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Religious endowments and trusts law in colonial India

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I. Introduction

In his speech introducing the draft Indian Trusts Bill, Whitley Stokes, president of the law commission for India and the Bill's chief draftsman, described it as part of a process to adjust the common law to Indian conditions. Stokes argued that Indian law had imported 'English rules ill-suited to Oriental habits and institutions' as a result of judges following unadapted English precedent.[1] The solution to the problems this had created lay in legislation which could adapt English law to meet Indian needs. Quoting Henry Maine,[2] he described the adaptations contained in the Bill as fulfilling the colonial government's project of creating 'a system of codified law adjusted to the best Native customs and the ascertained interests of the country'.[3] Yet, as this chapter will show, the process of adapting trusts law to Indian conditions was anything but straightforward, both in terms of the adjustments it entailed and in terms of the actual outcomes it produced. On a deeper analysis, it poses two puzzles whose importance extends well beyond the specific context of trusts law in India.

The first puzzle is the very fact that trusts law was sought to be adapted to fit the Indian context. As Alan Watson pointed out in his foundational work on legal transplants, a key factor in the transplantation of a legal institution from one jurisdiction to another is its ability to offer tools that users in the receiving jurisdiction believe to be convenient or attractive ways of responding to real legal questions or challenges.[4] Trusts law, however, is built on ideas, concepts, and distinctions that lack the universality that characterise other areas of private law such as contract: there is, as Maitland famously put it, nothing quite like it in any other legal system.[5] What, then, were the unmet legal needs in colonial India that trusts law was seen as having the potential to meet? What was it about the trust that led to it appearing attractive in the social and cultural conditions of nineteenth-century India?

The second puzzle relates to the failure of what was intended to be the central pillar of the adaptation of trusts law to India. The primary innovation of the Indian Trusts Act 1882 was its reworking of the conceptual underpinnings of trusts to eliminate their dependence on the distinction between legal and equitable title—a distinction that colonial governors were keen to avoid introducing into Indian law. Yet, as prior work has shown, this attempt at adaptation failed. Despite careful drafting, the idea of equitable ownership rapidly came to be embedded in Indian trusts law.[6] What, then, led to this failure, and to Indian law importing the precise ideas that the Act sought to exclude?

These questions matter not just for our understanding of Indian trusts law, but also for the way in which we approach the introduction and adaptation of trusts law in other colonised

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[1] Governor General's Council Proceedings of 15 June 1881, *Abstract of the Proceedings of the Council of the Governor General of India: Vol XX, 1881* (Calcutta 1882) 149.

[2] BL IOR/C/138, HS Maine, 'The revival of the Indian Law Commission', 20 November 1875, 3.

[3] Proceedings of 15 June 1881 (n 1) 149-150.

[4] See eg A Watson, 'Aspects of Reception of Law' (1996) 44 American Journal of Comparative Law 345.

[5] FW Maitland, *Equity* (Cambridge, Cambridge University Press, 1910) 23.

[6] S Tofaris, 'Trust Law Goes East: The Transplantation of Trust Law in India and Beyond' (2015) 36 Journal of Legal History 299.

jurisdictions. The question of how and why an institution as distinctively English as trusts came to take root in colonised jurisdictions is one that holds important lessons for our understanding of the colonial reception of common law and the (in many ways still ongoing) process of its adaptation to the new social and cultural context presented by the receiving state. The argument of this chapter is that the answer to these questions lies in an older, and less studied, aspect of the history of trusts law in India. The earliest use in India of concepts derived from trusts occurs not in the context of the Indian Trusts Act 1882 or the secular trusts that were its focus, but in statutes and regulations dealing with religious endowments. Long before the enactment of a general law of trusts, the language of 'trusts' and 'trustees', and ideas derived from the law of trusts, had come to find their way into rules dealing with Hindu religious endowments, as well as the practices of colonial administrators whose work brought them into contact with these bodies; and the problems and questions that arose in relation to religious endowments had come to be conceived of and regularly described in terms of trusts, trustees, beneficiaries, and intentions.

It is this dimension of the adaptation of trusts law to Indian legal needs—the use of trusts-like concepts in relation to religious endowments—that is the focus of this chapter. The central thesis of this chapter is that the transplantation and adaptation of trusts law shows the influence of two themes, one facilitatory in character and the other regulatory in character. Prior work has largely focused on the facilitatory theme, wherein colonial authorities sought to create a way to allow trusts to be used by British subjects in India (European as well as Indian) without having to also import into Indian law the distinction between legal and equitable title. This chapter demonstrates that a second and equally important theme in the development of trusts law was the regulatory use of the trust, instantiated in the use of rules and concepts taken from trusts law to regulate the management of the Hindu religious endowment. As this chapter shows, the need for both arose from a legal gap left by the erosion of pre-colonial legal and conceptual rules and frameworks, a gap that concepts and structures taken from the law of trusts were seen as ideally placed to being adapted to fill.

The chapter begins (section II) by discussing how colonial officials came to be involved in administering and resolving issues connected with Hindu religious endowments, by using the example of the interaction between temples and Boards of Revenue in colonial Madras. As it shows, the protection of temples was seen in pre-colonial constitutional theory as an important aspect of the proper role of kings, making it inevitable that colonial administrators would come to be concerned with them. The nature of the problems colonial administrators encountered made an analogy with trusts both attractive and useful as a tool not only for problem-solving but also for strategic action. It then moves (section III) to discussing how the conceptual framework provided by the law of trusts related to the pre-colonial jurisprudential framework within which Hindu religious endowments were created, organised and regulated. As I show, the status of these endowments was the subject of considerable legal debate in pre-colonial jurisprudence, encompassing theoretical debates about the legal nature and character of property as well as religious debates about the theological character of temple deities, and there was a significant, but poorly understood, gap between legal theory and legal practice. The result was that whilst concepts derived from the law of trusts rapidly came to be embedded both in administrative practices and in colonial legislation, their extension to religious endowments required a complex process of mutual adaptation (section IV).

Although the colonial government made several attempts to extricate itself from close involvement in managing religious endowments, its involvement not only endured but also

created a regulatory understanding of the trust which exercised significant influence over Indian law, and ultimately led to the emergence of the modern public trust as a distinct category. Equally, and despite a stated intention to refrain from altering the substantive rules of customary law in relation to traditional religious or charitable institutions, it led to the extension to religious endowments of principles taken from the law of trusts, such as the *cy-pres* doctrine, that had no counterpart in pre-colonial law (section V). The chapter concludes by arguing that this formed part of a broader trend in colonial India in which equitable concepts were used in legislation in order to give the courts power to deal responsively with social issues created by the gradual erosion of pre-colonial law.

II. Religious endowments and the imagined trustee: the origins of a metaphor

As the introduction has suggested, the career of the law of trusts in India began not with secular trusts but with attempts to deal with administrative problems created by Hindu religious endowments. In order to understand why colonial administrators found themselves drawn into these problems and why it was the law of trusts for which they reached in their quest to find a familiar and serviceable framework for responding to them, it is useful to begin by understanding the manner in which colonial administrators came into contact with these administrative problems—and, thus, the legal and social expectations to which they were forced to respond.

A. Regulating misuse: Kings, colonisers, and the management of endowments

At the start of the colonial period, the main legal framework relating to Hindu religious endowments was the law of gifts (*dāna*). Religious endowments were created by the making of a 'pious gift', under which a person bequeathed a portion of their property to be used for pious or charitable purposes. The making of pious gifts, in the general sense of a donation used for religious purposes, had a special significance in Hindu religious thought, and endowments were often made as a form of atonement for worldly sins. The purposes for which they were used was quite varied. Hindu law classified pious gifts into two: *iṣṭā* and *pūrta*. In origin, *iṣṭā* referred specifically to gifts given in the context of rituals of sacrifice while *pūrta* was a broader concept encompassing a range of types of pious liberality, but the precise scope of both classes evolved considerably as Hindu law developed.[7] By the colonial period, the received view among Indian jurists was that *iṣṭā* primarily referred to endowments for the purpose of hospitality—for example, rest houses along pilgrim routes, homes for widows, and so on.[8] *Pūrta* referred to a range of other endowments for religious work, ranging from the construction of hospitals for the sick to endowments associated with temples.[9] Endowments could be made for the construction of temples or of new shrines within existing temples, but they could also be made for the purpose of funding an aspect of the daily rituals associated with the worship of a deity in a temple. An endowment could, for example, be made to support the daily sweeping and cleaning of temples, for the presentation of temple offerings, for the regular carrying out of particular prayers or rituals, and so on. Equally, they could be made to construct, repair, or maintain temple tanks or wells, to plant or maintain sacred

[7] For an overview, see R Thapar, 'Dana and Daksina as forms of exchange' (1976) 13 *Indica* 37.
[8] Prannath Saraswati, *The Hindu Law of Endowments* (Calcutta, Thacker Spink & Co, 1897) 18—25.
[9] Ibid 25—27.

groves of plants or trees, to acquire or maintain sacred animals such as cows, bulls, or elephants, or to support scholars or priests within a temple or religious institution.[10]

Pre-colonial Hindu law on religious endowments, at least in the form recorded in texts, was concerned more with the disposition of property than the management of endowments. Examples of questions discussed included the question of when property owned by a Hindu undivided family could be the subject of a pious gift, whether an intention to make it the subject of a pious gift made it impartible, whether the making of a pious gift was within the capacity of a widow if there was a spiritual benefit to her deceased husband, the extent to which the making of a pious gift was subject to or exempt from the standard rules of Hindu law in relation to capacity, the distinction between an absolute donation of property and a donation of the proceeds of property, and so on.[11]

Beyond that, however, classical Hindu law texts had relatively little to say in relation to how properties should be managed, how disputes in relation to an endowment were to be resolved, who had standing to complain and what gave them standing, or what sort of duties the persons who managed or ran an endowment had beyond their religious obligations to the temple or its presiding deity and to whom these obligations were owed. The peculiar silence of the texts on what was almost certainly a real problem is at least partially explained by the fact that in practice, the task of dealing with issues with this type appears to have been seen as being within the domain of the obligations of kings. Rulers had a duty to uphold customary practices to the extent they were consistent with law, including customs in relation to the management of endowments. In addition, mediaeval legal texts such as the *Mitākśarā* suggest that kings and local 'petty' rulers were seen by virtue of the position they occupied as having an obligation to protect all religious institutions within their realm,[12] an obligation which included both a negative obligation to refrain from appropriating revenues from endowments[13] as well as a positive protective obligation which extended to resolving disputes and taking action against persons who were held to have misappropriated property that was the subject of an endowment. This was not simply a theoretical matter. Epigraphical and textual sources from the pre-colonial period demonstrate that complaints and disputes in relation to the management of endowments were regularly brought to kings for resolution.[14]

It was the relationship between the obligations of the ruler as traditionally conceived and the protection of endowments that led to colonial authorities being drawn into the management of Hindu religious endowments. Colonial records from the late eighteenth and early nineteenth centuries suggest that two factors lay behind their growing role in managing endowments. The first was their attempt to entrench their rule by depicting themselves as providing good governance and, thus, demonstrating to their subjects the 'happy distinction between British generosity and justice and Mohammadan rapacity and sacrilege', as one official put it.[15] The sectarian overtones of this statement were not disingenuous: district level

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[10] Ibid 27—28.
[11] Ibid 154—176.
[12] *Mitākśarā* II:186
[13] *Śukranīti* IV:2:V:9
[14] See eg the examples discussed in G-D Sontheimer, 'Religious Endowments in India: The Juristic Personality of Hindu Deities' in *Essays on Religion, Literature and Law* (Manohar, New Delhi, 2004) 38-40.
[15] *Board of Revenue Consultations*, 26 February 1802, vol 311, p 2094 (Tamil Nadu State Archives, Chennai), quoted in CY Mudaliar, *State and Religious Endowments in Madras* (Chennai, University of Madras, 1976) 15.

officials appear to have genuinely believed that the management of endowments had, through 'abuses that everywhere prevailed', degenerated into 'an empire of anarchy, soothed by the insidious conceits of premediated deceit'[16]—a state of things that they ascribed to the endowments' 'usurpation … by the Mussulman Government and its managers.'[17] Providing good governance required the colonial government to take on functions that had traditionally been performed by local rulers which, in turn, meant inevitably that the colonial government had to concern itself both with the stability and sustainability of endowments themselves and with disputes in relation to the manner in which they were used or applied by bringing them 'under the immediate care of the Collector'.[18] As an official in the Madras Presidency put it in the early nineteenth century, the government had given 'implied pledges of protection and support' to its Indian subjects which required it to intervene to defend religious endowments against misappropriation.[19]

This was given added force by a second, and not unrelated, impetus, namely, the work of revenue boards. The collection of revenue was from an early date an important aspect of the work of the East India Company in colonial India. The Company's approach to establishing British-governed bridgeheads in locations that were important for trade led to its acquiring concessions from pre-colonial rulers, which carried with them the right to revenue collection. Given the importance of religious institutions in Indian society, and the economic value of the holdings of the richer institutions, this inevitably brought revenue boards into contact with religious institutions and endowments, as well as with disputes in relation to how institutions were run which they, as rulers, were expected to resolve.[20]

These factors meant that the colonial administration, and particularly administrators at the provincial or district level, found themselves dealing quite regularly with disputes in relation to the management of religious endowments. Like the Indian rulers they displaced, the key concerns they faced were, firstly, the loss of property which formed part of these endowments as a result of its alienation by the persons who managed the endowments and, secondly, allegations that endowments were being misappropriated or misapplied.[21] It was as part of their attempt to find ways of resolving these disputes in a manner that was acceptable to the communities they governed that colonial administrators in India sought to adapt the conceptual tools provided by the law of trusts to the context of Hindu religious endowments.

B. Responsiveness and strategy: the pragmatics of an analogy

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[16] *Madura District Collectorate Records*, 26-28 January 1802, vol 1248, Hurdis to Petrie, para 31 (Tamil Nadu State Archives, Chennai), quoted in CA Breckenridge, 'The Śri Mīṇākṣi Sundarēṣvarar Temple: Worship and Documents in South India, 1833 to 1925' (PhD Thesis, University of Wisconsin-Madison 1977) 143.

[17] *Madura District Collectorate Records*, 26-28 January 1802, vol 1248, Hurdis to Petrie, para 26 (Tamil Nadu State Archives, Chennai), quoted in Breckenridge (n 16) 143.

[18] Letter of the Madura Board of Revenue of 3 January 1803, quoted in JH Nelson, *The Madura Country: A Manual Compiled by Order of the Madras Government*, vol 4 (Madras, Asylum Press, 1868) 130.

[19] *Board of Revenue Consultations*, 1 October 1838, vol 1628, p 12858 (Tamil Nadu State Archives, Chennai), quoted in K Nirmala Kumari, *History of the Hindu Religious Endowments in Andhra Pradesh* (New Delhi, Northern Book Centre, 1998) 39.

[20] For an overview, see CY Mudaliar, *The Secular State and Religious Institutions in India: A study of the administration of Hindu public religious trusts in Madras* (Wiesbaden, Franz Steiner Verlad, 1974) 1—12.

[21] Both were exhaustively documented in a major report by TB Hurdis, District Collector of Madura, to the Board of Revenue. See the discussion in Nelson (n 18) 122—123.

Unlike their Indian predecessors, colonial administrators neither knew nor had any easy way of accessing the intellectual and cultural framework which underpinned the manner in which pre-colonial rulers had exercised their powers of supervision and control over the use and maintenance of endowments. That framework was built on a large body of practice, which had its origins not only in ideas as to the nature of kingship and the social role of the king, but also in the manner in which property, ownership, and religious endowments were conceptualised in pre-colonial Indian legal thought. At an early date, administrative officials appear to have began drawing on analogies with trusts in deciding how to resolve these disputes. None of the extant sources explain precisely what led to them using these analogies, but the law of trusts appears to have provided administrators with a set of intellectual resources that were useful in at least two distinct ways. The first was that trusts law had the ability to provide effective solutions to the type of problems that were encountered in practice. Secondly, trusts law also did so in a way that provided rhetorical tools that helped to mitigate political pressures which India-based administrators faced from their superiors in London.

To begin with the first, thinking about endowments as a type of trust provided a useful way of defining the problem and, thus, of identifying possible types of action that colonial officials might take. The fact that issues connected with endowments were being dealt with by Boards of Revenue meant that they were in effect being handled by district-level administrators who lacked the understanding of local customs and the embedding in local networks that native rulers had in the pre-colonial period. It was, for example, a known practice for individuals to make a nominal gift of land to a temple without having any intention of actually transferring to the temple the benefit of holding that land, for the sole purpose of bringing that land under the temple's protection.[22] In consequence, if a complaint was made to a Board of Revenue that 'self-appropriation of temple funds' by the persons charged with administering them had caused 'ceremonies to be laid aside, and lesser servants to relinquish their duties' (as in fact happened in the Madurai District Collectorate in 1802),[23] the officials who had to deal with this dispute lacked the cultural context to understand the significance of the actions that were the subject of the complaint, the historical knowledge to locate those changes within the context of broader shifts in religious practices, and the social context to understand the interpersonal dynamic that underpinned the complaint. Against this background, the conceptual framework of trusts law and the duties of trustees provided an intuitive way in which to analyse allegations that funds had been misappropriated or mismanaged, or that the funds were not in fact supporting the activities they were intended to support; as well as a useful framework to identify solutions to these allegations.

Secondly, thinking about the issue in terms of trusts law also appears to have been helpful as a way of structuring and legitimising government action. Colonial authorities perceived their actions in relation to religious institutions as being open to objections on two fronts. Firstly, they were potentially vulnerable to being characterised as the actions of foreign rulers by Indians whose interests were affected. As discussed above, the colonial government believed that India's erstwhile Mughal rulers had been perceived precisely in this light, and it was anxious to avoid creating a similar perception itself.[24] Secondly, and more pressingly, as Section III discusses in more detail, actions that were seen as supporting Hindu religious

[22] See eg Nelson (n 18) 123.
[23] *Madura District Collectorate Records*, 26-28 January 1802, vol 1248, Hurdis to Petrie, para 34—35 (Tamil Nadu State Archives, Chennai), quoted in Breckenridge (n 16) 143, 145.
[24] Mudaliar, *Secular State and Religious Institutions in India* (n 20) 7.

practices were frequently opposed to or criticised by officials in Britain, on the basis that they undermined support for the British rule by interfering in native institutions, or alternatively that they supported what many in Britain regarded as false religions. This dimension became increasingly important with the growth of Christian revivalist movements in nineteenth century Britain, and colonial officials in India came under growing pressure from the Court of Directors of the East India Company to terminate all activities that might 'promote the growth and popularity of superstitions, the prevalence of which every rational and religious mind must lament'.[25]

Against this background, the idea that colonial authorities were doing no more than exercising powers of superintendence over the Indian equivalent of a public trust offered a powerful tool to justify their continued involvement with these institutions. The focus trusts law placed on the intentions of the donor or settlor reinforced this, making it straightforward for colonial administrators to respond to criticism from Britain by saying, as an official in the government of Madras Presidency put it in 1803, that:

> 'If the donation be made under the trust of a particular person, Government does not interfere further than in right of its general superintendence to see that it be appropriated as intended by the donor.'[26]

These aspects of the interaction between the colonial administration and its Indian subjects explain why concepts and principles derived from the law of trust came to be seen as a set of intellectual sources that could appropriately be applied to religious endowments.

Nevertheless, it leaves open two questions: firstly, how good a fit trusts law was, and secondly, why it came to be accepted by Indians connected with temple endowments as an appropriate framework within which to resolve the types of issues that arose in connection with them. The answer to these questions is complex, but also important. As the next section will show, colonial administrators and jurists largely misunderstood the manner in which religious endowments were conceptualised and discussed in pre-colonial legal thought and, in consequence, what the strengths and limitations of trusts law were as a mechanism to regulate their management. Similarities and differences went equally unrecognised, with the result that it was not only the law of trusts that had to adapt to fit Hindu religious endowments. The endowments, too, had to adapt to fit the manner in which they were regulated by the law of trusts, and that process of mutual adaptation holds broader lessons for the manner in which we analyse the reception of trusts law in colonised jurisdictions.

III. Owners, gods, and things: Religious endowments in pre-colonial jurisprudence

Pre-colonial legal thought described Hindu religious endowments as '*devasvaṃ*', literally, 'god-property'. The legal nature and incidents of *devasvaṃ* had been the subject of extensive theoretical and jurisprudential discussion since at least the ninth century CE. Two strands of this debate are of particular relevance to analysing the nature and extent of the adaptation that was required for the law of trusts to be capable of application to religious endowments. The first strand relates to the legal character and understanding of property that prevailed in

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[25] *Dispatch from the Court of Directors to the Governor General of India*, 20 February 1833, para 31, printed in House of Lords, *Papers respecting the Pilgrim Tax and the Employment of Christian Troops in the Religious Processions and Festivals of the Natives in India* (HL 1838, 261) 3, 8.
[26] *Board of Revenue Consultations*, 28 March 1803, vol 341, 3053—3061 (Tamil Nadu State Archives, Chennai), quoted in Mudaliar, *State and Religious Endowments in Madras* (n 15) 20.

pre-colonial Indian thought. Indian jurists had advanced a number of different theories of property, ownership, and the limits of the owner's rights over property, all of which had important implications for the way in which religious endowments were conceptualised and regulated in law and, thus, for how good a fit trusts law would be. In particular, a significant majority of jurists took the view that the powers of an owner over property were inherently limited, and that property could have multiple simultaneous owners.

The second strand relates to the question of how 'god-property' related to the deity, and whether the deity could in some way be said to have an interest in the property. This question was also the subject of significant jurisprudential and theological debate, which was in turn linked to debates as to the religious status of temple worship. There was a non-trivial gap between the positions taken by the elite jurists who produced the texts on which colonial lawyers relied and what appear to have been the actual rules of positive law that were administered in pre-colonial courts. The debate and its implications were poorly understood by colonial jurists and lawmakers, but the positions taken in it nevertheless had very significant implications for the relevance of trusts law as a way of thinking about and dealing with contested issues arising in relation to religious endowments and, thus, for the direction and extent of its adaptation.

A. Debating god-property: The sources, nature, and limits of divine ownership

Property in pre-colonial Indian legal thought was conceptualised not as a bundle of rights or interests as it was in England, but rather as a relationship (*saṃbandha*) between the thing that was owned (*svaṃ*) and its owner (*svāmin*). Indian jurists were essentially concerned with the nature of the 'propertyness' (*svatva*) that made something capable of being owned. The two aspects on which all jurists agreed were, firstly, that 'propertyness' was connected with the owner's ability to use the property to desired ends and, secondly, that a thing's 'propertyness' had to include within it principles that set limits on the uses to which an owner could put property. They differed, however, on three issues: first, the nature of the connection between *svaṃ* and *svāmin* that constituted *svatva*; secondly, where the limits of 'propertyness' lay, what their sources were, and the extent of the restrictions they placed on a *svāmin*; and, thirdly and even more significantly, whether 'propertyness' was a sui generis, intrinsically moral category that could be derived from scriptural sources, or whether it was a set of extra-moral, pragmatic principles that had emerged from custom and usage.[27]

The last of these was the key point of division from which the others emerged. Early scholars had discussed 'propertyness' in terms of the thing's usability to desired ends (*yatheṣṭaviniyogabhāva*[28] or *yatheṣṭaviniyojyatva*[29]), but by the ninth century it was broadly agreed that this definition was, on a literal understanding, overinclusive. Scholars who broadly belonged to the *Navyanyāya* school of philosophy took the view that 'propertyness' was a moral category which emerged from scriptural sources, that its use was limited by

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[27] The discussion in this section is based on the original Sanskrit texts of the sources cited. There have been two recent studies by Western scholars of property theory in pre-colonial India: ES Kroll, 'A logical approach to law' (PhD thesis, University of Chicago, 2010) and CT Fleming, *Ownership and Inheritance in Sanskrit Jurisprudence* (Oxford, Oxford University Press, 2020). Kroll and Fleming disagree in material ways in their reading of the relevant texts, but nevertheless between them give a good flavour of terms in which property theory was discussed and debated by theorists working within the Indian legal tradition.

[28] *Dvitiyavācaspatimiśra Nyāyatattvāloka* 2:1:34.

[29] *Pārthasārathimiśra Tantraratna* 4:2.

considerations of decorum (*aucitya*), and that the essence of 'propertyness' lay in the propriety of using a thing according to one's desire (*yatheṣṭaviniyogayogyatva*).[30] In contrast, other scholars took a broader view of property. To Vijñāneśvara, a 12th century commentator, and those who adopted his view, 'propertyness' had non-scriptural roots, and emerged from the fitness (*arha*) of using something to a desired end, with fitness not necessarily being connected to scripture but having a broader base. One consequence was that commentators from this latter school were open to recognising a number of innovations, one of the most important of which was the possibility of property having multiple owners, with the *svāmisaṃbandha* of one acting as a restraint on the others' ability to exercise powers ordinarily associated with ownership, such as alienation or disposal. In the context of family-owned land, for example, Vijñāneśvara argued that every member of the family became an owner by birth, and that their ownership limited the ability of the head of the family to dispose of the land.

This has obvious implications for religious endowments, but the situation was complicated by a long-running theological debate, which also spilled over into jurisprudence, as to the religious status of temple worship and the deities that were the subject of that worship. One school, referred to as *pūrvamīmāṃsā* or simply *mīmāṃsā*, denied the existence of deities as corporeal beings and, consequently, also denied that they were capable of owning property. Despite the use of the term '*devasvaṃ*', a religious endowment was not and could not in any real sense be the property of the deity. The other school, referred to as *uttaramīmāṃsā* or *vedānta*, affirmed the corporeal reality of deities and their ability to own property.

The philosophical tradition represented by *pūrvamīmāṃsā* was significantly more influential among jurists than *vedānta*, and legal texts therefore largely deny both the theologically existence of corporeal deities and their juristic capacity to own property. As a philosophical tradition, one of the core concerns of *pūrvamīmāṃsā* was the priority of sacrificial rituals and burnt offerings over temple worship. Whilst the arguments its proponents offered were partially a matter of theology—and, more specifically, concerned with the question of whether forms of worship prescribed in scripture had or should have priority over forms of worship derived from popular practice—the positions they took also drew heavily on property theory. Thus, for example, Śabara, an early *pūrvamīmāṃsā* philosopher, based his argument in favour of burnt offerings on the theological ground that deities did not exist as concrete entities and were mere verbal constructs to assist with sacrificial rites; but he also augmented this with the legal argument that deities could not logically be the recipients of offerings because they were incapable of ownership. 'Propertyness' was fundamentally dependant on the ability to use a thing to desired ends, and deities patently lacked this power. A deity did not decide how a field dedicated to it would be used. It was, rather, the temple priest, and it was therefore the priest who was the owner.[31] Śabara's views were influential, and to later more legally focused commentators such as Medhātithi, a tenth-century writer, their legal implications were obvious: a deity was incapable of having any relation to property as a *svāmin*, and *devasvaṃ* was only 'god-property' in the sense that it was dedicated to religious purposes. It was not, and could not be, the property *of* a god.[32] Subsequent commentators added to this a further argument: a pious gift could not in fact be a gift to a deity because a gift required an act of

[30] *Vācaspatimiśra Nyāyavārttikātatparyaṭīkā* 1:2:1.
[31] *Mīmāṃsāsūtra Śabarabhāṣya* 9:1:9.
[32] *Medhātithi manubhāṣya* 11:26.

acceptance, such as saying 'this is mine'. This was an act a deity, being only a verbal construct, was incapable of undertaking.[33]

The *vedānta* philosophical tradition took a very different view. Classical philosophers within the *vedānta* tradition wrote with the express goal of bringing the philosophy of religion into closer contact with popular religion and they accordingly took popular perceptions (*lokāḥ*) as being a valid source of knowledge, including in relation to the corporeal reality of deities and their ability to be the subject of pious acts.[34] Scholars working within this tradition tended to focus on philosophy rather than law, but the fact that it was more in tune with popular perceptions meant that it in practice tended to have a greater influence on the law than the works of legal theory produced by the *pūrvamīmāṃsā* tradition. Epigraphical evidence, particularly from Southern India where *pūrvamīmāṃsā* was significantly less influential than *vedānta*, shows that the conception of deities as being capable of ownership combined with the idea of multiple simultaneous owners (discussed in the previous section) to produce an understanding of *devasvaṃ* as representing ownership by a deity which could operate even though the property was in practice owned, managed, and enjoyed by a person or religious institution. It is, for example, not uncommon to see property described in inscriptions as being given *for* a deity *to* a priest.[35]

Equally, inscriptions also show that the law was in practice influenced by the theory that multiple ownership meant that the powers of one owner, such as the power to alienate, were necessarily limited by the *svāmisaṃbandha* of other simultaneous owners. The power of religious institutions to deal with property that was the subject of an endowment was, in consequence, significantly limited by the fact the property was seen as being vested in the presiding deity, thereby restricting the ability of the persons who actually ran or managed the institution to alienate endowed property.[36]

That this points to a significant gap between legal theory and the law as actually practiced should not come as a surprise in the context of an advanced legal system such as that of pre-colonial India. The modern English law of trusts presents us with numerous examples of divergences between what legal theory tells us the law ought to be and what the law really is. That pre-colonial India had similar divergences should not be unexpected, even if contemporary colonial legislators did not wholly appreciate the nature of the phenomena with which they were dealing.

B. Divergences and Convergences: Assessing the fit of trusts law

As the discussion thus far should have demonstrated, trusts law was an imperfect fit with the nature and needs of religious endowments, but it was nevertheless a fit. The imperfect character of the fit comes from the very significant divergences between the pre-colonial conception of religious endowments and the conception that emerged from trusts law. Thus, for example, the focus on the will of the grantor which, as we have seen above, characterised colonial administrators' responses to problems connected with religious endowments was a consequence of the reliance on an analogy with the trust. The pre-colonial conception of 'propertyness' as a relationship between *svaṃ* and *svāmin*, and its focus on use and desires in conceptualising the nature of that relationship, means that its focus was on the wishes of the

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[33] *Raghunandana Śuddhitattva,* cited in *Girijanund v Sailajanund* (1896) 23 Cal 645, 654-656.
[34] *Brahmasūtra Śaṅkarabhāṣya* 1:3:33.
[35] Sontheimer (n 14) 35.
[36] For examples, see Sontheimer (n 14) 32—39.

recipient rather than the donor, and pre-colonial customs and practices in relation to endowments had no obvious parallel to the central role the settlor's intention played in English trusts law.

Equally, Hindu law, unlike English law, did not distinguish between public and private purposes in regulating religious endowments. In consequence, it could and did treat identically religious endowments that, in English law, would necessarily have been private rather than public trusts. The use of trusts-based reasoning meant, however, that the public / private distinction was imported into Indian law, creating an uneasy fit whose results have been anything but straightforward. The question is, in principle, a question of fact[37] which looks at whether the beneficiaries are ascertainable individuals or an unascertainable community,[38] but its application to determine whether a given religious endowment is private or public continues to pose considerable difficulties for Indian courts.[39] The problem also extended to the regulation of how religious endowments were used. As late as the 1910s, comments from provincial authorities in response to proposed India-wide legislation on religious and charitable trusts stressed the inappropriateness of an intrusive regulatory framework to the numerous smaller endowments associated with small shrines and individual holy men, which had never truly separated between using endowments for personal purposes and for the purposes of the trust.[40]

That the analogy with trusts law persisted, and continued to have an apparent utility, reflected the congruence of two factors. The first was a simple historical contingency, namely, that the first endowments the colonial authorities encountered were the large and resource-rich endowments that were associated with particularly prominent temples with a complex and involved calendar of festivals and rituals to which the endowments related. Of their nature, it was these that were the likeliest to provoke controversies and to otherwise come to the attention of revenue authorities, and not the smaller endowments. As a result, these differences, despite their importance, were rarely if ever central to the issues that occupied colonial authorities.

The second, and arguably more significant, is that there were in fact significant congruences between the conceptual basis of pre-colonial Indian law and English trusts law, which remain significant even though colonial jurists and legislators were largely unaware of them. At least some pre-colonial theoretical understandings of property could and did contemplate the possibility of ownership as being limited rather than absolute, of the existence of a plurality of ownerships over the same asset, and of such an owner's powers of ownership and management being limited by the *svāmisaṃbandha* of others. While this is not the same as the distinction between legal and beneficial title that underpins the law of trusts, it is easy to see how, against the background of the erosion of the pre-colonial concept of property in colonial India, that distinction could be pressed into service to serve a very similar end. For all that it was poorly understood, it is at least arguable that it was this congruence that made it possible

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[37] *Radhakanta Deb v Commissioner of Hindu Religious Endowments, Orissa* AIR 1981 SC 798.
[38] *Deoki Nandan v Murlidhar* AIR 1957 SC 133.
[39] See eg *State of Bihar v Charusila Dasi* AIR 1959 SC 1002; *SGPC Amritsar v Som Nath Dass* AIR 2000 SC 1421.
[40] BL IOR/L/PJ/6/1627, File 6265, 28 October 1919, The Charitable and Religious Trusts Law, 1920: Paper II, 79 (comment from the Deputy Commissioner, Attock).

to use trusts law as a way of conceptualising and dealing with the issues arising out of religious institutions.

IV. Entrenching the metaphor: Colonial legislation on charitable endowments

The factors discussed in the previous section led to the analogy with trusts becoming increasingly entrenched in the way endowments were regulated by colonial law, and colonial lawmakers drew extensively on that body of law in framing statutes and regulations regulating religious endowments. In the 1810s and 1820s, each of the three presidencies passed laws to formalise the principles and practices that had evolved in relation to administering and settling disputes concerning Hindu religious endowments, starting in 1810 with Bengal,[41] followed in 1817 by Madras,[42] and ten years later in 1827 by Bombay.[43] The purpose of the regulations was to ensure that income from religious and charitable endowments was applied for the purpose for which they were endowed, and they were framed in a manner that sought to avoid interfering with the management of the institutions themselves whilst at the same time enabling Boards of Revenue in the relevant district to exercise superintendence over the ends to which funds were used.

The text of the regulations shows the extent to which analogies with trusts had come to shape the authorities' thinking. The preamble to the Madras Regulation begins by describing the mischief it was intended to deal with as being the appropriation of the produce of the endowments 'contrary to the intentions of the donors, to the personal use of the individuals in immediate charge and possession of such endowments', and declared it to be 'the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor'.[44] The substantive regulations similarly emphasise the broader goal of ensuring 'the due appropriation of lands or other endowments granted for public purposes agreeably to the intent of the grantor',[45] and the language of trusts is expressly used by the regulations. The individuals in charge of the institutions are described as their 'trustees, managers, or superintendents',[46] and disputes in relation to succession are discussed in terms of 'the person or persons claiming the trust'.[47] The primary reference point in determining the validity of the appointment of a trustee was to be 'the special provisions of the original endowment and appropriation by the founder' and, failing that, the 'general rules or maxims applicable to such institutions and foundations'.[48]

The other limb of the Regulation was the creation of a regulatory mechanism to exercise powers of superintendence over the administration of endowments, which sought to codify existing practice but was also based on an analogy with the powers of the Charity Commissioners over public or charitable trusts under English law (an analogy that would continue to be influential in legislation well into the twentieth century). The power of 'general superintendence' of all endowments – whether granted for the support of 'mosques, Hindu

[41] Bengal Regulation XIX of 1810.
[42] Madras Regulation VII of 1817.
[43] Bombay Regulation XVII of 1827
[44] Madras Regulation VII of 1817, Preamble
[45] Ibid, reg 14.
[46] Ibid, regs 10, 12, 16.
[47] Ibid, reg 11.
[48] Ibid, reg 10.

temples or colleges, or for other pious and beneficial purposes' — was vested in the Board of Revenue.[49] The Board had a specific obligation to 'prevent any endowments in land or money… from being converted to the private use of individuals or otherwise misappropriated',[50] and its agents in every district were to monitor and ascertain the particulars of all endowments covered by the regulation,[51] including the trustees, managers or superintendents in charge of them, the manner of their appointment,[52] and all vacancies as and when they arose.[53]

Both limbs soon entrenched themselves and appear to have become popular in the Indian community, although the extent of the involvement of colonial administrators in Hindu (and, in due course, Muslim) religious affairs continued to cause unease in London. In 1833, in part as a result of pressure brought by Protestant churches,[54] the Court of Directors of the East India Company ordered the Supreme Government in Calcutta to require servants of the Company to withdraw from all 'arrangements which implicate the Government, be it in a greater or lesser degree, in the ministrations of the local superstitions of the Natives', on the basis that they 'exhibit the British power in such intimate connexion with the unhappy and debasing superstitions' and lead to the belief 'that we admit the divine origin of those superstitions, or at least, that we ascribe to them some peculiar and venerable authority.'[55]

This did not, however, end the majority of practices of provincial governments nor did it influence their supervisory power. As a result, the Government in 1863 took a policy decision to legislate to 'rid itself of a burden which had been bequeathed to it by the former Rulers of India' by withdrawing colonial administrators at all levels from 'all further concern with Religious establishments.'[56] The Religious Endowments Act 1863 repealed the Bengal and Madras regulations in as much as they related to endowments made for religious purposes.[57] This did not, however, mean that the analogy with trusts was abandoned. Rather, the withdrawal of the government from direct involvement in management was dealt with by reinforcing that analogy and transferring jurisdiction to the ordinary courts. The civil courts were given the jurisdiction to deal with disputes in relation to the validity of appointment of trustees, and giving any person interested in the religious establishment, in worship within it, or in 'the trusts relating thereto' the power to apply to the civil courts for appropriate relief.[58] Interested persons could also sue trustees in the civil court for any 'misfeasance, breach of trust, or neglect of duty… in respect of the trusts vested in, or confided to them'.[59] 'Interest' was defined broadly. Interests that were neither pecuniary nor direct nor immediate, such as a right of attendance at worship, or partaking in the benefit of distribution of alms, was

[49] Ibid, reg 2.
[50] Ibid, reg 5.
[51] Ibid, reg 9.
[52] Ibid, reg 10.
[53] Ibid, reg 11.
[54] See eg *The Connexion of the East-India Company's Government with the Superstitious and Idolatrous Customs and Rites of the Natives of India Stated and Explained* (London, Hatchard & Son, 1838).
[55] *Dispatch from the Court of Directors* (n 25) 5—6.
[56] Governor General's Council Proceedings of 25 February 1863, *Abstract of the Proceedings of the Council of the Governor General of India: Vol II, 1863* (Calcutta 1863) 47—48.
[57] Religious Endowments Act 1863, s 1.
[58] Ibid, s 5.
[59] Ibid, s 14.

sufficient.[60] The courts were given the ability to order trustees to file accounts in court,[61] and the jurisdiction of criminal courts to entertain actions for criminal breach of trust was expressly mentioned as being unaffected by the powers of the civil courts.[62] Broader powers of superintendence were transferred from the Board of Revenue to special district-level committees[63] which were to consist of members of the same religion as the endowment related to[64] and who were appointed for life. The analogy with trusts, in other words, was here to stay, and continues to remain part of the framework for regulating religious endowments.

V. Extending and questioning the metaphor

The years after the passage of the 1863 Act saw a growing dissatisfaction with the arrangements it had put into place. A key focus of the dissatisfaction was the abolition of the jurisdiction of Boards of Revenue over endowments and the relative weakness of the committees that were created to take the place of that jurisdiction. There was a strong perception that the change had detracted from the objective of securing better management of religious, charitable, or public trusts. In 1890, the Charitable Endowments Act attempted to partially solve the problem by creating a new (and permissive) mechanism for charities whose purpose was poor relief, medical relief, or the advancement of any other object of general public utility. It permitted trustees or settlors to apply to the local Government to vest the trust property in a newly created government office, the treasurer of charitable endowments.[65] Yet the fact that this was a purely permissive law meant that it, too, was perceived as being inadequate. The Charitable and Religious Trusts Act 1920 expanded the powers of interested persons to sue in the civil courts to investigate the nature and objects of a religious trusts and audit its accounts,[66] but in the absence of any power of superintendence there was no effective obligation on trustees to actually keep accounts. There was also considerable dissatisfaction with making litigation the primary vehicle for contesting the administration of religious endowments: courts, it was argued, decided cases without having any sense of the social or cultural context that lay behind the creation of the endowment as the community itself would, and by expanding the range of persons who could invoke the power of the courts the Act had in effect divorced the management of endowments from their underlying cultural roots.[67] The extension of the rule of trusts law that beneficiaries could apply for the costs of litigation to be met from out of trust assets[68] was also the focus of considerable criticism, with one commentator arguing that it would 'foster all sort of vexatious and unnecessary litigation … thereby proving the ruin of many an ancient institution'.[69] There was also concern that the

[60] Ibid, s 15.
[61] Ibid, s 19.
[62] Ibid, s 20.
[63] Ibid, s 7.
[64] Ibid, s 8.
[65] Charitable Endowments Act 1890, ss 4—6.
[66] Charitable and Religious Trusts Act 1920, s 3.
[67] BL IOR/L/PJ/6/1627, File 6265, 28 October 1919, The Charitable and Religious Trusts Law, 1920: Paper II, 28—29 (comment from the President, South Indian Liberal Federation).
[68] Charitable and Religious Trusts Act 1920, s 8.
[69] Ibid 24—25 (comment from the Raja of Kollengode).

breadth of the power to initiate litigation would disrupt the traditional relationship between *guru* and disciple, by in effect subjecting it to the court's jurisdiction.[70]

A number of private efforts were made by Hindu and Muslim members of the national and provincial legislatures to pass legislation to alter the legal position and reintroduce some form of supervisory power, but they did not receive governmental support with the official position being that the Government would not be justified in intervening in relation to religious charities. Attempts by provincial legislatures to legislate – such as an attempt made in Madras in 1877 and one in Bombay in 1911[71] – were denied sanction to proceed by the Government of India. The failed 1877 legislation in Madras is of particular interest. The Bill sought to abolish the committees created by the 1863 Act, and instead create a new Central Board of Commissioners with a wide power of superintendence over all religious and charitable trusts in Madras, and not merely the subset of them that were subject to supervision by the committees created by the 1863 Act (which in turn was based on the endowments over which Boards of Revenue had jurisdiction under the 1817 Regulation). Crucially, the powers of the Central Board were closely modelled on those that the Charity Commissioners had under English law, highlighting the extent to which it had become accepted orthodoxy that endowments were in substance trusts and that their regulation was most appropriately modelled on the manner in which trusts were regulated in English law. Nevertheless, permission to proceed with the statute was not granted by the Government of India, which continued to hold to the policy of withdrawal on which the 1963 Act was based.[72] They held to this position even when, in 1893, a more modest proposal was put forward in Madras by a committee comprised wholly of Hindus, making it clear that they would not sanction any departure from the policy of the 1863 Act.[73] Although the 1920 Act was said by the Government to mark a reconsideration of this policy,[74] it made no moves towards reintroducing administrative supervision of the type that the Boards of Revenue had previously exercised. This position did not change until the reforms to the governance of India brought about by the Government of India Act 1919, which transferred the power to legislate in relation to religious endowments to provincial governments and vested them in the new ministries run by popularly elected members of the provincial legislatures.

As this suggests, there was during this period a divergence between, on the one hand, the position of the colonial government at the national level and, on the other hand, the position of representatives of the actual population of colonial India. The government appears to have placed the emphasis on the regulatory potential implicit in the ordinary operation of trust-like structures – and, in particular, in the legal duties of trustees and the ordinary powers of civil courts to exercise control over trusts – to deal with the issues that arose in relation to the management of religious endowments. Indeed, this was so much so that it saw it fit to reject the need for a more expressly regulatory or supervisory body to exercise powers of superintendence. Indian representatives, in contrast, appear to have placed considerably more weight on the need for a governmental body with powers of superintendence over religious endowments than they did on general principles of trusts law. To put it differently, the

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[70] Ibid 33-34 (comment from the Agent to Sri Sankara Acharya Swamigal, Kumbakonam)
[71] BL IOR/L/PJ/6/1627, File 6265, Charitable and Religious Trusts Act 1920, Statement of Objects and Reasons, 21 August 1919.
[72] Mudaliar, *Secular State and Religious Institutions in India* (n 20) 33—34.
[73] Ibid, 35—36.
[74] BL IOR/L/PJ/6/1627, File 6265, Charitable and Religious Trusts Act 1920, Statement of Objects and Reasons, 21 August 1919.

colonial authorities placed emphasis on and confidence in the positive outcomes which were capable of being produced if full effect was given to the standards of conduct and transparency of process that the law of trusts promotes. In contrast, the focus of Indian representatives was on creating a public body that could efficaciously exercise the powers of superintendence that were also associated with the legal regulation of public trusts in England because their overriding concern was to ensure that the resources of religious endowments were neither misappropriated nor squandered but were rather managed and applied to the intended ends in an effectively and efficient manner.

This difference of view is instantiated by the controversy provoked by the operation of doctrines of trusts law that were not directly connected with correcting maladministration and, in particular, the *cy-près* doctrine. The analogy drawn with trusts law meant that by the twentieth century, there was a general juristic view that the *cy-près* doctrine also applied to religious endowments, even though the Indian cases on the doctrine related largely to ordinary charitable trusts rather than specifically religious endowments, and in the few cases that did relate to religious endowments – such as *Harish Chandra v Hindu Dharam Sewak Mandal* – the courts largely declined to apply the *cy-près* doctrine on other grounds.[75] The received juristic view eventually made its way into statutes, where both its inclusion and the manner of its application were far from uncontroversial, particularly in the Madras Presidency. Madras was home to some of the most resource-rich temples in India, and its Legislative Council had been behind nine of the twelve attempts to alter the regime established by the 1863 Act. In 1922, its government introduced a Bill to create a Central Board modelled, as before, on the Charity Commissioners,[76] but with a broader jurisdiction than under the 1817 regulation. The 1922 Bill sought to enable them not just to exercise general superintendence but also to:

> 'do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist.'[77]

The new Bill also covered a wider range of religious institutions and assets than had been covered under the 1817 regulation, with the definition of 'religious endowment' widened to include not just endowments proper, but also all property belonging to temples and other religious institutions including their premises.[78]

Most controversially, the Bill created an expanded, statutory version of the *cy-près* doctrine which applied not only to cases where the original purpose was no longer capable of fulfilment, but also to any surplus funds in religious endowments.[79] Any funds left over after satisfying the purposes of the endowment and setting aside a sum for the repair and renovation of buildings connected with the environment could be treated as a surplus, and the Central Board was given wide discretion to decide how much of the surplus should be retained as a reserve and how much should be used for other purposes.[80] The Board also had a wide

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[75] AIR 1936 All 197 (refusing to apply the doctrine on the ground that the testator's intention was a specific charitable intention rather than a general charitable intention to be carried out in a specific way).
[76] Madras Hindu Religious Endowments Act 1926, s 10.
[77] Ibid, s 18(2).
[78] Ibid, s 9(11).
[79] Ibid, s 67(1).
[80] Ibid, s 67(2).

discretion to decide the purposes to which the surplus should be applied: any 'religious, educational, or charitable purposes not inconsistent with the objects of the endowment'[81] were eligible and, unlike the *cy-près* doctrine, the Board did not need to apply to the court to divert the surplus, although trustees of the endowment could apply to the court to modify or set aside an order made by the Board.[82]

The provision was the culmination of a campaign by the Justice Party, which had fought the 1921 Provincial election on a plank of using surplus funds from religious institutions for social, rather than narrowly religious, ends.[83] The policy was controversial, with opponents in the Legislative Council arguing that it was wrong as a matter of principle to divert religious funds for public projects that should, rather, be funded out of general taxation. Its proponents, in contrast, defended the extension on the basis that a person who made an endowment in the hope of attaining salvation or of obtaining relief from an ailment or from difficulties – all of which had historically been motives for making a pious gift – should be understood as having made it for that purpose rather than for the purpose specified in the donation, thus making it wholly appropriate to use the *cy-près* doctrine to divert the funds to other ends.[84]

This argument was disingenuous. As discussed above, Hindu law focused on the needs of the recipient rather than the intentions of the donor, and there was little basis in it for the reapplication of pious gifts to secular ends. Nevertheless, attempts to amend the law to limit the Board's power to divert surplus funds failed and the expanded power passed into law and remains in force. Its application, and the use of religious endowment funds for social rather than religious purposes, remained controversial even after Indian independence and continue to remain controversial, with opponents arguing that surplus funds from endowments should, as a matter of preference, be diverted to less resource-rich temples rather than being pressed into service for other social purposes.[85] Underpinning this is the same divergence of position discussed above. If one's focus is on trusts law's standards of conduct and transparency, then one will be more inclined to adopt the position taken by the proponents of the expanded *cy-près* doctrine, namely, permitting the diversion of religious funds as long as that diversion is done in accordance with an open and established process. In contrast, if one's focus is on ensuring the security and preservation of the fund and increasing the efficiency with which it furthers the purposes it was intended to serve, then one will be more inclined to adopt the position taken by the opponents of the expansion of the *cy-près* doctrine. That this issue remains the subject of controversy in the present day highlights the extent to which the extension of trust-derived concepts to religious endowments in India continues to be affected by the lack of clarity or consensus around the precise goals or ends that extension was intended to serve.

An even starker example of this divergence can be seen from the very different routes to regulating religious endowments taken by the legislatures of Bombay and Madras, a difference that has only grown wider after endowments. In 1951, the post-independence Government of Madras passed the Hindu Religious and Charitable Endowments Act, which abolished the Board of Commissioners and in its place assimilated the function of regulating Hindu

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[81] Ibid, s 67(1).
[82] Ibid, s 67(4)—(5).
[83] K Nambi Arooran, *Tamil Renaissance and Dravidian Nationalism, 1905-1944* (Madurai, Koodal Publishers, 1980) 146—148.
[84] Madras Legislative Council Proceedings 17 September 1926, vol 32, p 951.
[85] DE Smith, *India as a Secular State* (Princeton, Princeton University Press, 1963) 250—252.

charitable endowments into a government department. Bombay, in contrast, took a different path. In 1935, the Bombay Legislative Council passed the Bombay Public Trusts Registration Act 1935, along with two other similar laws that applied to Muslim *wakfs*[86] and Parsi public trusts.[87] This law unlike the control-oriented scheme enacted by the Madras legislature is principally concerned with transparency and standards, creating obligations to register, to prepare accounts, and so on; reinforcing in a statutory context the equitable duties of trustees and the rights of action of beneficiaries; and focusing the role of the Charity Commissioner on superintendence rather than control.

Subsequent laws in Bombay (and now Maharashtra) have largely followed the same scheme. A full analysis of the relatively effectiveness of the two schemes is, of course, well beyond the scope of this chapter, but the fact that two such different schemes exist, and that both can ultimately be traced back to the same early roots in colonial government, instantiates the plurality of views in India as to the precise social needs that the regulation of religious endowments should serve, and as to which aspects of the law of trusts offer the most useful regulatory potential to serve those ends.

VI. In conclusion: trusts, government, regulation, and adaptation

When the codification of a law of trusts for India was first proposed, Sir James Stephen thought it would do more harm than good. Introducing the concept of a trust, he argued, 'must of necessity introduce into India the very distinction between law and equity of which we in England are struggling to rid ourselves.'[88] Simply defining a trust in terms of obligations, as the draft Bill did, would not avoid this consequence. No amount of drafting skill could.[89] The subsequent development of trusts law in India, which unfolded in precisely the way Stephen feared, might at one level appear to have vindicated his concern. Yet, as this chapter has sought to argue through its discussion of how concepts derived from the law of trusts were applied to regulate religious endowments, the history is open to a different, and more positive, reading, in which equitable concepts and structures were used by colonial authorities and Indian subjects in two constructive ways: firstly, to deal with unfolding social issues and needs, and secondly, to mitigate problems caused by the disruption by colonial rule of frameworks and mechanisms that existed in pre-colonial law for dealing with situations in which the interests of different groups within society came into conflict.

Nor is this unique to the law of trusts. Rather, the history of adaptation described in this chapter is part of a broader part of the story of the reception of equity in British colonies which has only recently begun to be told. The doctrine of unconscionability, for example, was introduced into Indian contract law along with a significantly expanded power to relieve against penalties to deal with social unrest caused by agricultural debt, which was in turn caused by the abolition of pre-colonial rules and practices regulating debt.[90] Although the need to borrow ideas from the law of trusts to deal with religious endowments only arose because the introduction of colonial administration disrupted pre-colonial practices in relation to these endowments. the social regulatory potential that trust-based approaches

[86] Mussalman Wakf (Amendment) Act 1935.
[87] Parsi Public Trusts Registration Act 1936.
[88] BL/IOR/C/142, Memorandum on Codification in India by the Honourable Mr Justice Stephen (2 July 1879), 17—18.
[89] Ibid, 19.
[90] I discuss this in more depth in a chapter on liquidated damages in Indian law in the forthcoming *Oxford Handbook of the Indian Contract Act 1872*.

offered gave it the ability to act as a starting point for framing laws that met Indian ends at least as much as they met the goals of Empire, and that enabled the preservation of at least some of the work that pre-colonial legal frameworks had done. A central theme in any legal transplant, including legal transplants made necessary by colonial rule, is the challenge (and difficulty) of identifying, in a plural and diverse society, which type of regulatory potential the law should prioritise, what mechanisms it should adopt to further the chosen potential, and perhaps most fundamentally deciding to which of the many competing social needs the use of trusts law is intended to speak. In the context of this challenge, the reading advanced by this chapter has sought to show that far from being a failed attempt to adapt English law to Indian conditions, the introduction of trusts law to India represents a successful adaptation brought about by processes in which Indian subjects of empire, and the needs and goals they prioritised, exercised at least as much agency as did colonial administrators and governors.