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ABSTRACT

We examine the evolution of fishing rights in colonial Bengal through a series of cases heard at the Calcutta High Court in the 1880s and culminating in the passage of legislation in 1889. We posit an implicit relational contract between the colonizing British and the landowning class in colonial Bengal as a way to understand the concurrent evolution of fishing rights and institutions of governance in the region. The system of incentives created by this contract determined the development of fishing rights at a crucial moment in the history of colonial Bengal and, more broadly, became a primary mechanism of institutional change in the region. The analysis also shows the Calcutta High Court to have acted, albeit in vain, as a truly independent judiciary.

KEYWORDS: Fishing rights, state formation, relational contracts, colonialism, credible commitments

JEL CATEGORIES: N55, O13, P48.

Fishing Rights and Colonial Government: Institutional Development in The Bengal Presidency

Introduction

This paper analyzes the development of fishing rights in colonial Bengal through the nineteenth century. It posits an *implicit* and *relational* contract between the colonizing British and the landowning class, called *zamindars*, in the Bengal Presidency as a way to understand the historical development of fishing rights. This contract was *implicit* since it was legally unenforceable and took the form of a mutual understanding, and *relational* because a primary aim of the contract was to secure exchange between the parties into the future. We argue that this contract created an incentive system involving *credible commitments* and *credible threats*. In the absence of an external enforcement mechanism, relational contractors will try to impress upon one another that it makes sense to keep collaborating, either by showing their own commitment to collaboration or by highlighting the significant costs to be incurred from a deviation from collaboration. To the extent that they succeed, both parties are incentivized to uphold the terms of the contract. When this happens, the contract has been made *self-enforcing*.

Through the incentives it created, the self-enforcing contract between the *zamindars* and the British impacted the development of fishing rights in colonial Bengal and the political economy of Bengal more generally. To support this claim, we examine the development of fishing rights in the 1880s through a series of court cases heard in the Calcutta High Court and the subsequent passage of legislation. The circumstances of these cases suggest how the relational contract affected colonial institutions of government, the course of peasant-landlord conflict, and the management and use of natural resources. They also show the Calcutta High

Court to have been a truly independent judiciary. And while the High Court's rule for fisheries was ultimately not adopted in Bengal, it makes for an interesting counterfactual to the actual development of these institutions after 1890. In the sections that follow, we offer some historical background on the institutions of British rule in Bengal, sketch the history of fishing rights there, and elaborate and apply a contractual perspective to their development under British rule.

The British Arrival in Bengal and Permanent Settlement

A decades-long period of upheaval followed the East India Company's consolidation of power over Bengal.¹ Jeremy Bentham, writing in 1782, commented on the Company's mismanagement and abuse of power, and noted the damage being done both to the native inhabitants as well as the colonizer's bottom line (Bentham 1838: 375). A famine in 1770, brought on by crop failure and the harshness of British rule,² was the first to affect the region in hundreds of years (Osmani 2007: 167). By some accounts it killed a full one-third of the population of Bengal (Dutt 1908: 2, 51-52). Public outcry in England led to a policy response that began with the passage of the Regulating Act of 1773, which brought the East India Company under a greater degree of British government control. A new "revenue farming" plan, where estates were leased out to bidders, was set up after 1773 by the first Governor General of Bengal, Warren Hastings.³ This plan proved to be another disaster, and corruption remained a serious problem as well.

Contentious questions of land rights and revenue collection were seemingly settled with the Permanent Settlement of Bengal, proclaimed in 1793 by Governor General Cornwallis. The Permanent Settlement fixed revenues to be collected by the British from landowners in perpetuity and codified full proprietary rights for the land-holding class. From here on, the landowning class, the *zamindars*, managed their estates as they pleased so long as they kept up

with the revenue demands, which were to be fixed forever.⁴ But long-term objectives of the British in the Permanent Settlement are harder to discern. One perspective comes from Alexander Dow, an orientalist and East India Company officer who was an early proponent of the Permanent Settlement. He writes of the Indians, “To give them property would only bind them with stronger ties to our interest, and make them more our subjects; or if the British nation prefers the name, more our slaves” (Dow 1792: clv). Dow thus turned property, a natural right in the tradition of Locke, on its head and instead saw it as a means to ensure the servitude of the Indians. On the other hand, Phillip Francis – another Company official and an early architect of the Permanent Settlement – saw it as a way to “save” Bengal (Guha 1963: 90). Influenced by the physiocrats, Francis saw the development of land and agriculture as the basis of national wealth. In this view, the Permanent Settlement provided the incentives to develop the land and create economic value, some of which would ultimately be diverted into the coffers of the British.⁵ While Dow’s position took as its primary aim the institution of British power in Bengal, Francis’s view was concerned first with the improvement of land and the creation of wealth. As Guha (1963) shows, these two distinct strands of thought were both instrumental in the development and proclamation of the Permanent Settlement, and both informed British policy in Bengal more broadly. Dow’s view, in particular, continued to influence the character and evolution of institutions of British governance, with consequences extending a full century beyond the Permanent Settlement.

Colonial Rule by Implicit Contract

How could granting property be a means to a kind of enslavement of Indians? Systems of property rights were clearly in place in Bengal prior to the arrival of the British – specifically,

there were *zamindars*, who were taxed by the Mughals and often governed large tracts of land, and many subordinate rungs of society whose members held various types of proprietary and usage rights over land and common resources (Baden-Powell 1892: 207-209; Bose 1986: 11-12). But Dow was apparently largely ignorant of the existing structures of property and use that prevailed in different forms in the Bengali countryside.⁶ In effect, his aim was to establish a new landowning class whose authority would, through the Permanent Settlement, be perennially supported by the British and whose interests would thus become tied to the interests of the British. Dow believed that the interests of a new *zamindar* class, constituted by the Permanent Settlement,⁷ would necessarily become aligned with long-term British rule. But his rationale for this conclusion rests on the comical assertion that the heat and humidity of the climate make the Bengali people physically incapable of the vivacity required for political and economic freedom (Dow 1792: cxxi). Dow claimed that while secure property rights would push *zamindars* to develop their lands and augment British revenue, their fear of losing their property and their innate passivity would cause them never to question British rule (*ibid*). Throwing aside the claim that Bengalis are simply incapable of freedom due to their physical constitution, Dow's plan proposes an implicit contract of exchange. Specifically, the British supported extensive power and authority for the *zamindar* class over their lands in exchange for a certain standard of revenue and long-term loyalty to the British. Loyalty would mean not opposing British rule over Bengal, paying rents to the British as specified, and maintaining the conditions for effective revenue collection; these conditions included working the subordinate classes of tenants while dealing with any conflicts and opposition from these lower rungs of society. Crucially, since the *zamindars* were actually very much capable of revolt and the British equally capable of renegeing on their promises, the problem of enforcement was a real one. The contract, however, was made

self-enforcing by the increasing institutionalization of *zamindari* property rights, showing a credible commitment on the part of the British and incentivizing the *zamindars* to cooperate, along with the credible threat of *zamindari* non-cooperation, which incentivized the British to continue furthering *zamindari* interests.

The Permanent Settlement itself closely resembled the contractual relationship envisioned by Dow: the British codified perennial proprietary rights for *zamindars* into their colonial law while demanding a certain standard of revenue in return. But as we will see, the ramifications of this contract extended well beyond the proclamation and codification of the Permanent Settlement. Certain aspects of the contract were obviously enforceable from the beginning. For example, if a *zamindar* failed to meet the revenue demands of the British, his lands could be seized by the British authorities and auctioned off to new owners.⁸ Although the *zamindars* had no real recourse to justice other than armed insurrection if the British reneged on their terms, the codification of the Permanent Settlement and its implementation through the administrative apparatus of the colonial state showed a *credible commitment* on the part of the British to uphold their end of the deal. What is not made explicit in Permanent Settlement, but is clearly central to Dow's vision, is the understanding that the *zamindars* should remain loyal to the British. As Dow put it, this meant the alignment of British and *zamindari* interests.

Relational contracts generally are created to secure future transactions between the parties involved; their primary aim is the long-term preservation of the exchange relationship between the contractors (MacNeil 1978: 854-902). One important example of relational contracting is the "voluntary and interested" gift-exchange described by Marcel Mauss (1967), in which gifts are given as an invitation to and with an expectation of continuing reciprocity. The Permanent Settlement marked the inception of just such a relational contract between the British

and the *zamindars*, and in many ways, it resembled an initial Maussian gift. Its formal institutionalization of *zamindari* property rights, for one, represented a credible commitment to advance *zamindari* interests. And by fixing rents in perpetuity, the Permanent Settlement represented a commitment to disavowing arbitrary rate changes, removing an important source of uncertainty that had plagued *zamindars* under British rule prior to the Permanent Settlement.

What was really asked for in return was largely left unspoken: loyalty to the British state. *Zamindars* were not to oppose British rule over Bengal and were to advance the conditions of effective revenue collection. But while the Permanent Settlement addressed the property rights of *zamindars*, it did not deal with those of the many subordinate classes of tenants who lived and worked *zamindari* lands, and whose resistance or rebellion could threaten the *zamindars*' ability to offer the loyalty and revenue the contract required. These tenant cultivators – called *rayats* – had ancient customary rights to various uses of *zamindari* lands (Pokrant, Reeves & McGuire 2001, Guha 1983), so their interests had to be considered in any arrangement that obligated the *zamindars* to the British. A re-bargaining of these tenancy rights in the century after the Permanent Settlement would thus be an important arena for the development of the relational contract between the British and the *zamindars* along the lines envisioned by Dow. This was particularly true in the case of customary fishing.

Customary Rights, the Calcutta High Court, and the Fishing Cases

Rules, norms, and institutions can arise, become stable, and have legitimacy for stakeholders without the influence of a third party or central authority.⁹ Such local institutions are referred to here as *customary rights*, in contrast to the rights codified by the state and its legislatures. Based on many reported observations of customary fishing rights (Buchanan-Hamilton 1833: 137-142;

Guha 1983: 127-128; Nakazato 1994: 229; Pokrant, Reeves & McGuire 2001: 100), we know that customary fishing rules and rights existed in pre- and early colonial Bengal. Patterns of fishery use were organized by these institutions, tied to time and place, and broadly respected by those involved until the drastic social changes brought on by British rule.¹⁰ *Rayats* had used *zamindari* lands for fishing and cherished their right to do so. Guha (1983) notes that the cultural significance of fishing for the *rayat* class led to fishing tools taking on symbolic significance during peasant insurgencies of the nineteenth century. Conflicts over the fisheries themselves were widespread enough to reach the colonial court system through several cases in the 1880s. The way that the Calcutta High Court handled these cases, and what happened thereafter, shows how Dow's view – manifested in a relational contract between the British and *zamindars* – influenced the development of colonial institutions and, in turn, the society and livelihoods of the colonized.

By the 1880s, the colonial state in Bengal had developed an institutional structure that was far deeper than at the time of Permanent Settlement. After the Indian Rebellion of 1857, the Crown took over direct control of the Indian colonies from the East India Company. The Calcutta High Court was established in 1861 by the Indian High Courts Act, Parliament's response to the rebellion, as a means to provide justice and rule of law in India. Another post-rebellion reform, the Indian Penal Code,¹¹ was enacted in 1862. The highest court in Bengal, the High Court of Calcutta, was by the 1880s composed of promising English barristers and Indian graduates of the newly established Calcutta University (Buckland 1906: 160, 275; Kumar 1937). But while the High Court represented the forefront of legal scholarship, the lower courts were still staffed by laymen. The cases dealing with fishery rights were all first decided – that is,

before appeal – by magistrates, who were local administrative officers and other minor representatives of British authority with varying judicial knowledge (Derret 1968: 276-277).

The first two fishing cases to come before the Calcutta High Court in the 1880s both arose in Meherpur, *Mudhoo Mundle and Others v. Umesh Parni* (1886), and *The Meherpore Case* (1887). Meherpur is a town in the area of what is today the border between India and Bangladesh. The Jalangi River runs through the region and, during the monsoon months, mingles with a large local pond – called a *beel* in Bengali – that was central to both controversies. In *Mudhoo Mundle*, *rayats* who had gathered to fish the *beel*, which lay in *zamindari* lands, for Bengali New Year were summarily tried for theft and unlawful assembly and sentenced to fines, imprisonment, and whippings. The charge of unlawful assembly was dismissed by the High Court, which held that the defendants had not acted in a concerted effort to cause harm, and the charge of theft was sidestepped since no fish were actually removed.¹²

The following year, in *Meherpore*, the Calcutta High Court began to formulate a rule as to what constituted theft of fish. Chief Justice Sir William Comer Petheram, a member of the Middle Temple Bar in England and an experienced judge in India (Buckland, 1906: 335), summarized the facts of the case:

It appears that, on a particular day in the year, it is the practice of the inhabitants of the neighboring towns and villages to go to this bheel and catch what fish they can, and for doing that these sixty-eight persons have been convicted of stealing fish and punished in an extraordinary manner. A large number of them were whipped there and then, or at any rate a few hours after, and a large number of them have been sentenced to two months' rigorous

imprisonment (*Meherpore* 1887).

From this account, it is clear that customary fishing was coming into conflict with new realities. Despite the punishment meted out to the accused, in the absence of an internal re-bargaining of community institutions or a clear rule set by the state or its courts, the question of who had the right to fish in the *beel* was undecided. Whereas the *zamindars* of old were content to respect customary fishing rights, the new *zamindari* class, formed by the Permanent Settlement and driven by factors like their revenue commitment to the British and the expansion of markets, often did not recognize these rights and were willing to use violence against them. The question of how these *zamindar-rayat* conflicts were to be resolved by the British authorities became central to the future of the relational contract between the *zamindars* and British and to the administration of British rule in Bengal more generally.

In deciding the case, the justices of the Calcutta High Court relied on the doctrine of *ferae naturae*, which holds that wild animals are unowned property. Due to seasonal variations in water levels, *beels* and *jheels* – both local terms for small ponds and lakes – in Bengal are enclosed or connected to broader river systems depending on the season. Since the fish were in a *beel* that was connected to a broader riparian system at the time, the Court held that they were no one's property and could thus not have been stolen. Throughout the opinion in *Meherpore*, the Court showed a marked reluctance to engage the criminal law in the dispute over fishing rights. This aligns with the state of affairs in England, where fishing in a private fishery was not grounds for criminal larceny (*Rex v. Carradice, 1811*).¹³ The view of the Court seemed to be that the issue of fishing rights was basically a civil dispute that needed to be decided primarily through negotiations between those involved, perhaps at times involving civil litigation.¹⁴

While the Meherpur cases shut the door on the use of criminal law in fishery matters during the monsoon months when fish were free to move throughout the extended river systems, they left important questions unanswered. How do fish become someone's property? The *Meherpore* Court did not answer this question, except to say that in the case under consideration, which occurred at a time when the *beel* in question was connected to the Jalangi River, the fish were *ferae naturae*. As such, the fish could not be said to belong to someone just because they happened to be passing through a stretch of water over which that person had a right to fish. Such rights to operate fisheries over specific stretches of water, and to other commercial uses of the water fell under the general category of *jalkar* rights.¹⁵ In *Mudhoo Mundle* and *Meherpore*, the High Court showed a willingness to stick to legal principles, even if that meant going against British administrative and executive authorities and *zamindari* interests. This tendency in the High Court would jeopardize the relational contract between the *zamindars* and the British.

A Rule for Fish

A more complete rule for fishery use was developed by the Calcutta High Court in two further cases, *Maya Ram Surma v. Nichala Katani* (1888) and *Bhagiram Dome v. Abar Dome* (1888), decided on the same day by the High Court. They arose in the same district in modern-day Assam, and both involved parts of public rivers that had been leased out by the government to individuals for use as fisheries. The circumstances of both cases illustrate a growing conflict between the administrative and executive wings of the colonial government and the Calcutta High Court. While the executive and administrative sought to augment state revenue and limit dissent, the High Court remained committed to applying *stare decisis* and common law principles to Indian cases.¹⁶ In these cases, assistant and district commissioners in the region –

emissaries of the colonial state who acted as magistrate, commanded police functions in the region, and had summary jurisdiction in rent cases (Stokes, 1959: 156) – challenged the High Court on their rulings in the Meherpur cases. In answering the challenge, the Court formulated a rule for fishing rights that drew on precedent from England and other parts of India. The Court's decisions in these cases were a further rejection of the colonial practice of bringing the criminal law behind policy initiatives and threatened to weaken the position of *zamindars*.¹⁷

Maya Ram Surma involved the taking of fish from a privately excavated tank that at the time had been completely inundated by a neighboring river. In its decision, the Court expanded on what it considered to constitute possession of fish. Specifically, the justices noted that they would have been happy to affirm a conviction for theft if the fish were in a state where they could be taken at the will of the owner. In this case, if the tank had been fully enclosed, as during the dry season, the fish would have been unable to come and go between the tank and the river and would have therefore no longer been *ferae naturae*. The fish would then have been in the possession of the owner of the tank, and fishing out of this tank in the dry season would have constituted criminal larceny. This rule also seems applicable to the many *beels* and *jheels* throughout the Gangetic delta that became connected to river systems during the wet months but remained fully enclosed by land in the dry months. Fishing in these water bodies could not be considered larceny in the wetter months but might have been so considered in the dry season when the fish inside them were entirely trapped. Notably, this mirrors the patterns of customary fishing described by Nakazato (1994). In Bengal, customary fishing historically occurred during the wetter months, while commercial fisheries operated in the dry months when fish were constrained and easier to catch (Nakazato 1994: 229). So, while the *zamindars* were increasingly questioning the legitimacy of age-old customary fishing rules, and *zamindar-rayat* conflict was

becoming more acute on this issue, the Calcutta High Court, relying on common law principles, drew up a rule for fishery use that effectively mirrored ancient custom and gave *rayats* the rights they claimed. This was a clear threat to the relational contract between the British and *zamindars* posited here.

Bhagiram Dome v. Abar Dome and Another (1888),⁸ a case heard concurrently with *Maya Ram Surma*, further clarified and emphasized the above rule. On this occasion, the two accused along with eleven others were fishing during the monsoon in the Bhogdoi River. In deciding this case, the assistant commissioner, acting as magistrate, argued that the fishery owner *could have* easily captured the fish if he so desired, and so theft had been committed by the accused. He noted that typically, as the monsoon subsided, the fishery owners would trap the fish by putting up bamboo fencing in the riverbed, but he admitted, “in the present case the fencing had not been put up on the date of occurrence, as it does not pay to put it up till the end of the rains” (*Bhagiram Dome*, 825). The High Court, however, maintained that it was not enough to say that the fish *could* have been captured. The charge of theft was not applicable since the fish, in fact, had not been captured. But had the fencing actually been put up, and the fish actually been so constrained, then the fish would have been in the possession of the *jalkar* owner and the conviction of criminal larceny could have been sustained. This ruling reinforced *Maya Ram Surma* and restated the same standard of possession of fish. Fish cease to be *ferae naturae* only when they are kept and enclosed in such a way that the owner can retrieve them at his will. When fish cease to be *ferae naturae*, their taking constitutes criminal larceny. Otherwise, fish are *ferae naturae* and no one’s property until caught or constrained. *Zamindars* were incensed at this outcome and soon found other channels to assert their claims over fishing rights. The contract posited here is key to understanding how

and why the *zamindars* were ultimately able to contravene the Calcutta High Court and assert their claims over customary fishing rights. The way they were able to do so shows the power of the incentives brought to bear by the relational contract between the *zamindars* and the British.

The Bengal Act II of 1889: Private Fisheries Protection

The High Court's ruling in *Bhagiram Dome*, which effectively protected the customary fishing rights of *rayats* from the colonial criminal law, angered the *zamindari* establishment. By 1889, the British India Association, an organization of *zamindars*, lobbied the government of Bengal for a statutory revision of the rule handed down by the High Court. Ultimately, this led to the passage of the Bengal Act II of 1889, also known as the Private Fisheries Protection Act of 1889 (*The Bengal Code 1890*). This act criminalized all unauthorized fishing and trespass in fisheries, regardless of whether they were connected to river systems, and made the offense punishable by a fine not exceeding Rs. 50 for the first offence and simple or rigorous imprisonment of up to one month and/or a fine of up to Rs. 200 for subsequent offenses. The passage of this law overturned the High Court's alignment of property rights with ancient custom and effectively banned customary patterns of fishing.

As detailed by Stokes (1959), the development of legislative institutions in colonial India was influenced heavily by utilitarian philosophy. The utilitarians – led by Bentham and Mill – had thought of legislation as a science; it was “a task for the ablest philosophical mind, a subject for dispassionate study and expert knowledge, and not the sport of political passion or of popular and ignorant prejudice” (Stokes 1959: 176-177). While the structure of the various Indian legislatures was changed many times through the nineteenth century by acts of Parliament, in

1889 legislative bodies in India still resembled a panel of supposed “experts” and were by no means popular or representative bodies. Under the Councils Act of 1861,¹⁹ members of the Crown’s executive and administrative elite, along with a chosen few from the Indian population at large, were joined to enact legislation for India in the major colonial centers of Calcutta, Bombay, and Madras (Stokes 1959: 20-46). The *zamindars* objection to the High Court’s fishing rule was grounded in the assertion that they had historically enjoyed an exclusive right to fisheries. As we have seen, this assertion was either misinformed or disingenuous. Indeed, the advocate general, the jurist on the legislative council of Bengal, investigated the *zamindar*’s assertion of a historical exclusive fishery right and was unable to find any basis for it (Statement of the Course of Legislation, 1889: 657). The historical case, however, was not the only argument against the Court’s rule. Another was based on the consequences of the Court’s rule for the flow of revenue to the colonial government.²⁰ Concern over how the Court’s rule would affect these revenues was so great that the matter was referred to the Board of Revenue for an estimate. The Board could not arrive at any real figures, but a consensus was still reached there and in other administrative and executive offices that the property rights of fishery owners should be strengthened in order to protect revenue interests (Statement of the Course of Legislation 1889: 656).

With all of this in mind, the advocate general presented the final bill on a sweltering March day in Calcutta (Statement of the Course of Legislation 1889: 656). Strikingly, he defended the judgment of the High Court justices and the legal soundness of the principle they had developed in rejecting the *zamindars*’ appeal to a historically established right. Most of his speech, in fact, suggested a marked contempt for the legislation he was introducing:

I think those who endeavor to impeach the decisions of the highest tribunals of

this country and the opinions of Judges of experience should put forward a strong case. Such a case might be made by reference to decided cases which contravene the decisions objected to, or by challenging the principle on which the decisions are rested, or by showing that other acknowledged and well-recognized principles apply to the subject itself. Now, those who have made objections have done nothing of the kind. . . . [T]he objections, as far as I am aware, resolve themselves into irrelevant arguments, vituperative assertions, and an array of words which exhibit a confusion of thought as to the meaning of “property” and “possession” . . . (Statement of the Course of Legislation 1889: 660).

Reading this passage, one might think that the Bengal Act II of 1889 was not to be passed after all. But the Act was passed, and though the advocate general defended the legal reasoning behind the High Court’s rule and disparaged attempts to undermine it, he ultimately conceded the necessity for such a bill. The *zamindars*’ complaints, “irrelevant arguments” and “vituperative assertions” though they may have seemed to the advocate general, were nevertheless somehow also “in a temperate spirit” and “supported by very fair reasoning” (Statement of the Course of Legislation 1889: 661). What was this “fair reasoning?” Ostensibly, it was reasoning based on revenue interests. While revenue was a factor, a bigger factor was the dynamics of the relational contract between the British and the *zamindars*. The system of incentives that was put in place for the *zamindars* and British as a result of the relational contract between them played a central role in how the issue of fishing rights was resolved.

Why Private Fisheries Protection? Credible Threat and Commitment

While revenue concerns certainly affected the passage of the Private Fisheries Act, there are good reasons to believe that revenue in itself was not the only concern, or even the main one. Most obviously, the legislation was only taken up after the *zamindars'* complaint. The government of Bengal, in recommending legislation on behalf of the *zamindars*, warned of an exaggerated Hobbesian free-for-all as a consequence of the High Court rulings. "There can be little doubt," they declared, "that the value of *jalkur* [*jalkar*] property will be seriously, if not altogether destroyed" once *rayats* found out about this rule (Statement of the Course of Legislation, 1889: 657). It is very difficult to see how this threat to the *zamindars'*, and thus the state's, revenues could reasonably be said to emanate from the Court's rule. After all, taking fish from enclosed water bodies (tanks and *beels* and *jheels* during the dry months) was still against the law, so the Court's rule did not diminish *jalkar* value during dry months at all. During the wet months, every unenclosed water body distributed fish stock across large swathes of the wetland system. It is difficult to see how customary and subsistence fishing by *rayats* could have crippled such a stock. In the hypothetical case of larger scale fishing by traders or professionals in *jalkars*, *zamindars* still had recourse to compensatory torts.

Furthermore, there were things that *zamindars* could have done, albeit at a cost, to adjust their practices to the Court's rule. While the *zamindars* complained that civil lawsuits were useless given the poverty of *rayats*, justifying their own resort to violence, there were other courses of action. For one, systems of preemptively enclosing fish could have been developed. New norms of usage could also have been negotiated between *zamindars* and customary fishers. While the Calcutta High Court had effectively placed the customary fishing right during the wet season with the *rayats*, *zamindars* still had the ability to buy this right from the *rayats* if their

valuation justified it.²¹ Instead, the government memo warned that the landowning class would “take other means to protect rights to which they attach great value, and there will certainly be many cases in which violence will be used on one or both sides” (Statement of the Course of Legislation, 1889: 657). Given the alternatives, why was violence the *zamindars*’ first choice?

The *zamindars*’ resort to violence toward the *rayats* is linked to their relational contract with the British. As previously noted, this contract had no external enforcement mechanism. In such an environment of insecurity, contractors will often show their own commitment to collaboration or highlight the significant costs to be incurred from a deviation from collaboration in an effort to protect the incentive of others to meet their obligations as well. When the contract is mutually incentivized, it is made *self-enforcing*. In this light, the resort to violent punishment of the *rayats* is, for the *zamindars*, a mechanism of credible threat to the British. Severe punishment for even trivial infringements of the *zamindars*’ claimed property rights signaled the British that the costs of leniency might be very great – if the *rayats* were not closely disciplined, they would threaten not only the revenues of the *zamindars* but peace and order on the ground as well. In this way, the *zamindars* suggested that the costs to the British of failing to advance *zamindari* interests, in this case regarding fishing, might be very great. The *zamindars* did not need to use force directly against the British in order to impose significant costs on them. *Zamindar-rayat* conflict would hamper revenue value and collection; violence would impede British authority over Bengal and a forced cessation of violence would consume resources. Thus the costs of such conflict would be significant for the British.

If the *zamindars* showed their own commitment to the contract by using draconian means to ensure the revenues they were obligated to pay, the British would have had to express a similarly credible commitment to supporting the *zamindars*’ extensive power and authority over

their lands. In this case, the institutionalization of new and exclusive *jalkar* rights through the colonial law, overturning the rule consonant with local custom announced by the Calcutta High Court, can be seen as an expression of credible commitment by the British to the relational contract with the *zamindars*, even if this entailed what the High Court had understood to be injustice to the *rayats*. Another hint that the Bengal Act II was really an expression of credible commitment rather than a strictly revenue-based policy lies in the fact that it was only made applicable to Bengal. Indeed, the president of the Bengal legislative council had suggested that a bill should be passed that covered all of India; since the ruling of the Calcutta High Court applied to all of India and not just Bengal, legislation to counter that ruling should also cover all of India. However, the governor-general's response was that "the peculiar state of circumstances existed principally in Bengal and Assam," (Statement of the Course of Legislation 1889: 657).

Distinguishing Bengal from the rest of India in this way is on its face justifiable on purely revenue grounds. Fish were especially culturally significant in Bengal, and perhaps the impact to revenue of allowing customary fishing would not have been as substantial in other states. Furthermore, other parts of the country didn't experience the same kinds of seasonal flooding that blurred the lines between rivers, *beels*, and *jheels* in Bengal. However, disputes over fisheries clearly occurred often enough, for example, in Madras, as is evident from various fishery-related court cases from that region.²² Surely, strengthening fishery rights in Madras, for one, would also have helped the cause of revenue. So perhaps the governor-general's reference to "the peculiar state of circumstances" had to do with more than the cultural significance of fish or wetland topography. Indeed, another "peculiar set of circumstances" more or less unique to Bengal was the *zamindari* system itself. In Madras, for example, which was colonized later than Bengal, British revenue policy was structured around the *rayatwari* system, under which revenue

was settled directly between British authorities and cultivators; there was no officially recognized *zamindari* class and, consequently, no implicit contract along the lines of the one that existed in Bengal. The importance of the relational contract between the *zamindars* and British for establishing colonial authority in the Bengal presidency was the most important reason for the passage of the Bengal Act II. By passing this act, the British institutionalized exclusive fishing rights for *zamindars*, going against age-old custom and the rule announced by their own Calcutta High Court, and expressed a credible commitment to the *zamindars*.

Social, Political, and Economic Development by Relational Contract

Revenue was one obvious way in which British and *zamindari* interests aligned. The central argument of this essay, however, is that the incentives brought to bear by a relational contract between them created less obvious but no less important ways in which the interests of these two groups were tied together. The dynamics of this relationship profoundly impacted Bengali political economy. We can understand aspects of this relationship in terms of the enforcement problems faced by the contractors. Under this relational contract, the British backed extensive power and authority over land and resources for the *zamindars* in exchange for managing the revenue collection process, keeping the peace on the ground, and broadly supporting British government. Given enforcement problems, the relationship was characterized by credible commitment actions on the part of the British and credible threats on the part of the *zamindars*. One striking conclusion of this case study is that it shows the Calcutta High Court to have been a truly independent judiciary. In this final section, we highlight three other important and related historical conclusions suggested by the development of fishing rights in colonial Bengal.

The first is that aspects of the colonial institutional structure in Bengal were built on

advancing landowner interest. Our analysis shows how this happened in the case of fisheries, and ties this development to the need for the British to show credible commitment to supporting the *zamindars* as they administered land and collected revenue for them. North and Weingast (1989) note:

A ruler can establish . . . credible commitment in two ways. One is by setting a precedent of “responsible behavior,” appearing to be committed to a set of rules that he or she will consistently enforce. The second is by being constrained to obey a set of rules that do not permit leeway for violating commitments (North and Weingast 1989:804).

The passage of the Bengal Act II, like the Permanent Settlement, was an example of the second kind of strategy. The British showed a credible commitment to the *zamindars* by instituting *zamindari* interests into the colonial legal system. If this reading is correct, showing credible commitment to the landowning class was at times a guiding principle in the development of government institutions and state formation in colonial Bengal. Further research may well reveal other instances of institutional development in Bengal and other colonial settings that manifest a similar motivation.

A second conclusion is that, given the dynamics of the relational contract with the British, *zamindars* would have had limited incentive to work within communities to solve disputes like that with the *rayats* in a consensual way. The salience of credible threats as a mechanism of contract enforcement made it clearly in the *zamindars*' interest to threaten or engage in violence rather than negotiate with the *rayats*, even where more peaceful means might

have worked as well or better in excluding them from the fisheries and maintaining social order. The recipients of the message sent by the threats of violence were not just the *rayats*, but the British too, who were signaled that the *zamindars* would do whatever it took to secure their interests and enable them to meet their obligations to the British. The contrast between violence and negotiation is especially stark when one considers the alternative endorsed by the Calcutta High Court through its fisheries rule. Under the Court's rule, which endowed the *rayats* with meaningful rights to fish, the onus was on the *zamindars* to negotiate new norms of usage with the *rayats* and employ different fishing technologies and methods. This has important distributional consequences. If maximizing their own and the government's revenues requires *zamindars* to purchase the *rayats'* rights to fish in order to exclude them, the Court's rule gives the *rayats* an opportunity through bargaining to share in whatever new revenues might be realized by this new arrangement of property rights. Awarding the exclusive right to fish directly to the *zamindars*, as the Bengal Act II did, means that all the new revenues created by the exclusion will flow to the *zamindars*, and none to the *rayats*. Especially where, as here, custom had honored the rights of the displaced party, this was likely to cause serious problems. The incentives created by the implicit relational contract between the *zamindars* and the British ultimately fostered a dismantling of social life that had proceeded relatively peacefully and stably for a very long time. As credible threat on one side fed credible commitment—and further institutionalization of *zamindari* power—on the other, a feedback loop was created wherein measures to enhance enforcement of the contract between the *zamindars* and the British destroyed whatever goodwill and trust that had once existed between the *zamindars* and *rayats*, to the ultimate detriment of peoples' ability to peacefully and effectively solve the various problems that inevitably arise in social life. The habits of thought and behavior encouraged by

such a loop may plague nations and societies for generations. Various studies have also observed such links between colonial institutions and present-day political and economic outcomes (Acemoglu, Johnson, and Robinson 2001, Banerjee and Iyer 2005).

A third observation involves natural resource use and management. The case of fisheries shows that natural resource use was directly impacted by the *zamindar*-British relational contract. In the case of fisheries, landowners—backed by the institutions of colonial government—were able to secure exclusive usage and seize customary rights that had been historically held by *rayats*. As a result, the management and use of fish stocks developed in a way that was driven only by the demands of the landowners and their lessees. On the other hand, it is easy to imagine very different forms of management and use taking shape had the High Court’s rule been adopted. How might fishery institutions have developed differently had the High Court’s rule survived and the *rayats* been given more power to shape outcomes? Counterfactual argument is always to be approached with caution, but it seems reasonable to say that the methods of managing stock and distribution of the surplus created might have been very different than what actually transpired.

By the late nineteenth century, Alexander Dow’s view of the proper relation between the British and Indians was still alive and well in public discourse. As Lord Lytton, governor-general of India from 1876-1880, wrote to his friend, the Conservative politician and eventual Prime Minister, Lord Salisbury in 1877:

I am convinced that the fundamental mistake . . . of [our] Indian officials is a belief that we can hold India securely by what they call good government; that is to say, by improving the condition of the ryot [*rayat*], strictly administering

justice, spending immense sums on irrigation works, etc. Politically speaking, the Indian peasantry is an inert mass. If it ever moves at all, it will move in obedience, not to its British benefactors, but to its native chiefs and princes, however tyrannical they may be. . . . To secure completely, and efficiently utilize, the Indian aristocracy is, I am convinced, the most important problem now before us (Stokes 1959: 286).

This essay has examined the institutionalization of this view through a case study of the development of fishing rights. This has not only shed light on the history of colonial administration as it actually developed but offered a glimpse at a feasible and available institutional alternative to those historical outcomes – one close, perhaps, to Lytton’s “good government” – advanced by the Calcutta High Court. This alternative was based on common law principles of individual liberty rather than the advancement of a centralized colonial power, and failed under the weight of the incentives created by the implicit relational contract between *zamindars* and British that solidified the colonizer’s grip by increasing the authority of the local ruling class. The contractual framework enables us to connect various political and economic outcomes in colonial Bengal to the way that colonial government was theorized and instituted in that province, and identify patterns of behavior and institutional outcomes and failure – whether involving natural resource use, rural violence, or political organization – that persist to this day. The analytical power of this framework can become clearer only with further criticism and historical case studies. *7251 words*

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Notes

¹ The British gained Bengal after their victory at Plassey in 1757. At that time, “Bengal” included the contemporary Indian state of West Bengal, the nation of Bangladesh, and parts of the contemporary Indian states of Bihar, Odisha, Assam, and Chhattisgarh.

² Warren Hastings, a high-ranking Company official at the time, noted that revenue was not diminished through the period of famine due to the widespread use of violence by the Company. Rates of taxation were also kept significantly higher than they had been under the Mughals, and no famine relief was offered (Dutt 1908: 51-52).

³ Under this plan, estates were publicly auctioned off to the highest bidder in five year intervals. There was apparently a tendency for tax farmers to not develop the land for long-term success and decamp before the payment of taxes. Significant unpaid debts to the British had accumulated by the end of this experiment (Trotter 1890: 62).

⁴ In this paper, we use “*zamindar*” and “land owner” interchangeably. It is commonly understood that the situation on the ground was significantly more complicated in that there were various classes of property holders and cultivators (Raychaudhuri 1969: 163, Baden-Powell 1892: 2017-209), but much of the intricacies will be abstracted away here. The Permanent Settlement also applied to non-*zamindar* independent land owners, but not to proprietors who held tenancies under *zamindars*.

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- Guha points out that Francis's initial plan of 1776, which anticipated the central ideas of Permanent Settlement, was "more a philosophical statement than a mere administrative minute." (Guha 1963: 91).
- He advocated that the British establish, generally, "real property" in Bengal—he perceived an absence of "real property" in Bengal, and saw that as the cause of the ruin of the nation (Dow 1792: cxix).
- Indeed, this period saw a broad reconstitution of the *zamindari* class as many traditional *zamindars* struggled to cope with the high tax demand of the British. This history is discussed by Nakazato (1994).
- By all accounts, the British were not shy in exercising this power, and the constitution of the land-owning class was dramatically changed in parts of Bengal due to the inability of original land-holders to keep up with revenue demands (Nakazato 1994: 119).
- For example, Ostrom (1990) has shown how certain communities around the world have effectively managed common pool resources, like fisheries, without a central authority.
- Factors like the expansion of markets (Chaudhuri 1978: 46; Richards 1866: 551; Gupta 1959: 9), high taxation by *zamindars* (Dutt 1908: ix; Sen Gupta 1992: 112-113), famines (Osmani 2009), the reconstitution of the landowning class (Nakazato 1994: 119, 164), and the codification of *zamindari* rights but not tenancy rights (until the Bengal Tenancy Act of 1885) all contributed to upheaval in Bengali society at the time.
- The Indian Penal Code continues to form the basis of contemporary Indian criminal law (Law Commission, 2015).
- Guha argues that the unlawfully assembly section of the Indian Penal Code was often abused by colonial authorities to prevent any autonomous gathering of peasants (Guha 1983: 120-122).

¹³ But this could perhaps have been grounds for a tort, following *Keeble v. Hickeringill* (1707). In that case, Hickeringill was held liable for disrupting Keeble's right to use his land for profit. Hickeringill had discharged firearms on his land purely to scare away ducks (*ferae naturae*) from Keeble's duck traps on his land. Notably, in England there was also a public right to fish applicable to the seashore and all tidal rivers. Pokrant, Reeves, and McGuire (2001: 91) note that because of the centrality of a public fishing right in England, colonial jurists trained in the English law invoked a public right to fish in Bengal that, through the 1860s, hampered the imperial Crown's attempts to liberally farm out exclusive fishing rights in Bengali rivers.

¹⁴ Given the costs of prolonged civil litigation and the meager amounts of money at issue, the litigants would have good reason to resolve their dispute out of court. This could be done using informal arbitration procedures that had always existed in rural society (Washbrook, 1981: 658).

¹⁵ During this time, fishery rights were increasingly farmed out by *zamindars* to tenant cultivators. These fish farmers paid rent to the *zamindar* and freely fished the waters over which they held *jalkar* rights. Meanwhile, as both the Meherpur cases illustrate, local *rayats* continued to rely on long-held norms of customary fishing, which increasingly brought them into conflict with *zamindars* and the wealthier *rayats* to whom the *zamindars* typically farmed out *jalkars*. See Nakazato 1994: 292-282 on increasing stratification within the *rayat* class.

¹⁶ For example, Sklar (1988: 104) notes, "[The common law] was intended to safeguard the right of individuals freely to enter the markets and make contracts." He also comments on the tendency of the common law to permit "flexibility among private parties in regulating the market and developing new market relations with changing circumstances." In refusing to apply criminal law in the fishing cases, the Calcutta High Court seems to be following these principles.

¹⁷ A tendency described in Guha (1983) and Hardiman (1992) with abundant historical examples. Act XI of 1860, for example, gave magistrates criminal jurisdiction in breach of contract cases.

¹⁸ As with many cases from this time period and context, there appears to be some confusion regarding the naming of the case. Bhagiram Dome and Abar Dome were, in fact, the two accused in this case. Indeed, the Doms (or “Domes” as they are referred to in the case) were a highly marginalized group in Indian society and it seems very unlikely that a Dom could have obtained a right to fishery operations.

¹⁹ While legislative reform would occur again in 1892, in 1889 the Indian legislatures were structured according to the Indian Councils Act passed by Parliament in 1861.

²⁰ As we have seen in the two Assamese cases, some fisheries were directly leased out by the Crown.

²¹ While “buying” a right is rarely a simple matter, *zamindars* could have reasonably redistributed some proceeds from fisheries towards the poor *rayats* in return for circumscribing *jalkar* fishing by *rayats* during monsoon months. While there would be bargaining and enforcement costs, successful management of such situations through internal negotiations and the development of internal institutions is not unheard of (Ostrom 1990).

²² See, for example, *The Queen v. Revu Pothadu* (1882) and *Subba Reddi v. Munshoor Ali Saheb* (1901).