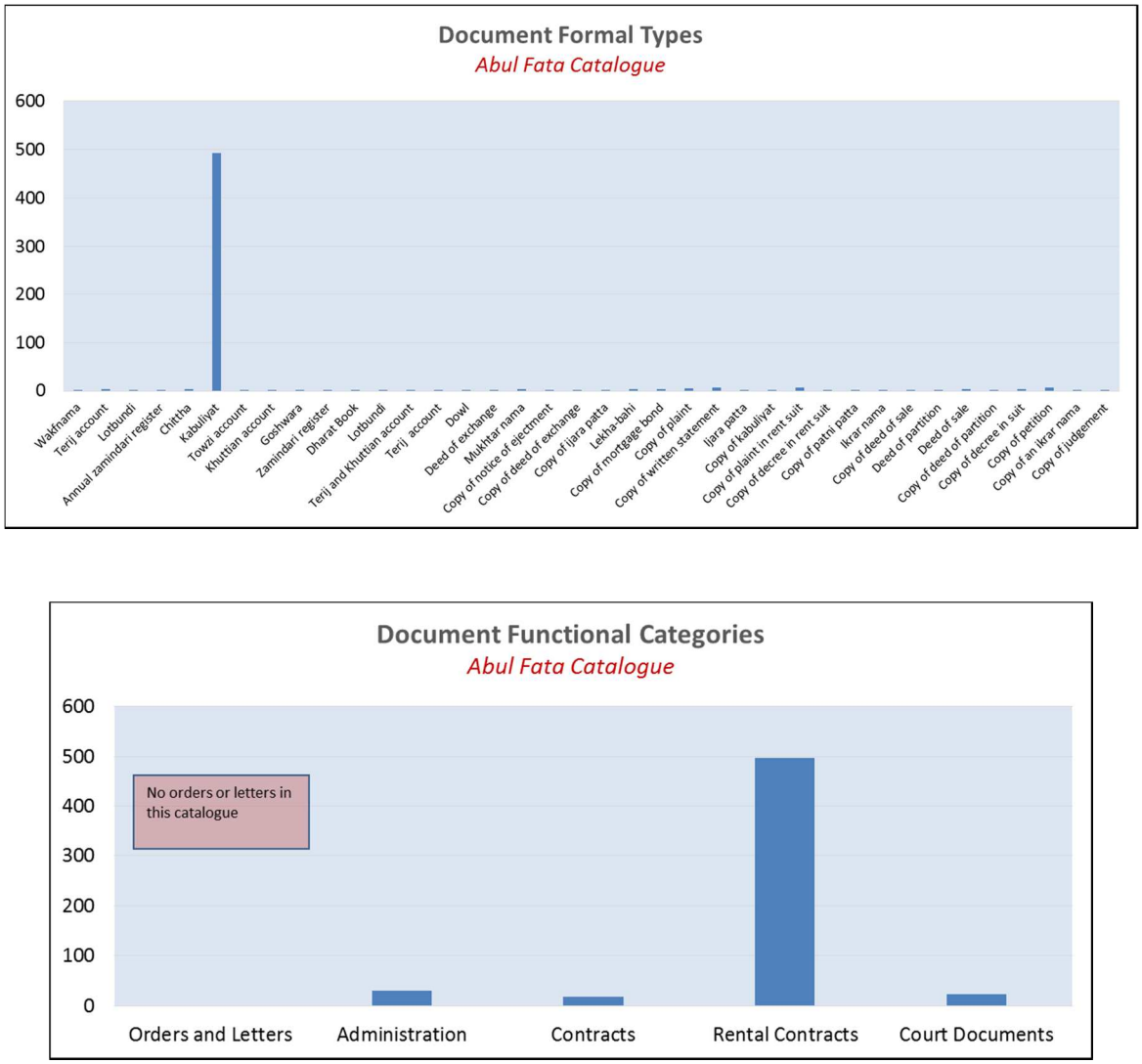





**Fig. 4 Typology of documents isted as exhibits in the Abul Fata case: visualisation**

**Conclusions**

In this paper, I have attempted to look at the official dossier of a colonial legal dispute in order to take a fresh look at colonial archives, and step beyond the notion of a single to uncover the multiple agents, imperatives and logics that underlay the colonial repository. I have argued not just that such other documenting logics and practices persisted through the colonial period in South Asia, but also that the stability and coherence of colonial archives is frequently a chimera, the product of a state-centric imaginary of the archive. Specifically, I have proposed that the voluminous Printed Papers of the Privy Council, the final court of appeal of the British Empire, offer windows frozen in time, into the patterns of paperwork in multiple other locales, including Muslim *zamīndārī* households in colonial Bengal.

From here, I have proceeded to offer some basic findings about the nature of and evolution of household archives in South Asia, from pre-colonial to colonial times. Firstly, I demonstrated the continuance of Indo-Islamic contractual forms for inter-personal transactions such as sales and mortgages. The classical *iqrār* remained the accepted form for recording sales, even if the legal and judicial settings were no longer Islamic in any substantive way. Secondly, and more importantly, I pointed to the the complete and utter shift in social vision underlying the altered documentary spread in the archives of landed lineages. Where once South Asian landlords would have looked upwards, towards the king, custom or public memory for confirmation of their own rights, they now turned to contracts with equals and subordinates and towards registers of routine administration.

Abul Fata's was a modern archive, and it was inflected with colonialism, but it was not a colonial archive; it was still a family of *zamīndārs* telling stories about themselves. Only the character types in that story were different from Mughal times: instead of princes and saints, there were pious Muslims, peasants and profit-makers.