

# PROPERTY AND SOVEREIGNTY: Creating, Destroying, and Resurrecting Property Rights in British India (1600–1800)

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PAPER

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# 1. Introduction

This paper seeks to delineate the configuration of property rights of *zamindars* (landlords) and *ryots* or *raiyats* (peasants) relative to the English East India Company (hereinafter "**East India Company**" or "**the Company**") over a period of two centuries from 1600 to 1800. This period begins with the Company's first arrival in India to the court of the Mughal Emperor *Jehangir* in 1600 as merely a trading company. It ends with the introduction of the Permanent Settlement in Bengal by Lord Cornwallis, the Governor General of Bengal in 1793, pursuant to the Company's exercise of sovereign authority over the provinces of Bengal, Bihar, and Orissa.

A plethora of social science literature in the nineteenth and twentieth centuries, and legal literature in the nineteenth century has been preoccupied with the peculiar nature of "proprietary" rights in land created by British rule. In this paper, I review this body of literature and argue that the use of the term "proprietary" as opposed to "property", in describing the configuration of property rights of *zamindars* and peasant cultivators in colonial India is peculiar to colonial literature about India, not to be seen in historical literature about property rights in England of the same period. I go on to show that the adoption of this term, which makes little legal sense, was not merely an outcome of the peculiarity of colonial language, but served a deliberate political goal of subordinating existing property rights in land to whatever property rights British colonisers, namely, the East India Company, and later the British Crown sought to create or destroy in pursuit of their twin goals of maximising land revenue and consolidating their political rule in India.

The earliest detailed engagement with property rights in land in India dates back to the works of *Henry Maine* and *Karl Marx* in the nineteenth century. Both *Maine* and *Marx* highlighted the differences between western ideas of property as they evolved after the Protestant and commercial revolutions in Europe in the sixteenth century, and Indian notions of property prevailing in the eighteenth century when British colonisation of India began. According to *Maine*, western notions of property embodying attributes of absolute ownership and exclusive rights of use, ownership, and possession were alien to India, which was a land of "self-sufficient village communities".<sup>1</sup> In spite of the differences between *Maine's* historicist approach to the evolution of law, and *Marx's* materialist conception of history according to which "law" emerged as part of the superstructure derived from the mode of production, *Marx* absorbed both the idea of the self-sufficiency and unchanging character of the village

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<sup>1</sup> Henry Sumner Maine, *Village Communities in the East and West* (New York: H. Holt and Company, 1889); see also Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, 2010), 133.

republics and *Maine's* belief that when the British colonised India, effective private property in land had no general existence.<sup>2</sup>

During the late twentieth century, social anthropologists and historians challenged the assumption of the unchanging village republic that underlay the writing of the Victorians. In the introduction to his book, *The Peasant and the Raj*, published in 1978, historian *Eric Stokes* noted, "social anthropologists have long [preached] that complexity is the hallmark of preindustrial rather than of industrial societies."<sup>3</sup> The revisionist thinking of the twentieth century contained in the writing of economists like *Walter C. Neale* and *Daniel Thorner*, and historians like *Ranajit Guha* and *Eric Stokes*, was not unified in its depiction of existing property rights in land in India at the time of the colonial encounter and the innovations introduced by the British. Nevertheless, they were all in agreement about two things. *First*, all of them accepted the colonial state's claim to the land as a super landlord. *Second*, all of them believed that the kind of property arrangements prevailing in India at the time of the British conquest and as they were altered following British innovations, were very different from those prevailing in the English or western world at the time. While they attributed different motivations to the British colonial administration's innovations in the existing land tenure systems, they agreed that this led to the creation of "imperfect" property rights in land in India, often described as "proprietary" rights in land.

Legal writing on property rights in India is limited to the nineteenth century. Chief amongst this literature are two near contemporaneous works. The first is *Charles Dickenson Field's* two volume treatise on "Landholding and the Relation of Landlord and Tenant", written in 1889, which is a comprehensive and sweeping overview of land tenure systems in different parts of the world.<sup>4</sup> The second is *B.H. Baden Powell's* three volume treatise on "The Land Systems of British India", written in 1892, which is the most comprehensive compilation of land legislation in colonial India, and is still cited by the Supreme Court of India, the highest court of appeal in India for determining property rights in land. For instance, during the 1950s and 1960s, the Supreme Court relied upon *Baden Powell's* work to determine the nature of intermediary tenures in the State of Bombay<sup>5</sup>, and the *ryot's* relation to the land in the *ryotwari* system of land tenure.<sup>6</sup> As recently as 2013, the Court relied upon *Baden*

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<sup>2</sup> *Irfan Habib*, "Marx's Perception of India," *Karl Marx on India: From the New York Daily Tribune and Extracts from Marx-Engels Correspondence 1853-1862* (New Delhi: 2006).

<sup>3</sup> *Eric Stokes*, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978), 1.

<sup>4</sup> *Charles Dickenson Field*, *Landholding and the relation of landlord and tenant in various countries* (2nd ed., Calcutta: Thacker and Spink and Co., 1885).

<sup>5</sup> *Ram Narain Medhi v. State of Bombay*, AIR 1959 SC 459.

<sup>6</sup> *Kunhikoman v. State of Kerala*, AIR 1962 SC 723.

Powell to adjudicate the mining rights of a *janmam* land owner in Kerala.<sup>7</sup> In contrast, however, despite the breadth and depth of Field's inquiry into the organisation of land rights in colonial India, Field's work seems to have been lost to modern writing.

Both Field and Baden Powell were better positioned than either Marx or Maine, none of whom ever travelled to India, to appreciate the complexity of land tenure systems in India before and after the advent of the British. In the preface to his book written in 1883, Field (1836-1912) notes that he came to India in the year 1860, a year and a half after the enactment of Act X of 1859<sup>8</sup>, which was intended to regulate and improve the relations between landlords and tenants in the extensive and populous provinces of the Bengal Presidency.<sup>9</sup> He spent the next nineteen years in the capacity of Revenue or Judicial Officer in most of the important districts of Lower Bengal. In the early years of his service, most of his time went in the trial of suits between landlords and tenants. In 1879, Field was appointed by the Bengal government to prepare a *Digest of the Law of Landlord and Tenant* in the Provinces under the administration of that government. The Digest was published a decade later, during which time (from 1880 to 1883), Field served as a judge of the High Court. The first seventeen chapters of Field's Digest provide a chapter by chapter summary of land tenure systems under the Roman Empire, and then go on to describe the feudal tenures in England, Prussia, France, Bavaria, Belgium, the Netherlands, Denmark, Sweden and Austria, Italy, Spain, Russia, Asiatic Turkey, Egypt, Ireland, the USA, and Australia. Chapters 18 to 30 of the Digest describe land tenure relations in India, starting from before Mughal times, during Mughal times, and during the period of British conquest of India, both, under the East India Company and the British Crown.

Baden Powell (1841-1901) was a civil servant who spent thirty years in the service of the Crown in India (1861-1889), both as the Conservator of Forests and a judge first in the Punjab Small Cause Court and finally, in the Punjab province's chief court. Baden Powell's encyclopaedic study contained in three volumes gives a region-by-region summary of the leading legislation affecting land tenures in relation to the immediate history of the regions at the time of their colonisation by the British. Baden Powell then traces the general effectiveness of the land tenure legislation in terms of the collection of land revenue on behalf of the Crown, discusses the protection of rights of various groups who were on

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<sup>7</sup> Threesiamma Jacob v. Department of Mining and Geology, [2013] 7 SCR 863.

<sup>8</sup> An Act to Amend the Law relating to the recovery of rent in the Presidency of Fort William in Bengal.

<sup>9</sup> C.D. Field, *Landholding and the relation between landlord and tenant in various countries* (2nd ed., Calcutta: Thacker, Spink and Co., 1885) at 452.

the land in the nineteenth century, and also makes reference to effects of British legislation on the distribution of land.

Perhaps a product of their different life and work experiences, Field's work focuses more on illuminating the consequences of British reforms on landlords and tenants whereas Baden Powell's work focuses more on describing the nature of the British government's relationship to the land with respect to landlords and tenants. Both Field and Baden Powell base their accounts on a close study of the land revenue regulations, annual and special government reports, the settlement reports, and the district gazetteers and manuals. Unlike Baden Powell however, Field begins his tome by noting the difficulty and difference of opinion on existing land tenures in India at the start of British conquest and colonisation. Field attributes these differences to the common mistake of applying to all parts of the country, facts that were only true of particular regions. He writes, "*Institutions, which in some places, were originally complete in all their parts, and the subsequent development of which became perfect, were in other places originally incomplete, or were afterwards imperfectly developed. Their growth was hindered at different stages, in different localities, by circumstances of external violence connected with those waves of invasion and conquest, which swept with varying violence across the country.*"<sup>10</sup> Later, when the British examined the "relics of these institutions", the relics suggested different ideas of the "perfect original". As a result, what the British assumed to be the original depended as much upon the lens through which they studied the issue, as upon the goals that they sought to achieve in moulding that original to their needs.

## 2. Nineteenth Century Scholarship on Property Rights in Land in India: Maine and Marx

The idea of India as "village communities", adopted and popularised by Maine<sup>11</sup> implied that the basic elements of the village societies of ancient India persisted even at the time when the British colonised India. According to Maine, within these village communities, the basic unit of organisation was the patriarchal family. Groups of these families united by real or assumed kinship, formed village communities,

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<sup>10</sup> Field vol. 2, at 417. See also, Elphinstone, History of India, p. 73.

<sup>11</sup> Henry Sumner Maine, Village Communities in the East and West (New York: H. Holt and Company, 1889); see also Karuna Mantena, Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism (Princeton, 2010), 133.

which exercised joint ownership over the land.<sup>12</sup> In its basic and most generic form, the village community comprised groups of kinsmen or co proprietors who exercised common ownership over the village as a whole. They cultivated the lands and shared its fruits collectively. Eventually, the village land was further divided into village (household), arable or wastelands, over which different kinds of rights and ownership developed.<sup>13</sup>

This was also the order of historical priority by which land rights in these different domains became individuated—first, in the separation of village land into individual households, then, in the apportionment of individual lots for cultivation in the arable lands, and finally, ending in the enclosure of the commons.<sup>14</sup> Authority in the village was exercised by the Panchayat<sup>15</sup>, a council of elders, which did not legislate, merely “declared” the time-honoured customs of the village.<sup>16</sup> According to Maine, these village communities were conservative and unchanging and there was little or no place for the play of market forces. There was an absence of land transfers, of evictions and inferior or dependent tenures were very imperfectly conceived and developed.<sup>17</sup> For Maine the real importance of studying village communities, in terms of understanding the origins of private property, stemmed less from their initial formation than their gradual dissolution. In this process lay the first historical differentiation of persons and property and the eventual emergence of individual right and private property in land.

In spite of the differences between their approaches, Marx absorbed both the idea of the self-sufficiency and unchanging character of the village republics and Maine’s belief that when the British colonised India, effective private property in land had no general existence. Marx’s major premise was that the peculiar character of Indian society made it both highly resistant to change in its social and cultural character, while simultaneously subject to constant political change and conquest from outside.<sup>18</sup> An important consequence of this “compartmentalism” was the

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<sup>12</sup> While the Hindu joint family could in practice earn its living through cultivation and ownership of land, according to Maine, the connection to land was an accidental and not necessary connection. Id.

<sup>13</sup> Ibid. at 134.

<sup>14</sup> Id.

<sup>15</sup> Usually numbering five, hence the name “panchayat” where “panch” stands for five.

<sup>16</sup> Henry Sumner Maine, *Village Communities in the East and West* (New York: H. Holt and Company, 1889) cited from Daniel Thorner, *The Shaping of Modern India* (Calcutta: Sameeksha Trust, 1980), 262.

<sup>17</sup> Id.

<sup>18</sup> “A country not only divided between the Mohammedan and Hindu, but between tribe and tribe, between caste and caste; a society whose framework was based on a sort of equilibrium, resulting from a general repulsion and constitutional exclusiveness between all its members. Such a country and such a society were they not the predestined prey of conquest? Indian

discontinuity between the social base and political superstructure. Marx therefore concluded that the self-sufficiency of the village republics and their unchanging character resulted in their lack of dependence on the town, with its exchange economy and class differentiation, which had resulted in the demise of European feudalism.<sup>19</sup> If compartmentalism characterised the social structure, Marx believed that Indian politics was an expression of "oriental despotism".<sup>20</sup> The consequence of this system was state taxation to the extent of complete absorption of the surplus produce of the soil beyond the bare subsistence needs of the cultivator.<sup>21</sup> In such a system, according to Marx, private rent in property and a stable "allodial aristocracy" based upon it never emerged.<sup>22</sup> Engels, echoing Marx, gave this belief "*vivid expression in his aphorism that the key to the whole of the East lay in the absence of private property in land.*"<sup>23</sup>

### 3. The Revisionist Twentieth Century Account of Property Rights in India: Thorner, Neale, Guha, and Stokes

During the late twentieth century, social anthropologists and historians challenged the assumption of the unchanging village republic that underlay the writing of the Victorians. In the introduction to his book, *The Peasant and the Raj*, published in 1978, historian Eric Stokes noted, "*social anthropologists have long [preached] that complexity is the hallmark of preindustrial rather than of industrial societies.*"<sup>24</sup> Stokes noted that, following the works of Maine, Marx and Baden Powell in the late nineteenth century, academic interest in land tenures dried up

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society has no history at all, at least no known history. What we call its history is but the history of the successive intruders who founded their empires on the passive basis of that unresisting and un-changing society." Karl Marx, *New York Daily Tribune*, 8 August 1953 cited from Shlomo Avineri, *Karl Marx on Colonialism and Modernisation* (New York: 1969), 132. See also, Irfan Habib, "Marx's Perception of India," *Karl Marx on India: From the New York Daily Tribune and Extracts from Marx-Engels Correspondence 1853-1862* (New Delhi: 2006).

<sup>19</sup> Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978), 20.

<sup>20</sup> *Ibid.* at 20.

<sup>21</sup> *Ibid.* at 21.

<sup>22</sup> *Id.*

<sup>23</sup> Shlomo Avineri, *Karl Marx on Colonialism and Modernisation* (New York: 1969), 45. See also, Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1979) at 2.

<sup>24</sup> Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978), 1.



during the twentieth century until its revival in the late twentieth century.<sup>25</sup>

The twentieth century's revisionist thinking on land tenures largely contained in the writings of economists like Walter C. Neale and Daniel Thorner, and historians like Ranajit Guha and Eric Stokes, was not unified in its depiction of existing property rights in land in India at the time of the colonial encounter and the innovations introduced by the British. Nevertheless, all four writers agreed on two things. *First*, all of them accepted the colonial state's claim to the land as a super landlord. *Second*, all of them believed that the kind of property arrangements prevailing in India at the time of the British conquest and as they were altered following British innovations, were very different from those prevailing in the English or western world at the time. While they attributed different motivations to the British colonial administration's innovations in the existing land tenure systems, they were agreed that this led to the creation of "imperfect" property rights in land in India.

Economists like Neale and Thorner believed that British innovations in land tenure arrangements in India were guided by ideological notions of private property rights in land prevailing in England at the time. For instance, Neale argued that "*British inability to free themselves of their ideological notions of an absolute and exclusive form of proprietorship in land when confronted by traditional land tenures in India that were multiple and in exclusive, led to a fundamental distortion in Indian land tenure arrangements.*"<sup>26</sup> More importantly, both agreed that the British colonial state retained control over all land within the territory of India. Accordingly, Thorner claimed that in all the British settlements of the late eighteenth and early nineteenth centuries, whether *zamindari*, *ryotwari*, *talugdari*, or *malguzari*, whether permanent or temporary, though private property rights were created in the land, these were invariably subordinate to the right of the state.<sup>27</sup> While the rights of transfer, mortgage and inheritance were indeed accorded to the new "owners", their privileges were restricted by the simultaneous recognition of rights that were both superior and inferior to their own in the same land. As a result, no land holder was granted the *exclusive* right to use, enjoy and dispose of the land. The state as a super landlord claimed a share of the rents; while the actual tillers exercised a traditional claim to occupancy.<sup>28</sup> Consequently, Thorner concludes that what the British established in India was an imperfect

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<sup>25</sup> Ibid. at 4.

<sup>26</sup> Walter C. Neale, "Land is to Rule," *Land Control and Social Structure in Indian History* (Frykenberg ed.) at 5.

<sup>27</sup> Id.

<sup>28</sup> Ibid. at 12-13.

private ownership in land. The elevation of a new group of penultimate landowners created the kinds of property rights that were more familiar to the western world.<sup>29</sup> But what was ultimately established in India was significantly different from the property arrangements prevailing in Britain.

Historians like Guha and Stokes argued that most twentieth century critics believed too readily both in the uniformity of British ideological influences in the shaping of property rights on the ground and "the gullibility of British officials", in failing to appreciate the "discrepancy between British law and Indian fact".<sup>30</sup> In fact, Stokes argued that British revenue law—at least in northern India—was clear that the novel "proprietary" right it created lay not in the land itself but in the right to levy revenue from it.<sup>31</sup> Stokes argued, as in fact Baden Powell had claimed, that the state's "customary" right of physical dominion over the land, including the power to locate cultivators, plant groves, sink wells, and in some areas cultivate wastelands was never seriously questioned. What the British attempted to do was to merge the property attaching to the revenue collecting right (*malguzari*) to this primary right of dominion. However, by rendering the revenue collecting right compulsorily saleable, for default and in satisfaction of decrees of debt, the British ensured that even where the right had been lodged with those exercising primary dominion "there was no solder that could keep the two together".<sup>32</sup>

In spite of his description of Baden-Powell's work as "muddled thinking", Stokes seems to have at least taken from that work the idea that introduction of British innovations in the land were motivated partly by "subconscious ideology" and partly by the "practical need to stabilise the tax system within an impersonal bureaucratic form of rule".<sup>33</sup> In that vein, Guha's classic essay on the Permanent Settlement in Bengal called *The Rule of Property in Bengal*, describes the ideological and institutional motivations of the four main advocates of the Permanent Settlement: Alexander Dow, Henry Pattullo, Lord Cornwallis,<sup>34</sup> and Thomas Law. Guha argues that all four advocates of the Permanent Settlement were agreed only about the need for recognition of private property rights in land but they held widely divergent views as to what the establishment of private property rights in land would achieve.

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<sup>29</sup> Ibid. at 13.

<sup>30</sup> Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978), 2.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Cornwallis replaced Warren Hastings as Governor General of India in 1786 and served until 1793. The Permanent Settlement was introduced in Bengal during his tenure.

Politically, they agreed and the history of British rule in India has confirmed that this would enable the Company to gain the absolute loyalty of the beneficiaries, the new landowning class of *zamindars*. But the social and economic considerations on which their support for private property rights was premised, varied, as did the intellectual affiliations of each advocate.<sup>35</sup>

Dow was a Scottish philosopher and mercantilist, who believed that secure private property would help in improving the terms of trade, an imbalance in which had resulted in the "drain of wealth" from India to Britain.<sup>36</sup> Pattullo, an English agronomist and physiocrat<sup>37</sup> living in France, regarded the creation of secure private property rights as a stimulus to greater agricultural productivity and revenues.<sup>38</sup> He believed that secure property rights would "induce a large amount of investment in land".<sup>39</sup> Cornwallis and Law were both free traders. For Cornwallis, secure property rights were the basis of all economic improvement, whereas for Law, they were essential for creating efficient land markets.<sup>40</sup> Thus, even for all four advocates of the Permanent Settlement, the creation of private property rights in land was a means to different "ends", the most important of which was improving agrarian productivity and revenue.

While Stokes was correct in his assessment that the British colonial administration's introduction of the Permanent Settlement in India was motivated less by ideological notions of western private property rights and more by the necessity of administering the land in a way that would maximise revenue for the British Crown, his understanding both, of property as understood in English common law, and property as existed in India at the time of colonisation is at variance from a legal

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<sup>35</sup> Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham: Duke University Press, 1996), 18.

<sup>36</sup> *Ibid.* at 18.

<sup>37</sup> Physiocrats were a group of economists who believed that the wealth of nations was derived solely from "land agriculture" or "land development". Their theories originated in France and were most popular during the second half of the eighteenth century. The physiocrats, in contrast with the mercantilists, placed emphasis on productive work as opposed to trade, as the source of the wealth of nations. Their theory of value was based on an analysis of agricultural production in which, much more than in industry, the difference between the value of labour power and the value created by its use appears in its most tangible form. It is this difference, which is the surplus appropriated by the landowner as rent. The physiocrats claimed to have invented the mechanism which in their ideal society would ensure the reproduction of this surplus and its correct distribution. The social philosophy on which this doctrine implicitly rested 'consisted in placing above everything else private property, especially property in land.' Weulersse, *Economics: The Physiocrats in Encyclopaedia of the Social Sciences* cited from Guha, *ibid.* at 99.

<sup>38</sup> *Id.*

<sup>39</sup> *Ibid.* at 48.

<sup>40</sup> *Id.*

understanding of property. In the next section, I describe the evolution in legal understanding of property within western thought from the eighteenth to the twentieth centuries. Based on this description, I show how we can understand the land tenure arrangements in pre-British India as constituting a valid configuration of "property" rights, and not "proprietary rights" as referred to in colonial literature.

## 4. A Theory of Property from the Eighteenth to Twentieth Centuries: From Blackstone to Hohfeld

Both Marx's and Maine's understanding of "western property" was likely derived from the common law conception of property embodied in William Blackstone's *Commentaries on the Laws of England*, published between 1765 and 1769. A legal philosopher of the late eighteenth century, Blackstone's work was the first and remains a rare systematic attempt to present a theory of the whole common law system.<sup>41</sup>

Blackstone noted that there was nothing that "engaged the affections of mankind" more than the "right to property". "Property", according to Blackstone, was "that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe."<sup>42</sup> Such a definition of property essentially consisted of two conceptions of property, the "physicalist" and "absolutist" conceptions of property.<sup>43</sup>

The "physicalist" conception of property required some "external thing" to serve as the object of property rights. Blackstone divided all legal rights into two categories: *rights over persons* and *rights over things*. The law of property only concerned the latter. The "absolutist" conception of property gave the owner "sole and despotic dominion" over the thing. According to this conception, the law would not permit even the smallest infringement of these rights, even for the good of the entire community.<sup>44</sup>

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<sup>41</sup> Duncan Kennedy, *The Structure of Blackstone's Commentaries* 28 *Buffalo Law Review* 205 (1979), at 209.

<sup>42</sup> William Blackstone, *Commentaries on the Laws of England* 2 (facsimile ed.) (1979) (1765-1769) cited from Carol Rose, *Canons of Property Talk, or, Blackstone's Anxiety* 108 *Yale L.J.* 601 (1998-1999).

<sup>43</sup> Kenneth J. Vandavelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" 29 *Buff. L. Rev.* (1980): 325, 331-333.

<sup>44</sup> *Id.*

However, there existed numerous exceptions to the “physicalist” and “absolutist” conceptions of property even at the time of Blackstone’s writing. Blackstone himself notes these exceptions in the *Commentaries* almost immediately after his lofty pronouncement of “property” as “absolute dominion over things”.<sup>45</sup>

Blackstone tried to explain those exceptions through a set of legal fictions, but only at the “expense of intellectual integrity”.<sup>46</sup> While English courts of Blackstone’s era claimed to be protecting the possession of “things”, they continually encountered situations in which the protection of some tangible “form of wealth” was more important to litigants than the protection of a tangible “thing”. As a result, by the end of the nineteenth century, courts no longer conceived of property rights as relative to the thing. They concluded that property rights protected “value” rather than a “thing”.<sup>47</sup> Moreover, increasing recognition by courts of property as consisting of “limited rights” over things rendered the idea of “property as absolute dominion over things” increasingly anachronistic.<sup>48</sup>

Duncan Kennedy describes an “elementary ambiguity” within the lay and legal definitions of property. Sometimes we use property to mean a thing that can be owned, but sometimes we use it to mean a legally enforceable right with respect to a particular physical object.<sup>49</sup> He describes this dichotomy with an example. When I say that “I own property in New Delhi”, I understand “property” to mean a “thing”. But when I assert that “life tenants under the common law had a limited property interest in the land”, here “property” indicates the limited rights of life tenants with respect to a thing, i.e. land. Kennedy argues that Blackstone disregarded this distinction in his adherence to the notion of “property as absolute dominion over things” at the peril of intellectual incoherence.

Nevertheless, Blackstone’s definition of property was cited extensively by courts and legal scholars during the nineteenth century,<sup>50</sup> and therefore, it is unsurprising that it framed the disquisitions of nineteenth century social scientists writing about India, like Marx and Maine. Modern legal scholars also often use Blackstone as the point of

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<sup>45</sup> Duncan Kennedy, *The Structure of Blackstone’s Commentaries* 28 *Buffalo Law Review* 205 (1979), at 318.

<sup>46</sup> Vandeveld, *Ibid.* at 333.

<sup>47</sup> *Ibid.* at 335.

<sup>48</sup> *Ibid.* at 337.

<sup>49</sup> Duncan Kennedy, *The Structure of Blackstone’s Commentaries* 28 *Buffalo Law Review* 205 (1979), at 318.

<sup>50</sup> Albert W. Alschuler, *Rediscovering Blackstone*, 145 *U. PA. L. REV.* 1 (1996).

departure for their own scholarly excursions.<sup>51</sup> Because Blackstone's definition of property as sole and exclusive dominion was clearly at variance with the existing realities of his time, some scholars believe that Blackstone posited his conception of property as an "ideal type", "free of the messy reality of feudal exceptions" that Blackstone was forced to explain away in his Commentaries.<sup>52</sup>

It wasn't until the twentieth century that Hohfeld provided a systematic schema of legal relations that banished the need for "things" from property law. In a pair of articles written in 1913 and 1917<sup>53</sup>, Hohfeld showed that legal concepts may be represented through a scheme of four fundamental legal relations, consisting of eight conceptions, each of which was defined relative to its opposite<sup>54</sup> and correlative<sup>55</sup>. The juxtaposition of these relations created the following scheme:

<b>Jural Opposites</b>	Right-no Right	Privilege-Duty	Power-Disability	Immunity-Liability
<b>Jural Correlatives</b>	Right-Duty	Privilege-No Right	Power-Liability	Immunity-Disability

Any legal concept, such as property could be expressed in terms of contingent bundles of some or more of these relations. For example, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) of that right is that Y is under a duty toward X to stay off X's land. Thus, X has the privilege of entering his land and Y has no right to enter into X's land. If Y were to enter X's land, then X would have the power to ask him to leave and remove him forcibly upon his failure to do so, and Y would be disabled from exercising his claim to enter X's land. Consequently, it may be said that X has an immunity against Y entering his land and making any alterations to it.

By showing that property could be expressed in terms of contingent bundles of these jural opposites and correlatives, Hohfeld banished the need for "things" from property law. On this understanding of property, the revenue collecting right of the *zamindars* was a property right in the

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<sup>51</sup> Carol Rose, *Canons of Property Talk, or, Blackstone's Anxiety* 108 YALE L.J. 601 (1998-1999), at 602. See, for example, Gregory Alexander, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 87 (1997); Margaret Jane Radin, *REINTERPRETING PROPERTY* 131 (1993); Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993).

<sup>52</sup> Carol Rose, *supra* note 50, at 604.

<sup>53</sup> Wesley N. Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning" 23 *Yale L. J.* (1913): 16, 30; Hohfeld, "Fundamental Legal Conceptions As Applied in Judicial Reasoning," 26(8) *Yale L. J.* 710 (1917).

<sup>54</sup> Jural Opposites: Right/No Right, Privilege/Duty, Power/Disability, Immunity/Liability.

<sup>55</sup> Jural Correlatives: Right/Duty, Privilege/No Right, Power/Liability, Immunity/Disability.

same way as the peasants' occupancy rights were also property rights. The revenue collecting right on part of the *zamindars* meant that the tenants had a correlative duty to pay the revenue. But the occupancy rights of tenants meant that the *zamindar* did not have the power to evict them from the land so long as they complied with their duty to pay the revenue, and even in many instances that they were unable to comply due to certain exigencies. Clearly, therefore, there existed secure property rights in land before British colonisation of India began, whether or not there were any land transfers in the sense that Marx and Maine understood them.

## 5. From "Proprietary" to "Property" Rights: Applying Hohfeld to Colonial Literature on Land Rights in India

By breaking a legal concept like property into its constituent parts, Hohfeld provided two fundamental insights. *First*, that it was impossible to deduce from the concept of property itself what the bundle of rights would be for different people in a particular legal regime.<sup>56</sup> *Second*, and following from the first point, the concept of property tells us nothing about how relations among people with respect to valued resources are configured in a particular society with a particular legal regime at a particular point in its history.<sup>57</sup> As a society evolves, institutions and actors within that society constantly reshape property rights and relations in accordance with changes in the economic, political and social structure, framed within overarching economic, social and political discourses. Therefore, at any given point of time in a particular society, the particular configuration of property rights protects particular "rights to things of value". Not all property interests are necessarily protected or protected to the same extent.<sup>58</sup>

Thus, it is not only confusing but also improper to use the term "proprietary" right to describe the "revenue collecting" right of the *zamindars* in the land as has been consistently done in the nineteenth and

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<sup>56</sup> Duncan Kennedy and Frank Michelman, "Are Property and Contract Efficient?" 8 *Hofstra L. Rev.* (1979-1980): 711, at 719.

<sup>57</sup> Morris Cohen, "Property and Sovereignty," 13 *Cornell L.Q.* 8 (1927-28); Kenneth J Vandavelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" 29 *Buff. L. Rev.* (1980): 325, at 360.

<sup>58</sup> Joseph William Singer, "Democratic Estates: Property law in a free and democratic society" 94 *Cornell L. Rev.* (2009): 1009; Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997), 21 (noting the early American efforts at "dismantling of 'aristocracy' and getting rid of all vestiges of feudalism").

twentieth century literature of the period. Moreover, it is wrong to suggest that there was no "property" in land in India, as it was understood in the western world, before British colonisation of India began in the eighteenth century.

Both Baden Powell and Field, legal scholars writing in the twentieth century, recognise this anomaly about the nineteenth century literature. Baden Powell notes that the term "*proprietary right*" was "peculiar to Indian revenue [law]" and did not occur in textbooks of English law or jurisprudence of that period.<sup>59</sup> He concluded that the use of the term "proprietary right" in the colonial literature was

*"due to the feeling that we rarely acknowledge anything like a complete unfettered right vested in any one person. The interest in the soil has come to be shared between two or even more grades...It is true that, in many cases, only one person is called "landlord", or "actual proprietor" but his right is limited; the rest of the right, so to speak, is in the hands of the other grades, even though they are called 'tenants', or by some vague title such as 'tenure-holders'. In many cases, as we have seen, this division is accentuated by the use of terms like 'sub proprietor' or 'proprietor of his holding'. The 'proprietary right' seems then a natural expression for the interest held by the landlord, when that interest is not the entire 'bundle of rights' (which in the aggregate make up an absolute or complete estate) but only some of them, the remainder being enjoyed by other persons."*<sup>60</sup>

Baden Powell went on to note that the debate on whether laws and customs of various princely states in India acknowledged a real ownership in land vested in private persons was inconclusive, with many writers asserting such a claim and others maintaining to the contrary. Such a debate however, was not "fruitful", because as he correctly noted, "there is no natural or universal standard of what 'property in land' is."<sup>61</sup>

Baden Powell noted that in English law, "there was no such thing as an absolute ownership of the soil vested in any private person." In support of this claim, he cited various authorities including Williams on *Principles of the Law of Real Property*, who stated that "[the idea of absolute ownership] is quite unknown to English law; no man is, in law, absolute owner of lands; he can only hold an estate in land."<sup>62</sup>

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<sup>59</sup> Id.

<sup>60</sup> Ibid. at 217-218.

<sup>61</sup> Id.

<sup>62</sup> Id. Joshua Williams, *Principles on the Law of Real Property* (London: 1871), at 20.



Consistent with the thesis of this paper, Baden Powell notes that the study of tenures in India arose not out of their "great historic and social interest", but because of the "more prosaic and practical reason", that without understanding the way in which people held land, "it was impossible to determine who should be responsible for the payment of government land revenue, and consequently, should as "proprietor" benefit by the remainder".<sup>63</sup> In other words, understanding the relation of the state to land, and understanding the nature of private property in India were necessary for administration and maximisation of land revenue for the British Crown.<sup>64</sup>

Consequently, Baden Powell noted that a large part of the early reports and minutes of the colonial administration were preoccupied by two interrelated questions. The *first question* was, whether the British government was or had become, the actual owner or universal landlord of all land, or whether there was in India, any real private property in the land preceding the claim of the state. In other words, the question was whether sovereignty and property were fused in the state in pre-British India. Baden Powell's answer was yes, and therefore the British East India Company, and later the British Crown succeeded to these fused property and sovereignty rights of the Mughal rulers. The *second question*, which followed from the first, was whether the British government took its land revenue as *rent* for the use and occupation of land, or as a sort of *tax*, which represented a share in the produce converted into money.

In order to answer these questions, Baden Powell conducted an elaborate review of the kinds of land revenue arrangements that existed at the time of the colonisation of Bengal, the first province to be colonised. Further, he conducted a study of ancient and medieval texts to determine the basis of existing land rights arrangements. Based on this review, he concluded, "there can be no doubt that in the latter part of the [eighteenth] century, when British administration began, the different native rulers who preceded us, had asserted rights as the universal landowners. That being the case, our government succeeded, legally, to the same claim and title."<sup>65</sup>

Without a detailed review of the ancient and medieval texts that Baden Powell relied upon in support of this conclusion, which is beyond the scope of this paper, it is not possible to assess whether his claim that the rulers preceding the British asserted rights as universal landowners

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<sup>63</sup> Baden Henry Baden-Powell, *The Land Systems of British India: Being a Manual of the Land Tenures and of the Systems of Land Revenue Administration Prevalent in the Several Provinces*, vol. 1 (London: 1892), 216.

<sup>64</sup> *Id.*

<sup>65</sup> *Ibid.* at 217.

is in fact accurate. But even on the evidence he presents in his review of these texts in the first volume of his three-volume treatise; claiming "universal ownership" on behalf of these native or princely rulers as an "undoubted" assertion seems unwarranted. Contemporaneous understandings of ancient and medieval texts by other British writers like Field also cast doubt on this claim.

Of course, it is clear why Baden Powell would want to make such an assertion on behalf of the colonial administration. Such a claim of universal ownership, and consequently the denial of private property in land, would entitle the colonial administration "to take the whole of the remaining produce of land, after allowing the cultivator the costs of cultivation and the profits of his capital."<sup>66</sup> More importantly, it would enable the colonial government to confer "proprietary" rights in land on particular holders, namely the *zamindars*. Once the government had "distinctly conferred property rights in land", Baden Powell asserted that any later use of the term "universal landlord" as applied to the government, "can only be in the nature of a metaphor". But he then goes on to note the following other functions of government as the "universal landlord":

1. The revenue claim of the government constituted the first charge on the land (hypothecation), and the estates could be sold for recovering arrears of revenue.
2. The government acceded to the land in the case of a failure of heirs (escheat).<sup>67</sup>
3. The government exercised general care for the progress of the estates, making advances to enable the cultivators to sink wells or effect other improvements; advancing money for general agricultural purposes (under special Acts); suspending or remitting the demand for revenue owing to famine or calamity of season.<sup>68</sup>

As the next sections show, Baden Powell's account of property in India was an attempt to legally justify the East India Company's and later the British Crown's conquest of India, and the consequent reshaping of property rights in land to maximize the collection of revenue by the conquering power. Such reshaping wreaked havoc and injustice on the cultivators of the land whose property rights were destroyed even as "distinct proprietary rights" were created and conferred on the *zamindars*, while the government continued to retain its ultimate claim as the "universal landlord". Baden Powell ultimately concludes that the land revenue is a "tax on agricultural incomes", not rent. This is because nowhere and under no revenue system, does government claim to take the "unearned increment" or the whole of what remains after the wages of

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<sup>66</sup> Ibid. at 217.

<sup>67</sup> Ibid. at 239.

<sup>68</sup> Ibid. at 240.

labour, or costs of cultivation and profits of capital have been accounted for.<sup>69</sup> Baden Powell is right to point out that the staggeringly rapacious land revenue system instituted by the Permanent Settlement was unheard of, but sadly, he believes it was justified as merely a continuation of the past. In the next few sections, I attempt, for the first time in the history of colonial thought, to determine the varying configuration of property rights during different phases of British conquest in India.

## 6. Hohfeldian Distribution of Property Rights in Colonial India from 1600 to 1800

British conquest of India happened in three major phases, spanning three and a half centuries. The first phase lasted for about a century from 1600 to about 1700, the second phase spanned a century and a half from 1700 to 1858, and the third phase lasted almost another century from 1858 to 1947. The first two phases of conquest stretching over two and a half centuries occurred under the rule of a private actor, a corporation called the East India Company, whereas the third and last phase lasting nearly a century occurred under the rule of a colonising power that is the British Crown. British conquest of India ended with Indian independence in 1947. In this paper, I will describe the Hohfeldian configuration of property rights during the first two centuries of British rule, starting from the time that the East India Company first came to India in 1600, and ending shortly after the introduction of the Permanent Settlement in 1793.

The **first phase (1600-1700)** of Indian conquest begins from the time the East India Company first came to India as a trading company to the court of Emperor *Jehangir*, under an exclusive trading monopoly granted by the British Crown in 1600. This period ends at the close of the century when control of the Company's affairs decisively shifted from the Crown to the British Parliament. During this period, the East India Company was merely a trading company with an exclusive monopoly over trading with India but had no sovereignty over Indian territory. The only property rights in land the Company possessed extended over few acres of land in its trading "factories" and the settlements of its officers and employees in Madras, Bombay, and Bengal, which were held under favour of the Mughal emperor. The House of Commons resolution in 1694, declaring that "all subjects of England have equal right to trade with the East Indies", and ending the

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<sup>69</sup> Ibid. at 240.

monopoly of the East India Company marked the beginning of the end of this phase.

The **second phase (1700-1858)** covers the period when the character of the East India Company changed from that of a trading company to a conquering power. Following hostilities with the *Subahdar* of Bengal in 1698, the East India Company gradually acquired property rights over land in Calcutta, and the adjacent villages of *Sutanati* and *Gobindpur*. The property right was a revenue collection right over these villages. Later, the Company's revenue collection right was extended to 38 additional villages in Bengal. The beginning of this period also saw the creation of the new East India Company in 1702, accompanied by the gradual death of the old East India Company stretched over a seven year period from 1702-1709. This was done under British parliamentary oversight, following the House of Commons resolution of 1694. However, following the battles of *Plassey*, 1757 and *Buxar*, 1764, the East India Company gradually acquired sovereignty over the provinces of Bengal, Bihar, and Orissa.

During this period, the East India Company introduced numerous innovations that reshaped property rights of various classes of landlords and tenants, as they grappled with the complex land tenure system in the provinces of Bengal, Bihar, and Orissa. In this paper, I will describe the ever changing property rights regimes effectuated by the British from the period 1700 to 1800. I will described the changes effectuated between 1800 and 1858 in a different paper.

As the East India Company transitioned from property holder to sovereign power during this phase, it used its sovereign power to dramatically alter existing property arrangements with the sole objective of maximising revenue for the Company and for the British Crown. In this process, Company officials almost completely disregarded the rights and welfare of native Indians.

Changes in property rights arrangements during this period may be understood as having broadly occurred during the following seven stages:

1. 1700-1757
2. 1757-1765
3. 1765-1772
4. 1772-1777
5. 1777-1784
6. 1785-1800
7. 1800-1858.

In this paper, I will only describe the changes in property rights during the first six stages, from 1700 to 1800, and ending with the Permanent Settlement of Bengal in 1793. In a subsequent paper, I will describe the

changes in property rights regimes effectuated during the first half of the nineteenth century, from 1800 to 1858.

The **third phase (1858-1947)** begins in 1858 when sovereignty over Indian territory passed from the East India Company to the British Crown. This period lasts until sovereignty is transferred to the democratically elected Indian government in 1947. A third paper will outline the changes made in property rights regimes during this phase.

## 7. First Phase (1600-1700): The Sole English Trading Company in India

In 1600, Queen Elizabeth gave the royal charter to the East India Company to trade exclusively with the East Indies<sup>70</sup>. The charter was granted for a period of 15 years on condition that the trade was profitable to the realm. Pursuant to the Charter, the East India Company was empowered to (a) use any trade route and exclusive rights of trading, (b) had the power to licence trade, (c) "make reasonable laws, [c]onstitutions and ordinances for the good government of the Company and its affairs" so long as they were not repugnant to the laws, statutes or customs of the English realm, and (d) to impose such fines or penalties as might be necessary for enforcing these laws.<sup>71</sup> In 1609, King James I renewed the royal charter to the East India Company.<sup>72</sup> The Royal Charter of 1615, gave the Company the power to issue a commission to the "general" in charge of a voyage to inflict punishments for non-capital offences.<sup>73</sup> During the period, 1624-1660, the East India Company was mainly involved in hostilities with the Dutch East India Company and English trading rivals.<sup>74</sup> In 1661, King Charles II granted the Company the right to coin money and exercise jurisdiction over their subjects in the East India Company. That same year, the port and island of Bombay was ceded to King Charles II as part of the marriage dowry of Infanta of Portugal.<sup>75</sup>

In 1669, the King presented the port and island of Bombay to the East India Company in return for an annual rent of 10 pounds.<sup>76</sup> The company at this time also owned some trading depots or factories on the west coast

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<sup>70</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xiii.

<sup>71</sup> Ibid. at xiv.

<sup>72</sup> Ibid. at xv.

<sup>73</sup> Ibid. at xv.

<sup>74</sup> Ibid. at xv.

<sup>75</sup> Ibid. at xvi.

<sup>76</sup> Ibid. at xvi.

of India. Similar depots were subsequently established in Madras, and other places on the east coast, and later in Bengal. In course of time, the factories at Bombay, Madras, and Calcutta became the three principal settlements, to which the others were placed in subordination. These factories or settlements comprised merely a few acres of ground occupied by the Company's warehouses and the residences of their officers; and they were held only under favour of the native sovereign of the territories in which they were situated. <sup>77</sup>

In 1677, the Royal Charter empowered the company to coin money at Bombay.<sup>78</sup> In 1687, the Company proclaimed that they intended to "*establish such a polity of civil and military power, and to create and secure such a large revenue...as may be the foundation of a large, well grounded, sure English dominion in India for all time to come.*"<sup>79</sup> Thus, in 1687, the Company was clearly determined to change its character from that of a trading company to one that had ambitions of establishing political and territorial sovereignty over India. In 1688, the Company laid down their future policy in the following resolution: "*the increase of our revenue is the subject of our care...as much as our trade; [it is that which] must maintain our force when twenty accidents may interrupt our trade; it is that must make us a nation in India. Without that we are but a great number of interlopers, united by His Majesty's royal charter, fit only to trade where nobody of power thinks it is their interest to prevent us.*"<sup>80</sup> According to Ilbert, legal advisor to the Governor General in Council in the late nineteenth century, this resolution shows the "unmistakable" determination of the Company to "guard their commercial supremacy on the basis of their territorial sovereignty and foreshadows the annexations of the next century."<sup>81</sup>

In the lead up to this official resolution, in 1686, hostilities broke out between the East India Company and the Subahdar of Bengal, Shaista Khan. The British were forced to flee. The Mughal Emperor Aurangzeb "greatly exasperated at the hostilities of the English" gave orders to expel them entirely from his dominions.<sup>82</sup> In 1687, King James II, exercising his royal prerogative of creating municipal corporations, delegated to the East India Company the power of establishing by charter a municipality at Madras.<sup>83</sup> Meanwhile, the Mughal government felt the loss of commerce with the English East India Company and was unhappy about the

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<sup>77</sup> Ibid. at xvi.

<sup>78</sup> Ibid. at xvi.

<sup>79</sup> Ibid. at xvi.

<sup>80</sup> Ibid. at xviii.

<sup>81</sup> Ibid. at xviii.

<sup>82</sup> CD Field at 452.

<sup>83</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xvii.

fact that the English ships were able to prevent the passage of Muslims to the pilgrimage of Mecca. So, reconciliation was effected, in consequence of which Aurangzeb directed the Subahdar of Bengal to invite the Company back. The East India Company returned to *Sutanapati* on August 24, 1690, and laid the foundation of Calcutta.<sup>84</sup>

In 1691, the Company's rivals formed a New Company that defied the Company's sole claim to the market of the East Indian trade. They raised the constitutional question whether the Crown could grant a monopoly of trade without the authority of Parliament.<sup>85</sup> This question was decided in favour of the Old Company by the Privy Council. Accordingly, the Charter of 1693 renewed the monopoly of the Old Company. But in 1694, the House of Commons passed a resolution declaring that "all subjects of England have equal right to trade with the East Indies".<sup>86</sup> This was a decisive shift in the control of the affairs of the Company from Crown to Parliament.

In 1698, the East India Company obtained permission from *Azimus Shah*, grandson of the Mughal emperor *Aurangzeb* and *Subahdar* of Bengal, Bihar and Orissa, to purchase from *zamindars* the *talukdari* right of Calcutta and the adjacent villages of *Sutanati* and *Gobindpur*, subject to the annual payment of Rs. 1195.<sup>87</sup> This marked the first time that the *Subahdar* of Bengal, who derived his governing power from the sovereign Mughal emperor, granted a property interest to the East India Company changing its character from a trading company to a company with property rights in India. In effect, the Company became another *zamindar* subject to the sovereignty of the Mughal Emperor.

Simultaneously, in 1698, the British Parliament passed an Act creating a general society, which on providing a loan of 2 million pounds to the Crown, was granted the exclusive right to trade to India, saving the rights of the Old East India Company to monopolise trade for three years after which they expired.<sup>88</sup> Thus, by 1701, the East India Company lost its monopoly over trade in India. Four classes of merchants now had the right to trade in India:

### 1. The New Company

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<sup>84</sup> CD Field at 452.

<sup>85</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xvii.

<sup>86</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xviii.

<sup>87</sup> CD Field at 452-453.

<sup>88</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xix.

2. The Old Company, trading on their original capital till 1701, and after that on the limited subscription of 315,000 pounds.
3. Those subscribers to the General Society who had held aloof from the Joint Stock of the New Company, their capital amounting to 22,000 pounds.
4. A few separate traders who had sent out their ships relying on the House of Commons' resolution of 1694 and had been permitted to complete their voyages.<sup>89</sup>

Between the New Company and the Old Company, there followed a struggle which partially came to an end in 1702, when upon pressure from the Crown and Parliament, the two Companies were forced into a preliminary union.<sup>90</sup>

Thus, during this first phase (1600-1700), marking the first century after East India Company's advent in India, the Company was merely a trading company with an exclusive monopoly over trading with India but had no sovereignty over Indian territory. The only property rights in land it had were possessory rights over a few acres of land in its trading "factories" and the settlements of its officers and employees in Madras, Bombay and Bengal, which were held not with any title, but under favour of the Mughal emperor.

## 8. Second Phase (1700-1800): From "Trader" to "Sovereign"

The eighteenth century marked the transition of the East India Company from a trading company to a sovereign power. This transition spanning the entire century, happened in six phases which involved the fusion of property and sovereignty in the Company, and the consequent reshaping of property rights in India. This in turn resulted in great misery of both landowners and peasants.

### 1. 1700-1757: From trader to zamindar

As described in the previous section, at the turn of the eighteenth century, the New Company and Old Company were forced into a preliminary union by the British Crown and Parliament in 1702. After six years of negotiation and compromise, in 1708, the union was made absolute by

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<sup>89</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xix.

<sup>90</sup> Indian Constitutional documents: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xix.



Parliament.<sup>91</sup> These developments coincided with the death of the Mughal Emperor Aurangzeb in 1707, the last of the great Mughal emperors. This led to many hostilities between the Mughals and Marathas during the period 1707-1750, and marked the beginning of the decline of the Mughal Empire in India. It was during this period that the French and English sought to conquer and annex territory in India. The principal struggle between the French and the English commenced in 1750 in Madras, where most of the French possessions were situated, and it ended with the establishment of supremacy of the English East India Company in Madras.<sup>92</sup> But at this time, the English did not have any property interest in land in Madras beyond the factories and settlements earlier noted.

In 1717, as gratitude for being cured by the Company's surgeon, the Mughal Emperor *Farrukhsiyar*, son of *Azizmus Shah*, granted the East India Company the privilege of duty free trade, and also permission to purchase the *talukdari* right of 38 villages adjacent to the three purchased in 1698.<sup>93</sup> However, this purchase was never effected because *Jaffier Khan*, the then *Subahdar* of Bengal was not favourably disposed toward the English and did not allow the sale to be made.<sup>94</sup> After Emperor *Farruksiyar's* demise in 1719, the Mughal Empire was in disarray with four emperors succeeding to the throne in one year.

Amidst the ensuing collapse of the Mughal Empire, in 1756, the *Subahdar* of Bengal, Bihar and Orissa, *Siraj-ud-daulah* marched against the East India Company and captured Fort William on 21 June, 1756.<sup>95</sup> With the help of reinforcements sent from Madras, Calcutta was recaptured by the East India Company on 2 January 1757. On 9 Feb, 1757, the East India Company concluded a treaty with *Siraj-ud-daulah* to effectuate the earlier trading privileges and the revenue collection rights of the additional 38 villages that had been purchased half a century earlier. But almost immediately hostilities broke out which became the battle of Plassey in 1757.

To sum up, it is clear that during the period 1695-1757, the British East India Company essentially only had a property right claim on the collection of revenue over the area that became Calcutta and Sutanati and Gobindpur. They also had a contested right to purchase the revenue collection right of 38 additional adjacent villages, which had not been effectuated in practice by the time the Battle of Plassey began in 1757.

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<sup>91</sup> Indian Constitutional documents: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xx.

<sup>92</sup> Indian Constitutional documents: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxi.

<sup>93</sup> Field at 453.

<sup>94</sup> Field at 453.

<sup>95</sup> Field at 453.

## 2.1757-1764: The Battles of Plassey and Buxar and transition from *zamindar* to *subahdar*

During the Battle of Plassey in 1757, the East India Company used Mir Jafar, the Commander in Chief of the *Nawab* of Bengal, Siraj-ud-daulah, who betrayed him to defeat the *Nawab*. Mirroring the seven years' war in Europe between the English and the French, the French East India Company supported Siraj-ud-daulah in the battle against the English. Nevertheless, the English East India Company were successful in conquering Calcutta. Following the battle of Plassey in 1757, Mir Jaffer agreed to grant to the Company the *zamindari* or revenue collection rights over the land within the Mahratta ditch and 600 yards beyond the ditch, and the land lying to the south of Calcutta as far as Kalpi,<sup>96</sup> on condition that the East India Company would pay to the Subahdar the revenue "in the same manner as the other *zamindars*". The revenue of this company was fixed at Rs. 2, 22, 958, and as it included twenty four *paraganas* or local divisions, it gave its name to the district around Calcutta which is still known as the district of Twenty Four *paraganas*.<sup>97</sup> Thus, following the Battle of *Plassey*, the East India Company acquired a property interest comprising of revenue collection rights over the district of Twenty Four *paraganas*.

In 1758, Warren Hastings, a long-time employee of the East India Company was appointed by General Clive as the British resident in Murshidabad. His role was essentially that of an ambassador but he also acted as General Clive's representative in giving orders to Mir Jaffer.

Over the next few years, as Mir Jaffer got older, the British sought to depose Mir Jaffer in favour of his son in law Mir Qasim.<sup>98</sup> Hastings was opposed to this move but was overruled. On 27 September, 1760, the East India Company concluded a treaty with Mir Qasim, whereby he assigned to them revenues from the three additional districts of Bardwan, Midnapore and Chittagong, which yielded about one third of the entire revenue of Bengal, to meet the charges of the army and provisions of the field.<sup>99</sup>

It is at this juncture that we see the beginning of a crucial shift from property right to sovereign right in favour of the East India Company. Hitherto the Company was like a *zamindar* under the Subahdar of Bengal, who derived his authority from the Mughal sovereign. But now, the Company was *de facto* an agent of the *Subahdar*. From just another *zamindar* operating under the control of the *Subahdar*, now it was the Company that

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<sup>96</sup> Field at 454.

<sup>97</sup> Field at 454.

<sup>98</sup> Field at 455.

<sup>99</sup> Field at 455.

was empowered to collect revenue from various categories of *zamindars*, *taluqdars*, and tenants in the districts of Bardwan, Midnapore, and Chittagong.

In 1761, as demanded by the British, the then Mughal emperor *Shah Alam II* invested *Mir Qasim* with the *subahdari* of Bengal, Bihar and Orissa, on his paying 24 lakh rupees of annual revenue.<sup>100</sup> But soon thereafter, disputes arose between *Mir Qasim* and the British, and once again war broke out.<sup>101</sup> The British reinstated *Mir Jaffer* to the *Subahdari* and *Mir Qasim* fled to Oudh. Since *Mir Jaffer* was dependent upon the Company for his rule as the *nawab*, eventually, on 10 July 1763, he signed treaties with the Company whereby he confirmed the cession of Bardwan, Midnapore and Chittagong.<sup>102</sup> Later, on 23 October, 1764, in the Battle of *Buxar*, the British defeated the *Nawab Vizier* of *Oudh* and cemented their sovereignty over these districts.<sup>103</sup> *Mir Jaffer* died in January 1765 and was succeeded by his son *Nadjam-ud-daulah*, who by treaty dated 25 February, 1765, confirmed all previous grants made to the company and transferred the power and costs of military defence to the British.<sup>104</sup>

The period between the battles of *Plassey* and *Buxar* was also a period of extensive trading abuses, looting, and speculation by the East India Company officers in Bengal. Hastings, the British resident in *Murshedabad* from 1758 to 1761, and a member of the Supreme Council of Bengal and resident in Calcutta from 1761 to 1764, was personally angered when he conducted an investigation into trading abuses in Bengal.<sup>105</sup> Writing half a century later, Macaulay describes the situation in the following terms<sup>106</sup>:

*"On one side was a band of English functionaries, daring, intelligent, eager to be rich. On the other side was a great native population, helpless, timid, accustomed to crouch under oppression. To keep the stronger race from preying on the weaker, was an undertaking which tasked to the utmost the talents and energy of Clive... the master caste, as was natural, broke loose from all restraint; and then was seen what we believe to be the most frightful of all spectacles, the strength of civilisation without its mercy...The superior intelligence and energy of the dominant class made their power irresistible. A war of [Bengalis] against Englishmen was like a war of sheep against wolves, of men against [demons]."*

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<sup>100</sup> Field at 456.

<sup>101</sup> Field at 456.

<sup>102</sup> Field at 456.

<sup>103</sup> Field at 456.

<sup>104</sup> Field at 456.

<sup>105</sup> Thomas Babington Macaulay, *Essay on Warren Hastings* (1841).

<sup>106</sup> *Id.*

According to Turnbull, Hastings' investigation revealed that persons travelling under the unauthorised protection of the British flag engaged in widespread fraud and in illegal trading, knowing that local customs officials would thereby be cowed into not interfering with them. Convinced this was bringing shame to Britain's reputation, Hastings urged the ruling authorities in Calcutta to put an end to it. The Supreme Council of Bengal considered his report but ultimately rejected Hastings' proposals and he was fiercely criticised by other members, many of whom had themselves profited from the trade.<sup>107</sup> In 1764, Hastings returned to England.<sup>108</sup>

Six months after the British treaty with the *Nawab* of Bengal, Nadjam-ud-daulah, on 12 August, 1765, the Mughal Emperor *Shah Alam II* issued a royal *firman* which granted the "diwani" of Bardwan, Midnapore, and Chittagong to the Company.<sup>109</sup> The "diwani" meant the office, jurisdiction, and emoluments of the "Diwan"; and the grant of the "diwani" was a grant of the right to collect the revenue from Bengal, Bihar and Orissa, and to exercise judicial powers in all civil and financial causes arising from these provinces.<sup>110</sup> The *Diwani* to the East India Company gave them the perpetual grant of the revenue collected subject to the payment of 26 lakhs to the Mughal emperor and to defraying the expenses of the *nizamat*<sup>111</sup>. "Nizamat" meant the office of the "nazim", the chief officer charged with the administration of the police and criminal law. Under the Mughal empire, the *Subahdar* managed both the *diwani* and the *nizamat*.<sup>112</sup> The British at this time had been given the *diwani* though not the *nizamat*, but they had to pay for the *nizamat*. This view is confirmed by the Court of Directors' Despatch dated May 17, 1768, noting that the "office of Dewan should be exercised only in superintending the collection and disposal of the revenues...the administration of justice, the appointments to offices, [zamindaries], in short whatever comes under the denomination of civil administration we understand, is to remain in the hands of the nawab or his ministers."<sup>113</sup>

To sum up the discussion thus far, by 1765 the East India Company had acquired many but not all attributes of sovereignty over the provinces of

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<sup>107</sup> Patrick Turnbull, *Warren Hastings*. New English Library, (1975) at 36-40.

<sup>108</sup> Thomas Babington Macaulay, *Essay on Warren Hastings* (1841).

<sup>109</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxii.

<sup>110</sup> Field at 458.

<sup>111</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxii.

<sup>112</sup> Field at 459.

<sup>113</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxii.

Bengal, Bihar and Orissa, insofar as they were responsible for the military defence of these provinces, the costs of which were to be defrayed from the revenue of the three districts of Bardwan, Midnapore and Chittagong. They were still responsible to pay a total revenue of Rs. 24 lakhs to the Mughal Emperor. In other words, they had stepped into the shoes of the Bengal *Subahdar* vis-à-vis the Mughal Emperor. In addition, the East India Company also had the following property rights.

1. Free tenure or title of the site of Calcutta;
2. *Zamindari* or revenue collection rights with respect to the district of Twenty Four Paraganas which accrued entirely to the Company;
3. Revenue collection rights on behalf of the Mughal Empire for the districts of Bardwan, Midnapore, and Chittagong.<sup>114</sup>

Finally, the East India Company also had exclusive privileges of trade in Bengal.<sup>115</sup>

### **3.1765-1772: The great famine of 1770 and experiments in administration of revenue**

In 1766, General Clive took his seat as *Diwan* at an annual ceremony of settling and commencing the collection of annual revenue held at *Motighil* near *Murshidabad*.<sup>116</sup> As described above, the previous period was marked by the excesses of British traders in a period of ongoing war and changing political equations in Bengal. Since 1765, the East India Company had the right to collect revenue for all of Bengal, Bihar, and Orissa, but they lacked the administrative capacity to do so.<sup>117</sup> They only collected the revenue for Bardwan, Midnapore, Chittagong, and the Twenty Four *Paraganas*.<sup>118</sup>

In 1768, Hastings returned to India, first to Madras and later to Bengal where in 1771, he was appointed as Governor of the Presidency of Calcutta.<sup>119</sup> Until 1769, Indian officers, *Mohd Reza Khan* in Murshidabad and *Scitab Roy* in Patna collected the revenues for the provinces of Bengal, and for the provinces of Bihar and Orissa respectively.<sup>120</sup> On 16 August, 1769, the Company appointed supervisors in addition to the Resident, who were instructed to compile a full history of land relations

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<sup>114</sup> Field at 456-57.

<sup>115</sup> Field at 457.

<sup>116</sup> Field at 463.

<sup>117</sup> Field at 463.

<sup>118</sup> Field at 463.

<sup>119</sup> Thomas Babington Macaulay, *Essay on Warren Hastings* (1841).

<sup>120</sup> Field at 463; James Fitzjames Stephen, *THE STORY OF NUNCOMAR AND THE IMPEACHMENT OF SIR ELIJAH IMPEY* vol. 1 at 11 <http://ebooks.library.cornell.edu/cgi/t/text/pageviewer-idx?c=cdl;cc=cdl;rgn=full%20text;idno=cdl417;didno=cdl417;view=image;seq=23;node=cdl417%3A6;page=root;size=100>

in the three provinces, and a clear assessment of the rents collected from different types of tenants.<sup>121</sup> According to the "Letter of Instructions" issued by the Court of Directors, the supervisors were mandated to, "prepare a summary history of the province" giving an account of the ancient constitution, the rulers, the order of succession, the revolutions in their families, and their connections, their peculiar customs.<sup>122</sup> Moreover, they were required to outline the state, produce, and capacity of the lands, the amount of the revenues, the cesses imposed on the *raiayat* by the government or the *zamindar*.<sup>123</sup>

The appointment of the Supervisors was followed in 1770 by the institution of two Revenue councils of control, one at Murshedabad, and the other at Patna, but this arrangement did not prove very successful.<sup>124</sup> During this period, there was a constant and unrelenting pressure on Hastings to raise the Company's revenues. In letters from the Court of Directors, though they did not require or justify oppression, they constantly sought an increase of revenue which was impossible without oppression.<sup>125</sup> In 1770, there was a great famine, which destroyed one third of the inhabitants of Bengal. Notwithstanding this mortality and the consequent decrease of cultivation, the East India Company's revenue collections for the following year 1771-72, exceeded not only those of 1769-70 but those of 1768-69.<sup>126</sup> This was possible only because the standard of collection was maintained by violence and oppression. For

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<sup>121</sup> Field at 463.

<sup>122</sup> Field at 463.

<sup>123</sup> Field at 463.

<sup>124</sup> Field at 470.

<sup>125</sup> As Macaulay writes, "Whoever examines their letters written at that time, will find there many just and humane sentiments, many excellent precepts, in short, an admirable code of political ethics. But every exhortation is modified or nullified by a demand for money. "Govern leniently, and send more money; practise strict justice and moderation towards neighbouring powers, and send more money"--this is, in truth, the sum of almost all the instructions that Hastings ever received from home. Now these instructions, being interpreted, mean simply, "Be the father and the oppressor of the people; be just and unjust, moderate and rapacious." The Directors dealt with India, as the Church, in the good old times, dealt with a heretic. They delivered the victim over to the executioners, with an earnest request that all possible tenderness might be shown. We by no means accuse or suspect those who framed these despatches of hypocrisy. It is probable that, writing fifteen thousand miles from the place where their orders were to be carried into effect, they never perceived the gross inconsistency of which they were guilty. But the inconsistency was at once manifest to their vicegerent at Calcutta, who, with an empty treasury, with an unpaid army, with his own salary often in arrear, with deficient crops, with government tenants daily running away, was called upon to remit home another half million without fail. Hastings saw that it was absolutely necessary for him to disregard either the moral discourses or the pecuniary requisitions of his employers. Being forced to disobey them in something, he had to consider what kind of disobedience they would most readily pardon; and he correctly judged that the safest course would be to neglect the sermons and to find the rupees."

<sup>126</sup> Field at 470.

instance, the British imposed upon the actual inhabitants of a local division the loss sustained in consequence of the *rai-yats* having died or absconded.<sup>127</sup> On 29 August 1771, the Court of Directors sent out instructions to assume the *diwani* and through the agency of the Company's servants to take over the management of the land revenues. As a result, they directed the dismissal of the Naibs of Murshedabad and Patna and the management of the Revenue department was removed from Murshedabad to Calcutta.<sup>128</sup>

In May 1772, the supervisors were styled "Collectors"<sup>129</sup>, a term that is the mainstay of Indian administration even today. But in November 1773, the "collectors" were withdrawn because of the "impracticability" of the task assigned to them and their districts left to the superintendence of the Bengali *Diwans* or *Amils*. A Committee of Revenue was formed at the presidency consisting of two members of the Council board and three senior civil servants.<sup>130</sup> The three provinces of Bengal, Bihar and Orissa were divided into six divisions, the Calcutta division being placed under the superintendence of the Committee, and the remaining five divisions were placed under the superintendence of the provincial councils stationed at Bardwan, Patna, Murshedabad, Dinajpur and Dhaka.<sup>131</sup>

Therefore, during the seven years after the British acquired many attributes of sovereignty and the legal right to undertake the civil administration of the provinces of Bengal, Bihar, and Orissa, there was no real change on the ground. The incapacity of the British state meant that the administration of land revenue remained the same in 1772 as it did before 1765, when the East India Company assumed control of administration under the Mughal Emperor. During this period, the Hohfeldian property rights distribution remained the same as it did during the Mughal rule. The incapacity of the East India Company, a trading company to undertake civil administration would plague its efforts to establish its civil and political authority over the land and peoples of Bengal, Bihar, and Orissa. It also partially explained the *ad hoc* and erratic nature of legal changes introduced by the Company as it struggled to administer the territory in order to maximise revenue for the British Crown. Indeed, maximisation of revenue was the only purpose, and only principle that governed the reshaping of property rights in the last quarter of the century.

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<sup>127</sup> Field at 470-471.

<sup>128</sup> Field at 472.

<sup>129</sup> Field at 473.

<sup>130</sup> Field at 473-474.

<sup>131</sup> Field at 474.

#### 4.1772-1776: The Supreme Council of Bengal and the Quinquennial Settlement in India

In 1773, the East India Company petitioned the British Parliament for a loan for carrying out its activities. The loan was granted but the British Parliament sought to "establish certain regulations for the better management of the affairs of the East India Company in India as in Europe" through the Regulating Act, 1773.<sup>132</sup>

The Regulating Act, 1773 provided that the government of Bengal should consist of a Governor General and four councillors. Decisions were to be taken by a majority, but in case of a tie, the Governor General would have a casting vote. The Presidents and Councils of Madras and Bombay were rendered subordinate to the Governor General and Council of Bengal, with respect to the declaration of war and conclusion of peace.<sup>133</sup> The Act named Warren Hastings as the first Governor General of Bengal and his council of four members, included Philip Francis, John Clavering, George Monson and Richard Barwell. Thereafter, the Council was to be appointed by the Court of Directors.<sup>134</sup>

This Supreme Council comprised of five white British men, was the highest executive authority in British India from 1774.<sup>135</sup> The Regulating Act empowered the Governor General and Council to "make and issue such rules, ordinances, and regulations for the good order and civil government of the Company's settlement at Fort William, and other factories and places subordinate to [the settlement] and to [impose reasonable fines and forfeiture for the breach and non-observance of such rules, ordinances and regulations.]"<sup>136</sup> The Regulating Act also created the Supreme Court of Bengal, intended to be an independent and effectual check upon the executive. The Supreme Court consisted of judges appointed by the Crown, whereas the executive government was composed of the Company's servants.<sup>137</sup> It consisted of a chief justice and three judges, which was subsequently reduced to two judges, appointed under a charter framed under the authority of the Regulating Act.<sup>138</sup> The Court exercised jurisdiction over his majesty's subjects in the provinces of Bengal,

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<sup>132</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv. A sum of 1,400,000 GBP was lent to the Company from the public coffers.

<sup>133</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>134</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>135</sup> The first Council meeting was held on October 20, 1774.

<sup>136</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>137</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>138</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.



Bihar, and Orissa. The King in Council retained the right to disallow or alter any rule or regulation framed by the government of India; and in civil cases, an appeal lay to the Privy Council.<sup>139</sup> The power and importance of the Supreme Court could be seen from the fact that any regulations passed by the Supreme Council only became valid once they were duly registered in the Supreme Court with the consent and approbation of said Court.<sup>140</sup>

As described earlier, the period from 1765 to 1772 saw differential administration of land revenue in the provinces of Bengal, Bihar, and Orissa according to the prevailing customs of the provinces by the *naibs* of Murshedabad and Patna. Under this system, while the revenue of Bihar was settled for a term of a few years, the revenues of Bengal and Orissa were settled annually.<sup>141</sup>

To establish a more uniform system of land revenue, on 14 May 1772, Hastings entered into a quinquennial settlement of the land revenue with the farmers of Bengal and Orissa for a period of five years. In order to make this settlement, a Committee consisting of the President, Hastings, and four other members went on circuit throughout the province.<sup>142</sup>

Pursuant to the quinquennial settlement, the Committee decided to farm out lands to the highest bidder. The motivation behind this was ease of collection of the revenue, "best adapted to a government, constituted like that of the Company, which cannot enter into the detail and minutiae of the collections."<sup>143</sup> With the quinquennial settlement, the East India Company government made the first British alteration to the property rights of landlords and raiyat cultivators. According to the terms of the settlement, the "the farmer" could not receive larger rents from the *raiya*ts than the stipulated amount of the *pattas* on any pretence whatsoever". For every instance of extortion, "the farmer on conviction

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<sup>139</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>140</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>141</sup> INDIAN CONSTITUTIONAL DOCUMENTS: 1773-1915 (Panchanandas Mukherji ed., Calcutta: Thacker Spink & Co., 1915), at xxiv.

<sup>142</sup> Field at 477-478.

<sup>143</sup> "There is no doubt that the mode of letting the lands in farm is in every respect the most eligible. It is the most simple, and therefore the best adapted to a government, constituted like that of the Company, which cannot enter into the detail and minutiae of the collections. Any mode of agency, by which the rents might be received is liable to uncertainty; to perplexed and inextricable accounts; to an infinity of little balances; and to embezzlements; in a word, both the interest of the state, and the property of the people, must be at the mercy of the agents. Nor is it an object of the trivial consideration, that the business of the Service, already so great that much of it is unavoidably neglected, would be thereby rendered so voluminous, and the attention of the Board so divided, that nothing would be duly attended to; the current affairs would fall into irrecoverable arrears."

shall be compelled to pay back the sum taken from the *raiyat*", along with a penalty to the government. If such an instance were to be repeated, the farmer's lease would be annulled.<sup>144</sup>

From 1774, the new Supreme Council commenced operations, appointed for a period of five years. From the very outset, the majority of the Supreme Council of Bengal differed considerably from Warren Hastings. There had existed a bitter feud between Warren Hastings and Philip Francis. With the help of Monson and Clavering, Francis strove to undermine Hastings' policies and attempted to depose the Governor-General.<sup>145</sup> The situation climaxed with the Nanda Kumar affair. In March 1775, Maharaja Nanda Kumar, the former resident of Bengal accused Hastings of fraud and corruption in the administration of Bengal. Maharaja Nandkumar had hoped to succeed to the position of Mohd Reza Khan, the current *Diwan* and was deeply mortified when the powers of the Indian *diwans* were abolished. It caused him to hold a bitter animosity against Hastings.<sup>146</sup>

The majority of the Supreme Council consisting of Francis, Clavering and Monson immediately admitted Nandkumar's allegations and pursued an investigation with respect to the same. They also supported Nandkumar publicly and invited further allegations of corruption and wrongdoing against Hastings.<sup>147</sup> The same Council majority held that the charges were made out and ordered Hastings to refund a sum of thirty to forty thousand pounds.<sup>148</sup>

However, before further action could be taken against Hastings, Nanda Kumar was arrested and brought before the Supreme Court of Bengal on charges of forgery. For this offence, he was later tried and sentenced to death by the Court.<sup>149</sup> On 5 August, 1775, Nandakumar was publicly hanged. Hastings was later accused of committing a judicial murder in connivance with the Chief Justice of the Supreme Court, Sir Elijah Impey in his impeachment in the British Parliament by Edmund Burke. Historians believe that the forgery charges based on a previous case were brought on the behest of Hastings<sup>150</sup> and while the conviction was probably legal, the

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<sup>144</sup> Supplement to Colebrooke's Digest, 191.

<sup>145</sup> Macaulay, "Warren Hastings"

[http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt\\_complete.html#22](http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt_complete.html#22) See contrary opinion, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* (London: Macmillan and Co., 1885)

<sup>146</sup> Sir James Fitzjames Stephen

<sup>147</sup> Macaulay, "Warren Hastings"

<sup>148</sup> Macaulay, "Warren Hastings"

<sup>149</sup> Macaulay, "Warren Hastings"

<sup>150</sup> Macaulay, "Warren Hastings"

[http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt\\_complete.html#22](http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt_complete.html#22) See contrary opinion, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* (London: Macmillan and Co., 1885)

punishment was unjust.<sup>151</sup> Justice Impey had applied the English law on sentencing to Nandakumar, whereby forgery was punishable with death. But English law was applicable only to English citizens, and was not applicable to Indians like Nandakumar. While forgery was a crime even as per the Bengali law, it was not punishable by death in India.<sup>152</sup> This injustice caused a major upheaval within the British settlement, and was also the first major crisis in the Company's rule of India where the Supreme Court and majority of the Supreme Council were in clear conflict and foreshadowed perhaps the role of British courts as channelling opposition to executive action in coming years. In another paper, I will examine the role of the Court as a parallel, and often adversarial governance authority to the Supreme Council in India. For now, we must return to British reshaping of colonial property rights against the backdrop of a political and governance crisis in India.

Following the execution of Nandakumar, which infuriated Francis, the top management of the East India Company sought to remove Hastings through an address to Parliament under the provisions of the Regulating Act, 1773.<sup>153</sup> This attempt however, narrowly failed causing a serious rift between government ministers and the top management of the East India Company. In 1776, the death of Monson ended the majority united against Hastings. With Clavering and Francis on one side, Barwell and Hastings on the other; but with Hastings as Governor General with the casting vote in cases of disagreement, Hastings became absolute.

As the quinquennial settlement came to an end, it was widely regarded as a failure because the farmers were not able to make the payments that they had agreed to according to the terms of the settlement.<sup>154</sup> The Council did not consider whether the revenue demands were excessive given the conditions in Bengal, especially after the Bengal famine of 1770. The Council remained divided on the future course of action before the Company. Hastings was of the opinion that further and more exact information was needed to do a more accurate valuation of land for the purposes of taxation and for protection of the *rai-yats'* interests.<sup>155</sup> The East India Company sent Wheler as a replacement for Monson, but by the time Wheler arrived in India, Clavering too died and the Council was

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<sup>151</sup> Macaulay; Fitzjames Stephen

<sup>152</sup> Macaulay, "Warren Hastings"

[http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt\\_complete.html#22](http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/hastings/txt_complete.html#22) See contrary opinion, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* (London: Macmillan and Co., 1885)

<sup>153</sup> Macaulay

<sup>154</sup> Field at 481.

<sup>155</sup> CD Field at 482.

again split into two on either side, with Hastings having the casting vote.<sup>156</sup>

In an attempt to respond to the rapacious demands of revenue from the Court of Directors while retaining a modicum of compassion for the actual cultivators of the land, Hastings' Quinquennial Settlement made changes in the property rights of the revenue collectors by farming the right to the highest bidder. But the Quinquennial Settlement did not make any changes to the property rights of the actual cultivators of the land seeking to protect their undisturbed possession and occupancy rights of the land. There does not at this time appear any suggestion of the government being the "universal landlord". Instead, the government seems merely to exercise the right of sovereign to exact a tax on the agricultural incomes, while respecting the property rights of the "farmers" and the "cultivators" of land.

### **5.1777-1784: The Hastings-Francis debate and the introduction of annual settlements**

On 1 November 1776, Governor General Hastings proposed that one of two covenanted servants of the Company, assisted by a *Diwan* and other officers should be temporarily appointed to collect and compile the accounts of the past collections, to digest the materials furnished by the Provincial Councils and Diwans, and to obtain special accounts and other materials of information by deputing native officers on occasional investigations so as to secure to the *raiya*t the perpetual and undisturbed possession of their lands, and to guard them against arbitrary exactions.<sup>157</sup>

Expectedly, Francis opposed Hastings' proposal. He did not consider that an accurate valuation of the lands was an attainable object and even if it were attainable, he considered it useless except for the purpose of levying the greatest possible revenue.<sup>158</sup> He argued that the valuation, if it could be made, could be true only at a particular point in time, "because the proportionate value of land fluctuates in all countries" due to various unpredictable causes.<sup>159</sup>

Hastings responded to Francis, by noting that the "ancient distribution of land rent formed over 220 years" under Mughal rule was no longer binding.<sup>160</sup> In the twenty years since the battle of *Plassey*, rent had been collected based on "a conjectural valuation of the land, formed by the

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<sup>157</sup> CD Field at 481.

<sup>158</sup> Minute by Mr. Francis dated 5 November, 1776, Revenue Selections, pgs. 437-440; Field at 481.

<sup>159</sup> Field at 481.

<sup>160</sup> Field at 483.

amount of the receipts of former years and the opinions of officers of revenue."<sup>161</sup> An accurate valuation of the revenue could be done in one of two ways. The first was to do an actual survey and measurement, which based on past efforts, Hastings had found to be "too tedious, expensive and uncertain."<sup>162</sup> He proposed a trial of the second, which involved a study of the accounts of the land rents. According to him, "the accounts of revenue in Bengal [were] kept with a regularity and precision unknown in Europe." They were drawn out on one uniform plan, and were balanced and adjusted at fixed periods.<sup>163</sup> Writing in the late nineteenth century, Field notes that "Hastings was mistaken in his belief about the accuracy of the accounts", because the "preparation of complete sets of false accounts was very common."<sup>164</sup>

But Field goes on to note, Hastings was correct in the assertion that under the prevailing customary law, as long as the *raiyats* paid their rent, they had a secure property interest in possession of the land, and the *zamindar* had no right to dispossess them. Nor could the *zamindar* unilaterally exact a higher rent from the *raiyat* than his *patta* described.<sup>165</sup> Hastings wished to ensure that whatever settlement regulations were adopted, the property rights of the *raiyats* to possession and against the raising of rents would be protected. However, Francis felt that the government need only settle the revenue with the *zamindar* because once that was done, the "*zamindar* and the *raiyat*" would come to an "agreement to their mutual advantage."<sup>166</sup> "At all events, the interposition of the government between them should have no object but to enforce the execution of their respective engagements", Francis concluded.<sup>167</sup> Hastings strongly believed that many of the *zamindars*, both of Bengal and Bihar, were incapable of judging or acting for themselves, "being either minors, or men of weak understanding, or absolute idiots", and thought it necessary to secure the rights of the *raiyats* by checks and regulations.<sup>168</sup>

Despite their acrimonious disagreement on this and almost every other subject, both Francis and Hastings agreed that short settlements of revenue were injurious both to the *zamindars* and the *raiyats*, "calculated to produce rigour and exaction towards the cultivators of the soil, discouraging to all improvements in agriculture, and consequently

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<sup>161</sup> Field at 483.

<sup>162</sup> Field at 483.

<sup>163</sup> Minute by the Governor General dated 12 November 1776-I, Revenue Selections; Field at 486.

<sup>164</sup> Field at 484.

<sup>165</sup> Field at 485.

<sup>166</sup> Field at 482.

<sup>167</sup> Field at 482.

<sup>168</sup> Field at 486.

inimical to the general prosperity of the country."<sup>169</sup> In 1776, they submitted a plan for making a life settlement with the *zamindars* to the Court of Directors.<sup>170</sup> But the Court of Directors far away in England and concerned only about the quantum of revenue exactions refused to accept this plan, ordering that annual settlements be made, with a preference to be given to making settlements with the *zamindars*, whenever they were willing to agree to a reasonable assessment.<sup>171</sup>

The East India Company's practice of making annual settlements of the land revenue continued for a period of seven years until 1784. That year, the British Parliament passed an Act<sup>172</sup> which required the court of directors to give orders for "settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which the rents, tributes and service of the *rajas*, *zamindars*...and other landholders should be in future rendered and paid to the [East India Company].<sup>173</sup>

Until then, Hastings' influence in India continued to grow. In 1779, Sir Eyre Coote was sent to India as the commander of the armed forces, and as a member of the Supreme Council of Bengal. Hastings generally deferred to Coote in military matters, and the latter tended to side with him on the Council, which along with Barwell's vote gave him a majority against Francis and Wheler. In 1780, Hastings and Coote designed, and the latter successfully led, the military campaign against *Hyder Ali* who had defeated the East India Company in Madras and captured British forts and garrisons.<sup>174</sup> Meanwhile, the continuing bitterness between Hastings and Francis culminated in a duel, which Hastings won. After recovering from his duel wound, Francis returned to England, never to return to India.

On 20 Feb 1781, the provincial councils stationed at the six divisions in the provinces of Bengal, Bihar, and Orissa, were dissolved and their powers and duties transferred to a committee of Revenue at the Presidency, consisting of four covenanted civil servants, who were entrusted with the "charge and administration of all the public revenues of the provinces, and invested in the fullest manner with all the powers and the authority, under the control of the Governor General and Council".<sup>175</sup> However, the Council and the Company quickly realised that the plan of managing the whole business of revenue at the Presidency without the assistance of responsible local agents was impracticable.

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<sup>169</sup> Field at 486-487

<sup>170</sup> Field at 487.

<sup>171</sup> Field at 487.

<sup>172</sup> 24 Geo III, cap 25.

<sup>173</sup> Field at 487.

<sup>174</sup> Macaulay.

<sup>175</sup> Field at 475.

John Shore, an officer of the Company who had spent a decade in Murshedabad and Rajshahi with the board of revenue was appointed to this committee by Hastings in 1781. Lamenting the withdrawal of the collectors in the provinces, writing in 1782, Shore expressed his opinion that the real state of the districts was less known and the revenues less understood in 1782 than in 1774.<sup>176</sup>

Pursuant to the 1784 Act, the Court of Directors for the Company opined that in accordance with the spirit of the Act, a decennial settlement should be concluded with the *zamindars*, along with rules for maintaining the rights of other classes of people, including various categories of *raiyyats* according to the customs and usages of the country.<sup>177</sup> Underlying this opinion of the Court of Directors' was the assumption that by 1784, the Company possessed a fair assessment of the land tenure relations and assessments in the provinces of Bengal, Bihar, and Orissa. Those who had been working on the ground in administering the revenue like Hastings and Shore, however, disagreed. But Hastings' time in India was at an end. The new Governor General Lord Cornwallis agreed with the decision of the Court of Directors, to effectuate a more permanent settlement of revenue. In 1785, Hastings returned to England where he was impeached in the House of Commons by Edmund Burke, encouraged amongst others by Philip Francis for misdemeanours committed in India, including the alleged judicial killing of Nandakumar. After a long trial lasting nearly seven years, Hastings was acquitted of all charges in 1795. In 1786, Lord Cornwallis took charge as the new Governor General and Commander in Chief in India.

At the end of this period, which saw introduction of political government in India ordained by the British Parliament, but also political upheaval, intrigue and scandal, the significant change in property relations was a protection of the right of the *raiyyats*, in that they were not required to pay more revenue than that agreed upon in their *patta*, and they could not be evicted from their lands. Maximising the collection of revenue remained the only goal of the East India Company, and expediency, not principle, had dictated such assessments since the battle of Buxar. But while Hastings retained control of the Council, the property interests of the *raiyyats* were protected against the *zamindar*, at least in law.

## **6.1785-1800: Introduction of the permanent settlement in India**

In 1787, under the leadership of Lord Cornwallis, the provinces of Bengal and Orissa were divided into twenty collectorships, exclusive of those, which had already been established in Bihar, making thirty-six in all. On

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<sup>176</sup> Field at 475.

<sup>177</sup> Field at 487.

8 June 1787, rules were made for the conduct of the collectors, and these rules were subsequently re-enacted with amendments in 1793.

In his Minute of 2 April, 1788<sup>178</sup>, Shore notes the Board of Revenue's understanding of *zamindari*, as constituting "a conditional office, annually renewable, and revocable on defalcation."<sup>179</sup> Based on an evaluation of several materials, including expert researches on the laws and institutes of the Mughal period by James Grant, detailed responses to a questionnaire by the former *naib* of Bihar on the rights and privileges of *zamindars* and *ryots* in India, correspondence between the Board and Committee of Revenue, translations of texts relating to Mughal finance, translations of *sunnud* documents and proofs of sale, Shore concludes that there were two opposing views of the rights of *zamindars* to land in India.

According to the first view of the Mughal Constitution,

*"the property in the soil was absolutely and solely vested in the Crown, and the zamindari was an office only, originally conferred under certain conditions expressed in the grant of investiture, which is the sole foundation of the tenure. The Crown's right to property in the soil is supported by the facts of alienation of zamindari land in perpetuity under the denomination of altumgha, by the spirit of the rules of Mughal finance, as detailed in the Institutes of Timur and Akber and in the Ordinations of the Emperors; and by the practice of the provincial delegates to increase the revenues by an appropriation of the whole produce of the soil."*<sup>180</sup>

According to the second view, "the *zamindars* have by their tenure, however derived, a property in the soil, and the right of disposing of it, subject however, under any disposal or alienation, to the sovereign's claim for rent." Shore notes "in support of this assertion, the universal testimony of the people, the law of prescription, and the avowed and established rights of inheritance of the *zamindars* are adduced. These proofs are further strengthened by the ordinances of the Emperors, and by instances deduced from their conduct and their delegates, by the practice of the Mughal government in selling *zamindari* lands for discharge of arrears of rent, and by records of sales of the same lands by the [*zamindars*]...In opposition to the fundamental principle that the soil belongs to the

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<sup>178</sup> Mr Shore's Minute on the rights of *zamindars* and *talookdars*, recorded on the proceedings of government in the Revenue Department, 2 April, 1788 reproduced in Harington at 3. This understanding was also reflected in the Committee of Revenue letter to the Governor General and Council dated 18 April, 1786, which noted the Committee's unanimous opinion that "the soil undoubtedly belongs to the government, not to the *zamindars*."

<sup>179</sup> Minute, Harington at 30.

<sup>180</sup> Minute, Harington at 30-31.



sovereign exclusively, the Institutes of Timur, the Ordinations of Aurangzeb, and the Mahomedan Laws are produced."<sup>181</sup>

Shore concludes that on a subject so difficult, doubts would persist and therefore the best resolution would be to adopt "the most favourable decision for the rights of the people". In his opinion, that was the acceptance of the principle of the "sovereign's right to a proportion of the revenues of all lands not alienated by his sanction from the rental of the government." But he said that the Company's government must limit the demands of the government to a precise amount, leaving the remainder to the population to use for their own needs and "convert into affluence".<sup>182</sup>

In his Minute of 18 June, 1789 and subsequent minutes of 18 September and 8 December, 1789, Shore wrote against the hasty conclusion of a decennial or permanent settlement of the revenue, noting that British administration had been "fluctuating and uncertain" and the success of any measure for improvement was not guaranteed before it was tested.<sup>183</sup>

Shore pointed out that the relationship of the *zamindar* to government and of a *raiyat* to *zamindar* was neither that of proprietor nor a vassal, but a compound of both.<sup>184</sup> "The *zamindar* performed acts of authority unconnected with [property] right, the latter had rights without any real property."<sup>185</sup> The property of the one and the rights of the other were very much held at discretion. Much time would elapse before the compound relation of *zamindar* to government and *raiyats* to *zamindar* could be reduced to the simple principles of landlord and tenant.<sup>186</sup> Shore also highlighted the incapability of the Bengal *zamindars* to act as improving landlords. From this, arose the need for the political government to interpose between the *zamindars* and the *raiyats* and carefully define the rights of the latter.<sup>187</sup>

In his Minute of 3 February, 1790, Governor General Cornwallis responded to Shore's arguments, noting that the very factors that Shore believed should weigh against a permanent assessment of the revenue, namely, the susceptibility of the country to drought and inundation, were those that in his opinion weighed more strongly in its favour.<sup>188</sup> Cornwallis believed that if the government demand were fixed, then the burden of failure of the crops would not be borne by the government, but by the *zamindar*, who could "by the improvement of his lands, and he will likely provide for

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<sup>181</sup> Minute, Harington at 31.

<sup>182</sup> Minute, Harington at 32.

<sup>183</sup> Field at 489.

<sup>184</sup> Field at 490.

<sup>185</sup> Field at 490.

<sup>186</sup> Field at 490.

<sup>187</sup> Field at 492.

<sup>188</sup> Field at 493.

occasional losses from the profits of favourable seasons."<sup>189</sup> Likewise, the landholders would be made to grant pattas to the *raiyats* on principles proposed by Shore.<sup>190</sup> The government would retain the right to protect the interests of the *raiyats* by preventing the *zamindar* from imposing additional taxes or *abwabs* as they were wont to do in the past. The government also retained the right of abolishing existing taxes that were found to be unjust or oppressive.<sup>191</sup> Cornwallis noted that the possession rights of the *raiyats* would also be protected and the *zamindar* would not be able to evict tenants arbitrarily from the land.<sup>192</sup>

In the Shore-Cornwallis debate, Cornwallis' view prevailed with the Court of Directors, not least because they were already predisposed to that view because it would protect the Company's insatiable demand for revenue. The Directors expressed their conviction that, "a permanent assessment upon the scale of the present ability of the country must contain in its nature a productive principle; that the possession of property and the sure enjoyment of the benefits derivable from it will awaken and stimulate industry, promote agriculture, extend improvement, establish credit and augment the general wealth and prosperity."<sup>193A</sup> Decennial Settlement was concluded in 1793, which was declared permanent by a Proclamation dated March 22, 1793.

The Directors characterised the shifting nature of the assessment as an "instability in the administration of the revenue" which "reduced everything to temporary expedient, and destroyed all enlarged views of improvement."<sup>194</sup> They were mindful of the fact that the permanent assessment of revenue would only be successful if there were an equitable adjustment and collection of the rents payable by the *raiyats* to the *zamindars*. But they "hoped" that the *zamindars* would realise from experience that their own interests were connected with the security and encouragement of the cultivators of their soil, and take care of the same.<sup>195</sup>

From the above review, it is clear that both Cornwallis and the Court of Directors sought to reshape the existing property arrangements in a way that would guarantee to the *zamindars* the right to collect revenue from their lands in perpetuity so long as they paid a certain fixed assessment to the East India Company. The possession and occupancy rights of the *raiyats* were protected so long as they paid rents to the *zamindars* that

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<sup>189</sup> Field at 493.

<sup>190</sup> Field at 493.

<sup>191</sup> Field at 496.

<sup>192</sup> Field at 497.

<sup>193</sup> Field at 499.

<sup>194</sup> Field at 500.

<sup>195</sup> Field at 501.

the latter would "hopefully" assess fairly and equitably. The government reserved the right to intervene to protect the rights of the *raiya*t if the existing arrangements were found to be inequitable.<sup>196</sup> This power they claimed was consistent with the practice of the Mughal government, which followed the maxim that the immediate cultivator of the soil duly paying his rent should not be dispossessed of the land he occupied.<sup>197</sup>

The permanent settlement was concluded with the actual proprietors of the soil, of whatever denomination, whether *zamindars*, *talukdars* or *chowdharies*.<sup>198</sup> They and their heirs and lawful successors were allowed to hold their estates provided they paid revenue to the Company at the permanently assessed rate, at the stipulated periods, without delay or evasion.<sup>199</sup> They were also required to conduct themselves with good faith and moderation towards their dependent *talukdars* and *raiya*t.<sup>200</sup>

According to the Bengal Revenue Regulation, 1793, the stated goal of the permanent settlement was to effectuate improvements in agriculture. The settlement consisted of two essential features. First, "the property in the soil vested with the landholders", and second, the revenue payable to the government from each estate was fixed forever.<sup>201</sup>

But, as I have described earlier, property is essentially a bundle of rights, powers, privileges, and immunities. Therefore, following the permanent settlement, we can deduce that the following property rights were created in favour of *zamindars* and *raiya*t. The *zamindar* had the title to an estate, which gave him the property right to receive rents from all the lands, including rights to mining and fishing that lay within the *zamindari* estate<sup>202</sup>, and was:

- (a) inheritable
- (b) transferable by sale, gift, or otherwise, in whole or in part<sup>203</sup>, according to the personal law of the *zamindar*, whether Hindu or Muslim law
- (c) lease the land for a term or in perpetuity subject to certain restrictions<sup>204</sup> or to mortgage the land.

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<sup>196</sup> Section 8, Bengal Permanent Settlement Regulation, 1793

<sup>197</sup> Field at 502.

<sup>198</sup> Section 3, Bengal Permanent Settlement Regulation, 1793, read with section 4, Bengal Decennial Settlement Regulation, 1793.

<sup>199</sup> Section 4, Bengal Permanent Settlement Regulation, 1793, read with section 4, Bengal Decennial Settlement Regulation, 1793.

<sup>200</sup> Section 7, Bengal Permanent Settlement Regulation, 1793.

<sup>201</sup> Section 1, Bengal Land Revenue Regulation, 1793.

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<sup>203</sup> Section 9, Permanent Settlement.

<sup>204</sup> Section 51, Decennial Settlement.

However, the *zamindar's* property interest was safeguarded only insofar as he paid the revenue assessed by the Company. In case of failure to pay the assessed revenue, the *zamindar's* property was subject to sale by auction. The purchaser acquired the estate free of all encumbrances created since the time of the permanent settlement and obtained a statutory title.<sup>205</sup>

The British also made a fundamental change in the existing property arrangements with respect to the rules of succession. Noting that the custom of succession for the more extensive *zamindaris* was the principle of primogeniture, the Bengal Inheritance Regulation, 1793, changed this to the religious inheritance law of the incumbent *zamindars*.<sup>206</sup> But while the Regulations sought to establish rules of intestate succession according to the religious inheritance laws, the *zamindar* could divest his heirs of their property by will, so long as this was not in contravention of the Governor General in Council's Regulations or the personal laws.

The *zamindar's* right to lease the land was subject to the following restrictions:

1. Prohibition on imposition of certain customary taxes called *abwabs* or *mhatuts*. All such impositions were to be consolidated with the *asil* in a specific sum<sup>207</sup>. No new *abwabs* or *mhatuts* were to be imposed upon the *raiyats*<sup>208</sup>;
2. The rents payable by the *raiyats* were to be specifically stated in the *patta*. Where this was not possible, as when rent was paid on measurement of the lands or a survey of the crop or in kind, the rate and terms of payment, and the proportion of the crop to be delivered with every condition to be clearly specified.<sup>209</sup>
3. *Pattas* could be varied between *zamindars* and *raiyats* provided they agreed upon a specific sum for a particular quantity of land.<sup>210</sup>
4. Forms of *pattas* were to be prepared, and when approved by the Collector, were to be registered in the civil court. *Raiyats* were declared entitled to receive corresponding *pattas*. Once the rent was adjusted and settled, a *patta* for the adjusted rent was to be prepared and tendered to each *raiyat*.<sup>211</sup>

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<sup>205</sup> Field at 516.

<sup>206</sup> Section 1,

<sup>207</sup> Bengal Inheritance Regulation, 1793.

<sup>208</sup> Section 55, Decennial Settlement.

<sup>209</sup> Section 56, Decennial Settlement, later repealed by Repealing Act, 1876 (12 of 1786).

<sup>210</sup> Section 57, Decennial Settlement, later repealed by Bengal Land Revenue Sales Regulation, 1812.

<sup>211</sup> Sections 59 and 60 of the Decennial Settlement, repealed by the Repealing Act, 1876.

5. Time was to be allowed for preparation and delivery of *pattas* to *raiyyats* and after the expiry of this time, claims not supported by *pattas* were to be inadmissible in court.<sup>212</sup>
6. Rules were laid down for the maintenance of *patwaris* and keeping proper *zamindari* accounts. It was pointed out to zamindars that they had no incentive to conceal the profits from their land because the assessments were not to be subjected to an increase in revenue.<sup>213</sup>
7. *Zamindars* and other proprietors were required to give receipts for the rents collected to the dependent talukdars, under farmers, *raiyyats* and others for all sums paid by them.<sup>214</sup>
8. The rents of *raiyyats* who absconded on account of inundation, drought, or other calamity, were not to be demanded from those who remained.<sup>215</sup>

To conclude, the permanent settlement of revenue with the *zamindars* recognised certain customary property rights of collecting revenue from the soil, abolished certain entitlements, namely, *abwabs*, *mhatuts* and other arbitrary cesses, and created new ones, like the ability to vary *pattas* in agreement with the *ryots*. Insofar as the government did not afford the same recognition of rights of the *ryots*, it destroyed their customary possessory and occupancy rights. Even though the government reserved the ability to intervene on behalf of the *ryots* at a future date, and recognised the possession and occupancy rights of the *ryots* so long as they paid rents to the *zamindars* that the latter would "hopefully" assess fairly and equitably, at the time of conclusion of the Permanent Settlement, it left the *ryots* completely at the mercy of the *zamindars*. This was not only contrary to Mughal law, which recognised various categories of rights of *ryots* to the soil, it also went completely contrary to the Company's assertions during the twenty years prior to the conclusion of the Permanent Settlement. This can be seen from Hastings' assertion in his Minute of 1 November, 1776, about securing to the *raiyyats* "perpetual and undisturbed possession of the lands".

Cornwallis' belief that the *zamindars* and the *raiyyats* would be able to negotiate their rights with each other shows either a naïve or wilful ignorance of the realities of *zamindar* and *ryot* relations at the time and the abuses that the former were capable of inflicting on the latter, reflected in the extra cesses that were abolished by the Permanent settlement regulations. By leaving uncertain the right of the *zamindars*

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<sup>212</sup> Section 61, Decennial Settlement, repealed by the Repealing Act, 1874 (16 of 1874).

<sup>213</sup> Section 62, Decennial Settlement repealed by the Bengal Patwaris Regulation, 1817 (12 of 1817), as extended by the Bengal Kanungos and Patwaris Regulation, 1819.

<sup>214</sup> Section 63(1), Decennial Settlement repealed by the Repealing Act, 1874 (16 of 1874).

<sup>215</sup> Section 63(2), Decennial Settlement repealed by the Repealing Act, 1874 (16 of 1874).

to evict the tenants in the PS regulations, the government allowed might to prevail. The result was widespread evictions of ryots for failure to pay the *zamindar's* demand for rent, and many cases preferred to the courts to decide competing claims. This led to a clogging of the courts with land claims which continues even today.

As Field notes, "in Bengal, as in Ireland, contract failed to adjust those relations, because one side was not free to deal on equal terms, and the other side was placed in a position of advantage by abnormal legislation", and that notwithstanding much oppression by the landlords, the government failed to intervene and enact tenancy protection legislation until 1859.<sup>216</sup>

Baden Powell's review is more favourable to Cornwallis, though he too notes the failure of the Permanent Settlement as lying in its not limiting the rights of the *zamindars* with regard to all the *raiyats*.<sup>217</sup> He however concludes that while it was easy to criticize the architects of the Permanent Settlement with the benefit of hindsight, at that time "no one knew what practical steps to take". While collectors knew that village rolls showing the sums payable by *raiyats* existed, how these sums were ascertained and how far, and on what principles they could be altered periodically, no one knew.<sup>218</sup> It could not have been foreseen that the *pattas* would not be generally granted, and that no machine existed for seeing that they were granted, still less was it suspected, that the *patta* would be turned into an "engine of extortion".<sup>219</sup> And finally, he concludes that the permanent settlement was not the fault of Cornwallis, but that of the Company's servants, including Shore, who while deprecating the hasty assessment of the revenue in perpetuity was not against a Permanent Settlement of the revenue in principle, Thomas Law, Collector of Bihar and Brook of Shahabad who had written greatly in favour of the same. But he does hold Cornwallis responsible for hastily making the decennial settlement permanent, with arguments that did not adequately respond to the objections made by Shore.

Based on the above review, Baden Powell's rather favourable assessment of Cornwallis in instituting the Permanent Settlement appears rather naïve. Within the existing scenario of shared property rights between *zamindars* and *ryots*, when the government through the Permanent Settlement sought only to protect the interests of the former, only wilful blindness could have prevented Cornwallis or the Court of Directors from seeing that the increased powers of the *zamindars* in light of the unrelenting revenue demands of the Company would turn the *zamindars* into oppressors, and make

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<sup>216</sup> Field at 429.

<sup>217</sup> Baden Powell, Book II, at 403.

<sup>218</sup> Baden Powell, Book II, at 404.

<sup>219</sup> Baden Powell, Book II, at 404.

the *patta* an “engine of extortion”. If for some reason they could not have anticipated this reality, warnings from Hastings, the most experienced British officer in India who had protected the rights of the *rai-yats* during the quinquennial settlement and later annual settlements should have stayed their hands in signing the Permanent Settlement Regulation. But though couched in lofty pronouncements of improving agriculture to the benefit of all, in actual fact, the Permanent Settlement sought only to improve the Company’s efforts at maximising revenue from the land, which is not unusual from the perspective of corporate conduct even today.

## 9. Conclusion

Nineteenth and twentieth century colonial social science literature has often used the term "proprietary" as opposed to "property" right to describe the changing configuration of property rights of *zamindars* or landlords and *ryots* or peasant cultivators. This paper has shown that the adoption of the term "proprietary" which makes little legal sense, was not merely an outcome of the peculiarity of colonial language, but served a deliberate political goal of subordinating existing property rights in land to whatever property rights British colonisers, namely, the East India Company, and later the British Crown sought to create in pursuit of their twin goals of maximising land revenue and consolidating their political rule in India.

This paper constitutes the first systematic legal attempt to describe the changing configuration of property rights in colonial India over a period of nearly two hundred years from 1600 to 1793, since Baden Powell's and Field's volumes were published in the 1890s. As described in this paper, during this period of great political upheaval, scandal, and intrigue, as the East India Company gradually transitioned from a monopoly trading company to a conquering and then an administering power, Company officials, the Governor General, and later the Supreme Council of Bengal, in fulfillment of directions from the Court of Directors, created, destroyed, and resurrected property rights of landlords and tenant cultivators. Writing a century later, both Baden Powell and Field note difficulties faced by Company officials (who lacked both training and capacity in administration) in ascertaining prevailing property arrangements with respect to land in pre-British India. Over a nearly thirty year period from 1765 to 1793 which included the great Bengal famine in 1770, the Supreme Council of Bengal experimented with different property arrangements that would maximise revenue for the Company to the complete and utter disregard of the rights of peasant cultivators of Bengal. Though Hastings was more empathetic than his successor Cornwallis, as well as other members of the Supreme Council of Bengal who served with him, the consistent rapacious demands for revenue from the Company's Court of Directors tied his hands in protecting the rights of vulnerable peasant cultivators. As described in this paper, once Hastings was gone, the new Governor General Lord Cornwallis introduced the Permanent Settlement of Revenue in 1793, which completely destroyed the rights of peasant cultivators in favour of *zamindars*, and wreaked great injustice and misery upon the people of Bengal. It would take nearly seventy years for British government to begin to reverse this injustice through tenancy protection legislation enacted in 1859, and this reversal in law would only be completed following land reforms introduced by provincial governments post India's independence in 1947.