

*The Informal, Illicit and Complicit: Speculation, the Futures Contract, and Genealogies of Neoliberal Governmentality*  
ABSTRACT/Introduction

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Colonial history has taught us about the intimacies of formal and informal economic worlds, and indeed of the very production of the distinction between the two. Building on such research, this presentation is most broadly interested in the mutual history of contemporary languages of the global and the idea of informality, a history that bears the imprint of imperialism and its market governance. Here I address a key site for that history: the problem of speculative market practices that are engaged in the valuation of the future and central to processes of global financialization. If the turn of the twentieth century signaled an era of the aggressive expansion of finance capital, contemporary neoliberal globality, which operates on and cultivates a distinction between the global and the local, the formal and the informal, extends and unearths new territory for financialization and the production of market values.

The study of informal capitalism and everyday markets is especially relevant today exactly because 'local' practices have become the focus of contemporary global discourses of economic development grounded in the cultivation of entrepreneurship.<sup>1</sup> At the same time, informal practices are also at the heart of prominent critiques of such projects.

Today, a broad range of discussions are especially concerned with the folding of the informal into the formal. Take for example the economist Hernando De Soto's much acclaimed work on the "dead" capital of the Latin American agrarian underclass, which must be mobilized through the gifting of private property right. The rise of New Institutional Economics is also informative; its theories embrace the distinction between formal/informal economies in order to cut across it, by exploring and universalizing economically rational behavior. NIE elaborates on neoclassical economics by focusing on the rationale for market choices, arguing that preferences emerge through transaction cost assessments, and that norms cohere through the regularization of these preferences; as such, informal market behavior is endowed with economic rationality. On the other end, ethnographers of development and microfinance such as Ananya Roy have mapped the making of whole new markets of financial capital through the expansion of credit to subaltern and underclass groups, or what she calls "bottom billion capitalism."<sup>ii</sup> And Partha Chatterjee has spoken influentially of the distinction between *corporate and non-corporate capital*, the first directed at profit, and the latter at livelihood, to describe the reproduction of inequalities in neoliberal India.<sup>iii</sup>

As I've argued, in the nineteenth century, colonial governmentality in India rendered the customary market practices of vernacular capitalism illegitimate and also illicit in its political economy of modernization, even as these vernacular infrastructures continued to map the avenues and byways of exchange and production. The customary kinship-based practices of the bazaar were at once delegitimized as 'cultural' and also reproduced under the domain of personal law.<sup>iv</sup> Today we must further explore this complicity between modernizing codes and customary conventions: the virtual, intrepid

and global movements of capital today, alongside the reproduction of feudal disparities in income and capabilities, demand attention to the techniques by which the informal is *folded into* the formal, by which they are rendered *complicit*, in current political-economic formations and their historical genealogies. The question of speculation is especially potent in this context, for despite the classification of most customary market practices under personal law, futures and options trading on stocks and commodities was specifically criminalized, rather than just rendered 'cultural.' Even still, I would like to emphasize, 'informal' practices that were specifically coded as illicit came slowly to be folded into—rendered complicit with--the formal domains of market speculation.

The study of contemporary neoliberal governmentality, which codes the political subject as economic agent first and foremost, and seeks to fortify citizenship through access to markets, especially requires attention to these processes. To consider informal markets as targets and tools of governance, it is crucial to understand that the very distinction between the formal and the informal is as much a terrain of law as it is of economy—in fact the two cannot be divorced. And 'law' does not simply mean that which comes from above. As I have argued elsewhere, to engage political economy as a discourse of governing and managing (as Foucault elaborates) demands a careful and robust reading of law as *nomos* (changeable convention, custom, practice, the 'law' that is at the etymological heart of economy) and as *logos* (statute, the sovereign speech-act, formal administrative regulation).<sup>v</sup> There is perhaps a no more potent site for engaging law as economy, and economy as a legal performative, than the problem of market speculation. Whether we speak of *teji-mundi* transactions in the 1890s, or the "casino capitalism" of

Wall Street today, it is the language of law that distinguishes legitimate economic speculation (and its formal domains) from gambling and (its informal arenas).

Here then, I would like to consider processes by which practices that are coded as informal and illicit are folded into formal frameworks of market organization, a question most prominently legible through the problem of speculative market practices and the changing parameters of the legal medium of the futures contract. The futures contract provides a magnifying lens through which to discover vernacular languages of formality and informality, as well as to consider the ways in which practices previously coded as illicit are not only legitimized, but also ultimately formalized in law. The shift from police raids on jute-gambling in Barabazaar in the 1920s to the Forwards Contract regulation Act of 1952 and the Securities Contracts Regulation Act of 1956 reflects this transition. At the same time, the futures contract highlights that engagement with uncertainty—or what modernization coded as economic irrationality—cuts across formal and informal speculative practices.

### **Distinguishing Gambling from Speculation**

In the early decades of the twentieth century, modernizers in India and around the world were at pains to distinguish between (to use Weber's coding) the "enchanted" irrationality manifest as gambling in the bazaar and in bucket-shops, and the "disenchanted" practices of legitimate financial speculation. Drawing the distinction was a conundrum because vernacular practices were *de facto* at one with emergent speculative practices globally: speculation (the broad Hindustani term for which was *satta*) included forward trading in commodities for delivery at a given time (*sowda, fatka*), options or the settling on a price for a given time (*badni*), and betting on expected price differences in

commodities and securities (*teji-mundi*). These were indistinguishable from basic forms of betting and wagering. In the late nineteenth century United States for example, where everything from life insurance to options and futures trading was condemned as "repugnant to the law of God and man," the making of the distinction between gambling and speculation was, as it was in the UK and other spaces in the Anglo-American legal universe, imbricated in the globalization and formalization of contract law. A condensed site of this global transformation, the Indian bazaar also illuminates important aspects of the broader global history of law and its relationship to derivatives. (Derivatives refer, at their most basic, to "a transmission of some value from a source to something else," and so encompass all forms of wagering on the future.<sup>vi</sup>) At the same time, India foregrounds questions about the reproduction of "embedded" or informal economic practices within the law itself (and so about the category of corruption).

The burst of new speculative practices in the late nineteenth century required a working out of the relationship between formal legal mechanisms and the customary practices of merchants across the globe. In the United States for example, common law was crucial in managing the burst of new forms of speculative activity, so much so that the private exchanges of merchants, like the Chicago Board of Trade, were recognized as formal associations, and the state resisted regulating them directly (except of course, by way of profit, in taxing forms of speculative profits).<sup>vii</sup> In India in this period, speculative practices became subject to criminal investigation. By the 1920s, at least two bills were put forward by native members of the Bengal assembly to establish what were called native "baras" or trading exchanges, based on the vernacular organizations of traders.<sup>viii</sup> They cited the common law affirmation of private exchanges abroad, but they failed. Other

forms of customary market activity were shielded by the culturalist imperatives of personal law. The legal dilemmas posed by the burst of speculative activity globally—the question of whether to affirm and fortify the customary realm of what was called the *lex mercatoria*, or to regulate via direct legislation--was a potent matter of policy in Great Britain, especially after the consolidation of betting and gaming acts in the 1860s. These regulations were transported to India, and reflected a mid-nineteenth century moral paternalism towards the working classes, alongside the elaboration of policing and concepts of public order. In 1895 and more comprehensively in 1898, Select Committees of the British Parliament had conducted inquiries about new forms of trading in commodities futures across the globe, soliciting assessments from British representatives in Berlin, Vienna, St. Petersburg, Washington D.C., Brussels, Athens, Stockholm, Berne, Buenos Aires and Budapest on what were called "time-bargains" calling for "Legislative Measures Respecting Gambling in 'Option' and 'Future' Contracts."<sup>ix</sup> What is striking about the articulated aims of this expansive survey is exactly the question of *gambling* in options and futures *contracts*.

### **The Futures of Contract**

Contracting, in its most philosophical conceptualization—in law, social contract theory, and moral philosophy--would be the antithesis of gambling, for it seeks to enforce and guarantee promises for the future. Thus, when we speak of financial speculation, we speak futures and options *contracts*.<sup>x</sup> But, as legal theorists have asserted, contract in most overarching definition can be understood as "the projection of exchange into the future," a rather more open-ended articulation.<sup>xi</sup> The influential law and economics

school associated with the Chicago school economist and jurist Richard Posner, building on the theories of the early twentieth century economist Frank H. Knight, has engaged this open-endedness, establishing contract as a tool in the allocation of risk in the face of the unexpected. Indeed, in the United States, as legal historian Roy Kreitner has argued, "by recognizing that an element of gambling existed in all economic activity, contract discourse made way for the emergence of an individual who could claim mastery even while acknowledging uncertainty."<sup>xii</sup> As Kreitner highlights, it was only in the 1930s that definitive US Federal regulation settled the distinction between the wager, a form of gambling which was not enforceable in law, and the speculative market contract. It was at this time that the settling of price differences *without the delivery of actual goods* came to be understood not as illicit wagering, but as "anticipatory breach of contract." In this way, in the US, *speculative practices transformed the very concept of contract*; legal mechanisms that rendered contracts open to reformulation and renegotiation, whether for early settlement or the deferral of delivery of goods, evinced the opening of contract law to engagement with uncertainty.<sup>xiii</sup> Very similar processes begin to manifest themselves in India in the period after 1930, even as the emergent nation-state and a capitalist class cultivated a planning-based developmentalist futurity, articulated as early as 1944 in the Bombay Plan.

In India, the story of the folding of informal or customary speculative practices into formal market organization highlights the dynamic tension between law as speculative medium and law as instrument of security, a tension encapsulated in the very concept of the futures contract. To begin to historicize transformations in the concept of the futures contract in India, it is important to take a moment to consider the different *futures of*

*contract*. A projection of exchange into the future may demonstrate, perhaps first and foremost, an inclination to control the future, as in the projections of scientific and technical experts after detailed data inspection. But projection also evokes cinema, the manifestation of spectacular fantasies, and with it, the projection of desires and anxieties in the psychological sense. If contract is generally associated with the first kind of future projection, as manifest in five-year plans as well as the calculating rationality of Economic Man, it may also be tied to the second kind of future projection. Here, Nietzsche's figuration of the ascetic addicted to the afterlife or what he calls a "phantasmagoria of anticipated future bliss," is a powerful image, for it links engagement with a spectacular future to the history of debt and legal contract.<sup>xiv</sup>

In India we have studied formal developmentalist future projections much more than the speculative conjurings of finance and commodity markets. The latter are especially relevant for unpacking contemporary India's political economy and governing modalities, for it is the very ethos of speculation that fuels both. Speculative financial capital operates by folding the informal into the formal: the everyday and informal worlds of labor and commerce form the backbone for the spectacular neoliberal dreams of contemporary India, from real estate speculation to the consumer wonderlands of high-end malls, powerfully manifest in the 'dream' projects and rhetoric of Narendra Modi. Here, I highlight a story from case law in India to consider the techniques by which the speculative informal is folded into the speculative formal, by governmental authorities *and* by vernacular capitalists, and in doing so, seek to foreground historical trends in the making of India's brand of neoliberal governmentality.



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<sup>i</sup> For more see Birla, "The Rule of Law and Economic Development: Global Scripts, Vernacular Translations," in Sarat and Ewick eds., *Wiley Handbook of Law and Society* (forthcoming).

<sup>ii</sup> Ananya Roy, "Subjects of Risk," *Public Culture* 24:1, 131-155.

<sup>iii</sup> Chatterjee, *Lineages of Political Society* (Columbia, 2011)

<sup>iv</sup> Birla, *Stages of Capital*, passim.

<sup>v</sup> See Birla, *Stages of Capital* and Birla, "Law as Economy: Convention, Corporation, Currency," *UC Irvine Law Review*, 1:3, 1015-37.

<sup>vi</sup> See Randy Martin, "After Economy? The Social Logics of the Derivative," *Social Text* 31:1 (Spring 2013) 83-106, p. 84. See also Study of the Forward Markets Commission of India, [http://www.cse.iitb.ac.in/alumni/~sagar07/projects/Study\\_of\\_Forward\\_Market\\_Commission\\_of\\_India.pdf](http://www.cse.iitb.ac.in/alumni/~sagar07/projects/Study_of_Forward_Market_Commission_of_India.pdf), accessed February 17, 2013. On the United States, see Lynn Stout and Roy Krietner (Columbia Law Review).

<sup>vii</sup> See Lynn Stout, "Uncertainty, Dangerous Optimism and Speculation: An Inquiry into the Limits of Democratic Governance," 37 *Cornell Law Review* 1177.

<sup>viii</sup> See Birla, *Stages of Capital*, chapter 4.

<sup>ix</sup> Birla, *Stages of Capital*, 146-148. For the colonial debates that accompanied the formalizing of the legal distinction between gambling and futures speculation, as well as criminal inquiries in the various Indian provinces, see chapter 4.

<sup>x</sup> For an elaboration on the concept of the futures contract, see Krietner.

<sup>xi</sup> Ian Macneil, "The Many Futures of Contract," 47 *S. Cal. Law Rev* 691, 712-13 (1974) cited in Krietner, 1097.

<sup>xii</sup> Krietner, 1096.

<sup>xiii</sup> Krietner, 1102-03. As Morton Horowitz has detailed in his monumental *Transformation of American Law*, the growth of as markets in agricultural commodities by the early nineteenth century produced new forms of futures contracts, and in time, judges came to abandon the predominant eighteenth century notion of contract as a fair exchange (so that price differences, or speculation, could be accommodated). See Krietner, 1103, n.23.

<sup>xiv</sup> Nietzsche, *Genealogy of Morals*, trans. Walter Kauffman.