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ABSTRACT

In recent years, Indian interstate water disputes have grown both in number and contentiousness, exacerbating an already fragile federalism. The genesis of these disputes is traceable, in part, to India's colonial legal history. During the colonial era, interstate water disputes occurred between the Indian States and the British Presidencies. The disputes were both the cause of – and the consequence stemming from – application of English principles of prescription and prescriptive rights to an alien social and environmental context. Colonial law cast social relationships over water within a framework that institutionalized an imperial interest in water. Those same colonial legal principles and statutes continue to define social relationships over water throughout much of India today.

The dispute over Tungabhadra waters and Kaveri waters between Mysore State and the Madras Presidency was one of the earliest interstate disputes to be resolved through an agreement on water sharing. The Agreement of 1892 became the legal basis for regulation of interstate water allocation and continues to govern and influence water-sharing principles between states in post-Independence India.

This article analyses the Agreement of 1892 in order to better understand the role of colonial law in Indian interstate water conflicts. Colonial rule introduced a disjuncture between legal rights of States as set out in treaties, settlements, and other legal instruments and the reality in society as reflected by geographical and historical conditions. Colonial rule introduced conflicting trajectories of economic development, different political structures, and different mixes of traditional and modern technology, and situated those differences within a legal framework that gave the disjuncture its structure. Indeed, India's early experiments in colonial water regulation have had lasting structural implications for water use throughout the country.

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I. INTRODUCTION

In 1890, the Madras Presidency complained to the Government of India that the state of Mysore was constructing new irrigation projects on the Tungabhadra and Kaveri river systems.[1] The legal basis for the Madras Presidency's complaint was that Madras farmers had acquired prescriptive rights over the waters of the two rivers based on ancient use since the pre-Christian era.[2] The new irrigation works constructed—or proposed for construction—by Mysore, would, in the Presidency's view, adversely affect the Kurnool-Cuddapah canals in the Krishna delta regions and the Kaveri anicut in the Kaveri delta regions.[3] Although Indian water use practices and technologies dated back to the pre-Christian era, the legal rights of prescription and easement were distinctly British in origin.[4]

The claims for prescriptive interstate rights came in the wake of the Madras Compulsory Labour Act of 1858,[5] the Madras Irrigation Cess Act of 1865,[6] and, most importantly, the Indian Easement Act of 1882[7] within the Presidency. The constitutional framework for the statutes in

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1. 3 CENT. WATER COMM'N, INTERSTATE MATTERS DIRECTORATE, LEGAL INSTRUMENTS ON RIVERS IN INDIA 277-78 (1995). Prior to Independence in 1947, parts of what is presently the Union of India were under direct British rule. Territories under the British East India Company's rule were known as Presidencies. Later, under the constitutional reforms of the early twentieth century, these territories came to be referred to as Provinces. After Independence, under constitutional federalism, the units comprising the Union of India were referred to as the States of the Union. Two-thirds of the present Union of India consisted of formally autonomous protectorates of Britain, called Princely States or the Indian States. Bilateral treaties specific to each State governed the relations between the Indian States and Britain. Britain's relationship with the Indian States was referred to as the "Paramountacy." A small number of states known as Agency States were annexed territories where the rulers were appointed to be agents of the Crown. *Id.*

2. M. BASHEER HUSSAIN, THE CAUVERY WATER DISPUTE: AN ANALYSIS OF MYSORE'S CASE 1 (1972). Throughout this article I use Hussain's book as the source for the correspondence between Mysore state and the Madras Presidency. I found this book in the basement of the Institute for Social and Economic Change in Bangalore, India, and photocopied relevant pages. In the book the author had essentially reproduced the original documents from the original archival source with brief introductory comments. The article draws from the original documents as reprinted in the book.

3. *Id.*

4. CTR. FOR SCI. & ENV'T, DYING WISDOM: RISE, FALL AND POTENTIAL OF INDIA'S TRADITIONAL WATER HARVESTING SYSTEMS 11-24 (Anil Agarwal & Sunita Narain eds., 1997).

5. M.S. VANI, ROLE OF PANCHAYAT INSTITUTIONS IN IRRIGATION MANAGEMENT: LAW AND POLICY 55 (1992).

6. *Id.*

7. The Indian Easements Act, Act No. 5 of 1882, *available at* http://indiacode.nic.in/ (last visited June 23, 2005) [hereinafter Indian Easements Act].

the Madras Presidency was the Government of India Act of 1858,[8] which introduced direct Crown rule. The statute incorporated, in modified form, the last charter issued to the East India Company under the Charter Act of 1853.[9]

The state of Mysore disputed the Madras Presidency's prescriptive claims.[10] Mysore's objections were based on similar claims of immemorial use, prescription, and water appropriation practices that Mysore farmers had observed since "the time whereof no mind is to the contrary," the common law rule for prescriptive claims.[11] Indeed, it is not necessary to labor the point that irrigation technologies and uses in the Tungabhadra basin date back to the legal requirements for prescription in common law.[12] It is generally accepted now that the Tungabhadra basin in the pre-colonial era was dotted with irrigation works, large and small, dating back to the medieval era and earlier.[13]

However, despite the prevalence of irrigation works at the time, Mysore did not develop an irrigation statute until 1932.[14] The Tank Panchayat Act of 1911[15] provided for the maintenance, restoration, and repair of "minor" tanks.[16] In contrast, regulation of irrigation was performed largely through administrative rules, departmental directives, and customary law.[17] The constitutional context for the 1890 disputes between Madras and Mysore was the "rendition" of Mysore—the Instrument of Transfer of 1881[18] by which Mysore was restored to sovereignty on limited terms and that became the basis for what came to be termed in political literature "indirect rule."[19]

The disputes culminated in the first major interstate agreement to detail water sharing between two states on the Indian sub-continent.[20]

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8. C.L ANAND & H.N. SETH, CONSTITUTIONAL LAW AND HISTORY OF GOVERNMENT OF INDIA, GOVERNMENT OF INDIA ACT, 1935, AND THE CONSTITUTION OF INDIA 47 (1992).

9. *Id.* at 37–39.

10. HUSSAIN, *supra* note 2, at 3–4.

11. 2 EARL JOWITT & CLIFFORD WALSH, JOWITT'S DICTIONARY OF ENGLISH LAW 1413 (John Burke ed., 1977).

12. *Id.*

13. CTR. FOR SCI. & ENV'T, *supra* note 4, at 205.

14. VANI, *supra* note 5, at 106.

15. *Id.* at 103.

16. *Id.*

17. *See generally id.* chs. 2, 3.

18. BJORN HETTNE, THE POLITICAL ECONOMY OF INDIRECT RULE: MYSORE 1881–1947, at 48–51 (1978).

19. John Hurd II, *The Economic Consequences of Indirect Rule in India*, 12 INDIAN ECON. & SOC. HIST. REV. 169 (1975).

20. *See generally* 3 CENT. WATER COMM'N, *supra* note 1, at 277–93. The Agreement of 1892 relates to the Tungabhadra and Kaveri river systems. *Id.* This article focuses primarily

In retrospect, the disputes, the Agreement—signed on February 18, 1892—and the sociological ramifications stemming from both assume amplified relevance today for two principal reasons.

First, there is a renewed interest in Indian tank irrigation and traditional water use practices, and increasing support within international development agencies for revisiting these historic techniques.[21] The growing literature on water appropriation frames the issue primarily as a technological problem within the dichotomous categories of "traditional versus modern irrigation technologies" and "large versus small works."[22] Yet, the legal and institutional framework for traditional water systems and the sociological implications of superimposing colonial legal concepts on indigenous technologies and practices is a research problem that, thus far, has not been analyzed in the literature. Such an analysis requires integrating the legal and institutional framework supporting traditional water systems with traditional Indian water technologies. Fortunately, the Agreement of 1892 (Agreement) affords a useful opportunity to examine the interface between traditional irrigation systems and colonial law, as well as the resulting structural tensions.

The second reason the Agreement assumes relevance in modern India relates to the fact that today's interstate conflicts over river waters exacerbate an already strained federal-state relationship in India and remain relatively under-theorized.[23] The Agreement did not resolve conflicts over Tungabhdra waters. Instead, it led to a chain of subsequent agreements and disputes between the Madras Presidency and Mysore in 1892,[24] 1933,[25] and 1944;[26] two between the Madras Presidency and the state of Hyderabad in 1938[27] and 1944;[28] supplemental agreements in

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on the Tungabhadra dispute, touching on the Kaveri dispute for comparative perspectives and questions of interpretation arising from the Agreement.

21. *See generally* JASHBHAI PATEL, STORY OF A RIVULET ARVARI: FROM DEATH TO REBIRTH (1997); CTR. FOR SCI. & ENV'T, *supra* note 4.

22. *See generally* SATYAJIT SINGH, TAMING THE WATERS: THE POLITICAL ECONOMY OF LARGE DAMS IN INDIA (1997); Nirmal Sengupta, Field Systems, Property Reform and Indigenous Irrigation (paper presented at Madras Institute of Development Studies conference on *The Heyday of Colonial Rule, 1830s-1914*, Sept. 24-27, 1985) (on file with author).

23. Radha D'Souza, *At the Confluence of Law and Geography: Inter-State Water Disputes in India*, 33 GEOFORUM 255, 255 (2002).

24. 3 CENT. WATER COMM'N, *supra* note 1, at 278-98.

25. *Id.* at 294-95.

26. *Id.* at 302-06.

27. *Id.* at 297-98.

28. *Id.* at 299-301.

1945[29] and 1946;[30] the States Reorganisation Act of 1956;[31] and the proceedings before the Krishna Water Disputes Tribunal in 1973[32] (modified in 1976). The disputes threaten to resurface now that the award of 1973/1976 has expired.[33]

The Agreement touched on two principal issues. The first was related to the application of English common law principles of prescriptive rights and how they were to be interpreted in regions dominated by tank irrigation systems.[34] Second, in retrospect, the Agreement drew attention to the institutional mechanisms that would need to develop if imperial interests in water were to be reconciled with a federal polity in the future.[35] Revisiting the Agreement and contextualizing it helps to illustrate the disjuncture between legal relations and social relations as a structural feature of Indian society resulting from colonization. This article uses the Agreement as a point of departure in an effort to more fully describe the twin dynamic set in motion by colonial rule.

II. THE AGREEMENT OF 1892

In the Presidencies, irrigation statutes and rules attempted to define, codify, and regulate access to water between the colonial state and the agriculturists, on the one hand, and among agriculturists themselves, on the other.[36] These statutes and rules introduced the "productive-protective" dichotomy and the "project approach" to water works that became entrenched in the legal framework as structural conditions of water use:[37]

> "Protective" works were those undertaken as measures of famine relief, which were not required to yield any fixed rate of return. "Productive" works were expected to yield a

29. *Id.* at 307.

30. *Id.* at 308-12.

31. The States Reorganisation Act 1956, Act No. 37 of 1956, *available at* http://indiacode.nic.in/ (last visited June 23, 2005).

32. *See* KRISHNA WATER DISPUTES TRIBUNAL, GOV'T OF INDIA, THE REPORT OF THE KRISHNA WATER DISPUTES TRIBUNAL (1973).

33. *Id.* at 230. The award expired on May 30, 2000.

34. CENT. WATER COMM'N, *supra* note 1, at 280.

35. *Id.*

36. VANI, *supra* note 5, at 31-73.

37. D'Souza, *supra* note 23, at 262; Rahda D'Souza, *International Law – Recolonizing the Third World? Law and Conflicts over Water in the Krishna River Basin* [hereinafter D'Souza, *International Law*], *in* LAW, HISTORY AND COLONIALISM: EMPIRE'S REACH 248 (Diane Kirkby & Catherine Colborne eds., 2001).

> fixed rate of return....Eligibility for subsidies, fiscal incentives, rates of cess, levies and taxes followed the categorisation. Different institutional mechanisms and policy frameworks evolved for the two types of work.[38]

The process of alienating irrigation works from agricultural practices of the local populace began when the East India Company started the process of inventorying irrigation works in the Deccan region, later classifying them for revenue and administrative purposes into "major" and "minor," "productive" and "protective."[39] Using principles of classification (*intelligible differentia*), colonial law institutionalized a structural schism in water use.[40] The legal framework created the conceptual alienation of water from land in law, a condition precedent for development planning in the post-Independence era.[41] The Agreement attempted to define, codify, and regulate access to water between the two states, one semi-sovereign and the other a colony within the imperial Empire system.[42] It furthered the "project-approach" by entrenching access to water within interstate agreements.[43] This was very different from the conceptual separation of water from land in law and institutional practices in Western capitalist nations, particularly in the wake of capitalist development.[44]

The Agreement of 1892 was signed between the Madras Presidency and the state of Mysore through the mediation of the Government of India and the Resident[45] of Mysore, representing the interests of the Government of India in Mysore.[46] The Agreement placed irrigation works within a framework that was based on neither statute nor international treaty. The Agreement therefore did not follow nor did it precede the standard chain of institutional and contractual arrangements that legislative processes entail; neither did it give Mysore the autonomy to negotiate and effectuate international obligations through international treaty.

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38. D'Souza, *International Law*, *supra* note 37.

39. VANI, *supra* note 5, at 62, 87–88, 94–95, 101–02.

40. D'Souza, *International Law*, *supra* note 37, at 246, 248, 251.

41. *Id.* at 245–46.

42. 3 CENT. WATER COMM'N, *supra* note 1, at 280.

43. For more on a "project approach" to water, see D'Souza, *International Law*, *supra* note 37, at 246, 248, 251.

44. D'Souza, *supra* note 23, at 258.

45. HENRY YULE & A.C. BURNELL, HOBSON-JOBSON: THE ANGLO-INDIAN DICTIONARY 761 (1996). During the Company's rule, the term "resident" was used to refer to the chiefs of the Company's commercial establishments in the provinces. Later it was used to refer to the representative of the Governor-General at an important native court. *Id.*

46. 3 CENT. WATER COMM'N, *supra* note 1, at 277–78.

The Agreement nevertheless conceptually alienated irrigation works from their embedded place in agricultural practice by the manner in which such works were defined in the document. The Agreement defined "New Irrigation Works," "New Reservoir," and "Repair of Irrigation Reservoirs" and provided that no new irrigation works were to be constructed by Mysore without previous reference to Madras.[47] Clause 1 of the Agreement provided:

> 1. In these rules:
>
> (1) "New irrigation reservoirs" shall mean and include such irrigation reservoirs or tanks as have not before existed, or, having once existed, have been abandoned and been in disuse for more than 30 years past.
>
> (2) "A new irrigation Reservoir" fed by an anicut across a stream shall be regarded as a "New Irrigation reservoir across" that stream.
>
> (3) "Repair of irrigation reservoirs" shall include (a) increase of the level of waste weirs and other improvements of existing irrigation reservoirs or tanks, provided that either the quantity of water to be impounded, or the area to be irrigated is not more than the quantity previously impounded, or the area previously irrigated by them; and (b) the substitution of a new irrigation reservoir for and in supersession of an existing irrigation reservoir but in a different situation, or for and in supersession of a group of existing irrigation reservoirs, provided that the new work either impounds not more than the total quantity of water previously impounded by the superceded works, or irrigates not more than the total area previously irrigated by the superceded works.
>
> (4) Any increase of capacity other than what falls under "Repair of irrigation Reservoirs" defined above shall be regarded as "New Irrigation Reservoir."[48]

Under the terms of the Agreement, Mysore was restrained from undertaking any "new irrigation reservoirs" without prior consent of

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47. *Id.* at 279.

48. *Id.* An anicut is used in the irrigation of the Madras Presidency to refer to the dam constructed across a river in order to fill and regulate the supply of the channels drawn off from it—the cardinal work, in fact, of the great irrigation systems. The word, which has of late years become familiar all over India, is derived from the Tamil word "anai-kattu," "dam building." YULE, *supra* note 45, at 30–31.

Madras.[49] The restrictions applied to the Tunga, Bhadra, Tungabhadra, and the Vedavati rivers and included 17 streams and drainage areas specified in the schedule to the Agreement.[50]

In addition, the Agreement contained the following conceptual underpinnings:

> a. Water works could be alienated from land for the purposes of administration;[51]
>
> b. The state could and should monitor and police appropriation of water within its boundaries in order to discharge its responsibilities to neighboring states;[52]
>
> c. The state had the legal standing (*locus standii*) to negotiate and represent the interests of the agriculturists within its jurisdiction;[53]
>
> d. The state could enter into agreements with other states in the absence of a specific mandate, through the securing of contracts, licences or permits from the agriculturists, whether represented in person, by corporate entities or through the legislative process (entailing pre-legislative public submissions and other parliamentary processes).[54]

These conceptual underpinnings were hardly surprising given rule under an imperial-colonial regime. Indeed the literature on colonial irrigation and the colonial state is extensive and need not be traversed in detail here.[55] The significance of the Agreement lies in the legal principles it invoked and the ways in which those principles were

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49. 3 CENT. WATER COMM'N, *supra* note 1, at 279.

50. *Id.* at 282–89.

51. D'Souza, *International Law*, *supra* note 37, at 245–46.

52. The Agreement was signed by the State, which in Western theory represents its citizens and, therefore, as signatory, would be expected to enforce the terms of the Agreement.

53. The State was recognized as signatory and therefore competent to sign on behalf of its subjects.

54. The State was not a functioning democracy as we understand the term today.

55. *See, e.g.*, VANI, *supra* note 5; Sengupta, *supra* note 22; Nirmal Sengupta, *Irrigation: Traditional vs. Modern*, 20 ECON. & POL. WKLY. 1919–38 (1985) [hereinafter Sengupta, *Traditional vs. Modern*]; Nirmal Sengupta, Colonial Impact on Agriculture: A Systems View (paper presented at International Workshop on Comparative Studies of Rural Transformation in Asia, Oct. 2–4, 1986) (on file with author); Alex Bolding et al., *Modules for Modernisation: Colonial Irrigation in India and the Technological Dimension of Agrarian Change*, 31 J. DEV. STUD. 805 (1995); ZAHEER BABER, THE SCIENCE OF EMPIRE: SCIENTIFIC KNOWLEDGE, CIVILIZATION AND COLONIAL RULE IN INDIA (1998); Agarwal, *supra* note 4; NATURE, CULTURE AND IMPERIALISM: ESSAYS ON THE ENVIRONMENTAL HISTORY OF SOUTH ASIA, STUDIES IN SOCIAL ECOLOGY AND ENVIRONMENTAL HISTORY (David Arnold & Ramachandra Guha eds., 1995).

modified and used in the colonial context to arrive at the concepts on which water sharing between states—and, indeed, within states—came to be based. These concepts and principles govern social relations over water even today.[56]

The legal principle forming the basis of water sharing in the Agreement is "prescription."[57] Clause III of the Agreement provided that, if Mysore wished to construct any "New Irrigation reservoir" and applied to the Madras government,

> [t]he Madras Government shall be bound not to refuse such consent except for the protection of prescriptive rights already acquired and actually existing, the existence, extent, nature of such right and the mode of exercising it being in every case determined in accordance with the law on the subject of prescriptive rights to use of water and in accordance with what is fair and reasonable under all the circumstances of each individual case.[58]

Prescription as the underlying basis for legal rights to water between states presents two potential problems, both of which are discussed in greater detail in the sections that follow. The first problem relates to the social, historical, constitutional, and institutional context within which rights such as prescription and easements[59] existed and continue to exist in Britain and the Euro-American nations, generally. The second problem arises from attempting to superimpose law from one geo-historical context onto another—in this case from Britain onto India. In addition, there is a third difficulty, namely the problem of attempting to adapt technology to fit within culturally novel legal regimes—for example, the attempt to fit tank irrigation within the British legal regime.

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56. *See generally* The Interstate Water Disputes Act, Act No. 33 of 1956, *available at* http://indiacode.nic.in/ (last visited June 27, 2005), and the adjudication of disputes under the Act. *See also* KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32.

57. JOWITT & WALSH, *supra* note 11, at 1412. Prescription is a right, immunity, or obligation that "exists by reason of lapse of time." *Id.*

58. 3 CENT. WATER COMM'N, *supra* note 1, at 80.

59. JOWITT & WALSH, *supra* note 11, at 675. "An easement is an incorporeal hereditament and is a privilege without profit." *Id.* The Indian Easement Act of 1882 defines an easement as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own." Indian Easements Act, *supra* note 7.

III. PRESCRIPTIVE RIGHTS: LAW AND CONTEXT

European legal systems are a fusion of six strands of European legal history: Roman law, feudal or seigneurial law, canon law (ecclesiastical law), royal law, merchant law (lex mercatoria), and natural law.[60] Simply stated, the differences between the legal systems in different Euro-American nations may be traced to varying emphasis on the six constituent strands.

The conceptual underpinnings of European legal systems derive principally from Roman law. In the words of Geoffrey Samuel, "Since Roman times, there have been very few new and independent conceptual ideas [in law]."[61] Roman law, in turn, was based upon three fundamental legal categories: Law of Persons or Obligations, Law of Things or Property, and Law of Actions (remedies, rights and enforcement machinery).[62] The formal divide between Roman law and politics was the division between the "public" and the "private."[63] At the same time, the dichotomy between public and private relationships formed part of the overall definition of the Roman—and now, the modern European—state.[64] As Fraz Wieacker states, "Roman law is a bond of law by which so often the West is held together."[65]

The lasting effect of Roman law on modern European legal systems may be attributed to "the Roman concept of political power as a legal order;...the strict isolation of this legal order from its social and economic background; and...the control of legal decision-making by means of a consistent system of cognitive principles."[66] These characteristics of Roman law gave European nations the legal and institutional tools necessary to sustain an expansionist social system. Indeed, the word colony (*coloniae*) dates back to the Roman Empire.[67] A network of Roman and Latin *coloniae* made possible the expansion of the city-state into vast regions.[68]

Although European notions of public, private, and the state have undergone transformations over time—from the Roman era through

60. MICHAEL E. TIGAR, LAW AND THE RISE OF CAPITALISM 8-9 (1977).
61. Geoffrey Samuel, *Roman Law and Modern Capitalism*, 4 LEGAL STUDIES 185, 209 (1984).
62. *Id.* at 192.
63. *Id.* at 185.
64. *Id.* at 191.
65. Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257, 258 (1981).
66. *Id.* at 262.
67. *Id.* at 264.
68. *Id.*

feudal times, followed by the subsequent rise of liberal theories of state within capitalism, and later, the spectacular expansion of modern corporate entities—the three concepts are nevertheless organic to European social histories and social practices.[69] It becomes necessary to revisit these basic concepts and ideas in order to begin to grasp the implications of applying principles of prescription to an interstate water sharing agreement in a colonial context.

Prescriptive rights are, by definition, rights situated in the "private" realm.[70] Based on Roman law, they were later modified by canon law and influenced by English common law.[71] Prescriptive rights are attached to land and/or property and are not personal to landowners.[72] Prescriptive rights may be claimed between citizens (private rights), or between citizens and the state (public property rights), as in the case of commons, right of passage, or navigation rights.[73]

The legal principles that govern treaties and covenants between nations (ius gentium—law of nations,[74] lex fori—law of the forum,[75] ius commune—common law[76]) are very different from the public and private rights between citizens inter se and citizens and states. Indeed, from the very character of prescriptive rights, it can be said that the state can make no prescriptive claims either against citizens or against other states.[77] In the colonial context, this public/private divide in law and society was highly problematic for the state and remains so today.

In contrast, the conceptual underpinnings of Indian legal systems in the pre-colonial era were founded on concepts of place (*e.g.*,

69. For the public-private divide as well as problems arising from it in Western law, see generally, TIGAR, *supra* note 60; Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1429 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1332 (1982); Paul Brest, *State Action and Liberal Theory: A Case Note on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1289 (1982).

70. JOWITT & WALSH, *supra* note 11, at 1412.

71. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 304 (5th ed. 1956).

72. JOWITT & WALSH, *supra* note 11, at 1412; 14 HALSBURY'S LAWS OF ENGLAND 47 (Lord Hailsham of St. Marylebone ed., 4th ed. 1975).

73. 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 72, at 36, 47, 90.

74. Samuel, *supra* note 61, at 187.

75. Wieacker, *supra* note 65, at 280.

76. *Id.* at 258, 260, 269, 278, 280.

77. As prescriptive rights are about rights of landowners and State/Crown lands are part of the public domain, the State cannot claim prescriptive rights against private landowners.

village) and ethnic membership (*jati*).[78] Under these early legal systems, the state was a tenuous institution at best.[79] Furthermore, the legal, political, social, moral, and institutional dimensions of society were not readily segregable under these legal systems.[80] Although rights and obligations to water use were defined and regulated, the institutional framework for exercising those rights had not developed anything comparable to the European concepts of "public," "private," and the "state."[81]

Colonial law legislated into existence a private realm in Indian society through the fiat of positive statute law. Private law in the colonial context, including the most sacred of all private law—the law of contracts—was developed through public legislation.[82] In contrast, the evolution of private law in European society came through the legal recognition of both the habitual transactions of people in their daily lives and the customary practices that had evolved over time. When private rights are decreed through legislation, they take on an instrumentalist character and the attempted translation of statutory law into customary practice becomes problematic.

In the European context, private rights were not legislated into existence de novo as they were in colonial India. Rather, from time to time statutory law codified, rationalized and modified existing European practices.[83] In contrast, the Madras government legislated into existence prescriptive easement rights.[84] Such legislation suggests a contradiction in terms, as there could not be "new" prescriptive rights if such rights derived from historical use, and if the old modes of water use were to be recognized by way of prescription then the state could have no role in regulating such rights.

Unlike the Madras legislation, in Mysore there were no statutes regulating water until 1932.[85] Instead, the institutional context under indirect rule was much more in tune with customary institutions and practices. The administrative rules on water, however inequitable, did

78. Satish Saberwal, *Enlargement of Scales, Plural Traditions, and Rule of Law: Comparative Reflections on European and Indian History*, 1 REV. OF DEV. & CHANGE 1, 4–5 (1996).

79. *Id.*

80. *See generally id.*

81. *See, e.g.*, Radha D'Souza, *Contextualising Interstate Conflicts over Krishna Waters*, *in* LAW, SCIENCE AND IMPERIALISM: HYDERABAD (forthcoming 2005).

82. *See, e.g.*, Indian Easements Act, *supra* note 7.

83. *See, e.g.*, PLUCKNETT, *supra* note 71, at 325.

84. Indian Easements Act, *supra* note 7.

85. VANI, *supra* note 5, at 106.

not transform the structure of the indirectly ruled state as it did the directly ruled states.[86]

Given the contrast between the Madras and Mysore approach to water rights prior to 1932, it is not entirely clear what the Agreement of 1892 sought to achieve when it stated that the Madras government would act only to protect prescriptive rights already acquired, with "the existence, extent, nature of such right and the mode of exercising it being in every case determined in accordance with the law on the subject of prescriptive rights to use of water...."[87]

A second problem with the Agreement of 1892 was that, in Mysore's case, the Agreement was not an international treaty, nor was it domestic legislation. Unlike the case of Madras, in Mysore, the colonial state was not responsible for enforcing the Agreement once Mysore was designated a sovereign state following the Instrument of Transfer of 1881 (Instrument).[88]

Under the Instrument, Britain restored autonomy to Mysore but severely restricted its scope.[89] The Instrument represented a unilateral decision by Britain, as well as a unilateral document.[90] The first three articles dealt with installation of the Maharaja and the line of succession.[91] The Governor-General retained the right to de-recognize any ruler if he showed "manifest unfitness to rule."[92] The fourth article affirmed the subordinate status of the Maharaja under the 1799 Treaty of Srirangapatnam.[93] The fifth article fixed a subsidy of Rupees 350,000 payable by Mysore to the British government.[94] Other articles in the Instrument curtailed the military powers of Mysore and the right to communicate with other States.[95] Articles 14 and 15 required Mysore to provide free land for telegraphs and railways.[96] In addition, a number of articles provided for extradition of criminals wanted by the British government and exemption of British citizens from trial in Mysore.[97] The Instrument thus became the constitutional framework within which future developmental, administrative, economic, and social policy would

86. HETTNE, *supra* note 18, at 92-93, 233-34.
87. CENT. WATER COMM'N, supra note 1, at 280.
88. HETTNE, *supra* note 18, at 48.
89. *Id.* at 49-50.
90. *Id.* at 48.
91. *Id.* at 48-49.
92. *Id.* at 49.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

eventually grow in Mysore. Although burdened with subsidy payments and military and trade restrictions, for the purposes of administrative responsibilities including land tenure and water access, Mysore was deemed an autonomous entity with limited sovereignty.[98] In that context, how was Mysore to protect its prescriptive rights when the legal architecture of Indian society was not founded on the formal separation of public, private, and state spheres, and when Indian social institutions and practices were not premised on the existence of a comparable legal architecture to that of Britain?

Although Mysore signed the Agreement of 1892, the document remained a source of tension between the two states. The memoranda of Sir K. Sheshadri Iyer, the Dewan of Mysore, dated June 10, 1890 (before the agreement was signed) and March 26, 1892 (after the agreement was signed) reflect the nature of those tensions.[99]

IV. SHESHADRI IYER'S OBJECTIONS: TRADITIONAL IRRIGATION WORKS UNDER COLONIAL LAW

Sir K. Sheshadri Iyer was the Dewan of Mysore and, in that capacity, represented the State of Mysore in the water dispute.[100] His appointment came at a time of divisive Madras-Mysore factions within the Mysore bureaucracy.[101] Iyer was initially viewed as a member of the Madras faction and, therefore, "pro-Resident."[102] Indeed, as a Madras Brahmin with English education, his appointment was viewed favorably by the Resident of the time.[103] Nevertheless, once charged with the affairs of the state, Iyer had to plead the case of the Mysore farmers with the British government.[104]

There was a sense of urgency surrounding the negotiations, particularly given the context of the "rendition" of Mysore.[105] The "rendition"—the decision to unilaterally restore Mysore's autonomy—came in the wake of the Great Mysore Famines of 1878–1879.[106] The famines reduced revenue to the British government by 25 percent annually, with a loss of one million lives and large-scale depopulation of

98. *Id.* at 50.
99. HUSSAIN, *supra* note 2, at 48–55.
100. *Id.* at 2.
101. *Id.* at 68–69.
102. *Id.* at 69–70.
103. *Id.*
104. *Id.* at 2.
105. *Id.* at 48–51.
106. *Id.* at 35.

certain regions.[107] The cause of the famine is generally attributed to the failure of British irrigation and land revenue policies.[108] The famine occurred when Mysore was under direct Crown rule during a brief period of 50 years, from 1830 to 1880.[109] The British solution to the abject failure of direct Crown rule was to restore autonomy to Mysore so that the state could sort itself out.[110] The task of sorting out the state fell squarely on Sheshadri Iyer's shoulders.[111]

Sheshadri Iyer pleaded the case for customary irrigation in the Deccan region in the language of English law. In his memorandum of June 10, 1890, Iyer argued in clause 6(a):

> The supply of water which we propose to store and use for irrigation and water-supply is only casual, intermittent, and *exclusively dependent upon the rainfall on Mysore land.* We have a natural right to collect and dispose of all water on the surface of our land, and though, as between private owners, such natural right would (subject to the exceptions hereafter to be noticed) be restricted to *water not flowing in a defined channel,* the case of a State is, I submit, very different. It has to deal with large interests and establish means of irrigation and water-supply over extensive areas, and *it cannot effectually dispose of surface waters before it enters some defined channel.* And I submit that *the question as affecting the State has to be decided on the higher grounds of public welfare and general prosperity, and not according to the strict rules of law applicable only to private rights.*[112]

Iyer's memorandum raises significant questions about the appropriateness of applying English riparian principles to traditional irrigation practices in the region. English riparian laws developed in the social, historical, and ecological context of British society. The factors that influenced the concepts underpinning riparian rights in England, and European nations generally, evolved out of a number of factors peculiar to those societies. The most important ecological factor was that the majority of European rivers are perennial and snow-fed. With perennial rivers, water flows into channels due to natural causes, and it is therefore a given natural condition of the land. As a result, water rights in Europe

107. *Id.* at 35, 226–27.

108. VANI, *supra* note 65, at 226–35. *See generally* B.M. BHATIA, FAMINES IN INDIA: A STUDY IN SOME ASPECTS OF THE ECONOMIC HISTORY OF INDIA (1860–1945) (1963).

109. HETTNE, *supra* note 18, at 35, 226.

110. *Id.* at 226.

111. *Id.* at 232–35.

112. HUSSAIN, *supra* note 2, at 49–50 (emphasis added).

were considered an inalienable part of land rights until well into the early twentieth century.[113] In the humid conditions of Europe, drainage was the problem, not irrigation, as in the dry conditions of the East.[114]

With the onset of the early twentieth century, the production of hydropower due to technological developments, as well as the expansion of corporations due to institutional developments, imposed new demands on traditional riparian rights and prior appropriation rights in law. Those demands led to an evolution in legal definitions and concepts appropriate to the twentieth century demands of European capitalism.[115]

European riparian common law dates back to the rule in *Chasemore v. Richards*,[116] in which the court reaffirmed the principle of the primacy of land in riparian rights. At the time, the theoretical and empirical knowledge in the West was, generally speaking, based on engineering principles applied to urban environments. In the East, knowledge—both theoretical and empirical—was, generally speaking, agricultural and rural-oriented.[117]

As discussed earlier, regulation of water in England and the Euro-American nations developed within the structure of public and private rights mediated by the state.[118] In case of new uses, particularly in the wake of industries, factories, and urbanization, the state's right to intervene in the prescriptive rights of the landowners was limited to the public dimensions of water use.[119] Prescriptive rights were strictly private rights and were attached to the land.[120] If new users wanted access to water, or old users had problems with how water was used by the new users, (*e.g.*, if they caused pollution), the matter was considered a private dispute between citizens inter se.[121] Usually, riparian rights gave landowners an edge in negotiating changes with new users of water.[122] Such disputes and subsequent resolutions negotiated among citizens, and between citizens and the state, were by no means fair, without undue influences, or independent of ideological, political, and

113. LUDWIK A. TECLAFF, THE RIVER BASIN IN HISTORY AND LAW 88 (1967).

114. M. NEWSON, LAND, WATER AND DEVELOPMENT 15-16 (2d ed. 1992).

115. *See generally* Ludwik A. Teclaff, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RESOURCES J. 45 (1991); TECLAFF, *supra* note 113, ch. VI.

116. Chasemore v. Richards, 7 H.L. Cas. 349 (1859), All E.R. Rep. (1843-60).

117. NEWSON, *supra* note 114, at 5-6, 14.

118. *See generally* Teclaff, *supra* note 115, at 45-73; TECLAFF, *supra* note 113, ch. V.

119. NEWSON, *supra* note 114, at 18-19; TECLAFF, *supra* note 113, at 87-89.

120. JOWITT & WALSH, *supra* note 11, at 1412; 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 72, at 36.

121. Teclaff, *supra* note 115, at 61.

122. Teclaff, *supra* note 113, at 88, 97.

moral overtones. However, the public-private-state structure of European society insulated those issues from the strictly legal process of the determination of rights and dispute resolution.

Instead, such negotiations occurred within the wider socio-historical-environmental context of European civilization. According to Robert W. Cox, a civilization is characterized by

> an intersubjective order, that is to say, people understand the entities and principles upon which it is based in roughly the same way. Their understandings are stimulated and confirmed by their own experiences of material life. By understanding their world in the same way, they reproduce it by their actions. Intersubjective meanings construct the objective world of the state system and the economy.[123]

Sheshadri Iyer's memorandum attempted to highlight the differences between the European and Indian intersubjective order. In Indian states dotted with traditional irrigation structures capturing water from rainfall, water did not form natural channels, nor was it a given condition of land. Instead rainwater fell into channels and structures constructed through human endeavor. Land was subject to the general climatic conditions of a given region, including supplies fed to river channels by the monsoons. Prescriptive rights could not—and did not—apply where water entered artificial channels.

English law was premised upon the distinction between a natural right and a legal right.[124] Artificial channels were excluded as natural rights because, within the public-private-state structure, all artificial channels were required to be based on some form of agreement, whether implied or express.[125] In *Kensit v. Great Eastern Railway Co.*,[126] the judge observed, "It seems to me to be a contradiction in terms to say that any natural right can ever be acquired in an artificial cut."[127] Similarly, Iyer concluded in his Memorandum of 1890:

> The State naturally would have a greater right of control over water falling on the surface of its own lands and gathering into a defined channel within its own frontier

123. Robert W. Cox, *Structural Issues of Global Governance: Implications for Europe, in* GRAMSCI, HISTORICAL MATERIALISM AND INTERNATIONAL RELATIONS 259, 265 (Stephen Gill ed., 1993).

124. 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 72, at 90.

125. *Id.*

126. Kensit v. Great E. Ry. Co., 27 Ch.D. 122, 133-34 (C.A. 1884).

127. *Id.*

> than it would in the case of a stream rising outside its frontier and merely flowing through it into the Madras Districts; the obligations which may exist in respect of a stream of the latter kind do not arise in any of the cases under dispute.[128]

The extensive networks of irrigation works in peninsular India during Iyer's time were created through human intervention. However, the assumption in English law that these irrigation works ought to have been premised on some form of agreement, public or private, could not be made because the property regimes, land titles, and allotment regimes in pre-colonial India were very different, as Iyer argued in his memoranda. If the water fell on Mysore land—literally, from the skies—there was no way the state could dispose of that water before it entered some channel. Therefore, according to Iyer, the issue had to be determined "on the higher grounds of public welfare and general prosperity, and not according to the strict rules of law applicable only to private rights."[129]

Many potential ramifications arose from the most controversial issue surrounding the 1890 interstate disputes—namely, at what point in the hydrological cycle did water become open to legal appropriation in public law and in private law? Potential ramifications arising from this question included whether, in the case of monsoon ecology, disruption of the hydrological cycle could be held as interference in the proprietary rights of landowners over water, whether public laws could regulate the conditions required for the hydrological cycle in tropical climates to operate without hindrance so as to secure private rights over waters, and whether there were appropriate institutional conditions under which such regulation was possible given a particular geographic area and period of time in the hydrological cycle. When viewed in this way, it is easy to identify the inappropriateness of Western legal concepts in regulating traditional Indian water use practices.

The objections Iyer raised in his memorandum relate to the problem of fitting traditional water use practices into a modern legal framework—a problem that remains with us to this day. Contemporary debates on the usefulness of traditional irrigation technologies approach the issue from a water conservation perspective and assume that any water conserved will automatically result in equitable water allocation.[130] Although the environmental critique of Indian water

128. HUSSAIN, *supra* note 2, at 50.
129. 3 CENT. WATER COMM'N, *supra* note 1, at 279.
130. *See generally* CTR. FOR SCI. & ENV'T, *supra* note 4, vol. 4, ch. 4.

appropriation advocates a return to traditional practices, the legal and institutional regime supporting traditional practices remains enframed within the concept of public and private property rights—such as easement and prescription—for both natural and corporate persons, as underpinned by the state. According to Anil Agarwal and Sunita Narain:

> The state may have to play a role in such conditions, or appropriate multi-settlement people's institutions, with adequate control and legal powers, will have to be developed. Unfortunately, institutional aspects often do not figure prominently in the planning of such activities....Institutions cannot function unless there is a clear delineation of rights. A scheme of individual, community and state rights over water must be defined by planners and legal experts if traditional systems are to be revived.[131]

In the case of corporate entities, the legal assumption is that issues of social equity in water relations can be fixed by prescribing an appropriate mode of incorporation (*e.g.*, co-operative, trust, company, and others).[132] This view is shared by international development agencies such as the World Bank, as well as national policy-making agencies.[133] It is premised on instrumentalist views of black letter law and on uncritical assumptions about law *and* societies and law *in* societies.[134] Revisiting legal histories concerning the management of natural resources becomes an important means of examining these assumptions.

V. SHESHADRI IYER'S OBJECTIONS: THE TIME FRAME FOR PRESCRIPTIVE RIGHTS

The second objection raised by Sheshadri Iyer in his Memorandum of 1890 reads:

> If a right of easement by prescription is claimed on behalf of the Madras raiyats, I can only say (assuming that such a

131. *Id.* at 325.

132. *Id.* at 330–31.

133. AGRIC. OPERATIONS DIV., INDIA COUNTRY DEP'T & THE WORLD BANK, I INDIA IRRIGATION SECTOR REVIEW, World Bank Rep. No. 9518-IN 14 (1991); NEW DELHI PLANNING COMM'N, GOV'T OF INDIA, REPORT OF THE COMMITTEE ON PRICING OF IRRIGATION WATER xiii, 348–49 (1992); RATHINASAMAY SALETH, WATER INSTITUTIONS IN INDIA: ECONOMICS, LAW AND POLICY 266–67 (1996); Salman M.A. Salman, *The Legal Framework for Water User's Associations: A Comparative Study*, World Bank Technical Paper No. 360 (1997).

134. *Cf.* INDIAN L. INST., WATER LAW IN INDIA (Chhatrapati Singh ed., 1992).

> limiting right as an easement can at all be acquired by Madras raiyats against the Mysore State) that it is most difficult to say what period of time would be reasonable for the acquisition of such a right against the State. For obvious reasons, the 20 years of the Easement Act would be too short a term, and in the case of Mysore, the fact of the British Administration of the Province during half a century has an important bearing upon the questions.[135]

Iyer's objection indirectly references English customary and common law rights, both of which are premised on the concept of "legal memory" (*i.e.*, user rights based on use over an extended period of time). In English common law, legal memory dates back to the reign of Richard I in 1189 after the Norman conquests.[136] In the colonial context, legal memory dates back (implicitly) to colonial rule.[137] However, the concept of "legal memory" so integral to common law is really anachronistic in the colonial context because, at the time of the interstate disputes of 1890, the prescriptive rights under consideration had hardly been in existence long enough to apply the "legal memory" entailed in common law. In other words, prescriptive rights had not become recurring everyday practices of social life entrenched in social habits and mores. Instead, Indian prescriptive rights were both contemporary and evolving.

In the Madras Presidency, the Easement Act of 1882 (Easement Act) is an example of one such contemporary statute.[138] The Easement Act created new rights and identified new modes of water use previously unknown in peninsular India. The Easement Act protected prescriptive rights of citizens inter se, but only on terms imposed by the state.[139] While prescriptive titles generally could not be claimed, vis-à-vis the state, in the Presidencies,[140] the Agreement of 1892 was premised on the understanding that the Madras Presidency could claim prescriptive rights vis-à-vis another state, Mysore, even when the issue of water did not feature in the Instrument of Transfer of 1881.[141]

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135. HUSSAIN, *supra* note 2, at 50–51. "Raiyat," also written as "ryot," roughly translates as "tenant of the soil, cultivator of land." *See* YULE & BURNELL, *supra* note 45, at 777.

136. JOWITT & WALSH, *supra* note 11, at 1413.

137. Colonial rule marked the beginning of legal systems recognized in modern Indian law.

138. Indian Easements Act, *supra* note 7.

139. *Id.* §§ 15, 20, 21.

140. The law then applied only to Madras, because only the Madras Presidency was under Crown jurisdiction. Mysore, in contrast, was under indirect rule. Titles based on prescription must be distinguished from adverse possession under limitation statutes; however, it is not necessary to probe into those distinctions for the purposes of this article.

141. 3 CENT. WATER COMM'N, *supra* note 1, at 280.

The Indian Easement Act of 1882 was very different from its predecessor, the Prescription Act of 1832 in England. The English statute was enacted for the limited purpose of reducing the injustices arising from the common law rule for prescriptive claims—from "the time whereof the memory of man runneth not to the contrary"[142]—with respect to the difficulties in interpreting presumptions about lost grants.[143] The Indian Easement Act of 1882, in contrast, was markedly different from the earlier British statute in both scope and effect. It impinged upon Mysore in significant ways. The Madras Presidency's claim was based on the Easement Act, enacted after the Instrument of Transfer of 1881.[144] It is difficult to conceive how Madras could claim, vis-à-vis Mysore, that the raiyats in Madras had prescriptive rights under the Indian Easement Act of 1882, particularly because the statute prescribed a period of 20 years uninterrupted use to claim easement rights by prescription.[145]

The timeframes implied in the disputes of 1890 are problematic in yet another way. During direct British rule between 1830 and 1880, British administrators imposed a number of changes in the administration of water and land revenue, with disastrous consequences that culminated in the "rendition" of Mysore.[146] The 50-year period was characterized by an interruption in prescriptive uses by Mysore raiyats through forcible occupation and conquest.[147] Even if the numerous treaties with the Mysore rulers were taken at face value, the legality of actions under occupation was open to challenge following the "rendition." Prescription should, therefore, refer back to pre-1830 (*i.e.*, before Mysore came under direct Crown rule and interrupted water rights during the 50 years before the "rendition" under the Instrument of Transfer of 1881). Thus, Iyer correctly argued in his memorandum: "[T]he fact of the British Administration of the Province during half a century has an important bearing upon the questions."[148]

Time—the essence of prescriptive rights—surfaces in the dispute in a third way, as articulated in Iyer's Memorandum of June 1890:

> Moreover, a right of easement can never be acquired by a mere Permissive user. It cannot be said that Mysore never intended to store its rainfall for irrigation and other

142. JOWITT & WALSH, *supra* note 11, at 1413.
143. *Id.*; 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 72, at 39.
144. Indian Easements Act, *supra* note 7.
145. *Id.* § 15.
146. HETTNE, *supra* note 18, at 34–35. *See generally* VANI, *supra* note 5.
147. HETTNE, *supra* note 18, at 32–36.
148. 3 CENT. WATER COMM'N, *supra* note 1, at 50–51, 279.

> purposes to a greater extent than it used to do at some remote period. It is indeed more reasonable to infer that the user in question was permitted to be in force only so long as the State did not wish or were not able to store more water. As a matter of fact, the history of the Mysore Irrigation Department, as already shown, bears ample testimony to the Mysore Government having always intended to store and utilize as much of its rainfall as possible, and the presumption of a grant from prescriptive enjoyment is therefore most distinctly and expressly negatived in the case of all Mysore streams, to the extent to which they may be capable of being utilized for irrigation and other purposes within Mysore Territory.[149]

Prescriptive rights are, by definition, rights based on actual and de facto use and enjoyment of the right.[150] What the Agreement purported to do was to stop future uses of water.[151] In retrospect, it is interesting to note that Mysore's claim was never based on a strict riparian rights theory of primacy of territoriality and state sovereignty, or of water rights as integral to landowners' rights.[152] Instead, Mysore's claim highlighted the problem of superimposing legal concepts upon pre-existing social and environmental relationships in society.

In perennial rivers, water is always present as a given natural resource that runs with the land. In that environmental context, water rights regulate water resources that actually existed in the past, exist now, and will continue to exist in the future. Prescriptive water rights were not anticipatory rights contingent on water being available in the future, and, therefore, such rights did not allow for permissive use. In the case of peninsular India, each monsoon brought new water. What the Madras government sought to do through the Agreement was to facilitate future uses in anticipation of water contributions that the monsoon might bring in the years to come.[153] Sheshadri Iyer's objections drew attention to the fact that the intention to use water in the future cannot become part of any current prescriptive claim.

Finally, time as a factor in the disputes manifests in the real reason for the disputes and for the Agreement—the creation within the

149. HUSSAIN, *supra* note 2, at 51.

150. 14 HALSBURY'S LAWS OF ENGLAND, *supra* note 72, at 36; JOWITT & WALSH, *supra* note 11, at 1412.

151. 3 CENT. WATER COMM'N, *supra* note 1, at 278.

152. HUSSAIN, *supra* note 2, at 49, 52.

153. *See* 3 CENT. WATER COMM'N, *supra* note 1, at 278, 279.

Madras Presidency of new works. According to Iyer's Memorandum of June 1890:

> It is also most important to remember that the so-called right by prescription cannot be claimed either in the case of recent Madras works or recent enlargement of old Madras works; nor as regards water which now flows to waste over existing Madras works, can any right whatsoever be claimed by Madras, for the essence of a prescriptive right is enjoyment and use, which cannot, of course be predicated on what is allowed to run waste.[154]

Unlike the Kaveri delta, the Kurnool-Cuddapah canals were projects promoted by the colonial government in Madras.[155] The involvement of the colonial state in irrigation came in the wake of the Industrial Revolution in Britain and the resulting structural changes in the economy.[156] At first, the Kurnool-Cuddapah canal was envisaged as a state-owned enterprise to be undertaken by the Madras Irrigation and Canal Company by mobilizing private capital for the project.[157] Although the first phase of the project was completed in 1859, the affairs of the company deteriorated to such an extent that it was taken over by the government in 1882.[158] Major policy changes followed, including the elimination of political boundaries as impediments to irrigation projects.[159] These new works could not, in Mysore's view, be part of any prescriptive claims in preference to Mysore's water use practices over long periods of time.[160]

VI. SHESHADRI IYER'S OBJECTIONS: THE LEGAL REGIME

Sheshadri Iyer's objections related to a central issue in the Agreement—the institutional regime for prescriptive rights. He argued that prescriptive rights could not be claimed by one state against another state, as these rights were governed by municipal law under domestic jurisdictions.[161] Notwithstanding Iyer's objections, given Mysore's status

154. HUSSAIN, *supra* note 2, at 52.
155. VANI, *supra* note 5, at 42.
156. Bipan Chandra, *Colonialism: States of Colonialism and the Colonial State*, 10 J. CONTEMP. ASIA 272, 276 (1980); Bolding et al., *supra* note 55, at 808.
157. VANI, *supra* note 5, at 42.
158. *Id.* at 43.
159. CENT. BD. OF IRRIGATION & POWER, HISTORY OF THE BOARD (C.V.J. Varma ed., 1977).
160. HUSSAIN, *supra* note 2, at 50–51.
161. *Id.* at 53.

under the Instrument of Transfer of 1881, Mysore signed the Agreement on February 18, 1892.[162] The Agreement did not resolve the problem of water sharing between the two states; instead, it raised a new set of institutional issues relating to water use and rights.

On March 26, 1892, after signing the Agreement, Iyer raised some post-agreement problems that are significant in retrospect.[163] Clause IV of the Agreement provided for arbitration in case of any disputes between the states arising from the Agreement.[164] The arbitrator was to be appointed either by the consent of both governments or by the government of India.[165] However, arbitration would likely require evidence, especially as prescriptive rights were always based on pre-existing rights. Traditional irrigation systems did not require public record keeping, as land and water uses were largely self-regulated by village communities.[166] Thus, Iyer argued that Madras should be called upon to maintain an inventory of irrigation works in order to make the Agreement work.

In his March 1892 Memorandum, Iyer observed:

> [I]n the case of any new irrigation work in Mysore which comes under the class for which the Rules in question provide a reference to the Madras Government, it is of the utmost importance to investigate before hand, whether any "Prescriptive right already acquired and actually existing" in Madras Territory is likely to be affected by the proposed Mysore Work. Such investigation should include the collection of information as to the nature, extent and dimensions of any existing prescriptive right in Madras, when and how such right was acquired, how the same has been enjoyed, etc., e.g. suppose a new work in Mysore (coming under the Rules) is at all likely to diminish the supply of water to an existing Madras tank, the information to be collected should include (1) when the Madras tank was constructed, or enlarged, (2) whether twenty years have elapsed since such construction or enlargement, (3) its capacity and the area which drains into it, (4) the area of actual irrigation under it, (5) whether the new Mysore tank is likely to cause any and what diminution of supply for the existing irrigation in Madras, and, if so, whether such

162. 3 CENT. WATER COMM'N, *supra* note 1, at 277.
163. HUSSAIN, *supra* note 2, at 48, 54.
164. 3 CENT. WATER COMM'N, *supra* note 1, at 280.
165. *Id.*
166. Sengupta, *Traditional vs. Modern*, *supra* note 55, at 1933.

> dimunition can be regarded as meterial or as causing any appreciable practical injury to such irrigation.[167]

Despite Iyer's request, no systems were set up to undertake information sharing. Indeed, given that a large colonial irrigation bureaucracy had earlier proclaimed it a virtually impossible task, this is hardly surprising.[168]

The Agreement of 1892 did not resolve the disputes between the states over waters of either the Kaveri or the Tungabhadra. In the case of the Kaveri, the arbitration clause in the Agreement was invoked when Mysore proposed to construct the Krishnarajasagara dam in 1910.[169] The arbitrator, Sir H.D. Griffins, in his award of May 12, 1914, upheld Mysore's interpretation of prescriptive rights and attempted to put in place systems for data gathering and information sharing between the two states.[170] Griffins took a facilitative approach toward the Krishnarajasagara project[171] and the government of India ultimately ratified Griffins's award.[172] However, the Madras Presidency appealed to the Secretary of State for India in Britain who subsequently suspended the award.[173]

The main objection Madras had to the award was that Griffins had considered only established and existing irrigation rights and did not adequately protect Madras with respect to surplus waters of the river and future extension of irrigation.[174] Through its objection, Madras misconstrued the very concept of prescription. Fresh negotiations were commenced and a new agreement was signed with respect to Kaveri waters in February 1924.[175] The new agreement saved the earlier 1892 Agreement, with the exception of several minor modifications.[176] The modified Agreement of 1924 allowed projects in both Madras and Mysore to go ahead.[177] The first attempt to resolve interstate disputes through formal dispute resolution mechanisms thus ran aground.

In the case of the Tungabhadra, the arbitration clause was never invoked and the 1892 Agreement went through a series of ad hoc

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167. HUSSAIN, *supra* note 2, at 54.
168. VANI, *supra* note 5, at 87.
169. B.R. CHAUHAN, SETTLEMENT OF INTERNATIONAL AND INTER-STATE WATER DISPUTES IN INDIA 158–59 (1992).
170. *Id.* at 160.
171. *Id.* at 159–60.
172. 3 CENT. WATER COMM'N, *supra* note 1, at 347.
173. CHAUHAN, *supra* note 169, at 159.
174. *Id.*
175. 3 CENT. WATER COMM'N, *supra* note 1, at 347.
176. *Id.* at 350.
177. *Id.* at 348 (cl. 10, read with annexures).

modifications, exemplified by the sub-agreements among Mysore, Madras, and Hyderabad.[178] In 1933, Madras and Mysore concluded an agreement resolving specific issues arising from the 1892 Agreement. The 1933 Agreement provided for information sharing between the states.[179] It also modified the prior approval requirement from Madras if the construction of a new anicut did not irrigate new land, and it resolved issues specific to certain irrigation works on specified streams and tributaries and tanks.[180]

In November 1938, Madras and the state of Hyderabad signed an agreement for appropriation of the waters of the Tungabhadra for a hydropower project at Mallapuram.[181] Mysore was not consulted, although it could claim rights of prescription in subsequent years because of the project.[182] The Tungabhadra project was conceived during the Depression era,[183] during which time investments in public projects were seen as a means of addressing economic problems posed by the struggling economy.[184] With the onset of World War II and the emergence of India as the regional base for Britain's war efforts, the need for hydropower to feed the industries supporting the war efforts became vital.[185] The Agreement of 1938 was curious as it provided for construction of the project without resolving any legal issues between the states. Clause 3 of the Agreement of 1938 states:

> The object at present is to decide on the practicability of a joint scheme between Hyderabad and Madras for a partial appropriation of the Tungabhadra waters at Mallapuram leaving all matters of absolute rights and claims and the disputed points for future settlement. It shall be clearly understood that neither Government shall be considered to have given up any of its points in the final settlement of rights and shall be free to raise the same at any time.[186]

The Agreement allowed Madras to withdraw 50 billion cubic feet of water and Hyderabad to withdraw 65 billion cubic feet of water for

178. *Id.* at 294–307.
179. *Id.* at 294.
180. *Id.*
181. *Id.* at 297.
182. The Agreement of 1938 was between Hyderabad and Madras only, although Mysore was a co-riparian. *See* 3 CENT. WATER COMM'N, *supra* note 1, at 297.
183. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 46.
184. Dietmar Rothermund, *The Great Depression and British Financial Policy in India, 1929–1934*, 18 INDIAN J. ECON. & SOC. HIST. REV. 1, 13 (1987).
185. SINGH, *supra* note 22, at 50.
186. 3 CENT. WATER COMM'N, *supra* note 1, at 297.

power generation, with return flow into the river channel.[187] The assumption underlying the 1938 Agreement was that far-reaching social, environmental, and economic changes in a region could be undertaken without prejudice, as though it were possible to return to status quo ante should the parties so desire at a future date. This assumption highlights the problem of transposing private law concepts onto interstate relations.

The Agreement of 1944 between Madras and Hyderabad was even more urgent and ad hoc. It superseded the 1938 agreement and allowed for both Madras and Hyderabad to be entitled to withdraw 65 billion cubic feet of water.[188] The tenor of the 1944 Agreement suggested that the intent of the parties was to get on with construction of the hydropower plant without delay:

> The object at present is to make it possible to start immediately a joint scheme between Hyderabad and Madras for a partial appropriation of the Tungabhadra waters at Mallapuram leaving all matters of absolute right and claims and disputed points for future settlements.[189]

Mysore did not impugn the agreements between Madras and Hyderabad by invoking the arbitration clause in the 1892 Agreement between the two states. Nor did Mysore argue that Madras could not create third party rights in the waters of the Tungabhadra that affected prescriptive rights in the basins of the streams and tributaries specified in the 1892 Agreement. Instead, Mysore proposed a project of its own, above Mallapuram on the Bhadra at Lakavalli, and pressed for renegotiating royalties payable for using Kaveri waters for power generation at the Sivasamudram project.[190] Mysore allowed that the Agreement "shall constitute a final settlement of the rights of the respective governments in the waters of the Tungabhadra basin above Mallapuram."[191] However, the Agreement curiously went on to add:

> If at anytime at the instance of the other party claiming a right to the waters of the Tungabhadra it becomes necessary to have recourse to arbitration in respect of the sharing of the Tungabhadra waters and if the arbitration tribunal were to award to the Governments of Mysore and Madras a quantity differing from those referred to in Clause 1, 6, and 9 above, [*i.e.*, agreement of July 1944] the

187. *Id.*
188. *Id.* at 299.
189. *Id.*
190. *Id.* at 305.
191. *Id.*

> two Governments hereby agree to abide by such award....Nothing contained in the foregoing clauses shall be deemed to qualify or limit in any manner the operation of the Agreement dated the 18th February, 1892 between the Governments of Madras and Mysore in regard to matters other than those to which this agreement relates.[192]

It is clear from this addition that the practical need to work around the 1892 Agreement in order to facilitate hydropower, irrigation, and multipurpose projects meant that legal and institutional developments never consolidated and took root to produce a legal memory. If the essence of prescription in England was premised on legal memory, prescription in the colonial context achieved exactly the opposite result by *erasing* legal memory of pre-colonial customary uses and practices through ad hoc importation of legal principles devoid of historical, social, environmental, and geographical context. In the new legal edifice, the only legal memory dated from the time of colonization. This legal edifice, founded on colonization as the legal memory, became the structural foundation for a neo-imperial/neo-colonial society in the New World Order that followed the end of World War II, internationally, and Independence in India.

The fragmented negotiations between Madras and Hyderabad and between Madras and Mysore could not form a durable basis for the use of Tungabhadra waters between the three states. In December 1945[193] and April 1946,[194] two further agreements were concluded in an effort to iron out the issues arising from the projects undertaken on the Tungabhadra by the three states, as well as all the riparian states, including Bombay and Sangli. Post-Independence disputes over Tungabhadra waters resurfaced in the politics of the reorganization of states, particularly where the politics of democracy and federalism intertwined with the politics of development and economic integration nationally and internationally.[195] It fell on the Krishna Water Disputes Tribunal, in an award decided in 1976, to finally determine the status of the 1892 Agreement.[196]

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192. *Id.*
193. *Id.* at 307.
194. *Id.* at 308.
195. Radha D'Souza, *The Democracy-Development Tension in Dam Projects: The Long Hand of the Law*, 23 POL. GEOGRAPHY 701, 717 (2004).
196. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 229.

VII. THE TUNGABHADRA AGREEMENTS AND THE KRISHNA WATER DISPUTES TRIBUNAL

Post-Independence, in a new world order dominated by the discourse of "development," the Agreement of 1892, and subsequent agreements modifying it ad hoc over time became an important issue before the Krishna Water Disputes Tribunal. Before the Tribunal, Mysore impugned all interstate agreements on Tungabhadra waters.[197] Mysore's claims were based on its perception that the 1892 Agreement was obtained under coercion; that it was imposed by a colonial government on a vulnerable state and therefore was unconscionable.[198] The political heirs of Sheshadri Iyer were not wanting in their forensic capabilities.

Mysore's representatives argued that a contract must be entered into without undue influence or coercion and that the agreements did not survive upon the merger of the Indian States into the Union of India in 1947.[199] Further, they argued, the agreements did not survive after the reorganization of states in 1956, since the boundaries of the states were significantly altered.[200]

The agreements of 1944 were bad in law, as they did not include Bombay and Sangli, the two other riparian states with interests in the waters of the Tungabhadra.[201] The June 1944 Agreement with Hyderabad, Mysore argued, did not survive after the Indian Independence Act of 1947, the coming into force of the Indian Constitution and the merger of the state of Hyderabad into the Union of India.[202]

Andhra Pradesh, the successor-state to Madras in the disputes, argued that the population of the state had developed equitable interests in the changes that colonization had brought to the region.[203] The political changes following Independence, accession to the Union of India, and states' reorganization notwithstanding, Andhra Pradesh was entitled to keep the benefits that it had inherited from the Madras Presidency under direct British rule.[204]

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197. *Id.* at 44.

198. T.S. Rama Rao, *The Cauvery Water Dispute: Is the Centre an Empire or Partisan?*, *in* INDIAN FEDERALISM AND UNITY OF NATION: A REVIEW OF INDIAN CONSTITUTIONAL EXPERIENCES 351, 352 (U.N. Gupta ed., 1988).

199. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 44–54.

200. *Id.* at 44.

201. *Id.* at 46–47.

202. *Id.* at 47.

203. *Id.* at 174.

204. *Id.* at 177–78.

These legal arguments raised fundamental issues about the meaning and effect of de-colonization. Confronted with the possibility of having to probe into the legal status of a series of historical events memorialized in legal statutes and deeds, such as the Indian Independence Act of 1947,[205] the Constitution of India,[206] and the treaties of accession to the Union of India with the states of Mysore,[207] Hyderabad,[208] and Sangli,[209] the tribunal persuaded the parties to come to a negotiated settlement on the Tungabhadra disputes.[210] The states agreed that the Agreement of 1892 imposing restrictions on projects on specified streams should be modified and reduced. [211] More importantly the states also agreed that

> in the events that have happened it is not necessary to decide these issues [the legal status of the colonial agreements] as this Hon'ble Tribunal has general jurisdiction in the matter of equitable distribution of waters of the river Krishna (including the waters of the Tungabhadra river) between the States of Andhra Pradesh, Maharashtra and Mysore.[212]

Nevertheless, the issues previously raised by Sheshadri Iyer and the rationale of the Madras Presidency did not go away. Instead they resurfaced under claims for equitable apportionment and the difficult question of how equity should be defined in post-Independence India. These issues were eventually thrashed out—not in the language of prescriptive rights under English law—but under equitable apportionment, as defined by the Helsinki Rules and international law.[213]

If the Agreement of 1892 evidenced a disjuncture between formal legalism and reality in society, the arguments of the states before the Tribunal continued to be based on a disjuncture between formal legalism and social reality. Indeed, the disjuncture between formal law and social reality is a characteristic feature of colonial law, as the Agreement of 1892 clearly exemplifies. This disjuncture forms a structural feature of Indian society, one that entrenches a schism

205. B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 539-55 (1966).
206. *Id.* at 511-57.
207. *Id.*
208. *Id.*
209. *Id.* at 554.
210. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 44-54.
211. *Id.*
212. *Id.* at 47.
213. D'Souza, *supra* note 23, at 261; D'Souza, *supra* note 195, at 724.

between law and society and reproduces the imperial-colonial relations long after Independence.

VIII. COLONIAL LAW IN INDEPENDENT INDIA

The arbitration award of Sir H.D. Griffins ran aground because of the absence of a distinctly colonial constitutional and institutional framework for managing colonial social relations in imperial interests. Until then, imperial governance was largely through administrative fiat and to a lesser extent statutory law. Subsequently, early twentieth century imperial governance focused on constitutional and institutional developments.[214]

The 40-year span from 1905 to 1945 was a period of wide ranging constitutional and institutional change, both internationally and within India. On the sub-continent, there were two principal strands of change that intertwined in the lead up to the Union of India following Independence in 1947. The constitutional and institutional changes within British India comprised one strand. The other was the slow progress toward a federal structure through integration of the Indian States into a federal framework. Unlike federal constitutions in capitalist countries, the Indian Constitution comprises both unitary and federal features.[215] Necessarily simplifying the issues, the unitary features evolved from the constitutional and institutional developments within British India.[216] The federal features evolved from the integration of Indian States.

While the constitutional reforms of 1907,[217] 1919,[218] and 1935[219] created the conditions for independence, the institutional reforms following the constitutional developments created national water institutions necessary to appropriate and regulate water use in the interest of development.[220]

These developments in British India dovetailed with efforts to integrate the Indian States into a larger Union of India. The Treaty of

214. D'Souza, *International Law*, *supra* note 37, at 248–49; D'Souza, *supra* note 23, at 263–64.

215. INDIA CONST. pt. XI, sched. 7 (as amended up to Constitution Sixty-First Amendment Act, 1988).

216. D'Souza, *International Law*, *supra* note 37, at 248–49; D'Souza, *supra* note 23, at 263–64.

217. ANAND & SETH, *supra* note 8, at 56.

218. *Id.* at 215; *see also* D'Souza, *International Law*, *supra* note 37, at 249; D'Souza, *supra* note 23, at 263–64.

219. ANAND & SETH, *supra* note 8, at 317; *see also* D'Souza, *International Law*, *supra* note 37, at 249; D'Souza, *supra* note 23, at 263–64.

220. D'Souza, *supra* note 23, at 259.

Mysore of 1913[221] relaxed the restrictions on Mysore under the Instrument of Transfer of 1881. The Chamber of Princes[222] was formed in 1921, setting up formal consultative processes between the Indian States, the Government of India, and the British Government. The Chamber of Princes also facilitated collective representation of the Indian States in the League of Nations.[223] In the absence of the Chamber, each Indian State, being sovereign in legal theory, would be entitled to separate representation—a prospect that could have scuttled unification and constitutional federalism. The Government of India Act of 1935[224] provided for accession to the Union of India, which Mysore and many other states declined.[225] The Act nevertheless created the basis for unification.[226]

The constitutional status of water and the institutional arrangements for water closely follow the twin strands mentioned above. Today, water remains a state subject within the constitutional schema,[227] largely a result of the Indian States' refusal to relinquish control over water.[228] While constitutional integration of the Indian States proved difficult, institutional integration proved relatively easier. The ideology of "progress," "modernization," and, later, "development" smoothed the integration of economic institutions.[229] The Central Board of Irrigation[230] and Bureau of Information for Irrigation,[231] which formed pursuant to the constitutional reforms of 1919, provided for membership of the Indian States in order to facilitate the coordination and development of water resources on the subcontinent.[232]

The experiment with indirect rule in Mysore, within which the interstate Agreement of 1892 took place, was an important milestone in imperial governance and provided many valuable lessons. The twin objectives of indirect rule—economic control and political devolution—can be seen in the problems relating to the 1892 Agreement.

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221. HETTNE, *supra* note 18, at 51–53.

222. J.I. Hurd, *The Influence of British Policy on Industrial Development in the Princely States of India, 1890–1933*, 12 INDIAN ECON. & SOC. HIST. REV. 409, 412 (1975); *see also* HETTNE, *supra* note 18, at 52–53.

223. Hurd, *supra* note 222, at 412; *see also* HETTNE, *supra* note 18, at 52–53.

224. B. SHIVA RAO, *supra* note 205, at 511–57.

225. *Id.*

226. *Id.*

227. INDIA CONST. pt. XI, sched. 7 (as amended up to Constitution Sixty-First Amendment Act, 1988).

228. *See* B. SHIVA RAO, *supra* note 205, at 303–25, 747–85, 776–92.

229. D'Souza, *supra* note 195, at 724.

230. CENT. BD. OF IRRIGATION & POWER, *supra* note 159, at 5.

231. *Id.* at 8.

232. *Id.* at 14.

Many social contradictions that dogged colonial rule continue to surface periodically in modern water disputes. If Iyer argued that institutional mechanisms for the 1892 Agreement needed to be in place to make the Agreement work, the Krishna Water Disputes Tribunal, after a lengthy hearing—and an equally lengthy award—concluded that it did not have power to rule on institutional issues.[233] It left the award without effective enforcement machinery.[234] The difficulty of reconciling traditional and modern irrigation practices within a colonial legal framework, evidenced by the erudite forensic representations of Iyer, hounded the hearings before the tribunal.[235] Should there be a fresh dispute over Tungabhadra waters, these representations may resurface once again, especially given the current interest in traditional irrigation technologies. Thus, the starting line for legal memory is continually brought forward in time. If the Agreement of 1892 sought to erase the pre-colonial memory, the tribunal, by superseding the Tungabhadra agreements, sought to erase the colonial memory.[236]

Post-Independence legal memory relates back to the Constitution, as the tribunal's ruling on the Tungabhadra disputes demonstrates. As the colonial government borrowed the conceptual categories of law from English law, the tribunal borrowed its conceptual categories from international law, which in turn was an application of Euro-American law to the needs of the twentieth century.[237] Thus, legal formalism and social disjuncture continue in India today. The constitutional developments in the first half of the twentieth century entrenched this disjuncture between law and society, making it a permanent structural feature of Indian society.[238]

IX. CONCLUDING REFLECTIONS

The role of law in society may be seen as twofold, both conceptual and praxiological. At the conceptual level, law provides the framework defining relationships between nature, society, and people. It provides the conceptual categories that constitute the normative order, which, in turn, becomes the frame of reference for social transactions in relation to nature and to people. These social transactions may reaffirm, confirm, modify, change, alter, or negate the normative order.

233. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 165.
234. *Id.* at 166.
235. The period of the Award ended in May 2000.
236. KRISHNA WATER DISPUTES TRIBUNAL, *supra* note 32, at 229.
237. D'Souza, *supra* note 23, at 266.
238. D'Souza, *International Law*, *supra* note 37, at 243, 251.

Nevertheless, the engagement is still within the normative order that the legal categories prescribe as the framework for social and environmental relationships. Concepts in society develop through the historical and environmental experiences of people and are therefore grounded in history and geography, as well as time and place.

At the pragmatic level, its strong praxiological orientation gives law a policy focus that deals with immediate problems. Despite the strong legal arguments advanced by Sheshadri Iyer, he signed the Agreement of 1892, just as Mysore—before the Krishna Water Disputes Tribunal—did not ask to renegotiate the terms of integration with the Union of India. At this second, pragmatic level, law appears de-historicized and de-spatialized. Inevitably, imperial law is articulated in universal categories that must be fleshed out by the different limbs of the state: executive, legislative, and judicial. Lifting the veil of law becomes necessary to understand the complex legal and societal interactions that the universalism of imperial law conceals so adeptly.

Taken together, the two levels at which law operates mirror social relationships. Social and environmental relations become entrenched through everyday practices that are, in turn, reinforced through the legal framework. The role of law in reproducing social relations in capitalist countries forms the subject matter of an extensive literature in critical legal studies.[239] However, the role of imperial law in reproducing colonial social relations in societies with colonial histories has not received as much attention.

The question "What is de-colonization in law?" touches on fundamental structural questions of Indian society. By locating interstate water disputes—one of the most pressing legal issues of our time—in colonial law and history, this article has attempted to draw attention to problems of imperial law in neo-colonial societies.

239. *See generally* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993).