WATER, FISH AND PROPERTY IN COLONIAL INDIA, 1860–1890*

I
INTRODUCTION

> If water were our chief symbol for property, we might think of property rights — and perhaps other rights — in a quite different way. We might think of rights literally and figuratively as more fluid and less fenced-in; we might think of property as entailing less of the awesome Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems.[1]

Carol Rose's observation reproduced in the epigraph highlights the extent to which the right to property, long considered by liberal thinkers to be one of humanity's foundational rights, has been shaped and nurtured by a terrestrial imagination. After all, it is land, not water, that has served as the chief symbol and primary target of the discourse surrounding modern property rights.[2] And yet, if the seeming fixity of land has allowed it to function as the prime referent of property, the very fluidity of water has continually raised fundamental questions about the nature of property and the rights associated with it. Can water be the subject of property? And if so, what kinds of rights can one claim over a fluid resource?

For generations, these vexed questions have forced jurists and scholars to re-examine the foundations of property and to

* I thank Bhavani Raman for her comments on this article and for the opportunity to engage with her work on the foreshore. My thanks also to Alastair McClure for clarifying questions relating to the law.

[1] Carol M. Rose, 'Property as the Keystone Right?', *Notre Dame Law Review*, lxxi, 3 (1996), 351. Reprinted with permission. © *Notre Dame Law Review*, University of Notre Dame.

[2] For a fascinating and comprehensive examination of how the term 'property' was associated most closely with animals and objects rather than land in medieval England, see David J. Seipp, 'The Concept of Property in the Early Common Law', *Law and History Review*, xii, 1 (1994).

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recover its legal basis. In England, where debates over water rights were particularly charged and influential, the law would offer very little clarity on the subject until well into the nineteenth century. With the spread of the British empire, these questions would re-emerge in imperial and post-imperial contexts, further unsettling established conventions. In this regard, the United States has often been cited and examined as an important site for legal experimentation over water rights, with the geographical and environmental peculiarities of the American West understood to have generated significant deviations from common law norms as they developed in England and the eastern United States. Moving away from the riparian doctrine with its emphasis on reasonable use, western states, it has been pointed out, formulated a distinctive approach to water laws that allowed much greater space for private rights based on theories of prior appropriation.[3]

In this article, I make a case for looking similarly at colonial India, and especially the province of Bengal, as an equally important site for examining the development of private property rights in water. I argue that, in late nineteenth-century India, the colonial state's attempts to grapple with complicated questions surrounding flowing waters produced a completely novel paradigm of private water rights that was distinct from both the riparian and prior appropriation systems that have been studied so far. In India the colonial state would first assert unprecedented authority over water resources before using these expansive claims of state ownership to make significant room for private rights over a resource that both common and civil law technically placed outside the bounds of property. This article will examine these transformations through a focus on disputes surrounding fishing rights that would generate much confusion and debate over the course of the late nineteenth century. These disputes were particularly complicated because, apart from issues surrounding rights over water, they raised additional questions about the kinds of rights that could be claimed over fish.

Along with wild animals, fish were categorized under Roman law as *ferae naturae*, or things over which only a qualified ownership could be established. This was a concept that, as

[3] See, for instance, Henry E. Smith, 'Governing Water: The Semicommons of Fluid Property Rights', *Arizona Law Review*, l, 2 (2008).

Andrew Fitzmaurice points out, medieval European commentators began increasingly to represent through the term *res nullius*.[4] This double indeterminacy, involving both water and fish, would lead to lengthy and often inconclusive debates about the nature of property claims that could be asserted over fishing privileges in colonial India, with Roman law, Magna Carta and common law precedents all featuring prominently in these discussions. Simultaneously, colonial authorities would raise questions about the applicability of these principles to India, allowing us to examine how these long-standing ambiguities played out in the colonial context. If these cases enable us to interrogate the unique solutions that were conceived in response to problems generated by water laws in the colony, they also allow us to unsettle assumptions about the colonial state's attitude towards property rights in India.

Given the economic and ideological significance of property for the colonial state, it is not surprising that laws governing property have featured prominently in scholarship on colonial South Asia.[5] Scholars have analysed various aspects of the 'rule of property' inaugurated by the colonial state and closely examined its far-reaching consequences. In doing so, they have highlighted crucial shifts in British attitudes towards property over the course of colonial rule and shown the diverse, often conflicting, ideological and economic imperatives shaping these transformations. Much of this literature, however, has been almost exclusively concerned with rights over land.[6] The few historians who have analysed the emerging property regime in the context of water have largely done so through a narrow focus on canals and irrigation.[7] While these studies have highlighted

[4] For an examination of the different ways in which the term *res nullius* was deployed in Europe from the medieval period onwards, see Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge, 2014).

[5] For two classic accounts focused on property in colonial India, see Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham, NC, 1996); Eric Stokes, *The English Utilitarians and India* (New Delhi, 1989).

[6] Some important recent works have turned their attention to hybrid land–water environments and shown that such spaces can be productive sites for interrogating colonialism from a novel perspective: see, for instance, Debjani Bhattacharyya, *Empire and Ecology in the Bengal Delta: The Making of Calcutta* (Cambridge, 2018); Iftekhar Iqbal, *The Bengal Delta: Ecology, State and Social Change, 1840–1943* (Basingstoke, 2010).

[7] David Gilmartin, *Blood and Water: The Indus River Basin in Modern History* (Berkeley, 2015); Aditya Ramesh, 'Custom as Natural: Land, Water and Law in

(cont. on p. 4)

the unique challenges produced by the entanglement of property rights with water, their narrow focus has led them to conclude simply that, as in the case of forests and wastelands, British efforts during this period were largely directed towards strengthening state control over water resources, efforts that were thwarted by political and ecological factors. But to what extent can conclusions drawn from an examination of the state's policies towards irrigation be applied to water resources more generally? How, in other words, can moving beyond land and public works, two of the most closely examined themes in South Asian history, help us to revisit some of the conclusions drawn about the colonial state and its approach to property rights in India? This question is especially salient for the period under study because historians have identified the late nineteenth century as a period marked by profound shifts in colonial agrarian policy, one generally associated with a turn away from private property.[8]

Chastened by the revolt of 1857, the colonial state is said to have abandoned its earlier commitment to private property and instead come down in favour of recognizing shared proprietary interests based on custom.[9] In her extremely influential *Alibis of Empire*, Karuna Mantena argues that the revolt instigated 'a shift in [colonial] economic policy against the extension of free market in land in favour of protecting the customary practices of the village community'.[10] As Mantena forcefully argues, this was part of a wider movement away from liberal imperialism towards

(n. 7 cont.)
Colonial Madras', *Studies in History*, xxxiv, 1 (2018). For general discussions of water laws in India, see I. A. Siddiqui, 'History of Water Laws in India', in Chhatrapati Singh (ed.), *Water Law in India* (New Delhi, 1992); Chhatrapati Singh, *Water Rights and Principles of Water Resources Management* (Bombay, 1991).

[8] See Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge, 1978); D. A. Washbrook, 'Law, State and Agrarian Society in Colonial India', *Modern Asian Studies*, xv, 3 (1981); Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, 2010); Andrew Sartori, *Liberalism in Empire: An Alternative History* (Oakland, 2014); Clive Dewey, 'The Influence of Sir Henry Maine on Agrarian Policy in India', in Alan Diamond (ed.), *The Victorian Achievement of Sir Henry Maine* (Cambridge, 1991); Peter Robb, *Ancient Rights and Future Comfort: Bihar, the Bengal Tenancy Act of 1885, and British Rule in India* (Richmond, 1997).

[9] For the most influential elaboration of this view, see Mantena, *Alibis of Empire*.

[10] *Ibid.*, 145.

indirect rule, an ideological transformation that she skilfully traces through her work. But in trying to establish indirect rule as a 'distinct ideological formation' rather than as a mere 'pragmatic innovation', she overstates its coherence. Not only was this ideological shift not as straightforward or as pervasive as she suggests, but, as Andrew Sartori has argued, the move towards custom that she identifies with a rising paternalist impulse could also be reconciled with a renewed commitment to liberalism and classical political economy.[11] Following Sartori, I too argue for the continuing relevance of liberal norms in shaping agrarian policies in India during the final decades of the nineteenth century. At the same time, going beyond Sartori and others who have highlighted a pro-peasant turn within the colonial establishment, this article not only shows a continued privileging of landowners in late nineteenth-century Bengal, but also, more significantly, draws attention to a process that historians of South Asia have so far either failed to notice or failed to engage with adequately: the extension of private property rights over waters that were conventionally held to be either common or public.

The turn away from Roman and natural law in the late nineteenth century, which, according to Mantena, raised questions about the universal validity of private rights in land, would, I argue, have the opposite effect in the case of water, with Indian specificities justifying the creation of private rights in flowing waters, against principles derived from Roman law. In other words, this article will argue that the period that has come to be associated with various deviations from prevailing liberal principles in colonial India was in fact the very period when landed property and the privileges of landownership were expanding in extraordinary ways. This would be achieved through the initial assertion of absolute state ownership over India's water resources and the incorporation of water into the legal definition of land.[12] Not only did 'land', in the final decades of the nineteenth century, increasingly reach down from the surface to incorporate the subterranean, as Matthew Shutzer has recently argued, but the very boundary between land and

[11] Sartori, *Liberalism in Empire*.

[12] For a discussion of how similar processes contributed to the development and elaboration of the public trust doctrine along the foreshore, see Bhavani Raman, 'Muddy Waters of the Foreshore', unpubd MS.

water would begin to blur as water began to be treated increasingly as just another form of land.[13] If it was the material specificities of water that had placed it outside the domain of property in Roman and natural law, then legal judgments and colonial legislation would begin to call this elemental distinction into question in late nineteenth-century India. In the process, they would introduce new forms of private rights in water at a time when similar processes of territorialization and privatization were unfolding in various ways in other bodies of water across the world.[14] Almost exactly a century after the enactment of the Permanent Settlement revolutionized property relations in Bengal, significant legal innovations would help to extend the logic of property to water during a period associated with the development of a global countryside and other important agrarian transformations. But before we turn to these significant legal mutations and trace their development in India, we must first examine different approaches to property in land and water as they developed in both Roman and English common law.

II

LAND AND SEA

Whether water could be partitioned and owned like land had been a fraught and controversial question in Europe since Roman times. Roman law, which exercised considerable influence over subsequent legal systems across the continent, considered all flowing waters to be either public or common property over which no individual could claim ownership rights. It did, however, recognize private rights over some bodies of water attached to land. In the extremely influential *Institutes of Justinian*, non-private property was divided into four categories: *res publica*, or property of the state; *res communes*, things that belonged to everyone; *res universitatis*, things owned by a community; and *res nullius*, or things that could never be acquired by anyone. While the text helped to promote a more systematic approach to property by establishing these separate categories, its classificatory system raised many questions of its own. In the case of water, it didn't adequately explain why rivers

[13] Matthew Shutzer, 'Subterranean Properties: India's Political Ecology of Coal, 1870–1975', *Comparative Studies in Society and History*, lxiii, 2 (2021).

[14] See Philip E. Steinberg, *The Social Construction of the Ocean* (Cambridge, 2001), 136–8.

were categorized as public while the sea was held to be common.[15] These ambiguities would persist in places that borrowed heavily from these Roman law codes, including England, where Roman law would provide the 'substantive core of land and water use doctrines'.[16]

Following the revival and incorporation of Roman legal principles into English common law, often attributed to Henry Bracton, legal figures in medieval England continually debated the status of water in property law.[17] While some argued over the differences between the various categories of rights, especially between *res communes*, *res nullius* and *res publica*, others would express divergent opinions on whether custom or prescription could grant individuals rights in public rivers and seas.[18] These disagreements would rage on for a considerable length of time, with legal consensus moving back and forth between these conflicting views. With European imperial expansion from the fifteenth century onwards, however, these questions about property began to assume even greater importance. One of the figures who played a key role in addressing the imperial implications of these issues was the Dutch jurist Hugo Grotius.

In his groundbreaking treatise *Mare Liberum*, published in 1609, Grotius mobilized new arguments to emphasize the freedom of the seas.[19] According to Grotius, the elemental separation between land and sea had placed the latter beyond the grasp of property. For him, as Renisa Mawani highlights, 'it was the physico-material properties of oceans — their expansiveness and ceaseless change — that rendered them to be

[15] Richard Perruso, 'The Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe', *Tijdschrift voor Rechstgeschiedenis*, lxx, 1–2 (2002).

[16] Joshua Getzler, *A History of Water Rights at Common Law* (Oxford, 2004), 65.

[17] On the controversy regarding whether Bracton was in fact the author or even compiler of the entire text, see Frederick Bernays Wiener, 'Did Bracton Write Bracton?', *American Bar Association Journal*, lxiv, 1 (1978).

[18] Perruso, 'Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe', 12–17.

[19] On the ideas behind Grotius' *Mare Liberum* (1609) and their significance, see Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters. With Special Reference to the Rights of Fishing and the Naval Salute* (Edinburgh, 1911), 338–51. Also see Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham, NC, 2018), 40–50.

juridically different from terra firma'.[20] Grotius' formulations drew sharp responses from writers such as William Welwod and John Selden, who saw in the Dutch writer's formulations a serious threat to the claims of the British Crown.[21] These debates helped to refocus attention on the uniqueness of water and its special place in property law. While Grotius and those responding to him were largely concerned with the sea and the law of nations, other writers helped to clarify matters relating to inland waters and their place in domestic law. Of these William Blackstone and Matthew Hale were among the most significant.

Blackstone is, of course, best known for his *Commentaries on the Laws of England*, published in four volumes between 1765 and 1769.[22] For him, property was one of the inalienable and absolute rights granted to man. Even as he held the right to property to be sacrosanct, Blackstone, echoing Bracton and various Roman jurists before him, reiterated that

> there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common ... Such (among others) are the elements of light, air, and water ... such also are the generality of those animals which are said to be ferae naturae, or of a wild and untameable disposition.[23]

Applying his theory of occupation to these categories, Blackstone asserted that a usufructuary property could be enjoyed in them and that the first occupant could accordingly assert some rights over them during 'the time he holds possession of them'.[24] It wasn't just the sea which couldn't be reduced to property, then; even claims over perennial rivers were suspect. Like Grotius, Blackstone, too, emphasized the unique physical properties of water and asserted that water rights constituted a 'qualified property in a public good'.[25] It was the very nature of water as transient, therefore, that precluded the

[20] Mawani, *Across Oceans of Law*, 43.

[21] On responses to Grotius, see Fulton, *Sovereignty of the Sea*, 352–77.

[22] In this monumental treatise, Blackstone identified occupancy as the 'true ground and foundation of all property'. While the principle of occupation, derived from Roman law, had long been regarded as the source of property rights in the law of nations, Blackstone is credited with domesticating this principle within English common law.

[23] William Blackstone, *Commentaries on the Laws of England: In Four Books*, 2nd edn, revised (Chicago, 1872), bk II, p. 13.

[24] For a close analysis of Blackstone's views on property rights over water, see Getzler, *History of Water Rights at Common Law*, ch. 4.

[25] *Ibid.*, 174, 165.

possibility of asserting fixed rights over it, as in the case of land. As a result, the qualified property that Blackstone admitted in the case of water could only be claimed during occupation.

Although Matthew Hale's *De Jure Maris* was written about a century before Blackstone, it was not published until 1787, a few years after the *Commentaries*. In it, Hale went further in clarifying the issue of private rights over water. While Blackstone repeatedly emphasized the limited nature of rights that could be asserted over water, Hale granted the possibility of much stronger claims. Despite acknowledging that navigable waters were common, he insisted that a subject could claim exclusive rights over these waters based either on a grant from the Crown or on custom and prescription.[26] According to Hale, of the rights that individuals could assert under these circumstances, the right of fishing was one of the most important. In the ensuing centuries, when disputes over fishing in tidal and navigable waters cropped up in Britain, they would largely revolve around the legitimacy of exclusive fishing rights based on a grant or prescription, while in other bodies of water, courts would be asked to adjudicate on the relative claims of riparian landowners.[27] Additionally, in both cases, the nature of rights that could be claimed, especially whether they included the right to soil, would also come up time and again.

Water law as it developed in England over the early modern period therefore reflected many of the ambiguities inherited from Roman law as well as those generated by imperial expansion. But what happened when this unstable body of laws encountered the ecological and political difference of the colony? To what extent could slippery English precedents concerning the legitimacy of property claims over water be applied to the colonial context? In the following section, I address these questions through a focus on crucial cases relating to fishing rights that came up for review in higher courts across colonial

[26] Matthew Hale, *A Treatise De Jure Maris et Brachiorum Ejusdem*, in *A History of the Foreshore and the Law Relating Thereto with a Hitherto Unpublished Treatise by Lord Hale, Lord Hale's De Jure Maris, and Hall's Essay on the Rights of the Crown in the Sea-Shore, with Notes and an Appendix Relating to Fisheries*, ed. Stuart A. Moore (London, 1888), 384.

[27] For a detailed discussion of cases involving fishing rights in England, see Stuart A. Moore and Hubert Stuart Moore, *The History and Law of Fisheries* (London, 1903).

India. As Mitra Sharafi notes, in the common law context 'a survey of leading cases' can help to illuminate significant 'judicial manoeuvres', especially those that shaped subsequent judgments.[28] Utilizing this methodology, I shall examine the legal complications generated by ambiguities embedded in water law and the ways in which legal experts and local colonial authorities attempted to reconcile indeterminate legal principles to the Indian situation in the late nineteenth century. The Indian case is especially illuminating because here Roman law seems to have played a more prominent role in legal decisions than in England owing to a perceived lack of local authorities and judgments pertaining to water rights.[29] And, as several historians have pointed out using the example of the United States, the introduction of Roman and common law principles to a distinct political and ecological context could create a number of problems, necessitating local innovations.[30] What particular complications did these issues generate in colonial India, and how did the state attempt to resolve them? In the following sections we turn to these questions, problematizing, in the process, fundamental assumptions about agrarian transformations in late nineteenth-century India, one of the most closely examined aspects of colonial rule in South Asia.

III
STAKES OF SOVEREIGNTY

Historians of South Asia have highlighted a paradigmatic shift in the policies of the government of India after the revolt of 1857. Abandoning its earlier commitment to laissez-faire principles, the colonial state in India is said to have moved in a decidedly protectionist direction, privileging custom over liberal norms in the recognition of property rights. While some have attributed this shift to a rising conservative impulse within the state, others have associated it with a new liberalism centred on the labour

[28] Mitra Sharafi, 'The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law', *Indian Economic and Social History Review*, xlvi, 1 (2009), 60.

[29] For a general discussion of the importance of Roman law in colonial India, see J. Duncan M. Derrett, 'The Role of Roman Law and Continental Laws in India', *Zeitschrift für Ausländisches und Internationales Privatrecht*, xxiv, 4 (1959).

[30] See, for instance, Carol M. Rose, 'Energy and Efficiency in the Realignment of Common-Law Water Rights', *Journal of Legal Studies*, xix, 2 (1990).

theory of value.[31] Whatever the motivations might have been, this shift is acknowledged to have become particularly evident from the 1870s, when the colonial state, invoking custom, began to pass a series of laws to clarify and secure the proprietary rights of tenants across British India. As Tariq Omar Ali notes, this was also a time when 'colonial property law was made more relevant and accessible to cultivators' as costs associated with litigation were reduced and the number of court-rooms and judges in the countryside was increased.[32] It is not surprising, then, that during these eventful decades courts across British India would be called upon to adjudicate between rival claims over fishing rights with much greater frequency. What kinds of doubts did these cases raise about the status of water in property law in colonial India? And what rationale did judges use while attempting to fix claims over a 'fugitive resource'? In this section, I shall address these questions through a focus on two important and influential cases involving the right to fish in the sea.

In 1870 a set of fishing stakes driven into the seabed about twenty miles north of Bombay gave rise to a lengthy dispute between two communities residing in adjoining villages.[33] These stakes, about sixty to seventy feet in length, had been erected a mile and a half from the shore opposite the village of Yerangal by fishermen belonging to a village located further north called Malavni. But a month later a large group of fishermen from another neighbouring village called Manori had sailed to this spot and pulled the stakes out of the sea. Stake-fishing was common across parts of India's western and south-western coastline, and its popularity around Bombay was noted in several colonial maps and texts.[34] It involved tying nets, usually made of hemp, to wooden stakes ranging from fifty to 150 feet in length which were driven into the bed of the sea and of other bodies of

[31] For these perspectives, see, respectively, Mantena, *Alibis of Empire*; Sartori, *Liberalism in Empire*.

[32] Tariq Omar Ali, *A Local History of Global Capital: Jute and Peasant Life in the Bengal Delta* (Princeton, 2018), 43.

[33] *Reg.* v. *Kastya Rama* (1871) 8 Bom. HCR 63.

[34] See, for instance, *Cyclopedia of India and of Eastern and Southern Asia, Commercial, Industrial and Scientific: Products of the Mineral, Vegetable and Animal Kingdoms, Useful Arts and Manufactures*, ed. Edward Balfour, 2nd edn, 5 vols. (Madras, 1871), i/2, 216; *Gazetteer of the Bombay Presidency*, xv/1 (Bombay, 1883), 301.

water (see Plate).[35] This mode of fishing, though, raised several important and complex legal questions. How could the fixing of stakes be reconciled with the exercise of the common right to fish in the sea? And what kinds of rights did the planting of stakes grant over the sea and its bed? In England such complications, as well as concerns about navigation and conservation, had prompted the state to curtail fishing with fixed implements in public and common waters.[36] But the widespread use of stakes among local fishing communities had discouraged the application of similar restrictions in India.

When their stakes were first uprooted, the aggrieved fishermen from Malavni approached the local magistrate, who convicted the defendants of unlawful assembly, mischief and theft. On appeal, the sessions judge in Thana upheld the first two convictions but dismissed the charge of theft.[37] When the case, *Reg.* v. *Kastya Rama*, finally reached the Bombay High Court, the two assigned judges were compelled to go into intricate questions relating to the nature of property rights that could be legitimately claimed over the disputed portion of the sea.

In their appeal, the defendants maintained that they had only removed the stakes because the *mamlatdar*, a local revenue official, had indicated that the right to fish in that part of the sea belonged exclusively to them.[38] They also insisted that they had acted in good faith, not intending to cause wrongful loss to the plaintiffs, 'and that as the title to fish was common to all the world, the defendants had committed no punishable offence, no injury having been done to the nets or stakes'.[39] What the judges had to decide was whether, in pulling out the stakes, the

[35] *Cyclopedia of India and of Eastern and Southern Asia, Commercial, Industrial and Scientific*, ed. Balfour, i/2, 216.

[36] Moore and Moore, *History and Law of Fisheries*, 24, 96. Also see Lal Mohun Doss, *The Law of Riparian Rights, Alluvion and Fishery: With Introductory Lectures on the Rights of Littoral States over the Open Sea, Territorial Waters, Bays, &c., and the Rights of the Crown and the Littoral Proprietors Respectively over the Fore-Shore of the Sea* (Calcutta, 1891); Hale, *De Jure Maris*, 389.

[37] *Reg.* v. *Kastya Rama*, 64.

[38] The *mamlatdar* was one of the most important local functionaries in parts of western India in the precolonial period. While the powers associated with the role were curtailed during colonial rule, it remained one of the most important positions that Indians could occupy in the Bombay administration in the nineteenth century. See Knut Aukland, 'Connecting British and Indian, Elite and Subaltern: Arthur Crawford and Corruption in the Later Nineteenth Century Western India', *South Asian History and Culture*, iv, 3 (2013).

[39] *Reg.* v. *Kastya Rama*, 69.

A line of fishing stakes on the Malabar coast, July 2018. Photograph by the author.

defendants had indeed committed the offence of mischief, a charge that the lower court had upheld.

In addressing this question, the first judge, Kemball, began by asserting that the part of the sea over which a state has jurisdiction is recognized as *res publica*, or state property in which all subjects are granted limited rights. Emphasizing the difference between *res publica* and *res communis*, Kemball highlighted that while first possession or occupation could grant some proprietary rights over the latter, 'no person can acquire property in a public thing'.[40] This was by no means an established legal principle. The confusion over common and public waters, as previously mentioned, was a long-standing one dating back to the early days of Roman law. For Kemball, however, while the open sea was common, territorial seas were public, a fact that made any claims to private property, including on the basis of occupation, untenable. But what right, then, did the plaintiffs have to erect stakes in these public waters? Here the judge pointed out that fishing with stakes was the 'ordinary and recognized practice of taking fish along the coast' and therefore their placement in this particular case must be regarded as legal. Since the defendants had uprooted these stakes, thereby disrupting the plaintiffs in the rightful pursuit of their vocation, Kemball held that the charge of mischief against the Manori fishermen was appropriate.

The second judge, West, delved deeper into the legal questions under consideration. Quoting a range of sources, including Matthew Hale, and citing various precedents from English common law, West stated that it was clear that the sea bed belonged to the Crown and that the right to fish in these waters was vested in all subjects.[41] But, departing from the views expressed by his colleague, West simultaneously held that this part of the sea was common rather than public, and that it was in fact possible for members of the public to claim exclusive rights over the sea either on the basis of a grant from the king or through prescription.[42] Whether individuals in India could

[40] *Ibid.*, 70.

[41] The origin of the idea that the Crown had exclusive right of property in the adjoining seas has been attributed to a treatise written by Thomas Digges in 1569 and it was incorporated into English law in the early modern period: see Fulton, *Sovereignty of the Sea*, 362.

[42] *Reg.* v. *Kastya Rama*, 87.

indeed claim rights over public or common waters would become a highly contentious question over the next decade, and the divergent opinions expressed by the two judges in this case illustrate the legal ambiguities involved. In the case under consideration, however, West observed that the Manori fishermen had failed to establish any exclusive rights over the disputed part of the sea, and that the *mamlatdar*, whose opinion the defendants had relied on, lacked jurisdiction over the sea. The defendants had also failed to show how the uprooted stakes had either disturbed their common right to fish or damaged public interests like navigation. Under such circumstances, Judge West, too, ruled against the Manori fishermen.

While the decision in this case was fairly straightforward, it hadn't fully resolved all outstanding issues between fishermen belonging to the contending villages, and within a few years another set of fishermen from the two villages once again found themselves facing each other in the Bombay High Court in the case of *Baban Mayacha* v. *Nagu Shravucha* (1876).[43] Realizing that claims to exclusive rights were going to be hard to sustain, the villagers of Manori appear to have changed their strategy. In 1872, shortly after the two judges pronounced their verdict in the previous case, a group of fishermen from Manori decided to erect a row of stakes immediately to the south of those planted by some fishermen in neighbouring Malavni. The Malavni fishermen approached the District Court in Thana complaining that the new stakes, planted barely 120 feet away from their own, were robbing them of the fish that were rightfully theirs. The Manori fishermen countered that, since the right to fish in the sea was held in common by all subjects, there was nothing preventing them from exercising this common right by planting stakes in any part of the sea that was not already occupied. When the District Court refused to hear the case on technical grounds, the Malavni fishermen appealed to the Bombay High Court. With both sides claiming that they were merely exercising their common right to fish, the court now had to decide whether one side was misusing this right, thereby preventing the other from fully enjoying it. Thus, apart from forcing the court to reconsider questions that had come up in *Reg.* v. *Kastya Rama*, this case

[43] *Baban Mayacha and ors.* v. *Nagu Shravucha and ors.* (1876) ILR 2 Bom. 19.

also compelled the judges to delve deeper into the nature of the common right to fish and to probe its limits.

In the case of *Baban Mayacha* v. *Nagu Shravucha*, Nanabhai Haridas and the Chief Justice, Michael Westropp, were on the bench. Whereas Haridas merely provided a short summary of the arguments put forward by both sides and the court's position on them, Westropp supplied the substantive comments. Claiming that there was 'an absolute dearth of authority in our Indian law books with respect to fisheries in the open sea', the Chief Justice stated that the court would have to rely on European precedents to address the questions raised by the case. Westropp began by quoting extensively from the *Institutes of Justinian* to highlight Roman law's commitment to the notion of common ownership over the sea as well as the principle's enduring influence on later commentators like Bracton and Grotius. After observing that important figures in international law admitted that a state could exercise certain rights over parts of the sea adjacent to it, he pointed out that states usually asserted this right on behalf of their subjects, even though he refused to engage with whether these rights were public or common in nature. Citing the authority of Hale, Westropp simultaneously conceded that in some 'exceptional cases' the king in England could transfer his rights over such waters to an individual.[44] Though Hale had himself used the present tense while referring to the Crown's ability to create private property out of public waters, Westropp, echoing established legal opinion, insisted that in England and Ireland the enactment of Magna Carta had put an end to this practice.[45] While this was a popular assumption among many legal figures in the nineteenth century, such a reading of Magna Carta was, in fact, inaccurate. The charter, as several legal commentators have noted, did not address the public's fishing rights at all.[46] And yet this 'legal fiction' associated with Magna Carta would have important

[44] *Ibid.*, 26, 34–5.

[45] Doss, *Law of Riparian Rights, Alluvion and Fishery*, 353. Hale's use of the present tense in referring to the Crown's ability to grant exclusive fishing rights in public waters was used by some commentators to argue that this right had not been affected by Magna Carta as commonly assumed: see, for instance, Moore and Moore, *History and Law of Fisheries*, 13.

[46] On the origin and impact of this legal fiction in England, see Richard A. Barnes, 'Revisiting the Public Right to Fish in British Waters', *International Journal of Marine and Coastal Law*, xxvi, 3 (2011).

implications not only in England, where it effectively prevented the grant of private fishing rights in tidal and navigable waters, but also in India, where it had the opposite effect. For as long as it was just Magna Carta that was curtailing the Crown's ability to use its proprietary rights over the sea bed and other flowing waters to exclude the public, then there was nothing stopping the colonial state from doing so in India, where the charter did not apply.

As we shall see, several judges would utilize this line of reasoning to conclude that in India the state had the power to create private rights in public waters, unlike in England, where the Crown's rights could only be exercised in the name of the public. Westropp himself refused to express a clear opinion on the soundness of this rationale and on whether the state was generally authorized to grant such rights in India. In the case under consideration, however, he categorically stated that neither side had established any special or exclusive right to fish in the sea and that they were merely fishing as members of the public. Turning to Blackstone, Westropp reiterated that 'water is a moveable, wandering thing, and must of necessity continue common by the law of Nature'. Highlighting that this principle had been upheld in important cases in England, he concluded that 'the right of the public to fish in the sea is common, and not ... the subject of property, and may be enumerated amongst the natural rights other than light, air, and water referred to, but not specified in detail by Blackstone'.[47] Having similarly dismissed the defendants' other objections based on jurisdiction, the Chief Justice declared that it was incumbent on both parties to exercise their common right to fish in a fair and equitable manner. Failure to do so, he added, provided sufficient grounds for prosecution. He accordingly reversed the District Court's decision to dismiss the case and agreed to institute a fresh trial, ending his long judgment by urging both parties to reach a settlement outside the court by themselves or with the aid of an arbitrator.[48]

[47] *Baban Mayacha* v. *Nagu Shravucha*, 51–2.

[48] On indigenous modes of dispute resolution in India, see Niels Brimnes, 'Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor's Court in Late Eighteenth-Century Madras', *Modern Asian Studies*, xxxvii, 3 (2003), 518–23. On legal pluralism in colonial settings, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, 2002).

Even though the outcomes of the two cases discussed above were fairly predictable and uncontroversial, over the course of their lengthy judgments the judges involved ended up highlighting and contributing to several semantic slippages as far as water rights were concerned. One was between common and public rights, with the two judges in *Reg.* v. *Kastya Rama* assigning different categories to the disputed waters but doing so in a manner that made the two terms almost interchangeable. More important was the equation of both categories with state ownership. While, as Richard Perruso notes, the confusion over common and public property goes back to Roman law itself, in Europe both were generally associated with unrestricted public access.[49] In India, on the other hand, as these judgments demonstrate, not only would common rights come to be glossed as public, but the term 'public' would increasingly come to be read as signalling unlimited state ownership in the absence of Magna Carta.[50] As we shall see in the next section, such a reading of public rights would set the stage not only for much greater state authority over flowing waters in India, but also for the creation of extraordinary private rights in such waters.

IV
RIGHTS AND RIVERS

Nourished by the mighty Ganga and Brahmaputra river systems, the Bengal delta is among the most fertile regions of the world. Historians of South Asia have highlighted the colonial state's economic reliance on these lands and have closely examined the means through which both the East India Company and the British Crown attempted to secure their hold over them. The Permanent Settlement of 1793, through which the Company State sought to establish property rights by creating a class of landlords tasked with revenue collection, known as zamindars, has consequently been one of the most closely analysed agrarian innovations of colonial rule. But in a fluid landscape, the Permanent Settlement, and indeed the issue of land revenue itself, involved more than just land, a fact that would become

[49] Perruso, 'Development of the Doctrine of *Res Communes* in Medieval and Early Modern Europe', 2.

[50] For a reading of the case as an important step in the development of the public trust doctrine, see Raman, 'Muddy Waters of the Foreshore'.

progressively more apparent over the course of the late nineteenth century.

One of the first important disputes to draw attention to fishing rights in public waters involved conflicting claims over the river Meghna. In this case, which came up before the Sadr Diwani Adalat, or Supreme Court of Revenue, in Calcutta in 1859, two landowners, Gureeb Hossein Chowdhree and George Lamb, claimed competing *julkar* rights over parts of the river.[51] When the Permanent Settlement was enacted, the term *julkar* initially referred to a set of rights that landowners in Bengal could exercise over the produce of water within their estates. But, by the early nineteenth century, the term had come to be associated most closely with fishing rights.[52] Over the following decades, many landowners began to rent out these rights, effectively separating them from their zamindari, or estate, giving rise to an increasing number of disputes between rival claimants. But the judges pointed out that in order to establish *julkar*s in a river where the law presumes the right to fish to lie with the public, landowners must provide very strong evidence of their special right either through a grant from the Crown or through prescription. Since, in this case, both parties had failed to do so, the court ruled that the right to fish in the river Meghna belonged to the public and neither side could claim exclusive rights over it.

Peter Reeves has attributed the increasing categorization of rivers as public property during this period to the colonial state's desire to assert greater control over fishery revenues.[53] His assumption was based on correspondence in which revenue officials highlighted the potential economic benefits of asserting the government's claims over the region's rivers. But, as the case of *Gureeb Hossein Chowdhree* v. *G. Lamb* highlights, it is

[51] *Gureeb Hossein Chowdhree* v. *G. Lamb* (1859) Cal. SDA 1357. The Sadr Diwani Adalat was the superior civil court in British India before high courts were established in Calcutta, Bombay and Madras in 1861.

[52] See B. H. Baden-Powell, *The Land-Systems of British India: Being a Manual of the Land-Tenures and of the Systems of Land-Revenue Administration Prevalent in the Several Provinces*, 3 vols. (Oxford, 1892), vol. i, bk 2, p. 420. For a detailed analysis of the term *julkar* and its transformations in late nineteenth- and early twentieth-century Bengal, see Peter Reeves, 'Inland Waters and Freshwater Fisheries: Some Issues of Control, Access and Conservation in Colonial India', in David Arnold and Ramachandra Guha (eds.), *Nature, Culture and Imperialism: Essays on the Environmental History of South Asia* (New Delhi, 1995).

[53] Reeves, 'Inland Waters and Freshwater Fisheries', 273.

important to acknowledge the role played by influential legal judgments in this process as well, and to recognize that during this period the term 'public property' was still being interpreted not as property belonging to the state but as one that was open to the public. These judgments themselves drew heavily on precedents that were becoming more clearly established in England even though, over the following decades, judges in India would express widely divergent opinions about the possibility of establishing private property in public waters. At a time when claims over land were being asserted and contested with greater urgency than ever before, courts across India would be forced to reckon with similar questions in the context of water as well. In this process, as we shall see, discussions centred on Magna Carta, and a reading of 'public property' as 'state property' would play a progressively more vital role.

While in 1859 the Sadr Diwani Adalat had come down strongly in favour of presuming public rights over rivers in India, in a judgment passed just over a decade later the Calcutta High Court would express an opinion that was far more sympathetic to private claims.[54] The plaintiffs in this case had accused the defendants of obstructing their right to fish as members of the public through the construction of stakes and other obstructions. The defendants, on the other hand, claimed that they had secured from the government an exclusive right to fish in the disputed waters. In asserting their rights, the plaintiffs had cited the case of *Gureeb Hossein Chowdhree* v. *G. Lamb* from 1859, but the court ruled that, while that case involved tidal waters, the present dispute pertained to waters that were navigable but not tidal. One of the judges went even further, claiming that those who interpreted the earlier judgment as denying the possibility of private rights over large bodies of water in India were making a mistake. While conceding that this earlier, influential case, along with other precedents, had established the Crown's claims over the beds of navigable rivers, he maintained that in India the Crown was at liberty to transfer or sell these rights to private individuals, unlike in England, where Magna Carta had curtailed its ability to do so.[55] As already mentioned, several

[54] *Chunder Juleah* v. *Ram Churn Mookerjee* (1871) 15 Weekly Reporter 212, 215.

[55] To establish an exclusive fishery in tidal navigable waters in England it was not sufficient to claim an easement by showing uninterrupted enjoyment for

(cont. on p. 21)

judges would use this line of reasoning referring to Magna Carta in order to create greater space for private rights in India than was possible in England.[56]

Such an interpretation would receive its strongest legal endorsement in *Hori Das Mal* v. *Mahomed Jaki*, a case that came up before a full bench of the Calcutta High Court in 1885. The majority opinion in this judgment overturned a resolution passed by the government of Bengal in 1869 which stated 'that it was impossible for the government to make over the fishery in a tidal river to any individual to the exclusion of the public generally'. In giving their opinion, three of the five judges stated that the official responsible for drafting this resolution had mistakenly assumed that 'the law in British India, as regards the right of fishery in tidal navigable rivers, was the same as it is in England'. Instead the judges ruled conclusively that in India there was no limit on the Crown's ability to grant rights even over navigable and tidal waters. In reaching this decision, the bench relied on the fact that in colonial India the Crown had the 'power of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands'. This, the court held, applied as much to 'lands covered by water' as to those 'not covered by water'.[57] A judgment from five years earlier had used a similarly broad definition of land to grant fishing rights to an individual claiming an easement on the basis of prescription, without a dominant tenement or adjacent landed property.[58] In that instance, the judges had pointed out that in India the term 'easement' had a much broader meaning than in England since it incorporated what was known as a profit *à prendre*, that is, a right to enjoy a profit out of the land of another. They further stated that, since the legal definition of land was not just dry land

(n. 55 cont.)
twenty or even thirty years; it was instead necessary to demonstrate that the origin of the grant was not 'modern': see Doss, *Law of Riparian Rights, Alluvion and Fishery*, 355.

[56] See *Hori Das Mal* v. *Mahomed Jaki and or.* (1885) ILR 11 Cal. 434; *Raja Srinath Roy* v. *Dinabandhu Sen* (1914) 16 Bom. LR 901; *Lakshman Gowroji Nakhwa* v. *Ramji Antone Nakhwa* (1921) 23 Bom. LR 939.

[57] *Hori Das Mal* v. *Mahomed Jaki*, 441, 444.

[58] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880) ILR 5 Cal. 945. An easement generally refers to a benefit that landowners can claim over another's land, such as a right of way. Usually easement rights are tied to and based on landownership, but under the Indian Limitation Act 1877 the term had a much broader meaning and could be claimed independently of landownership.

but also land covered by water, an easement could indeed be established over water based on uninterrupted usage for twenty years. In England the law categorically denied such a possibility in the case of tidal waters.[59]

During this period in colonial India, therefore, the very definition of land was being transformed in important ways. As Matthew Shutzer has pointed out, figures like Blackstone were invoked in these decades to expand the scope of the term 'land' to include minerals and other precious objects.[60] In the case of water, too, Blackstone was one of the influential authorities who had highlighted the fused legal identity of land and water. But Blackstone, it should be noted, had done so to emphasize that property claims cannot in fact be asserted over water itself.[61] Any such claims would instead have to be made on the land over which water flows. In colonial India, however, judges would transform this idea over time to declare that water was in effect legally no different from land. So while the incorporation of water into the category 'land' was noted in previously cited cases as well, such a categorization was not used initially to confer greater property rights over water, as would increasingly become the case in the following years.[62] With these later judgments taking such a definition increasingly to mean the legal equation of land and water, courts in India would end up effectively paving the way for unusually strong private rights over tidal waters.

There was yet another way in which the majority opinion in *Hori Das Mal* v. *Mahomed Jaki* bolstered the state's ability to grant rights over waters to private landowners. The judges declared that, even in relation to portions of rivers that were considered to be 'arms of the sea', there was no need for grant documents to state explicitly that the *julkar* extended to the tidal portions of the river. Going against the decision made in 1859 in the case of *Gureeb Hossein Chowdhree* v. *G. Lamb* involving the river Meghna, which held that in tidal waters the presumption was against the existence of such rights and could only be

[59] Doss, *Law of Riparian Rights, Alluvion and Fishery*, 355–6.
[60] Shutzer, 'Subterranean Properties', 424.
[61] Blackstone, *Commentaries on the Laws of England*, bk II, pp. 17–18.
[62] For an early instance of water's incorporation into the definition of land, see *Baban Mayacha* v. *Nagu Shravucha*, 15.

overturned with very clear proof, three judges of the court concluded that even secondary evidence would be sufficient to establish exclusive claims over such waters. The final judgment, therefore, not only authoritatively established the colonial state's ability to grant rights over tidal waters, but also provided additional legal sanctity for such grants by emphasizing their historical roots and wide prevalence in Bengal.

After a series of conflicting judgments on the issue, by the 1880s legal opinion in India had thus moved towards a recognition of private claims over tidal waters. Apart from the invocation of Magna Carta and its absence in the Indian context, this shift rested on a widening of the definition of land effectively to include water. It was the distinct physical characteristics associated with tidal waters — their vastness and mobility — that had historically separated the evolution of property rights in water from that in land. But now, with the very distinction between land and water being called into question in colonial India, private property could be extended more freely over waters that had traditionally been held to be either common or public.

Even these important transformations, however, failed actually to secure exclusive fishing privileges in Bengal and other parts of India. And, here again, it was principles derived from Roman law that were coming in the way, since fish were categorized as *res nullius*, that is, things over which no one could claim property except through possession. In England, over the course of the early nineteenth century, this principle had ensured that even those rare landowners who had managed to establish exclusive claims over certain waters found it difficult to prosecute anyone for fishing because fish were held to become the property of their captor. Growing resentment among landowners had forced the government to pass a series of laws in the 1860s to make fishing in private waters a punishable offence.[63] In disputes over fishing rights in India, too, the principle of *res nullius* only added another layer of complexity to already complicated questions surrounding water. But, as we shall see, the legal solutions that would ultimately be applied in India would go much further in

[63] These included the Larceny Act 1861 and the Sea Fisheries Act 1868: Moore and Moore, *History and Law of Fisheries*, 191.

strengthening the rights of landowners over both water and fish than was ever possible in England.

In 1873 Judge Kemp, who in the case of *Chunder Juleah* v. *Ram Churn Mookerjee* (1871) had passed a judgment that was broadly favourable to the rights of landowners, had to grapple with the special status of fish in property law.[64] This case had first come before a local joint magistrate, who ruled that in the absence of a separate fishery law in India, even if the right to fish in a portion of public river belonged to an individual, no member of the public could be punished for fishing in such waters. In reaching his judgment he observed that 'the fish taken cannot be said to have been in anyone's possession and so cannot have been the subject of theft'. The sessions judge had overturned this judgment, but when the case reached the High Court, Judge Kemp and Judge Pontifex upheld the original verdict, declaring 'that fish in a navigable river cannot be said to be in the possession of the proprietor of the *julkur* right'.[65] These opposing judgments were indicative of the various ways in which judges could interpret the heterogeneous and unstable body of laws governing fisheries. As Mitra Sharafi has pointed out in another context, such variations highlight the importance of engaging with case law as sites where judges interpreted ambiguous legal sources, especially in the absence of clear legislation on a particular issue.[66] During the period examined in this article, judges deciding cases on fishing rights were forced to take into account a wide variety of authorities ranging from Roman law to English precedents, leading them to contrasting and often contradictory judgments. In the 1880s, even as judges began to affirm the Crown's right to grant public or common waters to private individuals, several important judgments would simultaneously conclude that these grants did not confer any rights over the fish in these waters. As we shall see in the next section, the contradictory pulls of these judgments would come to a head at this juncture, ultimately necessitating state action.

[64] *Hurimoti Moddock* v. *Deno Nath Malo* (1873) 19 Sutherland's Weekly Reporter (Criminal Rulings) 47. For *Chunder Juleah* v. *Ram Churn Mookerjee*, see n. 54.

[65] *Hurimoti Moddock* v. *Deno Nath Malo*, 48.

[66] Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (New York, 2014), 10.

V
FISH AND FREEDOM

In the previous two sections we examined complications generated by the assertion of private rights over public waters in colonial India. While initially higher courts had generally upheld the principle of common ownership over such waters, by the 1880s some influential decisions had started to create greater space for private claims than was possible in England, where, after decades of uncertainty, legal opinion was finally settling on a riparian doctrine which recognized the claims of landowners but subordinated them to the principle of reasonable use.[67] However, there were, in India as in England, some bodies of water that were held to belong to private individuals. Non-navigable natural and artificial streams, lakes and ponds fell into this category. In India the colonial state also frequently leased out fishing rights in irrigation channels and government tanks to private individuals for a fixed sum. As many scholars have highlighted, the latter half of the nineteenth century was marked by a renewed focus on private property and acrimonious debates on the validity of competing proprietorial claims. Unsurprisingly, then, this was also the period when a whole range of private prerogatives over water were asserted and challenged in courts of law.

In a case that came up before the Madras High Court in 1882, for instance, a group of people had been convicted by a lower court of stealing fish from a government tank that had been leased out to an individual. The tank in question was an 'ordinary open irrigation tank' and the court had to decide 'whether fish living in reservoirs of this kind' could be said to be in the possession of the person who had leased the tank, so 'as to render their capture and removal ... a theft'.[68] Observing that in England such an act would only be punishable under a special statute, the court annulled the conviction and ordered the local government to return the fines paid by the accused. In their short judgment, however, the judges did not elaborate on the exact rationale behind their decision. Were the accused acquitted because they had fished in an open tank, or was it because,

[67] For an examination of the development of the riparian doctrine in England, see Getzler, *History of Water Rights at Common Law*, ch. 6.

[68] *The Queen* v. *Revu Pothadu* (1882) ILR 5 Mad. 390.

owing to the principle of *res nullius*, no one could be prosecuted for catching fish? These questions were particularly significant because this judgment appeared to contradict an earlier decision of the Bombay High Court in a similar case involving a government tank.[69] In that case, which came before the court in 1876, the headman of a village in the Kanara district of the Bombay presidency (in present-day Karnataka) had filed a complaint against several people for fishing in a government tank without permission.[70] Some of the accused were convicted by the magistrate, a decision that was subsequently upheld by the High Court. Curiously, this case does not seem to have been reported widely, a fact that was noted by later observers, who complained that the lack of information about the case had made it difficult to ascertain the court's reasons for reaching its decision. As a result, confusion over these questions would persist.

In 1885 two individuals were caught fishing in an enclosed tank in the town of Sirsi in the Bombay presidency that had been farmed out to another person. After being initially convicted of theft, the two were cleared on appeal by J. H. Todd, the subdivisional magistrate, who observed that fish were *ferae naturae* and could not 'be the subject of theft'. He reasoned that, 'if the tank had been stocked by the municipality, the case would be different, but in this case the fish are in reality wild animals not in the possession of the municipality'.[71] Such a judgment was in line with the one in *The Queen* v. *Revu Pothadu* (1882), but when the case reached the Bombay High Court, this decision was overturned.[72] The judges argued that in this particular case, unlike the previous one, the fish had been taken from an enclosed tank. 'The fish were therefore restrained of their natural liberty and liable to be taken at any time, according to the pleasure of the owner, and were therefore ... subjects of

[69] Mentioned in *Queen Empress* v. *Shaik Adam Valad Shaik Farid and Shaik Ibrahim Valad Shaik Umar* (1886) ILR 10 Bom. 194, 194–5.

[70] The case and its importance were also highlighted in other cases. See I. G. Moore, acting commissioner, to John Nugent, secretary to government, Revenue Department, 17 July 1884: Maharashtra State Archives, Mumbai, Revenue Department 1885, vol. 102.

[71] *Queen Empress* v. *Shaik Adam Valad Shaik Farid and Shaik Ibrahim Valad Shaik Umar*, 194.

[72] For *The Queen* v. *Revu Pothadu*, see n. 68.

theft'.[73] Based on this logic, the original conviction was upheld. This judgment made it clear that such cases would be decided on the basis of the relative liberty enjoyed by fish in a particular body of water. So, while courts were reluctant to penalize people for fishing in open tanks, those caught fishing in enclosed bodies of water could still find themselves on the wrong side of the law.

But what happened when such infringements undermined an individual's exclusive right to fish in a public body of water or a part of it? As we have seen, several important court decisions had established the right of the Crown in British India to grant such rights to individuals. Could a person be prosecuted, then, for fishing in waters that had been granted to another? In a couple of early decisions in 1873–4, including the previously cited *Hurimoti Moddock* v. *Deno Nath Malo*, the Calcutta High Court had ruled that the taking of fish in public rivers did not amount to theft even when such acts encroached on an individual's *julkar* rights. In reaching this judgment, the court had merely observed that 'fish in such a river cannot be said to be in the possession of the proprietor of the *julkar* right'.[74] It was therefore left to later judgments to clarify and explain this position. In 1877, in deciding on a similar case, two judges of the Calcutta High Court observed that any person caught fishing in public waters that fell within a *julkar* could not be prosecuted on the charge of trespass. A few years later, this position was reaffirmed by the Sadr Court of Sindh in a case involving a part of the Indus that had been leased to an individual. In this case, the court also clarified that in cases where an exclusive right to fish was held as an incorporeal right, that is, without a right over the soil, apart from theft, other charges such as criminal misappropriation of property would also not apply.[75]

By the 1880s, then, it was becoming increasingly clear that, even as the law was strengthening private rights over waters in colonial India, it was simultaneously making these rights hard to enforce by denying the possibility of exercising ownership over fish. Several influential decisions from this decade would prompt

[73] *Queen Empress* v. *Shaik Adam Valad Shaik Farid and Shaik Ibrahim Valad Shaik Umar*, 195.

[74] For *Hurimoti Moddock* v. *Deno Nath Malo*, see n. 64. For *julkar* rights, see n. 52.

[75] Report, 29 Jan. 1885: Maharashtra State Archives, Mumbai, Revenue Department 1885, vol. 102.

landowners to ask whether their fishing rights had effectively been rendered redundant, but if there was one case that drew unparalleled attention to the menacing implications of these judgments for landed interests, it was the much-publicized Meherpore case of 1887.

The case involved a large *bheel*, or enclosed body of water, in the Meherpore subdivision of Bengal owned by Baboo Chunder Pal Chowdry.[76] Fishing rights in this *bheel* were leased annually to different individuals and in 1886, in a previous case, the lessee, Umesh Parni, had filed a petition before the subdivisional magistrate, Luson, stating that he anticipated that a number of people would attempt to fish in this *bheel* on the Bengali New Year.[77] Despite precautions taken by the administration, a large number of people did ultimately gather around the tank on the appointed day, some of whom were arrested. In his statement Luson admitted that he was aware of a local custom according to which both Hindus and Muslims fished in open waters on the New Year, but he did not believe that this practice extended to private waters. He therefore convicted those arrested of theft, sentencing some to imprisonment and others to be whipped. He further warned them of harsher punishments if this act was repeated the following year. But when the case came up before the Calcutta High Court, Luson's decision was reversed, with the court concluding that there was no evidence to show that any fish had in fact been removed by the accused. The following year witnessed a similar series of events setting the stage for the fateful Meherpore case.[78] The *bheel* had been leased out to another individual, who filed an application seeking to prevent others from fishing in it on the occasion of the Bengali New Year. When about three thousand people congregated around the *bheel* and fished despite the issuance of prohibitory orders from the administration, Luson arrested sixty-eight men and held a summary trial the next day. The accused claimed that they were only following an old custom, but Luson, while acknowledging the existence of such a tradition, held it to be

[76] J. W. Edgar, officiating secretary to the government of Bengal, to the commissioner of the Presidency Division, 20 July 1887: National Archives of India, New Delhi, Home Department, Judicial Branch, Proceedings, 293–302.

[77] *Mudhoo Mundle and ors.* v. *Umesh Parni* (1886): see Edgar to the commissioner of the Presidency Division, 20 July 1887.

[78] Edgar to the commissioner of the Presidency Division, 20 July 1887.

immoral and therefore invalid. Accordingly, he sentenced several of the accused to be whipped and others to be imprisoned for two months. When this conviction was sent for appeal to the Calcutta High Court, however, the sentences were reversed, as in the previous year. But on this occasion the judges went much further in specifying the reasons behind their decision. While, in the first case, the judges had reversed the magistrate's decision on the grounds that theft couldn't be proved, in this case the judges declared that the charge of theft could not even be applied to a case like this because, despite being privately owned, the *bheel* in question was a natural body of water. '[T]he offence of theft', the judges stated, 'could not have been committed, because the fish said to have been stolen were not the subject of any one's property; they were wild fish in a natural lake, and until they were reduced to possession by being caught no property could be acquired in them by any one'.[79]

We have seen how, over the previous decade, higher courts across India had placed serious limits on the kinds of rights that could be asserted over fish by upholding the principle of *ferae naturae*. In previous decisions, the court had held that the infringement of exclusive fishery rights in public waters did not constitute an offence and indicated that people could only be prosecuted for fishing in enclosed waters where the liberty of the fish had been restrained. But now with this judgment the Calcutta High Court was indicating that, even in the case of enclosed waters, the rights of landowners over fish would be hard to establish. The Meherpore case attracted widespread attention not only because of the implications of the judgment but also because of the harsh punishment awarded by the magistrate. Newspapers like the *Amrita Bazaar Patrika* used the case to highlight the misuse of discretionary power by local officials, and asked the government to take action against Luson.[80] Even some colonial officials admitted that the magistrate's decision to whip several people in a case involving customary rights and complicated legal questions reflected poorly on the administration. The attention generated by the judgment also served to highlight the precarious nature of private claims over bodies of water.

[79] *Ibid.*
[80] *Ibid.*

By the end of the decade, as courts developed and elaborated on previous precedents on the question of fishing rights, it had become clear that both exclusive fisheries in public waters as well as fishing rights in private bodies of water, except those that involved fully enclosed artificial tanks, could not be defended legally because fish were held to lie outside the realm of property. However, such a legal position created serious problems for the colonial state by rendering valuable fishing rights worthless.

As we have seen, in England, too, similar concerns, along with a rising conservationist impulse, had led to the enactment of special legislation in 1861. The importance of conservation in shaping fishery policies has also been emphasized in the case of the United States, where fish increasingly came to symbolize the threat of over-exploitation hanging over common resources. Scholars have shown how these fears prompted state and federal governments to try and regulate fishing by asserting state ownership over fish and other wild animals at the turn of the twentieth century.[81]

This, of course, was also a period when the discourse surrounding conservation was gaining strength in India, with the colonial state passing important laws to enhance its control over forests and the animals in them.[82] In the case of fisheries, too, the issue of conservation would be raised by administrators such as the prominent ichthyologist Francis Day, a fact that has led some historians to attribute growing colonial interventions during the late nineteenth century to these protectionist concerns.[83] But while the importance of conservation would continue to grow in India during this period, these concerns would be intimately connected to the establishment of private property rights. When, for instance, following Day's

[81] See Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850–1980* (Cambridge, 1986).

[82] On the rise of scientific forestry and the growing influence of ideas associated with conservation during this period, see K. Sivaramakrishnan, *Modern Forests: Statemaking and Environmental Change in Colonial Eastern India* (Stanford, 1999); James Beattie, *Empire and Environmental Anxiety: Health, Science, Art and Conservation in South Asia and Australasia, 1800–1920* (London, 2011); Vijaya Ramadas Mandala, 'The Raj and the Paradoxes of Wildlife Conservation: British Attitudes and Expediencies', *Historical Journal*, lviii, 1 (2015).

[83] Vipul Singh and Sanu K. Gupta, 'Modern Acts, Conservation of Fish and Colonial Interest: Inland Fisheries in Mid-Ganga *Diara* Ecology, India', in Andrew M. Song *et al.* (eds.), *Inter-Sectoral Governance of Inland Fisheries* (St John's, Newfoundland, 2017).

recommendations, the Burma Fisheries Act was passed in 1875 partly owing to anxieties expressed by conservationists, it curtailed public access to state-owned inland waterways, which were now auctioned to private individuals, who were granted exclusive fishing privileges over the leased waters.[84] In colonial India, therefore, conservation in fisheries would go hand in hand with wider private control.

The clamour for similar legislation in other provinces in British India only intensified in the following years as court decisions revealed the shaky nature of rights that landowners had until then been taking for granted. It is not surprising that contestations over these rights multiplied during this period, when commercial developments had raised the value of these rights. So while landowners were attempting to restrict access to parts of their estates that had hitherto been open to the public, peasants and other subaltern groups were claiming these privileges with greater vigour.

As historians have shown, conflicts generated by competing proprietorial claims were particularly acute in Bengal, which was becoming more deeply embedded in the emerging global economy. Even in the case of fishing privileges, court decisions discussed in this section were especially controversial in Bengal's fluid terrain, where these rights were often assumed to be included in the revenue assessment under the Permanent Settlement.[85] As several commentators have noted, fish also had special economic and cultural significance in Bengal, where it was consumed in especially high quantities, with one estimate suggesting that about 80 per cent of the province's population were 'fish-eaters'.[86] As a staple food, fish had also permeated almost every important aspect of the province's cultural life. With court judgments threatening their hold over this precious commodity in the late nineteenth century, landowners in Bengal

[84] On the Burma Fisheries Act 1875, see Peter Reeves, Bob Pokrant and John McGuire, 'The Auction Lease System in Lower Burma's Fisheries, 1870–1904: Implications for Artisanal Fishers and Lessees', *Journal of Southeast Asian Studies*, xxx, 2 (1999).

[85] Reeves, 'Inland Waters and Freshwater Fisheries', 272. See also Shourya Sen and Richard Adelstein, 'Fishing Rights and Colonial Government: Institutional Development in the Bengal Presidency', *Cambridge Journal of Economics*, xlv, 2 (2021).

[86] Peter Reeves, *The Cultural Significance of Fish in India: First Steps in Coming to Terms with the Contradictory Positions of Some Key Materials*, Asia Research Institute Working Paper Series, No. 5 (Singapore, 2003), 4.

began to lobby the colonial state to pass a law to secure their rights over waters in their estates and over parts of navigable rivers in which they had bought proprietary rights.

In 1888 the British Indian Association, along with a large body of local and European landowners, flagged their concerns to the Bengal government in an influential memorial utilizing the language of custom. Pointing out that 'an exclusive right in fisheries had always been possessed by zamindars and the income from these exclusive rights were included in their assets on which the permanent settlement was assessed', the memorialists complained that these rights 'were now jeopardised by a series of decisions of the courts — decisions which, though they may not have changed the law, yet brought into prominence a reading of the law which left the zamindars without adequate protection'.[87] Custom could thus be invoked not just by those looking to protect their common rights, as E. P. Thompson suggested in his iconic *Customs in Common*, but also by those seeking to extinguish them.[88] Stating that recourse to civil law was inadequate to protect their interests, landowners insisted that any infringement of their rights must be brought within the ambit of criminal law. The government of India passed the memorial to the Board of Revenue, which concluded that the interests involved were of 'exceeding importance' and needed to be protected. The provincial government concurred, admitting that the 'value of julkar property would be seriously impaired, if not altogether destroyed when the real state of the law becomes generally known and when the mass of people realise that violation of julkar rights is not a criminal offence'. On the grounds of expediency, therefore, the government of Bengal agreed to introduce legislation to remedy the situation, even as senior officials conceded that the judgments of the Calcutta High Court were fundamentally correct, based as they were on an 'elementary principle of law'.[89] Despite an acknowledgement

[87] Extract from Abstract of Proceedings of the Lieutenant Governor of Bengal for the Purpose of Making Laws and Regulations Held on Saturday, 30 March 1889: National Archives of India, New Delhi, Home Department, Judicial Branch, Proceedings, 81–98.

[88] E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York, 1991).

[89] Extract from Abstract of Proceedings of the Lieutenant Governor of Bengal for the Purpose of Making Laws and Regulations Held on Saturday, 30 March 1889.

of the legal soundness of these judgments, officials insisted that the economic interests involved were altogether too great to be left unprotected and in 1889 passed the Bengal Private Fisheries Protection Act with the consent of the government of India. This legislation, its drafters explicitly stated, was passed in order to secure property rights and not for the needs of conservation, highlighting the extent to which protection of private rights would continue to supersede conservationist concerns during this period.

A close reading of the bill and the debates preceding its enactment reveal the extent to which this bill went much further than similar laws passed in other jurisdictions in securing private rights over both fish and water. It would do so through the introduction and utilization of the novel legal category of 'private waters'. While the redefinition of 'land' had facilitated the assertion of growing private claims over water in the final decades of the nineteenth century, the category of 'private waters' helped to enhance the enforceability of these claims.

Originally the draft of the bill had largely reproduced the terminology adopted in the Burma Fisheries Act 1875. It had accordingly simply used the term 'private fisheries', making any unauthorized fishing in these designated zones punishable, while making an allowance for 'bona fide claims of right'. But with senior officials warning that the utilization of a narrow term like 'private fisheries' and the recognition of bona fide claims would make prosecution almost impossible, the allowance made for such claims was dropped and the term 'private fisheries' was replaced by the far broader category of 'private waters'. This category was also defined in a manner that would allow it to address the particular legal difficulties generated by the attempt to establish property claims over fish. The final Act therefore defined 'private waters' as 'any waters which are private property or in which any person is entitled to an exclusive right of fishery and in which fish are not confined but have means of ingress and egress'.[90] With private waters defined in a manner that was both extremely broad and specific, the Act made fishing in such waters an offence that was punishable by both a fine and imprisonment. Since fish themselves, as judgments discussed in this section had made clear, could not be made the subject of

[90] On discussions surrounding the bill, see *ibid.*, 2–13.

property, the colonial state would ultimately secure fishing rights through a strong reinforcement of private rights over water. In the process, the colonial state would end up inaugurating a novel paradigm of private property over waters that were conventionally held to be either public or common, one that would be based on the state's original capacity to assert extremely broad rights over water. While colonial officials would continue to refer to this Act simply as an Indian version of fishery laws passed in Burma and England, in reality the Bengal Private Fisheries Protection Act, which was extended to other parts of India a decade later, went much further in privatizing public waters than either of these earlier legislations ever did.

VI
CONCLUSION

In a recent article Shourya Sen and Richard Adelstein interpreted judgments from the 1880s involving fishing rights in Bengal and the Bengal Private Fisheries Protection Act 1889 as signs of the independence of the Calcutta High Court, on the one hand, and of the existence of a 'relational contract' between the colonial state and the landowners of Bengal, on the other.[91] In this article, however, I have argued that the true significance of these and earlier legal interventions from other parts of India lies elsewhere. What these judgments reveal is not so much the Calcutta High Court's standing as a 'truly independent judiciary', as Sen and Adelstein suggest, as the enduring tensions surrounding the status of flowing waters and fish in law. As we have seen, these tensions had been accentuated by previous judgments of higher courts across British India that had facilitated the extension of property rights over water even as most water resources, including fish, continued to be held in common. Similarly, the Private Fisheries Protection Act of Bengal represented far more than the symbiotic relationship between the colonial state and landowners that the two authors emphasize in their account. What was particularly significant about the Act was its attempt to develop novel legal categories in order to resolve intractable problems surrounding fishing rights when these couldn't be overcome within the existing legal framework. Rather than viewing the judgments and the Act in

[91] Sen and Adelstein, 'Fishing Rights and Colonial Government'.

opposition to each other, therefore, we need to see them as part of a long and convoluted process through which water and fish were effectively rendered into property. In this process, these interventions had helped to establish a novel paradigm for the assertion of private rights over 'public waters', one that would be founded upon a legal recognition of the state's absolute proprietorial rights in colonial India and the gradual blurring of one of modernity's foundational binaries: that between land and water.

It would be easy to use these developments to suggest, as Carol Rose seems to indicate in the epigraph with which this article opened, that a property regime that takes water's materiality and fluidity seriously might be inherently more equitable when compared to one that treats water just like land. But it is important to remember that a recognition of water's distinct materiality has also been utilized at various junctures to justify both imperialism and fascism.[92] And, as Andrea Ballestero points out, such arguments premised on water's distinctiveness continue to be mobilized in different parts of the world to further extremely inequitable economic policies.[93] It is thus important to acknowledge that both recognition and denial of water's difference have historically been used to justify various exclusionary practices.

Without assuming that an acceptance of water's specificities naturally leads to fairer and more inclusive legal regimes, this article has attempted to highlight and examine the particular problems created by water and its unique place in property law in late nineteenth-century India. In tracking the legal mutations necessitated by these complications, it has demonstrated how, in the context of colonial India, a dissolution of this elemental difference between land and water became one of the ways through which water was incorporated into an expanding property regime in the final decades of the nineteenth century. Taken together, these alterations would allow public waters increasingly to be rendered as private property, with landowners being able to assert unparalleled control not just over water but also over fish, whose legal status had proven to be equally slippery so far. By the turn of the twentieth century, the rule of

[92] Hugo Grotius and Carl Schmitt perhaps provide the best-known illustrations of such justifications.

[93] Andrea Ballestero, *A Future History of Water* (Durham, NC, 2019).

property would spread so widely over Bengal's waters that it prompted some commentators to remark casually that the only place where the public could still fish freely was in the sea.[94] All other waters, along with the fish swimming in them, had effectively been privatized.

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[94] Reeves, 'Inland Waters and Freshwater Fisheries', 288.

ABSTRACT

Almost exactly a hundred years after the Permanent Settlement of 1793 revolutionized property relations in Bengal, a far less studied legislation would subtly extend the rule of property to include the province's waters. Bengal's Private Fisheries Protection Act 1889, which is usually regarded as having been motivated by conservationist or economic concerns, was in fact an attempt to resolve intractable legal problems surrounding the status of flowing waters and fish that had confounded judges and colonial officials in India for decades. Could water be owned like land? And could fish swimming in open waters be claimed as property? These questions would give rise to a number of important disputes in colonial India in the late nineteenth century, during a time associated with unprecedented changes in the agrarian economy. Coinciding with other legal manoeuvres that increasingly helped to render water as property in other parts of the world, the Private Fisheries Protection Act and important judgments that preceded it helped to create exceptional private rights over flowing waters in colonial India. Turning to these developments, this article examines the ways in which judges attempted to resolve contradictions generated by water's very materiality in an economy that rested so heavily on property.