

**LAW, STRATEGIES, IDEOLOGIES: LEGISLATING
FORESTS IN COLONIAL INDIA, 1792 - 1882**

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ABSTRACT

The thesis explores the relationships between legal provision and ideas on forests in colonial India from 1792 to 1882. The colonial officials generally maintained that in India there was disorder, despotism and injustice till they brought modern law, which was certain, ordered, principled and just. But in the case of forests, the forest law introduced by the colonial government was far from settled, certain and ordered. The law on the ownership of forests, whether the government or the landholders, was changed almost every ten years. This is not to say that 'traditional' law was itself settled and clear, but modern law, in its origins, was partisan, arbitrary and manipulative and far from its pretensions. Beneath the grandeur of legal theories and principles, there was strategic play of power and domination.

In exploring the processes and discourses through which these reversals of law were secured, I draw from and engage with the works of Foucault and other theorists of post-colonialism, post-structuralism, deconstruction and Critical Theory. I particularly critique work which accords primacy to textual productions, ignoring the specific social and historical conjunctures in which these are produced. Locating the specific provisions of law and legal ideas in the every-day practices in the micro sites, my study suggests that the specific legal provisions were neither authored by the top layers of the administration nor based on nor derived from legal theories and principles. The strategies and counter-strategies produced in the micro sites of societies were abstracted, refined and accommodated within the given legal ideas. In this sense, forest law was a dossier of already prevalent practices. Similarly, legal ideas were produced in specific contexts to legitimate certain strategic devices. These ideas then were refined, revised and assimilated in the body of legal knowledge. The legal theory had the function of legitimating and projecting certain practices while the Act took care of specific details of administering the forests. The law thus is formed through the negotiation of strategy and ideology; and theory and practice in macro and micro sites.

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ABBREVIATIONS

The following abbreviations have been used in referring to the archival material in the footnotes.

BPP	Bombay Public Proceedings
CD	Court of Directors
GGinC	Governor-General in Council
GinC	Governor in Council
GOB	Government of Bombay
GOI	Government of India
GOM	Government of Madras
HRA(F)	Home, Revenue and Agriculture (Forests)
IOL	India Office Library
LD	Legislative Department
MBOR	Madras Board of Revenue Proceedings
MC	Malabar Commission
MJC	Madras Judicial Consultation
MRC	Madras Revenue Consultation
NLS	National Library of Scotland, Edinburgh
PWD(F)	Public Works Department (Forests)
RA(F)	Revenue and Agriculture (Forests)
RAC(F)	Revenue, Agriculture and Commerce (Forests)
SS	Secretary of State
TNA	Tamil Nadu State Archives, Madras

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PREFACE

I argue in this dissertation that ideas need to be located in their social and material context. It would be ironic to say that the theme and its treatment had nothing to do with my context. I can identify three formative influences. Based in India, I see that law is everywhere in its presence and yet, an understanding of the working of law has received indifferent attention. It has been my endeavour to make a contribution in this field. The question of environment and forest use has much dominated the public attention. The tussles over it presented several facets of law, including its historical dimension, almost enticing one to work on it. But above all, social theory has presented an array of approaches. At times, these options are bewildering and other times, inviting and engaging. One can take different means, method or modality of engaging with it. But one cannot ignore it.

I first thank my supervisors Peter Young and Roger Jeffery for their continuous encouragement and support in developing and completing the study. Ajay Skaria, Steve Kemp and Richard Jones read drafts of the thesis and provided valuable suggestions for developing the ideas and improving the presentation. Crispin Bates always had references for any question on Indian history. I thank the staff of the India Office Library, London and State and National archives in Delhi, Bombay and Madras for their support. A Studentship from the University of Edinburgh was the material support for undertaking the doctoral work. The Ford Foundation, India, provided a grant to travel within India to visit archives.

The Sociology Department, University of Edinburgh, provided not only office and related assistance but also made me a part of a warm and collegial community of staff and doctoral students. I thank Sara for extending support and affection, despite enhanced responsibility of the care of our child, often at the cost of her academic engagements. Finally, Ishaan, my son, has been a source of joy.

INTRODUCTION: SCOPE AND THEORETICAL APPROACH

This work is on the making of the forest law in colonial India between 1792 and 1882. I understand law to involve two elements, firstly, specific functional details called legal provisions, and secondly, theories, concepts, ideas and ideologies associated with law. The study begins with the first contact between the British rule and India over the question of forests, which was in Malabar in 1792, and ends with an examination of the making of the Indian Forest Act, 1878 and the Madras Forest Act, 1882. I explore how specific legal provisions were strategically grafted to meet certain functional ends; how legal principles were revised to accommodate the specific legal provisions; and how social and administrative practices shaped legal ideas and provisions.

This dissertation is centrally on law: on the relationships between state, law and society. My engagement with the Indian colonial forest law is a part of a wider interest in the broad field of the sociology of law. I am concurrently interested in three fields, namely, forest law in colonial India; the making of law by the colonial state; and the nature of law in general. I hope to say something specific about forest law, to comment on the nature of law making by the colonial state, and to suggest possible ways of looking at law in general. I see conceptual threads running through these different layers. Further, in conducting a work in the sociology and history of law, one has to venture into, engage with, and even recreate, other fields. The study in its empirical location relates to the overall question of control, management and use of forests during British rule. It thus shares the terrain with the field of the history of the environment in India.

1. Objectives and Theoretical Position

My general interest is in how specific legal provisions and legal ideas are produced, modified and disseminated. I begin by stating my general theoretical position on making of law and how I came to work on forest law. Law passes under the authorship of the state. My contention, however, is that the state does not imagine and invent the law out of nothing. It extracts the law from social practices. The social is about co-operation and conflicts. The field of law, however, is concerned with conflict. Away from the institutions of the state, in different locations in the society, strategies and counter-strategies are produced to outflank, control and dominate one another.¹ The state abstracts, refines and organises these strategies and techniques as legal provisions. Law is a dossier of the strategies fashioned in the field. Further, strategies are always in relation to counter-strategies. These are produced to outflank counter-strategies. The strategies thus, are already imprinted with their opposites. As a result, law in encoding the strategies becomes a register of social struggle.² The law thus produced arises from specific contexts and contingencies. Once abstracted and freed of its specificity, it is extended to newer contexts. The text of the law is then received in the ideological and strategic context of the new locations. In this sense, law is always in formation and thus, emergent.

I similarly argue that legal ideas and theories are not idle contemplation by thinkers and philosophers. Nor are these centrally planned, detailed out and imprinted on the dispersed sites. People conceive ideas in specific contexts, in relation to strategies, and with the aim of production of specific practical effects. Strategies are forged in a certain context of beliefs, values and ideologies (including ideas associated with law). Ideology limits, facilitates and conditions the strategies. At the same time, legal ideas are framed and revised to accommodate strategic devices and produce certain desired results. The legal ideas produced in the field are then abstracted, refined,

¹ The study draws from Foucault in being attentive to details in sites away from the state, what Foucault calls, 'dispersed sites', and specific details in micro locations. I have several disagreements with Foucault's work. This will become clear in the course of this chapter. See Foucault (1980); and Foucault (1979).

² Edelman (1979).

theorised and accommodated within the body of existing legal theories. In this process, specific legal provisions are not simply derived from legal ideas. The two, in fact, seem to have different functions. The legal provisions deal with specific details of regulation, governance and control, while the ideas associated with the legal provisions serve the general function of representing the practices associated with the legal provisions as normal, appropriate, just, lawful and desirable.³

Such an understanding of law could be verified, elaborated and seen in action only in a study covering a relatively long period of time. The processes of abstraction of legal provisions from practices, revision of legal ideology and social acceptance of the new ideas, could be expected to take place only over many years. Further, in my theory, law is linked to strategies. To explore these linkages, I need to go into the details of a particular historical field. The contemporary conflicts over the use of forests, and the prominent role of law made in the past century, made forest law an appropriate field for study.

One quarter of India's territorial area is forests. The Indian state owns almost all of it. The forests are spread over different regions of India. The village communities living in the vicinity, by far the poorest rung of the India society, have long depended on these forests for their livelihoods. In the 1970s and 1980s, numerous conflicts between the state and the local population living in the vicinity of forests became prominent. The emergent international awareness about environmental issues gave a further impetus in recognising these concerns. The question of control, use and management of forests became a matter of national debate in India. The question of the livelihood of the forest dwellers was an immediate concern. But this also became a critique of the Indian state. The environmental groups, non-government organisations, activists and academics argued that the Indian state was promoting and protecting the urban and industrial interests at the expense of the poorer segments of the society.⁴

³ See for example essays in Hunt (1993).

⁴ Centre for Science and Environment (1982); and Centre for Science and Environment (1985).

There have been attempts through policy, governmental plans and initiatives of people to reduce the tension and conflict over the control, use and management of forests. This has generated a voluminous literature on the subject.⁵ One of the crucial interests in this field has been in the laws which secured the Indian state's ownership and control over its forests. The emergent policies of forest conservation and people's involvement since the 1980s stand in an uneasy truce with the forest laws formed in the colonial period. The newer thrust requires a restructuring of law, while so far there have only been selective insertions into an old body of law. The existing law is talked of as an insurmountable barrier in the path of creating a participatory property regime between the local people and the state. It is therefore important to explore how the state came to own the forests in the first place. There is also a hope that a study of how the law was made could give clues as to how it could possibly be remade.

Settling for a case study of a colonial law may provide additional insights. British rule considered the introduction of 'modern' 'Western' law as a major innovation and development in Indian society.⁶ The Indian polity is now based on a system of written laws and adjudication through courts. What India prides itself for, its modern Constitution and rule of law, comes from this colonial contact. The celebration here is that colonialism was undesirable but not modernity. For the past two decades, however, from the perspective of contemporary social theory, modernity has been in a crisis. The claim of the proponents of modernity, that modernity brought universal knowledge, progress and emancipation has been thrown into serious doubt. It is alleged that the self-secured, autonomous and conscious subject was in fact the invention of modernity. In the modern myth, the subject could somehow stand apart from society, history and time, to be the source of infallible truths. For the critics of modernity, the subject instead is found to be deeply implicated in his own times,

⁵ For a summary, see Centre for Science and Environment (1982) Centre for Science and Environment (1985); and Sundar and Jeffery (in Press).

⁶ This was asserted almost from the beginning of the Colonial rule. See *The Fifth Report From the Select Committee on the Affairs of the East India Company*, in Parliamentary Papers, 1812 (VII); and Stephen (1876). Also see speeches of Henry Maine in Duff (1892).

prejudices and incertitude.⁷ Modernity invented foundations for securing its prejudices as truth. It is only through convention, and force, that it secured its status as knowledge and truth. The crisis of modernity has thrown open the possibility of understanding the colonial project in a new light. In the past two decades, such research has been pursued.⁸ In this context, examining colonial law gives us a different vantage point for understanding modernity, since in the colonies the achievements of the modern law were claimed most emphatically.

Modern law was celebrated as an achievement over 'tradition' even in Europe.⁹ In the colonial context of India, Western-modern law was given an even more exalted place. As Stephen Benjamin, a prominent colonial official, the Law Member in the Governor-General's Council put it; 'Our law is in fact the sum and substance of what we have to teach them. It is so to speak the gospel of the English'.¹⁰ The Colonial administration pronounced that since time immemorial, in India there was chaos, disorder, despotism and injustice. It claimed that British rule brought the modern institutions of law and a glorious era began. In its judgement, the people were not worthy and deserving of these institutions. But such was the power of modern law that even among them, it created justice, order and civility.

In fact, as I shall argue, contrary to its representation, modern law in its working was far from being certain, measured, reasoned and objectively discovered. Instead, it was malleable, arbitrary, ad hoc and whimsical, just like the predecessor it wanted to condemn. In this dissertation, I shall show that the law on the ownership of forests was changed almost every ten years in the 19th Century in colonial India. The East India Company (hereafter, the Company) was incorporated in Britain with an exclusive charter from the Queen to trade with India. From the 1760s onwards, the Company acquired territory in India from the local rulers through wars and grants. In

⁷ See Bauman (1992).

⁸ See Chakrabarty (1991).

⁹ From Marx to Weber there was an agreement that modern law was an advance over prior legal forms. For Weber's work see Weber (1954). For Marx's work on law see Cain and Hunt (1979). In a more elaborate work in developing Marxist position, Pashukanis emphasised that only within capitalism individuals could become the bearers of rights. See Pashukanis (1978).

¹⁰ Stephen (1876).

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1792, it acquired the territorial control and administration of Malabar, the southern western coast of India, from the local ruler Tipu Sultan. Malabar was rich in timber and this was the first contact between the local society and Company administration over the question of rights over forests. Company officials in Malabar were emphatic that the landholders owned the forests, but the Court of Directors in London, the highest administrative body, in 1800 confidently declared that according to local law the forests belonged to the Company. With equal ease, the Court of Directors in 1840 stated that the Company never had any pretence of ownership over forests in Malabar. In Kanara, a district neighbouring Malabar, the Company administration had maintained since 1800 the law that the landholders owned forests. In 1860, this law was declared a 'mistake'. The correct law was that the state owned the forests. Even before the ink could dry, so to speak, the Madras officials were alleging that this 'correct' view was erroneous and the real owners were indeed the landholders. The 'mistake' after all was not a mistake. The mistakenly mistaken view was re-installed as the law in 1874. In this circus of law, there was another somersault. In 1882, the Madras Forest Act again declared the state to be the owner of forests.

Colonial state represented law to be reasoned, balanced, just and principled. I show in this dissertation by taking up the case of forest law, that law in its origins was partisan, arbitrary and manipulative. Beneath the grandeur of legal theories and principles, there was a strategic and contingent play of power and domination. I also explore how these contradictions between the practices on law and their representation were secured, how in the law, arbitrary and structured, malleable and firm, and justice and contingency were all possible. In the following sections, I review the literature on law, state and society in India; and social theory. From this review, I forge ideas for conducting a study on forest law. In the light of these ideas, I reappraise the literature on forest law in India to identify specific directions for the study.

2. Law, State and Society in India

I begin the review of literature on law from the material on the specific question of forest law in India. According to Guha and Gadgil, by the end of the 19th century, the colonial state acquired a vast area, almost one-fourth of the geographical extent of India, as forests under its exclusive ownership.¹¹ The Forest Departments were created in various provinces from 1860s to manage this property. The history of forests since has been one of conflicts between the Forest Departments and local communities. Forest Departments policed forests for imperial and commercial purposes while local communities, mainly peasants, depended on these resources for their survival. The control of the resources by the state and ‘scientific management’ of forests significantly restructured the relations between state, forests and local communities.¹² Law, particularly the Forest Act of 1878, is accorded a central place as the means for the state in usurping the resources of the local communities.¹³

Despite the centrality of the law, there has been no account of the social, administrative and legal processes through which the provisions of the law arose and became effective in creating government reserves. In most accounts, law is treated as a mere ‘instrument’ of the state power in appropriating the forests.¹⁴ This construction accords a unity to the state and to law. To the contrary, the state, even if a colonial one, has different institutions, organically tied to the society and other institutions of the state. In these institutions, different, and sometimes even contrary interests crystallise.¹⁵

Further, even if law is to be treated as an expression of state power, state power does not mechanically materialise in the text of law. The exercise of state power is bound and mediated by existing relations and legal provisions and ideologies. Since state

¹¹ See Guha (1989); and Gadgil and Guha (1992)

¹² See Rangarajan (1996); Bandopadhyay and Shiva (1987a); Bandopadhyay and Shiva (1987b); Gadgil and Guha (1992); and Guha (1989).

¹³ Guha (1989); Gadgil and Guha (1992); and Rangarajan (1996).

¹⁴ Guha (1989); and Gadgil and Guha (1992).

power has to be translated into the language of law, and law has its own network of meanings and procedures, the translation of state power may not be linear and mechanical.¹⁶

The instrumentalist nature of the explanation of forest law is a part of a general neglect of a sociological account of law in India. Social science has increasingly seen law as a site of multiple and complex linkages with society. This has been evident in the proliferation of academic work under the banner of the Sociology of Law, Law and Society, Critical Legal Studies, Law and Deconstruction and Law and Postmodernity. However, in writings on state and society in India, with some stray exceptions, law continues to be seen as an unproblematic instrument of state power either as 'will of the sovereign' or on behalf of the ruling classes. The only exception were the legal pluralists. Beyond this, researchers have merely urged others to develop a sociological understanding of law in India.¹⁷

2.1. Legal Pluralism

The legal pluralists posited a binary duality of 'traditional' and 'modern' law. This was a continuation and refinement of the colonial writings. The Colonial state considered that it was 'modernising' the law in India through codification of the existing law and introduction of new legislation.¹⁸ The liberation of the colonised nations after 1945 created renewed initiatives for understanding the transformation of these societies. Influential modernisation theory argued that the forces of modernisation would eventually displace the traditional polity, economy and legal system.

¹⁵ There is a wide body of literature on state and state theory. See Jessop (1990); Therborn (1989); and King (1990).

¹⁶ This has been the findings of the Sociology of Law. For a comprehensive review see Cotterrell (1984).

¹⁷ Baxi made the call in 1986 to develop a sociological understanding of law. See Baxi (1986). He had to repeat it a after seven years. Baxi (1993).

¹⁸ Duff (1892); and Stephen (1876).

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The empirical record and experience in India belied the assumptions of a gradual disappearance of 'tradition'. The past and tradition refused to disappear. The challenges were met in various ways by positing 'modernity of tradition',¹⁹ 'traditionalisation as a process of modernisation' and the absorption of tradition into modernity.²⁰ The revisions conceded that India's past was a formative influence on its modernisation. In relation to law, the Rudolphs responded to the persistence of the traditional legal system by a presumed co-existence of the two legal systems, that is, modern and traditional. They posited that both exist, but each gets modified in the interactive process.²¹ In a more imaginative summary of this academic tradition, Gallanter detailed the complexities involved in such duality and demonstrated the persistence of traditional in contemporary social processes under the hegemony of modern law.²²

The work of legal anthropologists was a major advance in exploring the relationship of state, law and society. The characterisation, however, of 'traditional' and 'modern' is not empirically tenable. Several studies have now shown that pre-British Indian society was dynamic with a developed trade, commerce, banking and commercialisation of agriculture.²³ Contrary to the view that *shastric* (scriptural texts) law was static and inflexible, Lingat invites our attention towards the essentially evolutionary processes through which customary law was incorporated in the *shastric* law by the *shastric* scholars from time to time.²⁴

If 'traditional' was a fiction, the modern was equally illusory. Washbrook demonstrates that British rule was not insistent on modernising India. Instead, it merely responded to national and international contexts to secure its colonial hold. In the course of it, the capitalist processes of changes were deliberately held back rather than ushered in. This was clearly reflected in the nature of the laws made under

¹⁹ Rudolph and Rudolph (1969).

²⁰ Galanter (1972).

²¹ Rudolph and Rudolph (1969).

²² Dhavan (1989).

²³ See Washbrook (1981).

²⁴ Lingat (1973).

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colonial rule. If there was never any 'traditional' and 'modern', 'modernisation of tradition' could only be a misleading conceptualisation.

Further, developments in social theory in the past two decades have made this duality entirely vacuous. Social theorists doubted the very claims of modernity, and eroded the claims of universal knowledge, progress and emancipation.²⁵ The duality had implied a value in advancing from 'traditional' to 'modern'. The critique of modernity ruptured these normative positions, and left its proponents bewildered. Thus, rather than assume pre-given categories of 'modern' and 'traditional', we need to explain the concrete economic, social and cultural practices of the contact of colonial and pre-colonial. Further, modernisation theorists constructed and imagined a 'tradition' over which, in a self-congratulatory mode, it could announce the triumph and victory of modernity. For example, modern law and its ideology of 'rule of law' created a myth of pre-modern societies as arbitrary, lawless and unjust.²⁶ We thus need be conscious that every description of 'traditional' is already coloured by these prejudices.

2.2. Sociology of Law

There are exceptionally insightful case studies on the working and implementation of specific legislation,²⁷ but there is nothing comparable on how laws come to be made. The sociology of law has had to jostle with an instrumentalist view of law that it was the 'will of the sovereign' or dictates of the ruling classes. Being emphatic that society constitutes the law was itself an achievement.²⁸ A more refined version was that the relationship between law and society was a two way process: law and society are tied in a constituting-constitutive relationship.²⁹ I take this position for granted. I am interested in working out how exactly law and society constitute one another. The studies which empirically engaged with the question of making of law, also worked

²⁵ See, for example, Bauman (1992).

²⁶ Fitzpatrick (1992). Also see Chapter 1 in Douzinas, Warrington and McVeigh (1991).

²⁷ See Hay (1975); and Thompson (1975).

²⁸ Hunt (1993).

²⁹ Hunt (1993).

at the macro level of generalisations. For example, the fascinating study, *Law and the Rise of Capitalism*, covers many centuries to show how modern law is imprinted with the historical struggle of the bourgeoisie.³⁰

Foucault's work has given a respectability to specific local studies, but the adoption of Foucault in the field of law has been slow. In Foucault's account, it is not the law, but disciplinary techniques which are at the centre of the modern society and state. Thus, there is no straightforward approach to bringing his work to a study on law. One suggestion is to see law as a means of bringing in 'normalisation' in society.³¹ I find this position a deterministic and instrumental account of law. In this account, law is nothing but a means of disciplining and normalising society. A study of law has only in the past two decades come out of instrumental accounts of law. 'Governmentality'³² is another theme from Foucault which is potentially useful to a study of law. The argument here is that the modern state does not repress people. It fosters life, makes individuals productive, and constitutes them. Law could be seen as a part of these techniques of 'governmentality'.³³ I find this position also unsatisfactory. Foucault himself denies that the modern state is only about governmentality. He sees the persistence of all the three modes in the modern state and society, juridical mode (associated with coercion and repression), disciplining and normalisation, and 'governmentality'.³⁴ Put this way, there is nothing distinctive about it to be a guide to a study on law. We already know that law has multiple functions in society. I do not think there is a direct way of using Foucault in studying law. But Foucault is immensely insightful, even for legal studies. Foucault never intended to be a comprehensive theorist of society. Thus, he can be of use only if we do not see him as giving us a theory of law. Freed of this constraint, we can borrow from his insights to graft on our own understanding of law.

Political science is another field where we can look for some guidance in understanding the processes which influence how law is made. This includes

³⁰ Tigar and Levy (1977).

³¹ Ewald (1990).

³² Burchell and Gordon (1991).

³³ Hunt and Wickham (1994).

³⁴ See Foucault's essay on governmentality in Burchell and Gordon (1991).

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Political science is another field where we can look for some guidance in understanding the processes which influence how law is made. This includes lobbying, publicity, campaign and consultation. These processes undoubtedly influence law making. But my concerns are distinct from this in two ways. Firstly, I am interested in finding the linkages between day-to-day practices, law and ideologies. I would thus ask: where do the ideas which are lobbied for come from? Secondly, what is made to bear at the level of legislature, still has to be translated into the language of law. It has to be expressed in specific provisions of law and justified by appropriate legal ideas. In the course of this, existing legal ideas are modified, abridged and displaced. Thus, in my project what is at stake is different from studying the influences that are brought to bear on the legislatures.

In the past two decades, Critical Legal Studies have questioned the neutrality of law and brought to the fore that law was implicated with power and inequality.³⁵ Authors in this group challenged the conventional ways of looking at the law. As a result, the insurgent positions were divergent. There was no coherent theoretical position of the Critical Legal Studies. Over the past decade, there have been further advances following developments in social theory. Derrida has been deployed to deconstruct texts on law and jurisprudence.³⁶ Post-modernity has invited us to the possibility, and even necessity, of demolishing the 'legal system'³⁷ and looking at law differently.³⁸ These studies rely upon and draw heavily from social theory, and I engage with the founding literature on which these studies are premised in the following sections three and four.

There is another imperative, perhaps more important, for engaging with social theory. An influential body of literature takes the view that the colonial power invented and fabricated truths about India.³⁹ It argues that there was no given knowledge about India. These were constituted through colonial discourses and India was made to

³⁵ See Fitzpatrick and Hunt (1987).

³⁶ Fitzpatrick (1992); and Douzinas, Warrington and McVeigh (1991).

³⁷ Sampford (1989).

³⁸ Sampford (1989).

made in the official discourses. Was law making purely a matter of how the colonial rule constructed the law on India? Was colonial rule autonomous in constructing these knowledges? I will explore these questions in relation to forest law. But also, the position itself is an offshoot of debates in Social Theory. We can seek a resolution of these questions in social theory. The broad question is on the nature of truth. Social theory has engaged with the question as to what extent truth is purely a matter of convention, that is, human discourses.

3. Knowledge and Discourse

What ideas and concepts could be used for studying the making of law? I start from the general field of social theory. I ask the specific question: Was forest law just a matter of what colonial rule constituted it to be? The question derives from the post-structuralists. They have espoused the linguistically inspired theory that truth is constituted through discourses alone. In other words, there is no other foundation to knowledge than human communication. Discourses constitute their own truth.

For example, Lacan asserts that everything, 'being', subject, and what the subject knows, is constituted through language and discourse.⁴⁰ Lacan bases this on his emphasis that the sub-conscious is constituted in and by language.⁴¹ For Lacan, it is through discourses that the sub-conscious comes to be constituted.⁴²

For Derrida, there is nothing outside of a 'text'. Everything is already a part of discourses. Derrida is emphatic in denouncing the theory of knowledge that Western Philosophy has held dear. According to it, 'truth', already there, is acquired through acquaintance and 'presence'. Having secured the possession of truth, language is

⁴⁰ Lacan (1989).

⁴¹ Lacan (1989).

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deployed as merely a means to communicate this truth to others. He 'deconstructs' philosophical texts to show that there is no 'presence' and 'truth' which Western Philosophy has privileged. It has only elevated its opinion and prejudices to the status of truth by force and injustice. Derrida and Lacan from here take a turn to subvert the very possibility of truth or knowledge. According to them, discourse (language), by its very organisation, is incapable of conveying a definite meaning. There is no single, ultimate meaning but only 'difference' and 'trace'.⁴³

Foucault gives a more socially and historically located exploration of how discourses constitute knowledge. Foucault also maintains that a discourse constitutes its own truth. He displaces conventional epistemology by contending that the social is not about 'will to knowledge' but 'will to power'. Epistemes and 'regimes of truth' change, but in each instance, knowledge is constructed within discourses and on the basis of power relations. Foucault maintains that power creates the objects of knowledge not only within discourse but as real objects.⁴⁴ In other words, there are no 'real' objects outside of discourses, but discourses constitute these objects and we come to see them as real.

I agree that there is no truth beyond discourse in general. There could be no human knowledge without human beings and society. In this sense, knowledge is constituted through discourses. However, this is different from contending that there is nothing that lies beyond a particular discourse, or that every discourse constitutes its own truth. This impression arises in Foucault's work because he privileged the dominant discourse and ignored the opposing ones from a multiplicity of counter discourses. He mentioned plurality of power, resistance and counter-knowledge but never took these seriously in his work.⁴⁵ If we engage with these, we would ask a different set of questions. We could ask, what did the opposing powers do? What happens to the truth claims of counter-knowledges? How does the dominant knowledge revise itself

⁴² Lacan (1989).

⁴³ Derrida (1976); and Derrida (1978).

⁴⁴ Foucault (1980); and Foucault (1979).

⁴⁵ Foucault (1980).

to counter the threat and spread of the counter-knowledge? How do the competing claims manage to legitimate themselves?

A discourse operates in relation to counter-discourses. A discourse, constituted by power/knowledge, as Foucault would have it, has to take account of resistance to power and counter-knowledges.⁴⁶ Discourses and counter-discourses, power and resistance, knowledge and counter-knowledge cannot keep working on their own. These are organically united. All knowledge is interested and motivated. However, disputes on what is going to count as the truth have to be resolved. Newer disputes arise, but at each stages, the contending parties have to take stock of the opposing positions and resolve the dispute.

How do people resolve conflicting claims and counter-claims? A discourse stakes a claim to truth. Counter-discourses attempt to question and present alternatives to these validity claims.⁴⁷ The competing discourses get into a dialogue, expand their boundaries and terms of reference to settle the dispute. The discourses refer beyond themselves to find a foundation for their claims.

The reference to things beyond a discourse is not to a transcendence beyond all discourses. It only brings to notice the historical location of the discourses. A discourse may be about power but this power cannot construct what it pleases. It has to work on prior knowledges which already exist. Undoubtedly, the prior knowledges themselves have been constituted by discourses and counter-discourses. A discourse does not mirror the world constituted through prior discourses. It works upon it, displaces it and constitutes it. At the same time, a discourse has to relate to what it represents from the vantage point of counter-discourses and prior discourses. The very intelligibility of a discourse is premised on knowledges constituted by prior discourses. Thus, a discourse is always constituted historically in relation to counter and parallel discourses.

⁴⁶ Dews (1987). See essays in Kelly (1994).

⁴⁷ This has been one way of understanding how human knowledge is constituted. See Barnes (1977). Also see, Callinicos (1982).

4. Text, Discourse and Social Practice

Said has been a theoretical force in deploying Foucault's ideas on the production of knowledge in relation to colonial domination.⁴⁸ In *Orientalism* he emphasises the prominence of certain kinds of discourses.⁴⁹ He takes literary and scholarly texts as the sites for production of hegemonic ideologies, claiming that through a discourse, European culture imagined, produced and managed the 'Orient' sociologically, ideologically and politically. He contends that the point is not to investigate the 'real' orient against the one constructed by Orientalism. Instead, the issue is how 'Orientalism' authorised and controlled the orient and appropriated the power to produce and disseminate by stripping the 'Other' as a 'free subject of thought or action' in the conditions of colonialism and imperialism.⁵⁰ Said thus maintains that knowledge and truth about the Orient were constituted in and through colonial discourses alone.

Works privileging discourses invariably use the literary and philosophical texts of a period as the main source for their analysis. The contested question is: what can we infer from these texts about social practice? Some works implicitly assume or merely claim that the literary and philosophical texts represent social practices or somehow manage to dictate these practices. The claim for privileging the texts in relation to Colonial rule is more emphatic, arguing that colonial rule appropriated the power to 'write' for the dominated and subjugated colonial subjects.⁵¹ The dominated were rendered voiceless and speechless. Thus, colonial rule had the power to represent India and its past. I broadly agree that the literature of a period would bear some relationship to its material and social context. However, I am in disagreement with Said's blurring of the distinction between different categories of texts and collapsing literature and social practices. The point becomes sharper when we see how Derrida

⁴⁸ Said (1979).

⁴⁹ In the last 20 years, Said has moved away from his founding work in *Orientalism*. To the extent it continues to be an inspiration, and also as a prominent landmark, we can engage with it.

⁵⁰ Said (1979).

⁵¹ Bhabha (1994).

takes this strategy of collapsing to an extreme, and by considering the critique by Habermas of Derrida's work.

Derrida justifies the strategy of collapsing different oeuvres of texts (for example, literary, philosophical, everyday practices) on the grounds that these use a common language. He highlights the metaphorical nature of all communication and thus disrobes any claim to the 'presence' of a truth. These post-structuralist and deconstructionist accounts of texts are based on a particular account of language. They claim that language, by its very organisation, is incapable of conveying a definite meaning. According to them, there are always 'freefloating signifiers' and 'signifiers sliding under the signified'.⁵²

The 'reading' of texts and the communication of ideas are important for both the domains of my study-- law and history. Law is textual, perennially caught in reading and re-readings. I will give an account of history by relying on colonial archival sources. These documents themselves were interpretations and re-interpretations of the previous ones. Thus, history in one sense itself is a web of texts. I am, however, unable to take the strong position on the inherent 'irreducibility' of meaning, emphatically asserted by Derrida. The inherent incapacity of a signifier to signify is founded on a particular reading of Saussure's linguistics. Towards this, Lacan claims that he showed the way to Derrida, and presumably, Derrida showed the way to the others.

Post-structuralists have come under scathing attack for advancing a distorted reading of Saussure. Tallis accuses Derrida of deliberately misreading Saussure to advance his fanciful theories of the 'irreducibility' of all meaning.⁵³ Ellis alleges that Derrida's reading of Saussure, that the relationship between signifiers and signified is arbitrary, is partisan and exaggerated. According to Ellis, Saussure consistently maintained that the signifier and signified were united like the two sides of a sheet of paper. There is no inherent relationship between a word and the idea it represents. In

⁵² Lacan (1989).

this sense, the relationship between signifier and signified is 'arbitrary'. But this should not let one to conclude, as Derrida does, that a signifier cannot unambiguously signify anything.⁵⁴ The association between signifier and signified is set up by practices and convention. More often than not, a signifier signifies something definite and intelligible. Without this, no language and society would be possible. Even a Derridean, Norris, recognises that the claims of the post-structuralism on the incapacity of signifiers to signify is exaggerated.⁵⁵

Habermas finds Derrida's collapsing of oeuvres rhetorical and misleading. He asserts that in everyday life, communicative practices of participants are dependent upon decision, action and consensus. Habermas emphasises that:

Linguistically mediated processes such as the acquisition of knowledge, the transmission of culture, the formation of social identity, and socialisation and social integration involve mastering problems posed by the world.⁵⁶

I would put the point more specifically. People receive and form their ideas in specific material and social contexts. Their horizons and experiences are limited by their contexts. Texts are received and interpreted in these specific contexts. Further, in specific contexts, people are engaged in day-to-day problems. Their interest in knowledge production are not speculative and idle but are instead oriented towards solving their concrete problems.⁵⁷ A text is thus received in a certain context and interpreted to solve problems. Ideas are never communicated exactly in the shape in which they arose. Their dissemination is mediated by the concrete interests and problems of different locations and sites. But this does not mean that signifiers cannot signify or as Derrida claims, that meaning is 'irreducible'. We should engage with the historical conjunctures and material conditions in which texts are produced

⁵³ Tallis (1995).

⁵⁴ Ellis (1989).

⁵⁵ Norris (1985).

⁵⁶ See the essay 'On Levelling the Genre Distinction Between Philosophy and Literature' in Habermas (1987).

⁵⁷ The point has been made by Barnes (1977).

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rather than accord an autonomy to the texts.⁵⁸ Through this engagement, we can explore the production, dissemination and reproduction of ideas and ideologies.

To summarise, my disagreements with work on truth and discourse are twofold. Firstly, a discourse is often analysed in isolation from other discourses and counter-discourses. Secondly, invariably, only the philosophical and literary texts of a period are given primacy as 'discourse', ignoring the social contexts in which these are produced and disseminated. The boundary of a discourse is closed at the sites of production of grand ideas, policy and ideology. We can make two different arguments to emphasise the same results. If by discourse we are to mean philosophical and literary texts only, we need to examine the social practices in which these texts are produced and disseminated. Alternately, we can argue that all social activities are communicative and thus discourses. There is no reason for us to privilege philosophical and literary discourses over other discourses.

In this light, we can evaluate Said's *Orientalism* and other works, for example that of Inden, who asserts that Europeans and Americans created the knowledge of 'others' during the period of their world ascendancy,⁵⁹ or Chakrabarty, who argues that analysts may have dissolved the dichotomy of the 'modern' and the 'tradition' but the phenomenon does not disappear simply because some have attained critical awareness of it.⁶⁰ According to him, 'Europe' and 'India' (Modern and Traditional) remain very much as figures of imagination and geographical referent, abstracted and celebrated in everyday relationships of power.

Porter questions Said's construction of the unified character of western discourse on the Orient.⁶¹ He finds that Said portrays as unified ideas of Europe and Orient that are riddled with ambivalence, contradictions and ruptures.⁶² Lele questions Said for

⁵⁸ The position informs all works of Eagleton. See introduction in Eagleton (1994); and Eagleton (1990).

⁵⁹ Inden (1990).

⁶⁰ Chakrabarty (1992).

⁶¹ Porter (1983).

⁶² Porter (1983).

creating this 'monolith of power' of Europe.⁶³ Majid, dealing with colonial writings on India, alleges that imperial power, in India at least, was of a much more fragile nature than the sort depicted by Said.⁶⁴ The power relations were an enmeshing of diverse interest of the colonial rule and local society, rather than an imperial hegemonic fabrication. Majid examines Mill's *History of India* and shows that it was intended to challenge a powerful dominant ideology in England by using India as a matrix for doing it. He also shows the complexity of the author's work, contradictions within the text and the multiple power relations within which these are produced.⁶⁵

Said, and others following him, privilege literary and scholarly texts as sites for discourses and production of ideas. William urges us to pay attention to not only 'the articulate upper level of ideology' but also 'a whole body of practices'.⁶⁶ The web of ideas and practices are dynamic and enmeshed. I agree with Porter's critique of Said that the works which accord a primacy to textual production⁶⁷ ignore that ideas are produced in concrete historical conjunctures through a sphere of conflicts in which power relations are continually reasserted, challenged and modified.

This review of social theory has contributed direction for my work on law. I am interested in finding out how knowledge on forest law, ideas about forest law and detailed specific provisions of law were made. The review suggests that the pronouncements of colonial officials, thinkers and legislators should not be accepted at their face value. I should examine how these ideas arose from social practices, and how these ideas were received, disseminated and impacted on social practice. In the light of the above discussion, I move from the general to the specific and assess how the knowledge on law was produced within the context of colonial domination.

⁶³ Lele (1993): p46.

⁶⁴ Majid (1992).

⁶⁵ Majid (1992).

⁶⁶ William (1977).

⁶⁷ Porter (1983).

5. Colonial Rule and Legal Knowledge

Irrespective of the social theory just discussed, some might simply argue that law was what the British authorities said it was. They were the rulers, and they were rulers because they had coercive and police powers over the subjects. But we will see that law's role could never be so straightforward.

5.1. Law and Coercion

British rule fought wars for imperial ends at the expense of the local people.⁶⁸ The wars, however, were not directed against the local people but against the armed forces of other rulers. In the course of consolidating its rule, Colonial rule systematically disarmed all other competitors, like *zamindars* (land owners) and conquered rulers,⁶⁹ and thus, monopolised the control of coercive forces.⁷⁰ As Arnold puts it,

Britain acquired India as a colony largely through the use of its army, and it was to the army that the British turned both in moments of extreme crisis and to provide a background source of deterrent strength.⁷¹

The army, however, was only the last resort. In other times, it maintained control through the police. British rule created a centralised police force for its colonial ends and yet the state was never omnipotent or omnipresent. It was constrained by the strength of diverse forces within the Indian society, its own financial stringency and by distrust of its subordinates. Due to a combination of these factors, resort to the exercise of coercive forces, with a few exceptions, was very limited.⁷²

Law was the main means for ruling India. The rule of law was not only a code for binding the ruler and ruled but also for accountability of the different hierarchies

⁶⁸ Marshall (1987); and Bayly (1989).

⁶⁹ Marshall (1987).

⁷⁰ Arnold (1986).

⁷¹ Arnold (1986): p4.

within the state.⁷³ The rule of law implied rule by 'law' and not the whims and fancies of the alien administrators. Often, coercion and consent, the two Gramscian modalities of ruling, are posed as poles of a duality. Law features as a part of 'consent'. I find the duality untenable. No society can be based on coercion alone. As Foucault demonstrates in relation to torture in *ancient regime*⁷⁴, coercion has to be social. Its purpose is to communicate a message and mould the subject. For this, coercion, as Foucault shows, has to be measured, graded and calculated. In other words, coercion is not mindless violence. There is a consent on the efficacy and legitimacy of violence. Even in coercion there is law, and law is about coercion.

'Colonial' rule gives an impression that any law could be imposed on the subjects. This was not the case. In appreciating the nature of law and state in colonial India, it is important to bear in mind that a few thousand Europeans on their own could not have ruled so vast a territory and population.⁷⁵ The colonial state was a crystallisation of multiple interests in England, India and within the state itself. To give some illustrations, in the beginning the rulers themselves were so incapacitated by their greed and lawlessness that Cornwallis, the Governor-General of India in 1790s, had to adopt the Permanent Land Settlement and to separate the executive and the judiciary. The Permanent Land Settlement fixed the land revenue in perpetuity and thus, among other things, took away the discretion of the company officials.⁷⁶ Yang in his appropriately titled book *The Limited Raj*, demonstrates that the power of the state tapered off beyond the district towns, where the *zamindars* took over. Further, the relationship of the *zamindar* to the cultivators in Saran, the district of his study, was mediated through a layer of intermediaries and social classes.⁷⁷

Guha records 100 major rebellions from 1800 to 1900.⁷⁸ Although the rebellions were crushed, at each stage major concessions were made.⁷⁹ In Oudh, land was

⁷² Bhattacharya (1992).

⁷³ Stokes (1959).

⁷⁴ Foucault (1979).

⁷⁵ Stokes (1959).

⁷⁶ Guha (1963); and Stokes (1959).

⁷⁷ Yang (1989).

⁷⁸ Guha (1983).

settled with cultivators and *talukdars* (an intermediary rentier class) were dubbed as parasites. After the mutiny of 1857, many settlements were reversed and *talukdars* were declared the natural leaders of the masses.⁸⁰ Within contract law, as it had emerged in England and was brought to India, the antecedents of the contracting parties was never a consideration. After the Decan revolt in 1880s, the contract between money-lender and peasant was to be subjected by the court to the previous transactions.⁸¹

I observe in this section that the Colonial state was not free to put up anything as law. If India was to be governed by law, in other words, if law had to acquire a significance as a mediator of social relations-- between social classes and groups, between state and society-- it could do so only by assimilating the claims and resistance of various social groups. My next question is how does law register these interests? Law passes under the authorship of the state. Thus, these interests have to register at the level of the institutions of the state. The specific question then is how did the Colonial state form knowledge about law on India?

5.2. Legal Theory and Social Practice

In the early years of the British rule, it was a general principle to follow the local law. Innovations had the danger of creating political turmoil and destabilising British rule. The administration thus was engaged in 'discovering' knowledge about the 'native' law. One would have expected the state, in this context, to have been bound by numerous social layers in its law making. In fact, on the contrary, the official discourses often appear autonomous in constituting what suited them as the 'truth' of the local law in India.

For example, in Bengal, despite opposition and evidence to the contrary from within the administration, it was officially concluded that the *zamindar* in India had always

⁷⁹ Haynes (1991).

⁸⁰ Metcalf(1969).

⁸¹ Baxi (1986).

been the owners of land.⁸² Under the Permanent land settlement, land was settled with them. Up to the 1820s, the Company maintained that *sati* was a practice sanctified by religion. After 1820, the earlier construction was reversed and it was asserted that *sati* was not a religious practice. This was to justify imposing restrictions on the practice.⁸³ Thomas Munro, the founder of *ryotwari* settlement, deemed the *vargadars* as the real and ancient landowners, founding their ownership on ancient well preserved records. The records turned out to be non-existent.⁸⁴ Nightingale goes even further in alleging the arbitrary nature of law making. She suggests that the Bombay Presidency officials in Malabar in the 1790s were reporting the local law to be the one which suited their private business interests.⁸⁵ The official discourses appear arbitrary and whimsical. The official pronouncements seem entirely unrelated with the way things actually were. However, we get a more complete picture when we look at the way these pronouncements were put into practice.

Local law was not a thing which could be discovered. There was no knowledge already there to be learnt. The local society had its own contradictions, inconsistencies and dynamism. Colonial rule had its own concepts, ideas and exigencies of administration. The very act of identifying the local law (for example, on who owned the land) was already pre-disposed and implicated in certain strategic devices. The law was to be a representation of the existing practices. The colonial officials had a degree of freedom in constructing the local law. They were not forced to adopt a particular understanding of the social practices. At the same time, the social practices and the way it was represented by them could not be completely divergent. The ultimate constraint was that the social practices could not be arbitrarily altered by these legal constructions. Social practices and official discourses had to find a common ground.

The relationship between law in official discourses and law in social practice took a specific form. The colonial state appropriated the monopoly over the production of

⁸² Guha (1963).

⁸³ Mani (1985).

⁸⁴ Stein (1989).

⁸⁵ Stein (1989).

legal knowledge. It forged theories and ideas (within the constraints of disputes within the state itself), most suited to its needs, but while deploying such theories, existing social arrangements were not disturbed. The existing practices were continued and accommodated in the theory as concession, *ex-gratis* and discretionary. Thus, the social practices, irrespective of their representation, could continue without major restructuring. What then was the use of developing a theory if it could not change practices? Development of a theory was no guarantee of its success in practice. But it created the potential for circulation of the theory and eventual transformation of the social practices.

To summarise, there were gaps, and even contradictions, between law in official discourses and social practice. I now want to move to further details as to how these gaps got created and were managed. How does law meet the contradictory demands of being fixed and malleable; and certain and ambiguous? My general argument is that law is both, functional and strategic; and theoretical and ideological. We can find directions by unifying these two facets of law, and relating them to social practices. Towards this, as I move from general to the specific details of law, I realise the paucity of work on law. However, there is literature on land settlement, policy and tenure relations. Many insights on state, law and society in colonial India can be extracted from this literature. I attempt this in the following section.

6. Law, Ideology and Social Practice

6.1. Law and Ideology

Law is associated with ideas, theory and ideology. It claims to derive from certain given principles. I want to explore this claim for colonial law and policy. Stokes and Guha argue that law and policies introduced in India were based and derived from

ideas developed in Europe.⁸⁶ They suggested that ideologies dominant in Europe became the yardstick for the colonial administrators to judge, evaluate, measure and transform Indian society. Thus, one needs to understand the dominant ideologies in Europe and locate India within it. Stokes emphasised that the 'British policies moved within the orbit of ideas primarily determined in Europe'.⁸⁷ He analysed the way in which utilitarianism, liberalism and the doctrine of rent developed by Malthus, James Mill and Ricardo dictated British legislation on India in the 19th century. Guha's essay 'Rule of Property', despite its depth and richness, nevertheless located the origin of the Permanent Land Settlement⁸⁸ in the 'confluence of ideas where the two mainstreams of English and French thought merged in the second half of the eighteenth century'.⁸⁹

As noted earlier, the linkages between everyday practices and philosophical and literary realms are complex. Guha and Stokes assume that the ideas developed in Europe were imbibed in their entirety by colonial officials, brought to India, and unfolded in their original sense without regard to the specific context of the actors and India. This position supposes that ideologies are fixed, coherent and settled, they can be communicated, and applied coherently and consistently. It also suggests that actors produce knowledge, free of all power relations, on the basis of this ideology.

In opposition to Guha and Stokes, some have suggested that the policies and laws framed by Colonial administrators had little to do with European experience, but were locally fashioned by the administrators in response to social and administrative imperatives.⁹⁰ Colonial rulers forged together ideas from local experience to secure the financial and political stability of their rule.⁹¹ In concrete terms, several 'local influences' and compulsions of the social structures were the determinants of British

⁸⁶ Guha (1963); and Stokes (1959).

⁸⁷ Stokes (1959).

⁸⁸ Permanent land settlement was a tenurial arrangement introduced by the East India Company in Bengal in 1792.

⁸⁹ Guha (1963).

⁹⁰ Beaglehole (1966); Frykenberg (1965); Pouchepadass (1992); Ray (1977); and Stein (1989).

⁹¹ Ray (1977); Stein (1989); and Frykenberg (1965).

policy.⁹² This position emphasises the strategic nature of the construction of the local society by the colonial administration.

Similarly, some assume that the British by sheer habit and familiarity, since the very beginning of colonial rule, introduced the system of courts based on the British system.⁹³ But this is not correct. They first tried to continue with the indigenous system of justice. Only when it did not produce desired results was the system of British courts introduced.⁹⁴

6.2. Law and Strategy

The argument that colonial law was forged together to produce specific results is attractive. Often, in the fascination of legal theory and principles, it is forgotten that one facet of law is specific, functional, instrumental and strategic, calculated to produce certain specific effects. Researchers have not given adequate notice to this feature of law in constructing legal theory. Foucault, who centrally engages with the micro-details of social life, launches an attack on political theory with the injunction 'to cut off the king's head'.⁹⁵ According to him, classical political theory was obsessed with the 'sovereign' as the maker of law. The call is instead to examine the micro-sites of the working of power in society. Foucault's position on the importance of law in modern society is at best ambivalent, but an engagement with micro-details can be illuminating.

The social is about conflict and co-operation but law is more concerned with conflict. The dispersed sites are locations for the formation of strategies. Strategies are in relation to opposing strategies, in that these are already impregnated with their opposite. I suggest that the strategies are abstracted from the field, refined and organised as law. I see law as a dossier of the strategies fashioned in the field.

⁹² Ray (1977).

⁹³ Guha (1963); and Metcalf (1994).

⁹⁴ Parliamentary Papers, 1812 (VII); Stokes (1963); and Mishra (1959).

⁹⁵ Foucault (1980).

Further, since strategies are in opposition to counter-strategies, law in encoding the strategies becomes a register of social struggle.⁹⁶

In emphasising the role of strategy, one should note that actors conceive strategies in certain ideological contexts. In my view, studies emphasising the functional role of law have implicitly assumed the abstract interests of the Company or 'colonial rule' as the guiding value, ideology and direction for all the officials. I find this to be a questionable assumption. The ideologies within which actors operate are more specific.

I propose an enmeshed account of strategy and ideology. Strategies are forged in a certain context of beliefs, values and ideologies (including ideas associated with law). Ideology limits, facilitates and conditions the strategies. For example, the instrumentality for administration during the colonial period was developed in the ideology of the rule of law, of faith in private property and of tolerance for local custom.⁹⁷ If strategies are conceived in an ideological context, ideologies themselves are modified in the course of accommodating the strategic devices. For example, by the 1860s, despite the proclamation of Queen Victoria to uphold native law, the idea was played down within the administration. Instead, the idea to intervene and restructure Indian society came to be accepted. As we have noted before, *talukdars* (an intermediary class), in Oudh were earlier believed to be parasitic elements. After the Mutiny of 1857 they were turned into natural local leaders.⁹⁸ The separation of executive and judiciary, a core feature of the rule of law, was abandoned within the *ryotwari* Settlement to centralise executive and judicial power in the Collector in Madras Presidency.⁹⁹ Ideology and strategy are caught in this interplay.

If strategies are formed in dispersed sites, ideologies are not grand designs centrally planned, detailed out and imprinted on the dispersed sites. Ideologies themselves are produced in dispersed sites in the society. A genealogy of an idea would take us to

⁹⁶ Edelman (1979).

⁹⁷ Guha (1963); and Metcalf (1994).

⁹⁸ Metcalf (1994).

⁹⁹ Stein (1989).

concrete practices from which it arose and show its partisan and base origins.¹⁰⁰ The rule of law was produced among the Burghers in Europe in their struggle against the feudal lords.¹⁰¹ British Imperialists' respect for Indian law came from their concrete experiences of early colonial contact where they realised that the local community might be sensitive to religious prejudices.

An ideology then may acquire a hegemonic position transcending its local roots to have a general validity. In the process of attaining hegemony over alternate articulations, ideas project their version as the truth cutting across diverse sites. Similarly, strategies have a dual affect on legal ideology. The existing legal ideologies condition the legitimate possibility of strategic devices, and the reverse, that legal ideology to accommodate strategic devices has to modify and re-state itself. In this interplay, laws acquire the ideological force of universality and inevitability.

6.3. Unifying Law, Strategy and Ideology

I thus focus on the abstraction of ideologies and strategies from dispersed sites. All sites are not privileged locations for the generation of all ideas. The dispersed sites are tied in a hierarchy of relations. The nature of power relations shapes the filtration of strategies and ideologies. For a strategy or ideology to become hegemonic, it has to pass through these channels. In this process, it undergoes modifications and refinement.

I formulate the relationship between law, strategy and ideology as follows. Law systematises the socially legitimate power by abstracting the strategies. If law systematises prevalent socially legitimate power, it also creates the foundation for the future directions of the relationship. It arises from a specific context, is abstract, stripped of its context, cast into universal terms and then extended to all sites. Law unsuccessfully attempts to empty the local context of its power relations by declaring

⁹⁹ Stein (1989).

¹⁰⁰ Minson (1985).

¹⁰¹ Tigar and Levy (1977).

the prevailing position as settled, beyond dispute and thus, manageable. But in practice, law is an encoded text of the present relationship with the seeds in it for its future directions. The text of law once extended is negotiated in newer contexts. In this sense, law itself is always in formation and thus, emergent. In its abstraction and dispersal, law becomes the language of communication across sites. This leads to homogenisation through dispersal and extension of law to all the sites and opens the possibility for its articulation. Therefore, law acquires its own life and by its existence, it affects the social relations. Thus, the application of law is contradictory and inconsistent, largely governed by the politics of ruling. However, law, once formed, affects social relations. Thus, in the process of modulating the social relations, law itself undergoes a change.

I have thus far developed ideas about law and Colonial rule, for example, how official discourses could have an autonomy in producing legal knowledge. I have also formulated a relationship between law, strategy and ideology. I take this perspective to reappraise the literature on forest law. I had a preliminary engagement with the literature to notice that it took law as an instrument of state power. In the reappraisal, I would identify specific issues which could possibly open up possibilities for investigation in the subsequent chapters.

7. Law and Forests

The interest in the environment in the past two decades has created the impetus for writing on environmental history. This body of literature deals with the questions of control, management and use of resources. It will be useful to engage with this literature.

7.1. State and Forest Conservation

Much of the literature on the environmental history of India creates a binary duality between western, modern, rational and commercial and 'traditional' and pre-colonial.

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In this conceptualisation, the 'traditional' society stood for resource conservation, symbiosis with resources and ecological prudence while the colonial state stood for resource exploitation and commercialisation. A modern property regime on forests subjugated and displaced the traditional arrangement. The literature on the history of forests, implicitly or explicitly, is set in this duality. A growing and influential body of literature has argued that in Western culture the dominant view of nature was to conquer, tame, control, subjugate and order it. The rise of empiricism and 'rational' science created the arrogance that comes with the capability of achieving this vision.¹⁰² Colonial rule was based on this culture to rule over people and nature. Following this, it is argued that in the cognition of the colonial officials, agriculture was productive, ordered and soothing. Forests, on the other hand, represented untamed nature and thus, were described as ugly, desolate and barren.¹⁰³ Thus, the approach of the colonial officers to forests was always hostile.¹⁰⁴

The adoption of the binary duality of modern and traditional is ironic. I have already noted that the tradition of scholarship relying on a binary duality of 'modern' and 'tradition' ran into problems. Attempts at resolution created unworkable formulations like 'modernity of tradition'. Surprisingly, environment studies picked up this category discarded by the rest of social sciences. I will question this duality again, this time with reference to literature from the field of environment studies.

One plank of the engagement is to question the fossilisation of the 'traditional' society.¹⁰⁵ The other approach presents a counter to the construction that the colonial rule necessarily 'appropriated' forests. Grove¹⁰⁶ draws attention to the rise of the science of environment and its impact on the management of forests in India during 1840 to 1860. Grove documents that by the 1840s the nexus between deforestation and siltation of rivers and ecological changes was developed and well understood in Europe from the experiences of France and Germany. The experiences of the tropical

¹⁰² See essays in Arnold and Guha (1995).

¹⁰³ Arnold and Guha (1995).

¹⁰⁴ Arnold and Guha (1995).

¹⁰⁵ Kosambi points out that the Indian civilisation became possible only by the clearance of forests. Kosambi (1956).

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forests of Mauritius and other colonies further strengthened the nascent science. The Company doctors who were respected and university educated 'experts' with knowledge of Botany applied their learning and also learnt from experience and observation of the environmental role of forests in India. The doctors highlighted the adverse effects of the destruction of the forests and precipitated a conservationist policy towards them. Grove concludes that this brought about a rupture from a production and exploitation centred agenda to one towards resources conservation. The Company thus abandoned short-term anarchic interests of capitalism for long term stability. As a result, the state vigorously created forest departments and entrusted them with the task of creating and managing government reserves.

By highlighting the interest of the colonial state in forest conservation, Grove demonstrates that the duality of pre-colonial and resource symbiosis counter-posed to colonial and resource exploitation in forest use lacks factual support. Despite this correction, in my opinion, both the positions suffer from a common problem. The writings are motivated by the contemporary interest in environment. Because preservation of forests has been a pressing contemporary concern, these studies have tended to be evaluative. Instead of engaging with the social and administrative relations within which forests figured, and ideologies on their use were generated, the studies ask the question: Was the conservation of forests a value, ideology and practice? The two positions are interested in a particular answer to the question. Thus, these positions miss the social and administrative relations through which forests and their management was constituted.

For example, Grove is interested in pan-global perspectives on the rise of environmental thought. In this, his reference becomes the emergence of environmental thought in Europe. The subsequent developments are explained with reference to this emergent science. Our reference should not only be Europe where environmentalist ideas were produced. In fact, we should be more interested in the power relations in India within which the idea was received. Only this will explain

¹⁰⁶ Grove (1995).

how a global environmental thought managed to take roots, if at all, in the context of India.

The rise of ideologies must be understood in the context of specific problems. Grove captures the formation of the ideology in the context of a science and its inquisitiveness. However, Grove makes the domains of knowledge and ideology autonomous. But ideas are produced in specific sites, are articulated in a language in search of legitimation, and acquire hegemonic positions through negotiation within and across sites. Thus, the fact of a production of 'knowledge of the environment' and an 'ideology of ecology' is no guarantee of its deployment. Their adoption, extension, articulation, accommodation and accession to a hegemonic position to acquire the status of 'knowledge' is contingent on the power relations in and across the dispersed sites. That doctors were respected people was no guarantee of the 'expert knowledge' acquiring a hegemonic position. In fact, on the contrary, without being deterministic, the 'expert' knowledge would be subservient to the power relations within which it was produced.

Similarly, I have emphasised in this chapter that the dissemination and adoption of any ideas, and here the idea of conservation, would be addressed to and received by different layers of administration differently. I will show that this is indeed what was happening. The 'experts' endorsed the use of the forests for imperial purposes and for coffee planters, which were declared by them to be legitimate activities. Conversely, the livelihoods of the indigenous population practising slash and burn agriculture was described as 'rude', 'uncivilised' and 'improvident'.¹⁰⁷ The Court of Directors talked of conservation in the interests of 'humankind' while the forest officers understood their job as only the organising of axemen to fell timber.

Thus, in my opinion, representing colonial policy and practice as 'appropriation' or 'conservation', as these two positions do, are only fragments of a complex process. Colonial documents are ambivalent and present a conjunction of opposing

¹⁰⁷ Pouchepadass (1995).

tendencies, appropriation and conservation; coercion and legitimation; and coherence and arbitrariness. The task before us is not to muster up material to highlight a pre-determined facet as characteristic of colonial rule. The challenge instead is to explore how the social is possible only through a continuous assertion, negotiation and resolution of these contradictions.

We should not take a policy, a pronouncement or a statement of an 'expert' as a representation of the dominant ideology and practice. The policy and reality, and 'expert' and practice are caught in multiple power negotiations. The 'science' of forests was learnt, developed and deployed in the context of the prevalent power relations. The 'science' expressed itself in the language and terms of the power relations to gain legitimacy. The 'respect' for the 'expert' knowledge was contingent on its usefulness, and the 'expert' knowledge was to be valued and adopted within these bounds. The question of forest law needs to be located within these processes of the rise and dissemination of ideas.

7.2. Law and Forests

Guha provides thus far an almost unchallenged account of the making of the forest Act of 1878 and Madras Act of 1882. He rightly notices that Baden-Powell, a prominent colonial official, constructed a theory that according to the ancient law of India, forests were the property of the state vested in the king. Using this precedent, Baden-Powell argued that the colonial state, as the conqueror, acquired the sovereign rights of all forests. According to Guha, Baden-Powell argued that the widespread use of forests in no way created a legal right for the local people, but only 'privileges' which could be denied at will by the state.

Guha calls this the 'annexationists' view which he portrays as dominating the thinking within the state. Guha informs us that following Baden-Powell's theory, 'a policy of state annexation of forest land was embarked upon'.¹⁰⁸ Guha contends that

¹⁰⁸ Guha (1990).

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based on Baden-Powell's distinction between 'rights' and 'privileges', the Forest Act of 1878,

...was a comprehensive piece of legislation which, by one stroke of the executive pen, attempted to obliterate centuries of customary use by rural population all over India.¹⁰⁹

I noted earlier that the state often constructed a theory which suited its interests. However, Guha alleges that the state went ahead and attempted to implement one of its far fetched theories. Guha is pre-disposed towards this conclusion because of the way he understands the state. Guha's favourite concept of the 'executive pen' assumes a simplistic view of the state, in that since the state was 'colonial', it must be coercive, repressive and arbitrary.

Guha further assumes that legal provisions are based on and derived from certain ideas. Guha's assumption is that the entire law was derived from the principle that the state had a right over forests and what people had was only 'privilege' and 'concession'. Detailed analysis of the legal provisions shows they were not 'derived' from the ideas which were being discussed. The Forest Act had very detailed provisions on management of forests, including use of forests by the local people, punishment for unauthorised use and transit restrictions. Guha provides no explanation of where did these come from?

Guha takes account of the different opinions within the state on the nature of legal rights on forests. He prefers the position of Brandis, the Inspector General of Forests over Baden-Powell. Brandis likened the use of forests in India to customary rights in England. Guha contends that Baden-Powell was firm that the common law was to be applied only in England. Guha laments that Baden-Powell was opposed to the liberal and enlightened European laws being made available to Indians. Thus, according to Guha, Baden-Powell was hostile to the idea of Brandis of treating local use of forests in India as 'customary rights' based on European law. Guha coins three terms

¹⁰⁹ Guha (1990): p78.

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'annexationist', 'pragmatists' and 'populists' and labels Baden-Powell's ideas as 'tortuous' and Brandis as a man of 'noble sentiments'.

I will not question here the way Guha has read the sources and drawn conclusions. I will take this up in substantive chapters that follow. Here, I will only engage with Guha's understanding of law and legal ideas. Guha makes the individuals and their ideas free of history and social context, and produces an inadequate account of how legal ideas are contested, negotiated and shaped. Colonial officers, even when engaging with 'theory', were acting in the realm of administration and practical effects. They were not interested in the sanctity and the logical coherence of ideas. Their interest was in producing certain desired effects. Thus, instead of judging the moral positions of the officials in the light of current concerns, I will ask first what was being secured by advancing a particular idea. When I explore this, an entirely different picture emerges.

8. Conclusion

In this chapter, I have moved from the general, the nature of ideas, their production and dissemination, to the specific, the details on forest law in India. In this conclusion, I shall reiterate the points which guide us through the subsequent chapters. One facet of law has to do with ideas, theories and concepts. In this dissertation, I shall be dealing with ideas associated with forest law. Ideas are articulated by individuals like thinkers, colonial officers or as a document in the name of the state. We should not be content to rely on these ideas. These ideas should be located in their social and material context. Production, revision and deployment of ideas are invariably involved in achieving certain results. Similarly, ideas are disseminated and received in specific contexts, partially deployed, selectively unfolded, abridged and modified to produce desired results.

A point related to this is that discourses are not only literary or by philosophers, thinkers and upper layers of the administration. They are related to the social,

material and everyday practices. We need to see these discourses in their relatedness. However, this does not mean that the social practices would map one to one in the discourses. As we have noted, the colonial state had a monopoly on the production of legal knowledge. In this sphere it produced what suited it the best. But the state could never immediately deploy these ideas into practices. This would have ruptured the social life and created 'lawlessness' and 'disorder'. Thus, in the gaps between official discourses and social practices, we should expect ambiguity, confusion, contradictions and co-existence of competing ideas. This is not to be regretted. We should not compress it to make it more coherent. In fact, these contradictions are productive, and without these the law would not be in motion.

In the conditions of coloniality, the state was powerful and hegemonic. The conflicting discourses (within or without the state), obviously seem feeble, futile and pointless. Despite this, we must bring to the surface and take account of the counter discourses. This is not to do with any normative celebration of dissent. Only when we take the opposing forces into account that we can see how the dominant discourses were organised. Discourses are integrated with their opposition, the counter-discourses. One would not exist without the other. In this sense, the colonial subject, even in his/her silence, was forever always present through the practices.

9. Organisation of Chapters

In what follows, I try to substantiate these general assertions by examining the development of legal ideas and provisions on ownership, use, control and management of forests in Colonial India between 1792 to 1882. I have divided the dissertation into two parts. Part one covers the question of ownership of forests in Malabar and Kanara from 1792 to 1860. Part two covers the legal developments during 1860 to 1882. Part one comprises of chapter one, two and three. The remainder chapters are in part two. There is a short note at the beginning of the two parts. In these notes, I provide a general background and supporting information to facilitate assimilation of the material covered in the chapters.

I begin the investigation with Chapter 1 with the very first contact between the colonial rule and Indian society over the question of forests. This was in Malabar in 1792. The East India Company had won over Malabar from Tipu Sultan, the ruler of the neighbouring Mysore state. At different times, three groups were advanced as the owners of forests, *jennkars* (local landholders), local *rajas* (rulers) and Tipu Sultan. The three positions emerged and receded depending on the dominant interests of the Company officials in Malabar. Finally, the Court of Directors imposed the least likely option. They alleged that Tipu Sultan, and through him the Company as the new ruler, was the owner of forests.

The law was only a pronouncement, and was yet to become a practice in Malabar. The law was taken to Malabar through a Conservator's establishment, created for extracting timber. Things worked out all right for a few years. The Court of Directors had made a provision for a 'pension' to the landholders to solicit their co-operation in timber extraction. The 'pension' was to be paid to those who 'alleged' that the forests were theirs. The Conservator paid a 'pension' to a landholder before felling timber. For the local people, oblivious of official pronouncements, the practice was only reasserting their property right. When the Conservator exceeded this limitation, by extending a complete state monopoly on forests and timber trade in Malabar and Kanara, there was widespread resentment. The Governor of Madras, Thomas Munro, persuaded the Government of India to abolish the Conservator's establishment. Thus, in 1820s the state lost all rights over forests it had developed over more than two decades. This forms the subject matter for Chapter 2

In Chapter 3 I take up the case of development of law of forests in Kanara. In 1800, the first Collector of Kanara, Thomas Munro, had declared that all lands including wastes and forests were private property of the *vargadars* (landholders). By 1840, there was much extension of agriculture and appreciation of the value of forests in Kanara. The Company, having conceded all land as private property, could neither charge additional revenue nor benefit from the timber trade. Thus, it developed an

interest in turning the law around. The Company officials struggled for twenty years, between 1840 to 1860, with the prevailing legal order and finally reversed it in 1860. The earlier position was described as a 'mistake'. The new law was that the government owned the forests. I explore the modalities and techniques which were used to reverse the law.

By 1860, the interest in forests was not confined to Malabar and Kanara. The Government of India had initiated measures to promote forest conservancy all over India. In 1840, a group of Company officials had emphasised the environmental functions of forests. They claimed that deforestation could lead to reduction in rainfall, desertification and dryness. This could affect the agricultural productivity even in areas far away from the forests. The nascent forest establishment took this environmental argument further to carve space for itself within the Company administration. In Chapter 4, I note that the ideas of forest conservation were there since the very beginning. In certain contexts, the idea became dominant and subsequently receded. I explore how the environmental arguments since 1840s were expressed differently to different layers of the administration in search of legitimation. In turn, the idea was received differently by the different layers of the administration. It is in this context of accommodation of ideas, interests and conflict within the state that we would be able to locate the formation of the Forest Act of 1878 and legal ideas.

In Chapter 5, I cover the period from 1865 to 1872, the early developments towards making of forest legislation. The forest departments pressed ahead with the creation of forest reserves, free of local use. On the initiative of the forest department, the Government of India made the Forest Act of 1865. But the Act was did not satisfy the aspirations of the forest department. It had hoped to have powers to curtail and extinguish local use. But within the dominant legal ideology, the Act had recognised the 'prescriptive' rights of the local people over the forests. Within this constraining context of the law, the nascent forest department had two detractors, the local people, and civil officers in the districts and local administration. The forest departments

forged strategies and practices to deal with the two opponents. It assimilated these practices in a draft of a new Act.

Alongside this, the forest department worked to displace the legal theory of 'prescriptive' rights over forests. Its concern was to advance a theory which would justify powers to the forest department to extinguish and curtail local rights. Several legal ideas were tried until the most appropriate theory could be found. Chapter 6 narrates this exploration.

The Forest Act was finally passed in 1878. In Chapter 7, I demonstrate that the provisions of the Forest Act came from the practices. The strategies fashioned in the field were refined and assimilated in the law. Each of the practices had emerged from protracted negotiations between the contending interests in the field. In this sense, the provisions were a dossier of practices and a register of social power.

Chapter 8 is on the making of the Madras Forest Act, 1882. The Madras Presidency vehemently opposed all the efforts of the Government of India to make a forest law. It advanced a theory of ownership of forests entirely opposed to the one favoured by the Government of India. It argued that in the Madras Presidency the government had no rights over forests. All forests were communal property. I suggest that in addition to a hostility towards the forest department, it was trying to assert its independence from the Government of India. It was taking a different position from the Government of India to make an issue out of it. Having denied its acceptance of the Act of 1878, it could exercise its legislative competence and make its own law. And it did. Despite all the controversy over the theory of ownership, it was the same law the Government of India had made. But the Government of India was not going to take to this evasion kindly. In Conclusion, I take up the themes I had raised in the introductory chapters. I show that the colonial discourses on the production of legal knowledge had a degree of freedom. But also, I show that these need to be seen in relation to the social and material practices. I also show that legal ideas and provisions are drawn from social practices. Finally, I take up the question of the 'rule

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of law' during the colonial period. Drawing from my study and leading literature on the subject, I suggest possible directions for locating and exploring the 'rule of law'.

PART I

DISCOURSE AND PRACTICE: OWNERSHIP OF FORESTS IN MALABAR AND KANARA

This part of the dissertation includes the first three chapters, in which I explore the formation of ideas on ownership of forests in Malabar and Kanara from 1792 to 1860. Malabar and Kanara districts were the main suppliers of timber to Bombay. Bombay was a major consumer of timber, particularly due to the requirements of the dockyards located there. During this period, the major interest was on the ownership of forests. By 1860, the Government of India became interested in managing the forests all over India. An engagement with the management of forests gave rise to numerous legal questions on control, conservation and use of forests. Thus, the form of law till 1860 was often only a statement as to who owned the forests. In the post-1860 period, law became more elaborate. I will take up this period in the second part of the dissertation.

By the beginning of the eighteenth century, the Company had three well-established trading centres in different parts of India. These were located at Calcutta, Bombay, and Madras. The Dutch and French also had their bases in India, and military attacks on one another were not uncommon. The trading establishments, as a result, were actually forts. In addition to personnel who procured, stored and shipped commodities, the forts also had military and soldiers. A council headed by a President administered these centres. Due to the office of the President, these centres came to be known as Presidencies: Bengal Presidency in Calcutta, Bombay Presidency and Madras Presidency. The overall supervision and control of these centres was done by the Court of Directors in London, the executive body of the Company.

In the second half of the eighteenth century, the company changed its character from being a merely trading establishment to administering territories. With the decline of

the centralised Mughal State in India in the early eighteenth century, numerous contenders for local power emerged. The Company was finding a stronghold in this fragmented Indian society. Through the war of Plassey in 1757, agreement with local rulers, and a charter from the Mughal emperor in Delhi in 1765, the Bengal Presidency acquired the right to collect revenue and administer the three provinces of Bengal, Bihar and Orissa.

In the beginning, the Company interested itself only in the revenue collection and left the general administration in the hands of the local rulers. This was followed by the Company officers taking over the administration from the local rulers. The Company followed the pre-existing, taking over the functions which the Indian rulers had performed. This included the function of revenue collection and administration of justice. Even this was found inadequate. Cornwallis, the Governor-General during 1786-93, realised that the administration was paralysed by the greed of its own employees. Excessive power in the hands of the officials was leading to lawlessness and extortion. Thus, he separated the executive and judicial functions. Administration of justice was taken from the Collectors and vested in Magistrates. The Collectors had administered the local law. The Magistrates, modelled as English courts, were to continue this. Cornwallis introduced a land policy called the Permanent Land Settlement. *Zamindars*, who collected land revenue from the cultivators over extensive estates and paid a part to the rulers, were recognised as the landowners. The revenue to be paid by the *zamindars* to the Company was fixed in perpetuity. This took away the discretionary powers of the Collectors and thus, the possibility of misuse of the office. Also, in the opinion of Cornwallis, it created certainty from the vagaries of exaction by the state, and thus, created a favourable environment for development of agriculture.

While the Bengal Presidency was governing extensive tracts, of the other two Presidencies, only Madras had some territory. In 1759, it acquired about 17,000 square miles from the *Nizam*, a local ruler with his seat in Hyderabad. The area came to be known as Northern *Circars*. Chingelpet district, called *Jaghire* was acquired

from the local rulers. After 1792, the territorial control of the Madras Presidency expanded. Tipu Sultan was the ruler of Mysore in the southern part of India. Following his defeat in a war in 1792, Tipu Sultan had to cede Malabar to the Company. In the next war with the Company in 1799, Tipu Sultan was comprehensively defeated. Following this, Kanara came in the territorial control of the Company. The Nizam's government ceded territory to the Company towards defraying costs of an 'augmented subsidiary force'. The territory came to be called Ceded districts. By 1800, the Madras Presidency controlled significant territory in southern India. Bombay Presidency was to have its territorial expansion in the subsequent decades.

To administer the new territory, there was already the model developed by the Bengal Presidency. This included creating courts and administering justice. This was an important means to bring the newly acquired areas under political control. For administering the 'local law', the prevailing law in the area had to be first found out. In the course of settling the newly acquired area in the Madras Presidency, a new system, *ryotwari*, in opposition to the Permanent Land Settlement, was put forward. *Ryotwari* became influential in the next two decades and was followed not only in the South but also in the other parts of India. Under the Permanent Land Settlement, the *zamindars* were deemed to be the landowners. The *zamindars* owned very extensive estates. Within *ryotwari*, it was the persons actually engaged in agriculture who were considered to be the landowners. *Ryot* meant one who cultivated the land.

The changing role of the Company led to changes in its administration. The three Presidencies had functioned independently, each reporting directly to the Court of Directors. In 1773, through the Regulation Act, a kind of central government was created. A Governor-General with four councillors, based in Calcutta, was to be primarily responsible for the administration of the Bengal Presidency. In addition, it was to exercise control over the Madras and Bombay Presidencies on matters relating to waging wars on and forming diplomatic and political relations with the local rulers. The Madras and Bombay Presidencies had Governors and Councillors for their administration.

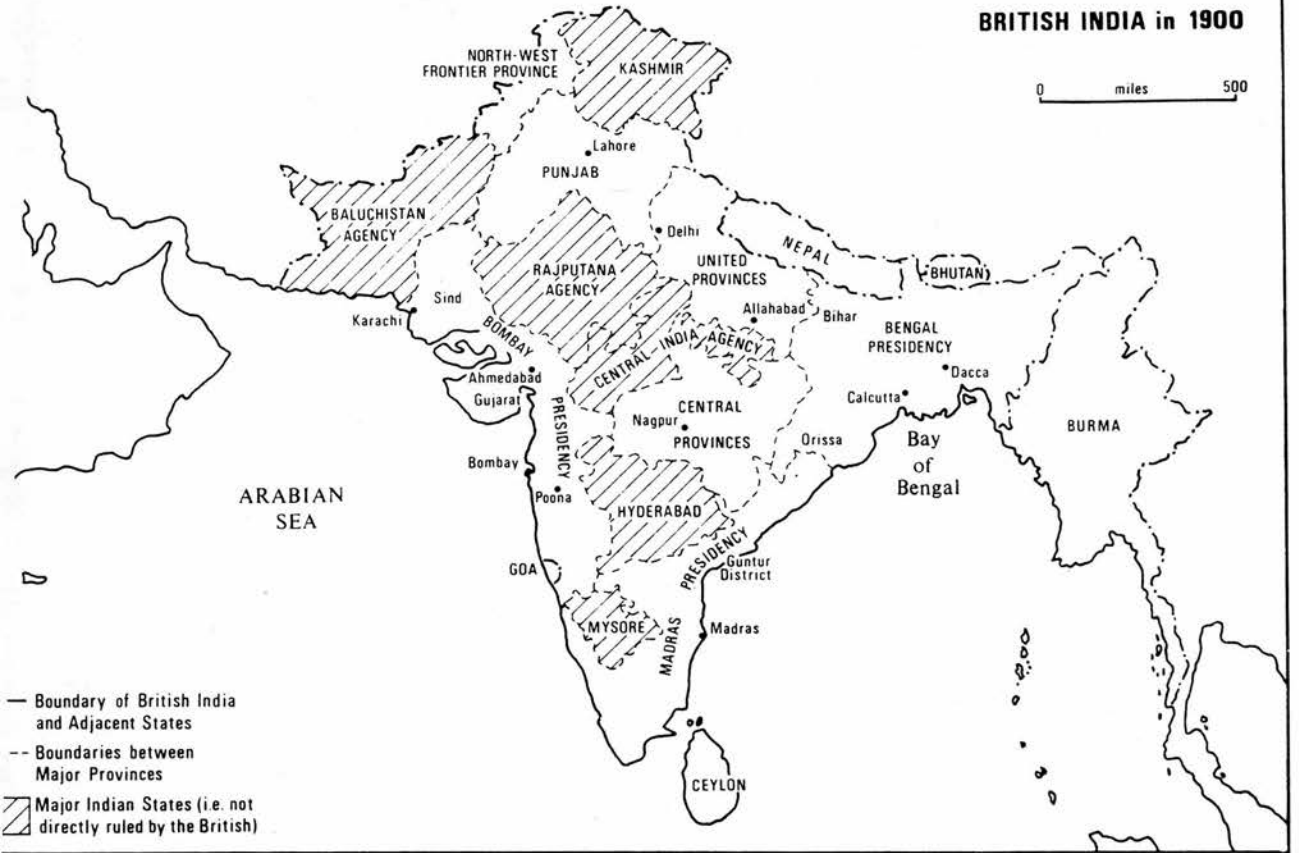
In the Madras Presidency a Governor and his Council headed the administration. The Governor always worked with his Council. This executive body was called the Governor in Council. The territory was divided in districts and sub-districts. A Collector or Principal Collector headed districts. The Collectors reported all matters relating to land and revenue administration to a Board of Revenue. The Board of Revenue was an intermediary body between the Collectors and the Governor in Council. The Board of Revenue took its decisions and forwarded matters for the orders of the Governor in Council. The administration was organised into different department, like Public, Revenue, Justice and Military. Matters were brought from all these departments for the orders of the Governor in Council.

The Company had frequent financial difficulties on account of its military campaigns. The British government bailed out the Company from liquidation in 1784. In return, it subjected it to its control through the India Act of 1784. A body controlled by the British Parliamentary, called 'Commissioners for the Affairs of India' was created. This body came to be known as the Board of Control, an instrument of control, direction and supervision over the affairs of the Company. Appendix 1 gives a more detailed account of State and administration during 1792 to 1882.

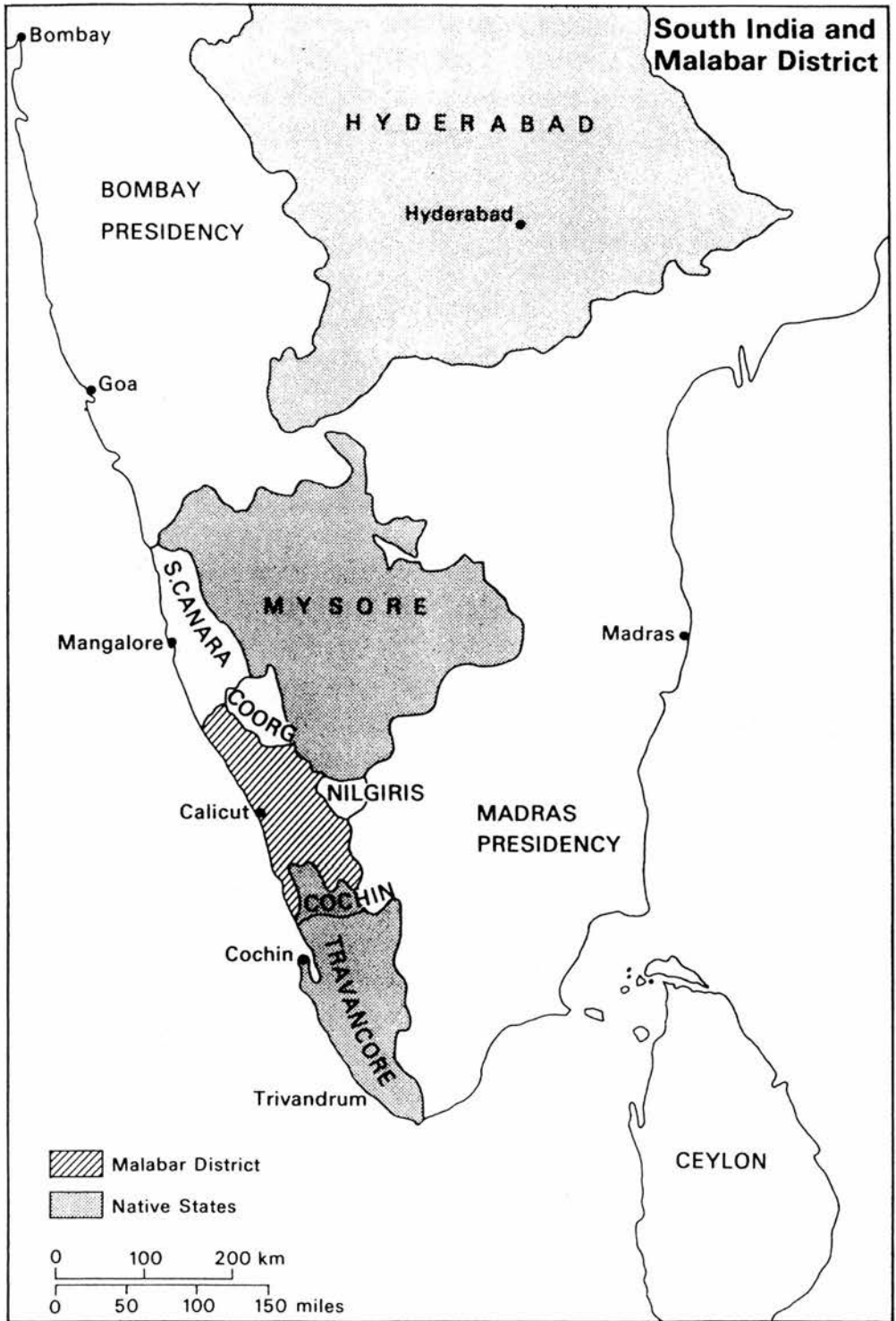
MAP 1

BRITISH INDIA in 1900

0 miles 500



MAP 2



CHAPTER 1

TRADERS AND LEGISLATORS: COMPANY RULE IN MALABAR, 1792-1807

Introduction

The first contact between the India society and the Company administration over the question of rights over forests was in Malabar in 1792. The Company acquired Malabar from Tipu Sultan in 1792. The acquisition of Malabar was in order to profit from the lucrative trade associated with it. In addition to other items, teak was a major item of trade from the Malabar Coast. For the new entrant to benefit from the timber trade, it became important to understand the existing practice. The Company had to 'discover' the existing law on ownership of forest.

The production of legal knowledge in official discourses can be autonomous from social practices. I will substantiate this claim in relation to the production of legal knowledge on the ownership of forests in Malabar. The Company officials in Malabar first reported that *jennmkars* (the local landholders) had ownership over all the teak trees. The position was changed in a year's time to assert that Tipu Sultan had a royalty right over all teak. Finally, following a detailed enquiry, the Company officers in Malabar and the government in Bombay concluded that the *jennmkars* were the owners of the teak growing in the forests. But the Court of Directors set the findings aside. It declared that Tipu Sultan had a royalty on forests and through him, the Company had acquired a right over the teak in Malabar.

There have been two main positions on the nature of law and policy introduced by the British rule in India. One position argues that these were derived from the dominant



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ideas in Europe. The second suggests that the laws and policies arose from the imperative of managing the local imperatives. I have argued that ideologies and strategies are fully enmeshed. In this chapter, I will illustrate this point. The Company officials, far from earning profits for the Company, were interested in individual profits through private trade. The law, which they reported as prevalent in the Malabar society, was calculated to secure their private trade. When the Malabar administration fell in more honest hands in 1800, the *jennkars* were advanced as the owners of forests. This was to secure their support in the politically turbulent Malabar. For Walker, this was a strategy to neutralise the influence of the *rajas* (the local rulers ruling small principalities). But the Court of Directors wanted to draw benefits from the timber trade and secure supplies to the dockyards at Bombay. The Company itself was the biggest buyer of timber supplied from Malabar at Bombay. The Company had the dockyards at Bombay where ships were under construction. It was thus emphatic about Tipu Sultan's right through which it could make a claim for the Company.

I will also show that ideas are produced, disseminated, understood and deployed in specific context towards attending to problems. The production, generation and deployment of ideas is not speculative but concrete, material and functional. The concern of the Company officials was not which theory was used but whether certain results were achieved or not. Thus, the Company officials in Malabar first followed the local categories and arrangement, the idea of 'royalty', for understanding property rights. When this could not be sustained, the notion of 'sovereign' rights on forests, and the dualistic conception of public and private for separating the domains of ownership was deployed. Walker relied on the local conception of *jennkar* as having the right by birth to own land. The Court of Directors, aware of their power and authority, did not even find it necessary to back their claim with a coherent theory. It vaguely asserted 'sovereign' rights but emphatically asserted that it had no doubts at all about its rights over the forests. In this context, I note that some have argued that the notion of public-private was distinctly a colonial introduction in India. Colonial officials, having

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internalised the concept of public-private from their social context of Europe, inevitably imposed it on India.¹ I show that the Company officials did not deploy ideas ideologically but strategically and functionally.

I first give a brief account of the society and administration in Malabar. This serves as a background to place the discourses on the question of ownership of forests. The second section is a narrative of changing positions on the question of ownership of forests within the Company administration. In the concluding section, I discuss the ideas that emerge from the narrative.

1.1. Bombay Presidency and Malabar

1.1.1 Geography and Economy of Malabar

The strip along the Western coast of India, upwards of the southern tip, constituted the Malabar Coast. Beyond the narrow coastal strip of plain land, away from the sea, land rose in a series of hills, abruptly acquired great heights (the *ghats*), and tapered in a plateau. Malabar could be accessed from above the *ghats*, now comprising the States of Tamil Nadu and Karnataka, only through a few treacherous passes. The isolation of Malabar from its neighbours, however, was more than compensated by vigorous communication through the sea route.²

Malabar had been a major commercial and trade centre since 600 AD. It had trade links with important centres in Asia and Africa.³ This had constituted the social and ethnic composition of Malabar. The agents of other trading centres settled in Malabar to

¹ Chakrabarty (1991).

² Dale (1980): p11-12

³ Gupta (1967).

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facilitate trade. Gradually, they made Malabar their home. The population of the settlers grew, creating a mix of ethnic groups in Malabar. The inhabitants included Arabs and Christians, in addition to the local Hindus.⁴ The coastal plains supplied rice, coconut and other food grains. The foothills and lower reaches of the *ghats* produced the major items of exports, spice, sandalwood and teak.⁵ The spice trade had lured all the European powers to Malabar. In the eighteenth century, the French, Dutch and the East India Company competed to control and profit from the lucrative trade.⁶

1.1.2 The Company and Local Nairs against Tipu Sultan

The East India Company acquired the territorial control of Malabar in 1792. The officials of the Bombay Presidency finally realised their long cherished dream of a territory under their control. Till then, only the Bengal presidency had command over territory. The Bengal officials had amassed wealth through trading on their personal accounts and extortion⁷ and returned home as 'nabobs of Bengal'. The Company officials in the other two Presidencies, Madras and Bombay, could only envy and attempt to emulate Bengal by waging wars to acquire territory. The ever rising military expenditure, due to such misadventures, had made the Company indebted. The Company's debt rose to 8 million pounds in 1784. To remain solvent, it had to submit itself to the Government control through the Pitt's India Act of 1784, which explicitly prohibited the Company from waging wars on or making treaties with the local rulers without the British government's permission.⁸

Malabar had been in the control of Tipu Sultan, the ruler of neighbouring Mysore. The forces of the Mysore state, located above the *ghats*, had successfully descended through the passes and invaded Malabar in 1776. Malabar till then was ruled, if the social

⁴ Dale (1980): p11-33.

⁵ Gupta (1967).

⁶ See Chapter 2, Nightingale (1970).

⁷ Nightingale (1970): p5.

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structure could at all be so described, by numerous local Hindu *rajās* (kings) who controlled small principalities. With Tipu Sultan's invasion, under the threat of conversion to Islam, much of the Hindu population fled to the neighbouring state of Travancore. *moppilas*, the Muslim population (descendent of Arab settlers), became the allies of Tipu Sultan. For Tipu Sultan, the East India Company was a formidable enemy in realising his ambition of territorial expansion and control. He had collaborated with the French and attempted to oust the Company by imposing a trade embargo. Cornwallis, the Governor-General of India, was concerned about the financial position of the Company. War would have meant heavy expenditure. He tried alliances with the local rulers, including attempts to make pacts with Tipu. But Tipu forced the Company into war.⁹

Cornwallis found natural allies in *Nair* princes (local Hindu *rajās* and chieftains), in exile in Travancore, to share the war efforts and expenditure. Treaties were signed for support and participation in a war against Tipu. The *Nair* rulers were to be reinstated and in return, they were to give the Company trading privileges. After losing the war in 1792, Tipu Sultan retained his Mysore State but had to cede Malabar to the Company.

1.1.3 Profiteering by Company Employees

To administer the newly acquired territory, Cornwallis appointed a four member Commission. Two members were drawn from the Bombay Presidency, and the other two were to be representatives of the Governor-General, drawn from the Bengal Presidency. This was understandable. The Governor of Bengal Presidency also had over-all charge of the administration in India and acted as the Governor-General. The Commission was to report on resources and on the best means of governing the hitherto unknown and turbulent Malabar. William Farmer and Alexander Dow were nominated from the

⁸ Nightingale (1970): p5-6.

⁹ See Chapter 2, Nightingale (1970).

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Bombay Presidency. Dow had been the military commander at Tellicherry (a town in Malabar) without distinguishing himself and Farmer had no experience of the province.¹⁰ Farmer had lost the lucrative chiefship of Surat, the only valued posting for a Bombay official, to his junior John Griffith. He and his brother in England bitterly complained against the 'reward' being denied.¹¹ Malabar, which was soon to have the reputation of making civil servants rich, came as a consolation to Farmer.

By the time Malabar was ceded, Cornwallis had decided not to reinstate the *Nair* princes as independent rulers. They were instead to be subjects on the same footing as the Bengal *zamindars* (landholders).¹² The Commission was instructed to conclude temporary agreement with the *rajās* to deliver one year's revenue to the Company; to transfer all judicial powers into the hands of the Company; and to enforce a Company monopoly on the pepper trade. The Commission also had to understand the local arrangement to suggest a system for administering the territory.¹³

The two Bombay Commissioners, who had exclusive control of the Commission till members from Bengal arrived months later, feared administrative reforms. Cornwallis was reforming the administration so that the civil servants would be denied the opportunity of private trade, and corruption and profiteering was being purged away. This was unacceptable to the Bombay officers. After decades of impoverishment, debt and failure, they had acquired the chance in Malabar to amass wealth.¹⁴

From their first meeting, instead of attempting to implement Cornwallis' instructions, Dow and Farmer vehemently opposed it. They argued that the Company should leave the

¹⁰ Nightingale (1970): p73.

¹¹ Farmer to Henry Dundas, Chairman of the Board of Control, 28/2/1787 and Samuel Farmer to CD, 28/2/1787, Melville Papers, MSS 1072, National Library of Scotland, Edinburgh. (National Library of Scotland, Edinburgh, hereafter NLS).

¹² Ross (1859): p159.

¹³ Nightingale (1970): p74.

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administration in the hands of the local *rajās*. Further, they proposed that the Company should give up any plans for a monopoly of pepper. This suggestion was revolutionary in the management of the affairs of the Company. Farmer was in alliance with Murdock Brown, a man who had been Tipu's ally in the embargo on English trade. Brown was based in Mahe, a territory in French occupation, and was trading in competition with the Company. Farmer was discussing the Company's policy with Brown and was reproducing Brown's views as his own to be endorsed by the Company.¹⁵ But the local *rajās* controlled the pepper trade, which partially vitiated the ambitions of Brown and his associates. Company intervention then became desirable to loosen the control of the *rajās*. In just nine months, between April 1792 to December 1792 the Commissioners reversed their position. They now alleged that the *rajās* were oppressive and irresponsible and thus, the Company intervention was desirable.¹⁶

Despite the arrival of Commissioners from Bengal, Duncan and Boddam, Brown's influence continued. Duncan and Boddam, unlike Farmer, did not have any business dealings with Brown.¹⁷ But Brown managed to impress and influence them. Subsequently, Duncan became the Governor of Bombay and Brown enjoyed a privileged position. Mahe, where Brown was based, fell from French control and came in the hands of the Company. Despite opposition from Bombay officials, in 1793, Brown was appointed to a senior position in Malabar administration. Bombay government ordered his dismissal but the Malabar authorities ignored the order and Brown kept his office.¹⁸ Murdock Brown's influence was felt everywhere in the province, and he and his partners profited while the Company struggled to get even a small share of the trade.

¹⁴ On low emoluments, Cornwallis confided in Henry Dundas that the Company servants were to either starve or take what was not theirs. And if such people were made governors no results and reforms could be expected, see Ross (1859): p170-1.

¹⁵ Nightingale (1970): p74-80.

¹⁶ Nightingale (1970): p73, 83-88.

¹⁷ Nightingale (1970): p93-94.

¹⁸ Nightingale (1970): p97.

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The Company, far from being a unified body with a single interest- the profit of the Company- was permeated by the individual interests of the employees. The policy and law, which was being set for Malabar, was guided by the private interest of the employees. In the next section, I explore how these interests worked to construct the law on property right over forests.

1.2. Discourses on Property Right on Timber

1.2.1 Introduction

The Commission was to explore and settle the ‘ancient customs’ in Malabar. This was to be the foundation for Company rule in Malabar. My specific concern here is the production of knowledge about property rights in forests in pre-British Malabar. For the Malabar administration, there was no given and fixed ‘pre-Colonial Malabar’ to be discovered. The production of knowledge amounted to the creation of an ‘archive’ on the basis of which a position could be advanced. Different groups within the Company took different positions on the ownership of forests. Almost arbitrarily, in a span of 15 years, all the positions, one after another, enjoyed the status of the authentic construction of Malabar’s past. And finally, the Court of Directors installed, what seemed to be the most improbable position at that time within the official discourses, as the correct understanding of social relations in Malabar.

In this section, I attempt to examine the modality and techniques by which different positions, all ‘truths’, were created, destroyed and re-created. In the course of this, the Company administrators expressed their preferred positions within at least three legitimate ideologies.

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1. The Company as the conqueror was the inheritor of Tipu's rights.
2. In opposition to 1, the Company should rule by the local social arrangement prevalent in Malabar before Tipu's period.
3. The conceptual distinction of public-private was a universal standard to express social, political and property relations.

We will see how these different ideologies were employed to create different effects.

1.2.2 Revival Of Timber Trade

Immediately after Malabar came in British control, the Court of Directors instructed the government in Malabar to identify commodities for trade. Particular attention was to be paid to trade which had flourished prior to Tipu's embargo.¹⁹ Trade in teak timber was one of them. In June 1793, Farmer pointed out that the Company had inherited from Tipu Sultan the right to enjoy a monopoly of all timber growing in the province.²⁰ A reliance on Tipu's claim over forests was surprising.

Cornwallis had reversed the policy of reinstating the local *rajās*. However, most of the princes believed that treaty with the Company was for their political independence. The local rulers still commanded political and social leadership. And even more, the *rajās* had come back as warriors in exile who fought Tipu to win their rule and restore the social order. The Company could not blatantly strip them of their powers. The imperative of acquiring political control compelled the Company to restore the property and social arrangement prior to the Tipu Sultan's rule. The supposed thrust of the administration was to understand the 'ancient' system which had prevailed prior to

¹⁹ CD to GinC (Commercial), 26/6/1008, e/4/1008, India Office Library, London. (India Office Library, London hereafter IOL).

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Tipu's rule. And indeed, the Commission in relation to agricultural land followed the arrangement prior to Tipu's rule.

The Commission reported that by the ancient customs of Malabar, the owners held their lands free. That is, they were not required to pay revenue or tax to the *rajas*. They were only obliged to attend their *rajas* when called on to war.²¹ The landowners were called *janmis*, the holders of land as a birth-right.²² An assertion of Company's claims over forests was incongruent. In the case of agricultural land, they were celebrating the *janman* right as a 'right to the soil', the 'plenum deminium' of Latin Jurists and directing the administration to act upon the validity of 'European Idea' they had found in Malabar.²³

1.2.3 Ownership of Forests Constructed as 'Royal Privilege'

On the question of ownership of forests, Farmer instead took an opposite view. He recognised the private ownership of forests prior to Tipu's rule. However, *jamabandi* (a statement of revenue of an area), which Tipu Sultan had submitted while ceding Malabar to Cornwallis, had an entry of 30,000 *pagodas* (local currency) as revenue drawn from timber in the province.²⁴ Farmer insisted that the Company inherited this rights of Tipu Sultan. And thus, it could utilise the forests as a royalty. Shortly after this, Farmer recommended that the Bombay Government should accept a proposal of Alexander Macknochie of setting up a sawmill at Beypore river to supply the Company with planks. The demand for timber at Bombay for shipbuilding was considerable and timber trade could be lucrative. The Commissioners highlighted that the sawmill would improve timber trade in the province of Malabar and be convenient for timber supplies to the

²⁰ Malabar Commission Report.

²¹ Malabar Commission Report.

²² Malabar Commission Report.

²³ Logan (1951): p491.

²⁴ GinC to CD, 21/1/1801, f/4/89/1843, IOL.

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docks.²⁵ The Company itself was the biggest buyer of timber for constructing ships at the Bombay dockyard.²⁶ Also teak was being exported, in small quantities, to England for repair of ships.²⁷ Farmer's recommendation was seconded by the Bombay government and sent to the Court of Directors. Farmer was supposed to be Macknochie's partner in the enterprise, and Farmer's associate, Murdock Brown, was also involved!²⁸ The legislators were traders, and the traders were legislators.

The Court of Directors approved Macknochie's proposal and advanced him a loan of 10,000 pounds for setting up a sawmill 'for improving timber trade in the province of Malabar'.²⁹ The Company was to buy planks from him for a period of ten years. The Court of Directors was interested in reviving and promoting trade for the benefit of the Company but not at the expense of political stability. Thus, the Court of Directors noted,

The encouragement we have agreed to extend to Macknochie in execution of a sawmill in Malabar province is not to be construed as allowing him to confer any monopoly of the timber trade whatever, nor it is meant to exclude any persons from disposing of their timber in any way they please.³⁰

Farmer had taken the position that Tipu Sultan had a monopoly on teak timber, despite other evidence to the contrary. Dow, another Commissioner reported that the forests were the private property of the inhabitants.³¹ According to Dow's report, annexed to the First Malabar Commission Report, even when Tipu Sultan ruled Malabar, he was obliged to pay to the landholders for cutting the timber.³² Further, in the review of the

²⁵ CD to GinC (Public), 28/4/1795, e/4/1010, IOL.

²⁶ CD to GinC (Marine), 1/8/1798, e/4/1013, IOL.

²⁷ CD to GinC (Public), 25/6/1793 (Public), e/4/1008, IOL.

²⁸ Nightingale (1970): p100.

²⁹ CD to GinC (Public), 1796, e/4/1011, IOL.

³⁰ CD to GinC (Public), 28/4/1795, e/4/1010, IOL.

³¹ Malabar Commission Report: p54-60.

³² Malabar Commission Report: p54-60.

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Malabar Commission Report, John Shore, the Governor-General, approvingly noted that forests in Malabar were private property.³³

In the meanwhile, the Government in Malabar, had entered into an agreement with local traders, to encourage timber trade. They were to be given a one-year lease for cutting timber and catching elephants within the 'wilds' and 'jungles'. It was assumed that these wild 'timber forests' were the property of the 'sovereign'. On finalisation of the contract, the Commissioners were to publish a proclamation prohibiting others from felling timber or catching elephants.³⁴ The contract was sent to the Governor for ratification.

Macknochie and Legal Position of 'Royalty'

In this while, Macknochie came back to Malabar in 1796 from Europe, after shipping the sawmill machinery, to learn that an exclusive contract was to be given to local contractors. The Commissioners had already been informed that the Court of Directors was giving him support for setting up a sawmill in Malabar. The proposed monopoly contract to the local merchants was obviously detrimental to his interest in timber trade. Macknochie raised several objections to the system of yearly lease. The Commissioners had got into the agreement to revive the timber trade and to raise revenue for the Company. They were also definite that Macknochie was proposing too large an expenditure for the resources that existed in Malabar.³⁵

The question became one of the legal rights of Macknochie. The Bombay government sought the opinion of the Company solicitor. The Solicitor noted that the proposed lease to the local merchants would be incompatible with the permission and encouragement given to Macknochie by the Court of Directors. In its opinion, Macknochie had spent labour and resources and would suffer great damage. The Bombay government exercised

³³ Shore (1879).

³⁴ Logan (1891).

³⁵ MC to GinC, Bombay Revenue Consultations, 25/1/1797, f/4/39/965 , IOL.

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its power to refuse to ratify the contract drawn with the local traders, and through a letter dated 28 February, 1797, it ordered the Commissioners to desist from reaching any agreement with local traders.³⁶

Macknochie started setting up the sawmill but a control on the timber in forests was important for the success of his enterprise. The problem had to be resolved. Macknochie used a two-fold strategy. One, he claimed that forests were the property of the Company. Following from this, two, he made a case for an exclusive privilege for the use of forests. In a letter dated September 15, 1797 to the Commissioners, he asserted the Company's prerogative to the exercise of royalty on forests.³⁷ His argument was that when Tipu ceded the province of Malabar, he also transferred all the rights whether of conquest or of treaty by which he had previously possessed the country. He contended that Tipu and Hyder considered their sovereignty over teak as a part of the revenue of the province, which they transferred to Cornwallis and which was valued at 30,000 *pagodas* in the *jamabandi*.³⁸

Macknochie was not importing any ideology from Europe. He was only stating the property arrangement in Malabar in the local category of 'royal privilege'. For Macknochie, it was a legitimate ideology to see the Company as an inheritor of Tipu's rights. He was aware, by then, that he was going against prevalent views, noting that 'the Company's right to this royalty seems to be denied by the Governor and Commander in Chief'.³⁹ He countered this by quoting from Farmer's report that during Tipu's period nothing was paid to the proprietor.⁴⁰

³⁶ Government in Malabar to CD (Revenue), 1/1/1798 and Bombay Revenue Consultations, 25/1/1797, f/4/39/965, IOL.

³⁷ Macknochie to John Spencer, the President of MC, 15/9/1797, No. 1710, Malabar Diaries, Tamil Nadu State Archives, Madras. (Tamil Nadu State Archives, Madras, hereafter TNA).

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

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Having, thus, argued for Company's property right over forests, Macknochie set out to establish his claims to derive a privilege from the Company.⁴¹ He alleged that the system of forest farming had led to the destruction of forests by adventurers who had neither the money to purchase timber, nor elephants to carry it away, and thus he should be awarded the exclusive right to use the forests.⁴² Macknochie applied for an exclusive privilege of farming forests for a sum of Rupees 10,000 a year. In the succeeding years, the amount was to be raised.⁴³

'Royalty': Counter-arguments

The administration in Malabar was not convinced. They argued that if an entry in *jamabandi* was decisive proof of royalty, by this logic, pepper should also be a royalty. Tipu had entered the profits in the trade of pepper in the *jamabandi*. The government in Malabar made the point that monopoly in trade and royalty rights were different things and should not to be confused.⁴⁴ The government in Malabar adduced facts to counter Macknochie's assertions. The Commissioners noted that the Supravisors⁴⁵ in the early years maintained that forests were private property, and that even Tipu had to pay the owners for the trees he felled.⁴⁶ The government in Malabar, thus, wondered why owners would wantonly destroy their own property. It further alleged that on enquiry with Macknochie, he could not furnish any details of names of persons destroying the forests. He only alleged a general devastation of forests by 'every person interested in opposing Company's right to the royalty of the forests, who had been in the practice of cutting timber therein, and appropriating it to their own purposes'.⁴⁷

⁴¹ *ibid.*

⁴² Government in Malabar to CD (Revenue), 1/1/ 1798, f/4/39/965 , IOL.

⁴³ GinC to CD (Revenue), 21/1/1801, (Revenue), f/4/89/1843, IOL.

⁴⁴ Government in Malabar to CD (Revenue), 1/1/1798, f/4/39/965 , IOL.

⁴⁵ The Company administrators in Malabar were called 'Supravisors'.

⁴⁶ Government in Malabar to CD (Revenue), 1/1/1798, f/4/39/965 , IOL.

⁴⁷ *ibid.*

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The government in Malabar reviewed the proposal of Macknochie to farm forests. They found the terms poor compared to what was offered by the local traders in Malabar. The crowning argument of the Commissioners however, was that the Court of Directors had imposed a general prohibition on Europeans being given a farming right. The Bombay Government, however, with a view to give encouragement to timber trade, and employment to his sawmill, entered in a contract with Macknochie in June 1797 for supply of seven thousand candies of timber and planks.⁴⁸ Macknochie was specifically instructed to take care of his relations with landholders, *Nairs* and *rajas*.⁴⁹

In these four years since Farmer had recommended Macknochie's application, several changes had taken place in Malabar. On October 11, 1793, the Commission was dissolved and Farmer acquired the administration of Malabar as Supravisor.⁵⁰ Farmer finally got the chiefship of Surat in the beginning of 1794 and was succeeded in Malabar by James Stevens as Supravisor.⁵¹ Stevens had private interests of his own, in competition with Murdock Brown. Stevens had to resign in the middle of December, 1795 on corruption charges and was succeeded by Handley.⁵² A special Commission, the Second Malabar Commission, was appointed in May, 1796 to investigate into the charges of corruption against Stevens. Stevens finally was found guilty by a court in England and given two years of imprisonment.⁵³ Stevens claimed that Brown was his bitterest foe and the entire case was fabricated by him.⁵⁴ Wilkinson and Alexander Dow were the members of the Commission. The Supravisor was also merged in the Commission and thus, Handley became the third member. Wilkinson was a partner in the Bombay Agency house of Rivett, Wilkinson and Torin.⁵⁵ Subsequently, all of them, Rivett, Wilkinson and Torin, became members of the Malabar Commission. The

⁴⁸ GinC to MC (Public), 5/6/1797, No. 1689, Malabar Diaries, TNA.

⁴⁹ *ibid.*

⁵⁰ Nightingale (1970).

⁵¹ Logan (1951): p508.

⁵² Logan (1951): p508.

⁵³ Logan (1951): p508.

⁵⁴ Nightingale (1970): p108-9.

⁵⁵ Nightingale (1970): p113.

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membership changed frequently but all of them were close to Murdock Brown and had business dealings with him.⁵⁶

In the context of proximity of member to Brown, it is surprising that Macknochie did not get ready support. In the absence of information, we can only speculate. One, Farmer, his promoter, was no more in Malabar. Two, Brown was trading actively in timber himself.⁵⁷ He had perhaps disassociated himself from Macknochie. Three, Macknochie's claims would have created a monopoly for him and jeopardised Brown's interest. However, what is more relevant for us is that the Commission eventually got around to the argued position on the royalty rights of Tipu Sultan.

1.2.4 Ownership Constructed as Public-Private Property

Macknochie, to reassert himself, shifted the terrain of his contention from the legality on the basis of *jamabandi* to social facts in Malabar. He submitted the findings of his 'enquiries' to the Commissioners on 24 May, 1798. Earlier, he had claimed that Tipu Sultan had a royalty over all forests. But he had to contend with the assertion of the Commissioners that forests were private property. The evidence of private property could not be countered by relying on the legality of *jamabandi*. It could be done by either controverting the facts produced by the Commissioners or revising the nature of the legality itself. Macknochie found the distinction of public and private property convenient. He distinguished between 'the forests and jungles properly so called', over which the Company have, he asserted 'a right of royalty' and the plantation of 'trees on the estates of individuals, or on pagoda lands' which were 'incontestably private property'.⁵⁸

⁵⁶ Nightingale (1970): p113.

⁵⁷ Nightingale (1970): p101.

⁵⁸ CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

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Thus, Macknochie jettisoned the local category of 'royal privilege' and imported the European distinction between public and private to construct the ownership of forests in Malabar. Through this deployment, he could still privilege the 'public', the rights of the Company. The categories of public-private were appropriate. The claims of the Commissioners could be conceded on 'private' forests without foregoing the rights of the Company on the rest of the forests. Till Macknochie was compelled to introduce the notion of public-private, he was comfortable working with the local category of 'royalty' rights.

Macknochie claimed that his views were based on a 'survey' conducted in the area. What was to count as 'knowledge' for the Company administration was not opinion and judgements. The knowledge had to be derived through certain procedures. For a claim to be tenable, it had to be scientific and rational, and based on a claim of having made a 'survey'.⁵⁹

1.2.5 Reversion to Royal Privileges

In the light of this assertion of Macknochie, the Commissioners considered it necessary to investigate the question of ownership of forests. According to the Commissioners, the statement which Dow had given to the first Commission claiming private property, seemed unsubstantiated. Further, Smee, the Superintendent of the Southern part of Malabar, had told Macknochie that there were forests which were not mentioned in Dow's list at all.⁶⁰

The Commissioners further investigated the question. They presented the views of Shamnath, the Minister of Zamorin⁶¹, who was employed by the Commissioners as an informant. Shamnath testified that previous to the Mysorean conquest, all *rajas* and

⁵⁹ GinC to CD (Revenue), 21/1/1801, f/4/89/1843, IOL.

⁶⁰ MC to GinC (Revenue), 12/10/1798, No. 1715, Malabar Diaries, TNA.

⁶¹ Zamorin was the ruling family of the state of Calicut in Malabar.

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chiefs held the adjoining timber in royalty. They either cut the produce themselves, or granted annual lease to the *Mopillas*, the Muslim contractors and traders. Some of the *rajas* and chiefs had even mortgaged the forests. However, during Hyder and Tipu's government, these *rajas* and chiefs were never allowed any rights in these forests, which were considered and held as royalties. Following this right, Tipu had leased forests in the southern part of Malabar for a lakh of rupees per annum, and prohibited *rajas* from felling timber or catching elephants.⁶²

Shamnath clarified that even the timber growing within the enclosures of private estate was a royalty during the Tipu's rule. The only exceptions were the forests standing on the enclosures of temples.⁶³ As a proof, Shamnath pointed out that the hills or groves of timber, even within the private enclosures, were not assessed to general revenue any more than the other forests.⁶⁴ Shamnath sounded an alarm that during the Company's rule, the *rajas* had resumed their 'interference' in the forests. Shamnath's claim was that the Company had inherited the right to forests from Tipu and it should assert its royalty over it.⁶⁵

Shamnath had given the names of two contractors who had felled during Tipu's rule. The Commission interviewed one of the contractors, who gave contradictory and misleading testimony. He deposed before the Commissioners that the growth of teak only in the forests, was 'generally' deemed royalty during Tipu's administration. The owners could not dispose of them without the government's permission. He had a contract with Tipu, which he supplied from his own land. Even for the Commissioners,

⁶² MC to GinC (Revenue), 12/10/1798, No. 1715, Malabar Diaries, TNA and GinC to CD (Revenue), 21/1/1801, f/4/89/1843, IOL.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

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this left the question open if he could have supplied from others without bargain with the proprietors.⁶⁶

A principal landholder, Mancherry, was also called as a witness. He deposed that the forests were the property of the landholders. He thereby implied that these were not the property of the rulers and *rajas*. For example, within the territory of Nilambur *raja*, he identified many landholders who were owners of forests, including himself. He told the Commissioners that Tipu would contract for supply of timber to *mopillas* and *mopillas* would fell what they wanted with the consent of, and only after setting terms with the proprietors.⁶⁷

The Commissioners, however, left the counter-evidence aside and solely relying on Shamnath's testimony concluded in their address to the Government of Bombay on 12 October, 1798,

...the teak forests may be considered royalty; at least, it is pretty evident, they were considered in this light under the Mohammedan government.⁶⁸

The Commissioners seem to have concluded on ambivalent evidence, a part of the larger politics of administration in Malabar. Commissioners in Malabar were setting a policy for the interest of private trade in Bombay. Nightingale describes them as a 'forward school of imperialists'.⁶⁹ The Commissioners were determined to extinguish the administrative and judicial authority of the local princes, by force if necessary. This was to be replaced by English officials and institutions. The private traders had two opponents. One, the *rajas* who sought to protect their own privileged commercial position. Two, directors and servants of the Company who wanted to benefit the Company not the private profits of the employees. The policy which met these two

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Nightingale (1970): p116.

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dangers, therefore, also combined an attack on the local institutions. Despite the protest of Duncan, the Governor of Bombay presidency, the Commissioners insisted on forcing the authority of the Company. In their zeal, they captured the *raja* of Pyche creating a military crisis. Thus, the conclusion of Company's right over forests on ambivalent testimony was not an isolated instance. It was a part of the general thrust of the administration to improve the power and authority of the Company.⁷⁰

The Commissioners received evidence from another landed chieftain, Tachera Taroopad. He asserted that previous to Tipu's government, the timber forests were considered as much private property as the rice fields. Tipu and his agents felled where they liked without paying the proprietors but they did not stop proprietors from felling as much as they wanted for their own use.⁷¹ He refuted that timber was a royalty. He claimed that landholders were free to fell from their own land; even felling of teak timber was not prohibited.⁷²

The Government in Bombay was suspicious of the designs of the Malabar officers. The Governor in January 1799 described the evidence as inadequate 'volumes of parole testimony'. The Governor still considered Dow's report, which had asserted private rights over forests, as the most informed answer. The Governor disregarded the testimony of Shamnath, noting that Shamnath had 'insensibly and unavoidably' supported the rights of ownership of landholders. In the judgement of the Governor, Shamnath confused 'claims of sovereignty' and 'rights of proprietorship'. Further, the Governor contrasted Shamnath's position with Dow's statement and came to a different conclusion about the status of the rights in forests during Tipu's period. The Governor also adduced other support to claim that, perhaps with the exception of a few years, Tipu paid for felling to the forest holders. He found the evidence of other witnesses

⁷⁰ Nightingale (1970): p116-7.

⁷¹ MC to GinC (Revenue), 28/10/1798, No. 1715, Malabar Diaries, TNA; and GinC to CD (Revenue), 21/1/1801, f/4/89/1843, IOL.

⁷² *ibid.*

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inadequate to conclude that Tipu had royalty rights. The Malabar officers were, thus, told to re-investigate. The best sources were to be persons who had taken mortgage from the forest holders.⁷³ The officers were further instructed,

... nothing was to be asserted in general terms or merely as opinion without quoting or adverting at the same time to the evidence or probability on which each position as to matter of fact may be founded...⁷⁴

Smee, one of the Commissioners was required to report. Smee was insistent. He noted in January 1799,

... but without incurring the imputation of interfering on private rights and dispossessing individuals whatever Royalties existed under the Mohammedan Government surely have by conquest ... unequivocally vested to the Company.⁷⁵

Smee claimed that under Zamorin, even the landholder entered into a contract with *moppilas* and other merchants to sell timber growing on their estate. At the same time, Zamorins as the permanent lord, could order teak for their own purposes from any of the forests and groves of his said vassal, in the like manner as he could command their personal assistance for military service. Smee observed that Tipu, from motives of convenience, could extend his engagement with timber only in one principal forest of Nilambur of district Ernad. It was no surprise for him that both Manchery and Tachery Terupad came from that area. Smee controverted Dow by alleging that 'the Sultan was not so accommodating to his *Nair* subjects' as Dow had credited him. In conclusion, he recommended to the government in Bombay that the Company's general right of royalty should be introduced. However, the exercise of the right should be introduced only gradually. A beginning could be made with the forest of Bollangur, in the territory of

⁷³ GinC to MC (Revenue), 18/1/1799, No. 1716, Malabar Diaries, TNA.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

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Zamorin, the revenue charge of which had been resumed by the Company.⁷⁶ Thus, Macknochie had started in 1797 with the assertion of 'royalty' but shifted in 1798 to the conceptual construct of public-private; by contrast, the Commission had by 1801 shifted back to the concept of 'royalty'.

1.2.6 Forests as the Property of Landholders

In the subsequent years, the conclusion and tenor of the investigation changed. Alexander Walker joined the Commission in early 1800. Even before this, he was a significant presence in Malabar as the Secretary to Stuart, the military Commander. The Governor and Stuart were based in Malabar to resolve the military crisis created by the capture of the *raja* of Pyche. The military crisis and the removal of some of the Commissioners had already brought home the point to the remaining Commissioners of the dangers of indiscriminate interference in the local affairs. Walker shifted the enquiry on forests from the arrangements during Tipu's tenure to the prior period. Smee had promised never to differ with him.⁷⁷ Walker was considered by the Governor- and even the Governor-General- to be one of the ablest and most honest officers. Walker was contemptuous of the dishonesty and inefficiency of his predecessors and was satisfied that Malabar had 'now fallen into more honest hands'.⁷⁸

Walker was clear in his reading of Malabar. He advised Duncan, the Governor of Bombay, that despite surface appearance, it should not be assumed that the Company had authority in Malabar. Walker cautioned,

We must not yet attempt a too indiscriminate play of sovereign power which will either be assisted or vainly exerted.⁷⁹

⁷⁶ *ibid.*

⁷⁷ Walker to Duncan, 23/4/1800, Walker Papers, MSS 13602, NLS.

⁷⁸ Walker to Phip Moodford, January, 1800, Walker Papers, MSS 13606, NLS.

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Walker was of the opinion that without the support of the principal inhabitants the authority of the government was nominal.⁸⁰ In the absence of support from the landholders, Malabar could be ruled only with the assistance of military. Walker's solution was to change the terms of 'justice' from the *rajas* to the people of Malabar.⁸¹ In other words, his strategy was to build the landholders as the allies of the Company. The perspective brought about a new position on the question of the ownership of forests.

Walker first demolished the testimony of Shamnath, the principal evidence on which the Commissioners had rested their claims. Shamnath testified to Walker that prior to the Mysorean rule, the *rajas* of Zamorin and Cochin were in full possession of the timber produce of their kingdoms. Walker noted that the area was far too extensive for the *rajas* to have ever exercised this claim. From Shamnath's testimony, Walker showed that the merchants would not go to a place where there were no convenient rivers,⁸² and thus demonstrated that Shamnath's claims were dubious.

Similarly, Shamnath had stated that the *rajas* of Palghat and Vellatre had property claims over forests. Walker contradicted that these *rajas* were never known to trade in timber. Walker then questioned the entire testimony of Shamnath by alleging that he had not adduced any argument or record to substantiate his point. According to Walker, from all that Shamnath had reported, the only inference which could be drawn was that every area generally acknowledged *raja's* authority. By Shamnath's testimony itself, in every area, there were villages and *pagodas* (temples), over which some principal person presided. In such cases, the Zamorin, the headman and the *pagodas*, participated in the profits of the trade.⁸³ Walker then brought in other evidences and said,

⁷⁹ Walker to Duncan, May, 1800, Walker Papers, MSS 13602, NLS.

⁸⁰ *ibid.*

⁸¹ Review of Administration in Malabar, by Walker, Walker Papers, MSS 13616, NLS.

⁸² Walker to the Board of Revenue, Bombay, 6/6/1800 Walker Papers, MSS 13609, NLS.

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I have received various particulars of information on the foregoing subject from different persons which if not better acquainted with them are probably less interested than Shamnath.⁸⁴

Walker reported that these people had informed him that the Zamorin *raja* never made any sort of trade in timber. But it was usual for merchants to purchase from individuals without any reference to the *rajas*. To give credence, Walker elaborated the detailed modality of this arrangement.⁸⁵

Walker gave a new interpretation to the previously alleged royalty of Tipu Sultan. According to Walker, Tipu had imposed prohibition only on private trade in timber. The merchants were forced to sell their timber to the Tipu's government. Walker by implication suggested that this was only a trade arrangement and the modality by which the merchant obtained the timber from the proprietor was left to them.⁸⁶

Even prior to this, evidence of *jenmkar's* (landholder of Malabar) right over forests was accumulating. Following the instructions of the Governor in Council, the President of the Commission, John Spencer, had sent instructions in May, 1799 to George Waddell, Acting Southern Superintendent, to ascertain the ownership of forests in his part of Malabar. Spencer directed Waddell to ascertain whether there were private claims to the forests within the Company's territory. Documents and proof of such ownership were to be collected. Spencer also said that landholders in Palghat were claiming forests while some *rajas* were opposing this. Waddell was to ascertain whether this was 'Muslim innovation or ancient constitution'.⁸⁷

Waddell replied on August 29, 1799 and enclosed several testimonies. Pathara Namboory testified that previous to Mysorean invasion, the forests belonged to *jenmkar*.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

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The merchants came and took permission from the *jenmkar* for felling trees. The *jenmkar* was not obliged to ask the *raja* for giving a lease of his forests. Pathara was categorical, 'The property was exclusively in him'. Similarly, the teak trees around the house were not the property of the tenants but exclusively vested in the *jenmkar*.⁸⁸

On the same note, Pathary Nair informed that timber was sold by the *jenmkar* and deemed their property. If the *raja* wanted timber for his own use or for *pagodas*, he sent one of his people to whom permission was given and no money charged. All trees on compounds and *pagodas* belonged to *jenmkars*. *Raja* of Velatre also attested that all timber belonged to the *jenmkar* and not the *raja*. According to him, a *raja* could fell trees for the repairs of his palace or *pagoda* but only after taking permission from the *jenmkar*. He also added that on the land of which he was the *jenm* (*jenm* was another word for *jenmkar*), the forests vested in him exclusively. Waddell also produced several documents which were copies of permission given by *jenms* to merchants to fell trees for the period during and prior to the Mysorean rule.⁸⁹

Waddell concluded on the above evidence and several other sources. He said,

... previous to the invasion of Malabar by Hyder Ali Nabob, there was no such thing as any royalty or property in the timber forests or hill vested in the different rajahs, but on the contrary the whole belonged to some or other *jenmkar*, where any *raja* possessed one or more forests or hills containing timber, the property was not vested in him as being the *rajah* of the country but as being *jenmkar* of such hills or forests.⁹⁰

⁸⁷ Spencer to Waddell, May 27/5/ 1799, f/4/89/1843, IOL.

⁸⁸ Waddell to Spencer, 29/8/1799, f/4/89/1843, IOL.

⁸⁹ *ibid.*

⁹⁰ *ibid.*

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So much so that there was a term *kutty kanam* for giving lease by the *jenmkar* to the merchants. The term *kutty kanam* 'is really neither more or less than the price of the tree paid to the *jenmkar*'.⁹¹

Walker already had support for his claims. He, thus, concluded,

I have been informed by several intelligent men that *Jenmkar* are considered the legal proprietors of hills and jungles within their respective estates, which right they have by inheritance. So much so that *jenmkar* furnish the merchant with a certificate defining the area from which the merchant could fell the trees...*Jenmkar* enjoy the produce of timber in Malabar which is universally considered their property.⁹²

Walker then theorised on the origin of such property relations. According to him, *Zamorin raja* had formerly a right to all the regions in the country producing wood. This right he derived from earlier period. But afterwards, he divided the country among lesser chieftains. In the uninhabited part, it is the *jenm* who were allowed to cut and fell as they pleased. When *Zamorin raja* made this arrangement, he reserved the right to himself to cut timber anywhere without paying for it, but every other person must pay to the *jenm*. In this way, *Zamorin* took timber when he pleased, by sending his people into the jungles, for his palace and *pagodas*.⁹³

The Company administration admitted different and even contrary ideologies as equally legitimate. One, the Company, as the conqueror, was the inheritor of Tipu's rights. Two, the property arrangement could be resolved in the familiar category of public-private. Three, Malabar was to be ruled by its 'ancient' constitution. If Macknochie and earlier Commissioners had followed the first two positions, Walker followed the third to constitute the *jenmkars* as owners of forests.

⁹¹ *ibid.*

⁹² Walker to the Board of Revenue, Bombay, 6/6/1800 Walker Papers, MSS 13609, NLS.

⁹³ *ibid.*

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Walker deployed the 'ancient' constitution to declare *janmis* (another name for *jenmkar*) as the owners of forests. He ignored the conception of public-private, even when Macknochie had already employed it. Instead, he constructed the property right in the local category of *janmis*, owners of territory by birthright. Rights of *rajas* to take timber free from owners were not constructed as a 'public' right. Instead, it was accommodated within the political arrangement of Malabar itself. The argument was much the way *janmis* had to give military service so they had to give free timber to the *raja* for his use. Constructing the rights on forests in the language of public-private would have meant the Company acquiring the 'public' right, the right of *rajas* to make free use of *janmi's* property for their own use. Walker was clear that the Company's 'sovereignty' was not to be introduced in Malabar in the current circumstances.

While the ownership of forests was constructed in the local categories, Walker, like the earlier Commissioners continued to posit for *janmis* (as owners of agricultural lands), a 'private' property even more perfect than the British one!⁹⁴ Walker did not employ ideologies for their theoretical and conceptual rigour, nor did he work them to their ultimate logical conclusion, by eliminating all contradictions. Instead, he deployed ideas strategically; certain facets were selectively unfolded; and their import carefully crafted. But Walker, despite his reputation for being able and honest, had not won. The Court of Directors dismissed everything he had done and the installed Company as the successor to Tipu's rights.

1.2.7 Court of Directors Reverts to Public-Private

The only mode of communication between India and London was through sea. Ships would leave only in certain seasons, when winds were favourable. Thus, a despatch from India could take as long as 9 months to reach London. While Walker was conducting investigations in Malabar, the Bombay Government informed the Court of Directors that

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Smee was stubborn in maintaining the royalty claims and that the Bombay Government had instructed the Malabar Government to do fresh enquiry to 'induce him to depart from the opinion.'⁹⁵ The Court of Directors had made up their minds on the question of property rights on forests. In fact, oblivious of Walker's zeal, they had already declared it unnecessary and redundant. The Court of Directors noted,

We are inclined to think that further investigation will terminate in the same uncertainty whether forests were considered as royalty previous to the province coming under the dominion of late Hyder Ally...If in the neighbouring states of Travancore and Cochin, timber and elephants, as has been asserted, are considered as royalties, it is not unreasonable to suppose that they were so considered in the province of Malabar previous to Mohammedan conquest.⁹⁶

Even this, however, could possibly leave space for further debate. The Court of Directors intended to crush any such possibility. They continued,

But the determination of this point does not, we conceive rest upon, this point being ascertained. It is sufficient to know that the late Tippoo Sultan exercised the right of felling timber as a branch of his Royal Prerogative.⁹⁷

Concurring entirely with Macknochie's claim, they reproduced his point that whatever royalties existed under the Mysore province under the Tipu's government had by 'conquest and consequent cessation unequivocally become vested in the Company'.⁹⁸

Having created the legal-ideological basis for Company's claim, they were reminded that laws and legal ideas do not only have to be tenable in official conversation, but they also had to be legitimated in the turbulent social context of Malabar. The *jenmkars*, oblivious

⁹⁴ Logan (1951): p496.

⁹⁵ GinC to CD (Revenue), 10/10/1800, 4/1799-1803, State Archives of Maharashtra, Mumbai.

⁹⁶ Macknochie in his report had indicated that in the Neighbouring States of Travancore and Cochin, the state held the rights to use forests. See CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

⁹⁷ CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

⁹⁸ *ibid.*

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of the official discourses, would have a basis for a counter-claim to the Company's proclaimed ownership. The Court of Directors moved to address this thorny issue. They cautioned the administration,

... utmost moderation should be observed in the exercise of this right, we most willing adopt the distinction proposed by Mr. Macknochie, in his very able letter upon the subject, between forests and jungles, properly so called, and those groves and plantations described in the proceedings as laying contiguous to or forming a part of the estates of the *Rajas* and landholders of the province...⁹⁹ (underlining original)

The Court of Directors, endorsing the suggestion of Macknochie, directed the government to conduct a survey to ascertain and fix the boundaries between forests and groves. Macknochie was to lead the survey. After the survey, the private property would be at the sole disposal of the proprietors and by the principle of exclusion, the rest would be 'public' property fully under the control of the government. Interestingly, the Court of Directors specifically directed Murdock Brown, because of his 'great knowledge and experience', to be associated with Macknochie in the survey of the forests.¹⁰⁰

The Court of Directors changed their tone of address,

... we authorise you to declare, by public proclamation, that the Company consider the right of cutting timber in the forests as vested in them, both by cessation and conquest, and that they will enact laws and regulations for the preservation of that right, the breach of which will be punished in the most exemplary manner.¹⁰¹

⁹⁹ *ibid.*

¹⁰⁰ CD to GinC, 18/3/1801, e/4/1016, IOL.

¹⁰¹ *ibid.*

1.2.8 Walker's Report and the Stubborn Court of Directors

The Court of Directors was oblivious of the findings and predilections of the Commissioners in Malabar. In the light of the new evidence, the Court of Directors could have revised their position. There was no question of loss of honour or prestige. After all, in the very same question of forests, in relation to Macknochie, they had revised their opinion several times. Macknochie had claimed that the survey, on the basis of which he had asserted Company's right on forests in Malabar, had escalated his estimated expenses from 1 lakh to 2,75,000 rupees of principal alone. He had pleaded to the Court of Directors for a loan on mortgage of the sawmill.

The Court of Directors asked the Bombay government to discuss it among them and decide. However, the Court of Directors volunteered that Macknochie has countered the practice of felling small tree prematurely in Malabar.¹⁰² Further, they suggested that if the Bombay government could forward the application to the Court of Directors, it could as well grant it. In short, it was a recommendation to consider the application favourably.

In the meantime, many apprehensions were caused by the failure of Tate, a principal merchant in Bombay. The government in Bombay then learnt that Tate was a partner of Macknochie in the sawmill. On hearing of this, the Governor wrote to Malabar administration on 24 June, 1799 to countermand the bond for loan. But the Commissioners had already executed the bond. Further, it was not in circulating paper but cash! The Bombay government pleaded to the Court of Directors that 'motive of preference' (of Commissioners in Malabar for paying in cash) which they were unable to specify as their letter got lost but must be 'reasonable and expedient' in the Malabar

¹⁰² CD to GinC (Revenue), 28/8/1800 (Revenue), e/4/1015, IOL.

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administration's view.¹⁰³ The government in Bombay was then mortified to learn that machinery had gone out of order and Macknochie asked for further assistance.¹⁰⁴

With the assistance of the Sheriff and the Bombay government, Macknochie bought Tate's share and liquidated the sawmill by handing it over to the government in Malabar. In the course of this, Macknochie proved difficult by contending over the terms and conditions of the loan and liquidation of the sawmill.¹⁰⁵

In 1800, Malabar was transferred to Madras Presidency. The Madras government, impatient with a stubborn and litigious Macknochie, asked him to quit Malabar.¹⁰⁶ The Court of Directors changed their position on Macknochie. They directed the Bombay government,

...his turbulent and litigious temper should be marked by your displeasure. We are decidedly of the opinion that he has forfeited all pretensions of our further protection.¹⁰⁷

Further, the Court of Directors ordered the Bombay government to cancel his appointment as a member of the survey team.¹⁰⁸

The Court of Directors accused Macknochie of representing himself as the sole owner when he was only a partner. From the writer of 'able' reports and knowledgeable on property rights on forests he became a villain. The Court of Directors noted,

... that should Macknochie ever turn from projects in mechanics to speculation in law, there is no Court to which he can resort...¹⁰⁹

¹⁰³ GinC to CD (Revenue), 21/1/1801, f/4/89/1843, IOL.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ CD to GinC (Public), 31/12/1801, e/4/1017, IOL.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ CD to GinC (Public), 31/8/1804, e/4/1019, IOL.

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In the new version of the Court of Directors, the Commissioners had ‘earnestly’ endorsed Macknochie’s proposal to improve timber trade. The Bombay government was not ‘badly motivated in advancing the loan’ and the advance was for ‘the cause of the nation’. And the Court of Directors was encouraging the ‘highest public utility’ of timber supply. Thus, except Macknochie, everyone was absolved.¹¹⁰

If the Court of Directors wanted to, they could have found many honourable ways of revising their opinion. But they reasserted their earlier view and summarily dismissed the matter, ‘Your proceedings have caused no alteration in the royalty position we expressed earlier’.¹¹¹

But why was the Court of Directors being stubborn? The Court of Directors, in the beginning, when they gave support to Macknochie, were interested in developing trade and merchandise in Malabar. However, by the end of 1800, they had realised that the Company had drawn no benefit from the timber trade. The neighbouring Cochin and Travancore, despite inferior quality of timber, were doing a vigorous trade in timber. There was considerable demand for timber for shipbuilding in Bombay and the Company itself was the sole buyer. A clear property claim over the forests could have taken away some of the uncertainty and improved the abysmal performance of its own officials. The King’s navy was short of timber for building ships and it was becoming a distinct possibility that frigates could be built in Bombay. These factors hardened the position of the Court of Directors.¹¹²

¹¹⁰ *ibid.*

¹¹¹ CD to GinC (Public), 31/12/1801, e/4/1017, IOL.

¹¹² CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

1.2.9 Transfer of Malabar from Bombay to Madras Presidency

The corruption and inefficiency of the Bombay government became intolerable for the Governor-General. To purge the administration of this, Malabar was transferred to the Madras Presidency in 1800. The official reason was the geographical proximity of Malabar to the Madras Presidency but the real reasons were inefficiency and corruption in Malabar. The Court of Directors, however, was keen for the Bombay Presidency to retain control over forests and forest trade. But they did not have the powers to effect the transfer themselves. The Court of Directors and Henry Dundas, then chairman of the Board of Control, perceived Bombay as an important commercial and strategic point. The Court of Directors, thus, pleaded to Fort William (the office of the Governor-General in Calcutta) that due to the port and sea route, the management of all commercial concerns on the western coasts should be vested exclusively with Bombay.¹¹³ The Court of Directors colluded with the Bombay Presidency and pressurised the Madras Presidency to get forest and forest trade transferred back to the Bombay Presidency. The Bombay government was asked by the Court of Directors to make a case to the Governor-General that timber was of great national importance for the King's Navy and that all the dockyards and shipbuilding were under the Bombay Presidency. The transfer finally materialised in 1806.

Bombay Presidency was agitated by the loss of control and territory. Duncan had bitterly complained of this loss to the President of the Board of Control. The government in Bombay was indebted to the Court of Directors for redeeming some of it by the transfer of forests to its control. The Bombay government had already pledged to the Court of Directors in 1805 that in the event forests were transferred to the Bombay Presidency, it would follow its position.¹¹⁴

¹¹³ CD to GOI, 2/12/1800, Banerjee (ed.) (1974).

¹¹⁴ GinC to CD (Public), 26/2/1805, e/4/482, IOL.

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The privileged position for the Bombay government now was not the report of Walker. It was a memoir prepared by Wrede, a person long resident in Malabar. The Bombay government claimed to the Court of Directors that he had prepared the report on his own but it was actually prepared on the initiative and suggestion of Jonahan Duncan, the Governor of the Bombay Presidency. The Bombay government perhaps felt embarrassed abruptly changing its position. Thus, it got Wrede to say what it desired. Wrede had relied on the claims of Tipu Sultan to establish the Company's right. However, pragmatically, he had suggested that those who had set up their claims could be compensated and their claims bought.¹¹⁵

To abide by the Court of Directors, the archives had to be reorganised. Wrede's report made Walker's findings ambiguous and inconclusive. In contrast, the received position was powerfully rehearsed and elaborated. A clear and categorical finding of Walker, just a few years back, was turned into,

Whatever might, or ought, it first have been observed in respect to the claims of these chieftains...¹¹⁶

Ignoring Walker's findings, Wrede noted,

... that any part of it is private property, lies with the claimants and hitherto, none of them has been able to make out his claim in a satisfactory manner nor probably ever will...they have no dominial rights over jungles, nor had their ancestors in the Zamorin's time, for after the conquest of Hyder, it is out of all question they did not venture, nor would they have been allowed to start such claims against his Circar...¹¹⁷

The claims of the chieftains were reluctantly conceded. Wrede was writing as if he were the Government of Bombay,

¹¹⁵ *ibid.*

¹¹⁶ BPP, 26/2/1805, p/343/20, IOL.

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... however as we have condescended to suspend the exercise of our royalty in its full extent, and these claimants are supposed to possess still more influence in the contiguous districts, it may be advisable to assign them small pensions by way of indemnity...¹¹⁸

The pension was subject to the assistance and co-operation from the grantees. The report was endorsed by the Bombay government and forwarded to the Court of Directors.

The Court of Directors was only too happy in the endorsement of their 'sentiments' by Wrede's report.¹¹⁹ In addition to the claim of deriving rights over forests from Tipu Sultan, and that in the neighbouring Travancore and Cochin the Kings had rights over forests, they reiterated Wrede,

At any rate the presumption of their being a royalty militates for the Company as sovereign of the country.¹²⁰

This legality needed to be reconciled with the fact that landholders and chiefs were in actual possession of forests. The Court of Directors noted,

As however the claims have unaccountably been allowed to exist to the present period, it would not perhaps be advisable to deprive the claimants altogether of the privileges to which they may consider themselves to be entitled. It may therefore be proper to assign them agreeably to the suggestions of Mr. Wrede's small pension, by way of indemnity under the proviso that they give every assistance in their power to such persons as may hereafter be appointed by us to the management of the forests.¹²¹

The Court of Directors, as suggested by Wrede, recommended a survey of forests for ascertaining timber availability. In relation to the question of property right on forests, they commented,

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

¹¹⁹ CD to GinC (Public), 2/5/1806, e/4/1021, IOL.

¹²⁰ *ibid.*

¹²¹ *ibid.*

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... with a full confidence that its importance will attract your most serious consideration, and should the result of the investigation be in our favour (which we can by no means doubt)...¹²²

When the surveyors took up the question of property rights, the Court of Directors prohibited them from investigating it. They reproduced Wrede's sentence,

... their being a royalty certainly militates in favour of the Company as sovereign of the country; the subject is however of ulterior consideration as connected with the survey of the forests, although of very great importance in itself which in due time we wish to be minutely investigated.¹²³

The 'due' time never came. The Court of Directors was determined to establish Company's ownership over forests. They only had to peg it on a convenient idea. The most convenient and appropriate one was Macknochie's idea of public-private. The contesting claims of ownership of *jenmkars* in Malabar could be cast aside by referring to the practices in the neighbouring states of Travancore and Cochin. The idea given by Wrede 'their being a royalty militates for the sovereignty of the Company' was reproduced. But how was the ownership of forests by the landholders going to militate against Company's sovereignty? What does the sentence mean? The Company was still the 'sovereign' in Malabar even if the question of ownership of forest was disputed. It could not have denied its sovereignty of Bengal, even if *zamindars* were considered as owners of forests.¹²⁴

The Court of Directors probably did not know what the sentence meant. They may have employed Wrede's statement without caring for what it meant. Why should we privilege every action and utterance with a settled meaning, conceptual neatness and coherence? The Court of Directors was interested in producing certain effects and not in working out

¹²² *ibid.*

¹²³ *ibid.*

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the conceptual rigour of their utterances. A reference to notion of 'sovereignty' was adequate for their purpose. However, if this was not adequate, for the Court of Directors, the right of 'conquest' was always there.¹²⁵

The Bombay government was reproducing and elaborating what the Court of Directors had said. And the Court of Directors had just rephrased and reproduced ideas and facts, which were reported to them. In the Company hierarchy, the supervisory and controlling layer was dependent on other sites for the production of knowledge. Even if the Court of Directors had information from non-official sources, these had to enter the official discourses to be a fact for the official hierarchy to work on. But they were completely ignorant of the realities in Malabar. Their ignorance and helplessness is apparent in their continuous reproduction of the reports and writings originating in Malabar. Clearly, a macro-level study, privileging the wisdom of the Court of Directors would be necessarily flawed.

The endless reproduction, however, had profound power effects. The re-circulation from the Court of Directors made a particular idea an authorised one in competition with other ideas. The endorsed position was further rehearsed, strengthened, modified, adapted and circulated. The unrestricted circulation of an idea invested it with power, authority and respectability. With its reproduction, the idea became clear and cogent. Through these power effects, certain opinions were elevated as knowledge and truth while others, the opposing ones, were denigrated as errors, misconceptions and opinion. In so rehearsing these ideas, putting them down on paper, circulating them, utterances transcended from knowledge to the status of law.

Wrede's report had strongly recommended the Company to exploit timber itself rather than lease it to merchants. Towards this, Wrede recommended an establishment of the

¹²⁴ GGinC to CD, 6/3/1793, see Ross (1859, Vol. 2): p554-55.

¹²⁵ CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

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government to fell, draw and trade timber from the unoccupied forests. He even nominated Macknochie as the head of the proposed establishment. Macknochie must have been very well connected with the Bombay government. Unfortunately, Macknochie died before he could take charge, and the establishment was created in Malabar with Captain Watson as its head, as the Conservator. With the creation of the Conservatorship, the question of ownership of forests in Malabar seemed settled, at least in the official discourses.

Conclusion

To summarise the main events, after acquiring Malabar from Tipu Sultan in 1792, the administration of the territory was entrusted to the Bombay Presidency. One of the first Commissioners, Dow, had reported that teak growing in the province was the property of the local landholders. But the later Commissioners took a different view on the subject. On the recommendation of Farmer, a Commissioner in Malabar, the Court of Directors gave a large loan to Macknochie to set up a saw mill in Malabar. Macknochie tried to establish a right for the Company over forests and derive benefits through it. In 1800, Walker demolished all claims of Macknochie and the prior Commissioners by establishing that *jenmkar* owned the teak trees in Malabar. But the Court of Directors in 1800 and 1801 set aside the findings of Walker and claimed that through Tipu Sultan the Company had acquired a right over teak trees. In 1806 a Conservatorship was established in Malabar to exercise this right.

I have illustrated in this chapter that the pronouncements in official discourses were not constrained by what the practice in Malabar was. The official discourses were autonomous in producing knowledge on the ownership of forests in Malabar. The Court of Directors refused to consider the detailed investigation of Walker by summarily dismissing it and claiming Company's rights over forests. I have also shown that Company officials produced, disseminated, understood, deployed and extended ideas on

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the ownership of forests in Malabar in a specific context with the intention of producing desired results or engaging with concrete problems in hand. Macknochie first understood and explained the arrangement in terms of 'royalty' rights. This was the best means of securing Company's claims from whom he could derive benefits. When this position did not produce results, he jettisoned the local category of 'royal privilege' and imported the European distinction between public and private. Walker deployed the 'ancient' constitution on Malabar society to claim that the *jenmkars* were the owners of forests. He deployed the theory only to the extent it was necessary to sustain his claim. If he followed this theory beyond a point, since in local conception the *rajas* had a claim of free timber for their use, he would have ended up conceding rights for the Company. The Court of Directors merely reproduced ideas propagated by Macknochie. Later, they reproduced a line from Wrede's report that did not make much sense. It went 'At any rate the presumption of their being a royalty militates for the Company as sovereign of the country'.

In this context, we can see the problem with Chakrabarty's argument that the notion of public-private was distinctly a colonial introduction in India. Colonial officials, having internalised the concept of public-private from their social context of Europe, in the context of colonial domination, its introduction was inevitable.¹²⁶ In thus arguing, Chakrabarty endows a fixity to the conceptions of public and private. I do not deny that the conception of public and private right was learnt from Europe. What I have shown is that several ideas were generally available. Company officials did not adopt an idea on the basis of its origin. An idea was selected for its suitability for substantiating a particular position. Similarly, the idea was understood, explained and unfolded to strengthen the claim of a particular position.

In the social practices in Malabar, however, the landholders and chiefs had maintained a claim over the forests. If the Company had to administer without creating political crises,

¹²⁶ Chakrabarty (1991).

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it was imperative for it to recognise the claims. Yet, the claims of landholders and chiefs did not determine the legal theory. The Company maintained a monopoly on production of legal knowledge and made this sphere independent of immediate constraints. Thus, it could be arbitrary in inventing the 'truth' of the pre-British law in Malabar. Having made the theory, the constraints were recognised not as a legal right but a 'pension' granted '*ex-gratia*'.¹²⁷ The local constraints could be described as exception and concession, and thus consigned to the periphery of the theory. The law was taken to Malabar within this political economy. On the request of the Bombay government, the Madras Presidency handed it over the forests of Kanara also in 1806. A Conservatorship was established in 1806 to exercise Company's rights over forests in Malabar and Kanara. In the next chapter, I explore how the theory of ownership propounded in the official discourses fared in the social and administrative context of Malabar and Kanara.

¹²⁷ BPP, 26/2/1805, p/343/20, IOL.

CHAPTER 2

DISCOURSE TO SOCIAL PRACTICES: IMPOSITION AND ABOLITION OF COMPANY'S RIGHTS, 1807-1823

Introduction

The Conservatorship in Malabar was based on the legal theory of 'sovereign' right over 'public' forests. But this was only a declaration in the official discourses. The categories of public and private were imposed on the insistence of the Court of Directors. Leaving it at this would be privileging or relying alone on the ideas produced by the upper layer of the administration or the official discourses. The official discourses need to be related to the social and administrative practices. In practice, the Company could not deploy these ideas into practices. This would have ruptured the social life in Malabar. Thus, there were contradictions between pronouncements and practices. In these gaps between official discourses and social practices, we should expect ambiguity, confusion, contradictions and co-existence of competing ideas.

The Court of Directors while pronouncing their theory, as we noted in the last chapter, had advised caution. Appropriate bridges were built between official discourse and social practice by making a provision for pension for the persons who claimed ownership over forests. The Conservator paid the landholders 'pension' before felling timber they 'alleged' were theirs. As a result, the existing arrangement was understood differently by different groups. The landholders understood the pension as the *kutty kanam*, their claim to a fee on each tree felled by the contractors, a well-recognised law in the Malabar society. Thus, seen from their point of view, the local law of Malabar was being respected and followed by the Company. The Madras Government understood the social arrangement within the *jenn*'s notion of property. The Bombay government and the

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Court of Directors understood that they had established their 'public' and 'sovereign' rights over forests.

These contradictions and ambivalence were productive of law. It created a possibility for the new legal ideas, pronounced in official discourses, to circulate and over a period of time engulf the practice. But this was only a possibility. As it happened in Malabar, a new and zealous Conservator disrupted the arrangement. He extended the monopoly of the Company without paying any pension. This created resentment among the local inhabitants. By 1815, the Madras government, charged with the administration of the area, became intolerant of the Conservatorship. It campaigned with the government in Calcutta and got the Conservatorship abolished in 1823. With this, all the construction of law that had taken place since 1792 was razed to the ground. But the categories of public and private were imposed in Malabar on the insistence of the Court of Directors. This became the authorised language for communication within the administration. The more the Madras government disputed the property rights over forests with the Bombay Presidency, the more it transformed the *jenm's* right into the language of public and private. Eventually, the 'sovereign' lost the forests but the categories of public and private circulated to become the conceptual categories for the state to understand the property arrangement in Malabar.

2.1. Conservatorship and Malabar Administration

Almost immediately after resuming the charge of the Conservatorship in 1806, Captain Watson proposed a regulation to arm him with authority. Madras government found this unacceptable. It had agreed to the supervision and use of government forests by the Conservator. However, it had not anticipated that the Conservator would impinge on general administration and affect the rights of the people. In Madras's opinion, such powers were to be exercised only by the Collectors and Magistrates. The Madras government expressed its reservation that the creation of the Conservatorship was not

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intended to give him 'powers which might infringe on the positive right of the inhabitants'.¹ It refused to enact a regulation vesting powers in the Conservator.² On the persistence of the Bombay government, the Madras government issued a proclamation in April 1807, declaring the Company's rights over forests. The proclamation declared,

The Honourable Court of Directors having resolved to assume the sovereignty of the forests in the province of Malabar and Canara and to place them under the superintendence and control of the Government of Bombay, the government has deemed it expedient to appoint an officer to the special charge of the forests, with the title of Conservator, whose particular duty it will be to see that no injury is done to the forests, and that no timber is cut in them without special authority of government.

All persons are accordingly hereby prohibited from cutting and destroying teak forests in the province of Malabar and Canara or from taking away the young plants on pain of being proceeded against as plunderers of public property.³

Problems with the authority of the Conservator started almost immediately. Douglas, a Company servant, complained to the Judge and Magistrate of Tellichery in September 1807, that the Conservator's establishment had detained and seized his timber.⁴ Watson argued that he could not execute his duties to prohibit illicit felling of trees from public forests 'without infringing the rights and interests of individuals'.⁵ The Judge was in 'considerable doubt' with the contentions of the Conservator.⁶ However, on the grounds that it was a temporary measure for gathering information, the Judge permitted the practice.⁷ The Conservator's establishment moved from one dispute to another. This time it was a complaint of the merchants of Malabar. The Court of Directors had

1 Minute recorded by William Thackeray, see 'Timber Monopoly and Malabar Forests', in 1822, f/4/777/21016, IOL. Hereafter Thackeray's Minute (1822).

2 Thackeray's Minute (1822).

3 MRC, 25/4/1807, p/276/13, IOL.

4 MJC, 27/10/1807, p/322/26, IOL.

5 *ibid*.

6 *ibid*.

7 *ibid*.

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summarily dismissed *jenm's* notion of property in favour of 'sovereignty' on 'public' forests. But the local people were insistent on the *jenm's* notion of property.

The complaint of the merchants was in February 1808 to the Judge of Tellichery about the timber monopoly. The merchants were aggrieved that the Conservator was appropriating the 'private' rights in timber of the landholders.⁸ The Judge tried to persuade them that 'the forests and all uninhabited waste were the prerogative of the ruling power'.⁹ But the merchants persisted and claimed, as reported by the Judge, that the landholders had

... obtained their right to the forests of Malabar precisely in the same way and hold them by the same tenure as they do every other description of landed property, and that therefore if the government annihilated the one, their property in the other becomes extremely precarious.¹⁰

It is curious that the merchants were anxious about the ownership rights of the landholders. The reason was that in Malabar timber could be extracted only if one had the means of carriage. Without this, timber had no value. Only the merchants had the capital and resources to extract and transport timber. Thus, they had interests in the ownership of the landholders. The continued ownership of landholders was essential for them to find access to the forests.

The Judge observed 'there is no doubt but that large tracts of these forests have escheated to the government'.¹¹ For the Judge, a conclusive proof was that timber supplies had been obtained at one-tenth the price without a murmur or objection from the inhabitants.¹² For the merchants, however, there was no question of any right vesting

8 MJC, 29/3/1808, p/322/31, IOL.

9 *ibid*.

10 *ibid*.

11 *ibid*.

12 *ibid*.

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in the Company. The Judge reported that they were clear that the property in forests had always vested in the *jenmkars*.

The Madras officials were also defending and working within the *jenm's* notion of property. In September 1807, Thackeray, a member of the Board of Revenue, despite the finality given by the Court of Directors to property right of the Company over forests, was emphasising the *jenmkars* as the owners. He was not only claiming the 'truth' of a past practice but also asserting it as a legitimate practice which had continued in Malabar. He stated,

Nairs who preferred to the proprietary rights in the trees and soil, have actually exercised this right by selling and mortgaging the trees to Moppilah merchants. In order to establish the monopoly on sure grounds and just principles, the Company ought to buy up the rights of individuals if there are private owners whose claims it is likely that the courts of judicature will acknowledge. Having purchased these rights, and either bought up or relinquished the trees which have been actually sold or mortgaged to the merchants, the Company will possess the sole property in the soil and in the trees.¹³

The previous year, the merchants had petitioned to Thackeray against the Conservator's monopoly. He had recommended to the government that if the rights of proprietors were bought, the merchants would have no basis for complaint.

The Madras government was concerned about the claims of the timber merchants. It sent a copy of the petition to Bombay and demanded that the Conservator's operations should be confined to 'such only of the forests as were undoubtedly public property'.¹⁴ It dragged in the authority of the Court of Directors to assert that they could not have intended to sanction the Bombay government to infringe on private rights. The Madras

13 Thackeray's Minute (1822).

14 MJC, 29/3/1808, p/322/31, IOL.

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government threatened, 'in the event any obstacle arises to the occupation of the duties confided to Watson, they would form the proper object of regulation'.¹⁵

While the Madras government was trying to prevent encroachments on the private rights of the inhabitants of Malabar, the Court of Directors was urging the Bombay government to get revenue and supplies out of forests. They directed,

...after the blood and treasure expended by us in obtaining them, fairly look for some benefits from them.¹⁶

The Bombay government pledged its obedience to the Court of Directors by claiming that they had established the sovereignty of the Company on the forests of Kanara and Malabar.¹⁷

The occasion for the Madras government to insist on a regulation soon arose. A person complained to Judge Ibberton on June 27, 1814, that a log of teak purchased from Cochin, having paid duty before, was detained for second duty. The party contended that the seizure was illegal. The Conservator's contention was that the produce of Cochin and Travancore was not exempt from taxation. The Judge demanded from Fell, the next Conservator, the document which authorised him to levy an impost upon timber, imported by sea from countries not within the Company's jurisdiction and totally unconnected with government forests in Malabar. Fell had none. He merely alleged that any wood which was floated on river whether from interior or foreign country had to pay duty.¹⁸

The Government of Madras wrote to Bombay government that the rights and duties of the Conservator were not recognised or supported by any of the regulations of the

15 *ibid* .

16 CD to GinC, 13/11/1811, f/4/429/10507, IOL.

17 GinC CD (Public), 21/12/1811, f/4/348/8156, IOL.

18 MJC, 26/7/1814, p/323/9, IOL.

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Madras government. As a result, many of his routine activities were illegal. Further, since the Conservator's establishment was not recognised by law, he could not appear before a court in his official capacity. Madras noted to the Bombay government that the incidence of interference with private rights had become frequent and intolerable. Madras government felt that the time had come to regulate the functions of the Conservator, and it suggested that the Bombay government should prepare a draft regulation and submit it for review. The Madras government considered it important to remind the Bombay government,

It may be unnecessary to add that the regulation will require to be framed with due regard to the interests and rights of individuals and of the community at large...¹⁹

While the Bombay government was still preparing a draft, the want of a regulation surfaced again. A merchant had filed a suit against the Conservator claiming money. But the Courts did not have an authority to summon the Conservator.

The first Conservator, Watson, had maintained a balance among the competing interests. The nature of right over forests was constituted differently in different discourses. The Court of Directors had ordered in the notion of public and private. Bombay government thought it had established its 'sovereignty' over forests. Madras and the local people continued to look at the forest rights in terms of the *jennm*'s notion of property.

The burden of the entire theory, however, was on the Conservators. They had to show results. To them it did not matter which theory was used as long as timber was extracted. 'Pension' served the bridge between theory and social context. The Court of Directors had suggested a small 'pension' for the chieftains. Captain Watson in 1807, instead of giving a pension to the claimants to forest property, proposed payment on the basis of per tree felled by the Conservator's establishment. He argued that this was more

¹⁹ *ibid*.

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economical and also, acceptable to the local people. Effectively, Watson was proposing the continuation of *kutty kanam*.²⁰ While for the Madras government it was the purchase of a right. Local people could see the pension as price for their '*jenm*' right. Thus, the official pronouncement of the law of 'public' ownership of forests by the Court of Directors had to confront other discourses and practices in Malabar. In this negotiation, the social practices in Malabar could not be transformed abruptly. Watson had successfully managed a balance by buying up the rights of the proprietors.²¹ However, things had changed after Fell took charge in 1809.²² He had extended the monopoly even to teak growing on private estates. Further, as the Judge noted,

... it is evident to me that irregularity and frauds of various kinds are very likely to occur in the forest Department and that the merchants employed in the trade must be subjected to occasional vexation and possible extortion, which they would be diffident of complaining of.²³

2.2. Madras Officials and Bombay's Draft Regulation

On May 12, 1815, the Madras government received a draft regulation from Bombay. It forwarded the draft to local officers in Malabar and Kanara for their comments. Apart from levying a duty on all timber, the draft asserted Company's sovereignty over forests. The provision of the draft over the question of ownership came in for severe criticism.

Pearson, the Judge and Magistrate of South Malabar, commented on the total silence on the extent of public and private forests in Bombay's draft regulation. Citing a letter from Bombay in 1806, He claimed that the timber in the inhabited part of the country was the property of the landholders, and jungles forming the eastern boundaries of the province were undoubtedly the right of the Company. According to him, Watson had respected

20 Bombay Public Consultations, 21/8/1807, p/343/48, IOL.

21 Pearson, Judge and Magistrate, South Malabar to GOM, 26/4/1815, MJC, 23/6/1815, p/323/17, IOL.

22 *ibid* .

23 *ibid* .

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this distinction but Fell took an extended view of the Company's rights. Under Fell's Conservatorship, all teak, whether on forests, mid-land district or gardens near the coast were all considered the property of the government and no tree could be felled without his permission.

Pearson suggested that the distinction between public forests and private property should be based on *jamabundy* (statement of revenue chargeable on an estate) and *piyamashee* (revenue on the basis of measurement of land) accounts.²⁴ The assessed lands were to be private property and unassessed lands were to be public.²⁵

Thackeray disagreed most vehemently with Pearson's suggestion. He contended,

The distinction does not depend upon what is assessed or not assessed, but upon what really is, or is not, private property and any other distinction is unjust...²⁶

In these claims, the Madras officials at times were presenting the *jennm's* notion of property and other times converting the *jennm's* claim in the language of public-private. Thus, commenting on the draft regulation in 1815, Warden, the Collector of Malabar, was at once undermining the notion of public-private and upholding *jennm's* notion of property. He pointed out that the proprietary right of the Company was assumed under orders from England. He implied that the theory imposed by the Court of Directors had no basis in the social and historical context of Malabar. As if to substantiate the point, he expressed satisfaction that in practice, the local notion of property in forests had prevailed,

... the manner of the assumption, as carried into effect by the first Conservator Watson, gave general satisfaction to the Rajas, chieftains and others who as proprietors had therefore received the profits arising

²⁴ MJC, 4/8/1815, p/323/18, IOL.

²⁵ *ibid*.

²⁶ Thackeray's Minute (1822).

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from the products of the forests. Their rights as proprietors were so far recognised and attended to, as to subject the government or the contractors employed in felling timber to pay them the customary fee called 'kuty kanum' on every teak that was cut down.²⁷

'Public-private' had started its career as an imagination of the Court of Directors. In fact, it was an imagination of others borrowed by the Court of Directors. But a communication between Bombay and Madras over the powers of the Conservator and forest rights was possible only in the language of 'sovereign' and 'public-private'. The Court of Directors had legitimated these terms. As Warden put it, 'the proprietary to the forests having already been assumed by the government, that is a question which can admit of no discussion'. However, he was translating the substantive *jenm* rights in the language of public-private. He thus objected that in the proposed regulation the section 'declaratory of the sovereignty of the Company over property of the forest and royalty' denied the *kutty kanam* rights prevalent in Malabar.²⁸

Warden was of the opinion that the public forests were those on the base of the *ghats*, uninhabited where trees grew spontaneously or without human aid. He emphasised that the Court of Directors could not have intended to exceed this limitation. For Warden, the Collector's revenue records could not be the basis for deciding uninhabited and inhabited parts. He recommended a joint commission of judicial, forest and revenue officers to ascertain the private and public rights.²⁹

If the government of Bombay had concluded the property right of the Company because the local people could not prove their rights, Harris, the Collector of Kanara, inverted the onus of proof. Since no document declaring the royalties could be found, he concluded that the inhabitants had the right to the forests. According to him, immemorial usage had

27 Warden to Board of Revenue, 24/8/1815, MBOR, 4/9/1815, p/291/51, IOL.

28 *ibid.*

29 *ibid.*

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guaranteed to the farmers the rights in forests.³⁰ Commenting on the draft regulation, he asserted for a prescriptive right of the inhabitants of the hills contiguous to estates. According to him, these rights were in vogue since the Bednore government in 1660 AD. The forests of Sonda and Soopah had been considered government's property but village communities had their common right of cutting, grazing, gathering leaves and manure within certain distance around each village. Further, if a rigid view of property in forests was to be taken 'the more beneficial extension of agriculture will never take place'. And arguing on the grounds of equity, 'But it would in a great measure interfere with the actual welfare of the most abject race of our subject, equally as deserving our protection'.³¹

2.3. Abolition of Monopoly

The Madras government sent their comments to the Bombay government in 1815. The Bombay government did nothing for six years. In 1821, they returned a revised draft. The new preamble declared that following the 'conquest of Tipu Sultan's right', the Company had acquired 'sovereign rights' on forests and the government had 'to assert and maintain the said just and unquestionable rights'. The Court of Directors had approved of Warden's recommendation to ascertain the claims of public and private through a survey and directed its incorporation in the draft regulation. But the Bombay government had omitted this. Instead, it adopted Pearson's distinction of assessed and unassessed lands.³²

Madras government did not take kindly to the unwarranted delay and tactics of the Bombay government. Thackeray, the earlier Collector of Malabar and then a Member of the Madras Board of Revenue, wrote a minute making a case for abolition of the

30 Harris to Board of Revenue, 13/9/1820, MBOR, 25/9/1820, p/293/64, IOL.

31 *ibid*.

32 Copy of the Draft Regulation, f/4/777/21016, IOL.

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Conservatorship itself. Thackeray, as we have seen before, had dismissed Pearson's views as erroneous. He accused Bombay government of deliberately following Pearson's suggestions. He commented that this was to,

... continue to the Conservator these indefinite powers of interference with private property, of which it is so desirable to deprive him.³³

Complaints against the Conservatorship had accumulated over the years. Thackeray consolidated these and made a scathing attack. He described the Conservatorship as 'an arbitrary and unjust system' which overlooked the rights and interests of men the Madras government was bound to protect.³⁴ Thackeray alleged that in the ambiguity of the extent of public and private forests, the Conservator was continuously encroaching on the rights of *rajas* and *ryots* to strengthen his monopoly. He argued that the Court of Directors never intended to give the Conservator,

...arbitrary powers to confiscate private property and levy duty on timber as he pleased without regard to custom, justice, or even law, for all his acts beyond these have been illegal.³⁵

Describing the monopoly as a major grievance, Thackeray alleged,

... the only beneficiary are the shipping interests in Bombay and individuals whom it gives appointments... Bombay should not be raised at the expense of Malabar, of justice and general policy... Why should the Conservator impoverish and disgust their subjects in Malabar, to supply the merchants of those provinces... The Collectors of Canara and Malabar have much more means of information and influence than the insulated Conservator. They will have much more encouragement to preserve and plant trees than double foreign management.³⁶

33 Thackeray's Minute (1822).

34 Thackeray's Minute (1822).

35 Thackeray's Minute (1822).

36 Thackeray's Minute (1822).

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The Madras government's antagonism to the Conservatorship could be explained as rivalry within the administration. Timber trade was exempted from payment of duty, reducing the revenue of the Madras presidency.³⁷ The Conservator had sold timber from Sonda, above the *ghats* in Kanara, to the neighbouring Maratha peasants. The Madras Presidency had vigorously asserted that this was not timber export but inland trade. The earnings should have been considered as land revenue and accrued to the Madras Presidency.³⁸ Shipbuilding had moved out of Malabar affecting the prosperity of Malabar.³⁹ The Conservatorship had created other impediments. Madras was keen to maintain good relations with the neighbouring states of Cochin and Travancore. But the Conservator had created ill feeling by insisting on the payment of duty on timber passing through Company territory in Malabar.⁴⁰

The Madras Presidency need not have opposed the legality of ownership of forests in order to retrieve forest management from the Bombay Presidency. After all, if it got back the control of territory, it would have already surrendered its right on forests to the local people. There was a lot more than simple administrative rivalry. Since 1800, there was intense tussle within the Company administration in India and England to reverse the Permanent Land Settlement by the *ryotwari* Settlement. Thomas Munro was the champion of the *ryotwari* system and had supporters in the administration in Madras and also in the Court of Directors and Board of Control in England.⁴¹ His appointment as Governor in Madras was a sign of a changing mood in the administration in England. Within the *ryotwari* system, the cultivator was constructed as the bearer of legal rights on land. The land and land revenue was to be settled with him. Defending the *ryotwari* Settlement was defending the rights of the *ryots*. How were the contradictory notions of

37 Thackeray's Minute (1822).

38 Thackeray's Minute (1822).

39 Thackeray's Minute (1822).

40 A minute by Thomas Munro 'Timber Monopoly in Madras and Canara', 26/11/1822, printed in ed. Arbuthnot (1886), hereafter Munro's Minute (1822): p181.

41 Stein (1989).

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property in forests in Malabar and privileging of *ryots* managed in the official discourses?

Thomas Munro, on becoming the Governor of Madras Presidency, took up the Conservatorship issue aggressively to bring the monopoly to an end. As we noted in Chapter 1, the Court of Directors had merely uttered 'sovereign' rights over forests, borrowing it from Wrede's memoirs, without bothering about its meaning and import. The Bombay government had parroted this claim. Munro asked,

...when the Conservator assumed sovereignty of the forests, that term should have been clearly defined, if it meant proprietary right, the assumption should have extended only to forests belonging to the government, and their limits should have been accurately ascertained, if it meant the right of presumption, the sovereignty should have been exercised only with respect to the trees required for national purposes, and provisions should have been made for affording ample indemnification to those over whom it is exercised.⁴²

On the question of indemnification for rights on forests, Munro resumed the position of Warden and Thackeray about the local arrangements which had prevailed in Malabar before and after Tipu's rule. Munro noted,

Under the Native Princes and under our own government, before the appointment of the Conservator, the trade and timber was perfectly free, subject to a duty of exportation. Every ryot planted or cut down at pleasure on his own property. Part of his property consisted of hills, some near, others remote, from his habitation. On these hills he occasionally cleared away spots in succession for cultivation, by selling or burning the trees without any interference whatever, because they were his property as much as his rice fields, and were included in the deeds of the sale of his estate.⁴³

42 Munro to GinC, Bombay, 2/12/1822, f/4/777/21016, IOL.

43 Munro's minute (1822): p184.

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Munro cautioned that the use of timber for domestic and agricultural purposes should not have been obstructed.⁴⁴ According to him, ‘immemorial usage’ constituted a private property and, he asserted, ‘it could not be taken from him without a violation of private property and administration both of his income and of the revenue’.⁴⁵

Thus, the established legality of public-private was again being questioned by bringing in the local system and practices. Public-private was instituted by the Court of Directors and could not be wished away. But Munro was being subversive in restoring local proprietors. He said,

In order to protect the property of the public and of individuals in the forests, their limit must first be ascertained, and this can only be done by a survey.⁴⁶

According to Munro, however, a fair survey could be done as long as the Conservatorship existed. Munro hoped,

By abolishing the monopoly, private rights will at once be secured by each man looking, as formerly, after his own... and the inhabitants will easily adjust their respective rights when they are freed from the intervening authority of the Conservator.

In negotiating the property rights on forests, there was another play. Thackeray and Munro, in constructing the local practices, replaced *ryot* for proprietor and *jenm*. *Ryot* emerged triumphant as a bearer of private rights on forests. *Ryotwari* system privileged the rights of *ryots* and paternalistic governance of the Collector. Munro noted,

Let the public be guarded by its ancient protector; not a stranger, but the Collector and Magistrate of the country, and we shall get all the wood the country can yield, more certainly than all the restrictive measures.⁴⁷

44 Munro to GinC, 2/12/1822, f/4/777/21016, IOL.

45 Munro's minute (1822): p184.

46 Munro's minute (1822): p183-4.

The Madras government finally won. The Conservatorship was abolished in 1823. After the abolition of the monopoly, in Malabar the forests were constituted as private property of the landholders. In the final section of this chapter, I explore how the property law on forests further unfolded in Malabar.

2.4. Malabar: Construction of Private Ownership

The government in Bombay had anticipated the outcome of the outrage of the Madras officials. At this late stage, there was no point in opposing the abolition of Conservatorship. The best was to accept it graciously. The Bombay government itself argued that the abolition of the Conservatorship would not have adverse effects. It brought to notice that shipbuilding for the Navy at Bombay was in any case being terminated. It further reasoned that the abolition of monopoly would make available timber at cheaper prices.⁴⁸ The amicable pronouncements, however, were only at the level of the governments in Bombay and Madras. Just the opposite was happening in Malabar. The Conservator's establishment ran away to Bombay with all the records. They did not even communicate with the Principal collectors in Malabar and Kanara about the existing arrangements.⁴⁹ Madras Presidency had to plead to be returned back at least the files on property rights on forests.⁵⁰

After the abolition of the monopoly, even after a lapse of 20 years, the persons, 'who had held possession of them on the first occupation of the province by the Company's government' resumed the right over forests.⁵¹ From a ruler, one never takes, it is always given away. The Madras government abandoned forests 'to the neighbouring rajas and

47 Munro's minute (1822): p186.

48 GOB to GOM, 24/4/1823, MRC, 16/5/1823, f/4/777/21016, IOL.

49 MRC, 17/10/1823, f/4/777/21016, IOL.

50 *ibid*.

51 Falconer (1852): p179.

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landholders'.⁵² The timber merchants got what they had struggled for. The exploitation of the forests started on the initiative of the timber agencies which had ceased to exist after the establishment of the Conservatorship.

Soon, the Marine Department at Bombay complained of shortage of quality timber at reasonable price. In 1830, the Bombay government requested the Indian Navy Board, the concerned body of timber users, to submit a report on the Malabar forests with the view to continued timber supplies. In 1831, the Navy Board complained that with the abolition of the Conservatorship, the accessible forests near the river banks had completely disappeared and inferior timber was being felled. The supply of quality timber meant higher extraction costs in drawing timber farther from the rivers. The Marine Board reasoned that this required elephants and labour which most contractors could not afford. The Marine Board, thus, looked back to the happy days of the Conservatorship by strongly advising its reconstitution.⁵³

The request was communicated for a decision to the Madras Board of Revenue. Having successfully wrested control of forest and forest trade from Bombay, Madras had passed the onus to Bombay for any reform. The Board remained silent for seven years. On prodding, it promised to make enquiries. It also forwarded a report by Clemenston, the Collector of Malabar, on the proposal to re-introduce the Conservatorship. The report had been submitted to the Board on April 3, 1834. On the abolition of the Conservatorship, Clemenston said that this,

... was obviously to afford protection to the inhabitants of Malabar against any encroachment on their private property. That the monopoly which prevailed until 1823 was an encroachment upon private rights and property, has been established beyond doubt... I confess I am at a loss how any infringement can be laid without infringing upon private rights, for with the exception of certain forests in the talooks of Palghaut,

52 Falconer (1852): p179.

53 MBOR, 28/4/1831, p/298/9, IOL.

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Temalpooram and Wynaad which belongs to the Government, all rest are private property.⁵⁴

To ward off the encroachment of Bombay, Clemenston asserted that there were strong private rights on forests in Malabar. The proposed Conservatorship could then be pitted against this firmly established private right. In this contest, the Conservatorship would inevitably infringe private rights. Clemenston further anticipated that the proposed Conservator's establishment would have imposed restrictions on the felling of young teak trees. He wanted to crush this option even before it could be suggested. Sheffield, a Collector before Clemenston, in a letter to Board, dated December 25, 1828 had proposed prohibition of young teak trees under a heavy penalty. Clemenston rebuked that the imposition would infringe private ownership and that this point had escaped the attention of the earlier Collectors. Clemenston asserted,

I cannot concur as it will be an illegal interference with private rights, which would be not only inconsistent with the liberal views of Government, but one which would, I fear excite the greatest discontent; all that can be done to discourage in some degree a practice which is likely to be injurious to our maritime interests, is impose duty.⁵⁵

The prevailing view of private property on which Clemenston relied was that it was absolute and unfettered and could not be regulated and modified. According to Clemenston, even in a 'public' cause, restrictions on felling would have been a direct interference with private property and rights. A duty, however, was acceptable. This would have only indirectly discouraged felling of under-sized timber. There were further reasons for insisting on a duty. A duty was a revenue to the account of the Malabar administration headed by the Collector, and a restriction, an arduous obligation.

The Marine Board and the Bombay Presidency continued to mount pressure. They were sending independent commissions and agents to Malabar to assess the availability of

⁵⁴ MBOR, 17/4/1834, p/299/35, IOL.

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timber during the late 1830s. Underwood, the Collector of Malabar in 1839, realised the urgency of addressing the availability of quality timber. He lamented that the unoccupied land on which the Conservatorship had effectively created government ownership had again fallen into private hands.

Clemenston had produced the 'law' to suit his requirements. Underwood had to surmount this precedent. He recollected that the proclamation of 1807 had constituted the Company's right over public forests. The argument ran that those rights had not been relinquished by any subsequent proclamation or by the measures of the Conservator.⁵⁶ Underwood argued that the decision to abolish the Conservatorship was only an administrative arrangement, and was not intended to give away the Company's rights over forests. In support, Underwood relied on a letter from the Secretary to the Government of Madras to the Madras Board of Revenue, issued after the abolition of the Conservatorship. The government had ordered, next to permitting people to use the resources,

... to secure the valuable property in the public forests from fraudulent and wanton injury... The principal collectors should actually inquire and examine the extent of public forests, the precise nature of the right of property in them...⁵⁷

Underwood lamented that the Board did not take prompt action by making definite arrangements. They had merely awaited reports from the local officers regarding 'tenures of forests in Malabar and Canara, the extent of the tracts they occupy and the nature of their produce'.⁵⁸ Following the legal position, Underwood argued that the government never intended to abandon its rights to the forests. He asserted that the government possessed a 'much stronger claim upon the forests than they assume'.⁵⁹

55 *ibid* .

56 MBOR, 10/10/1839, p/302/10, IOL. Hereafter Underwood's Report.

57 GOM to the Madras Board of Revenue, 17/10/1823, MRC, 17/10/1823, f/4/777/21016, IOL.

58 Underwood's Report.

59 Underwood's Report.

Underwood drew a parallel with the neighbouring states of Cochin and Travancore. He pointed out that the *rajahs* of these states, taking a hint from Tipu, 'seized the forests which they appear never to have relinquished, and if their right be one of assumption, and yet be recognised as a legal tenure'.⁶⁰ Underwood was of the opinion that the government could 'with equity and propriety' assert their claims to the royalty in the limited sense of imposing restrictions.⁶¹ Through this reasoning, Underwood was attempting to loosen the unfettered rights of the individuals and make claims for the Company to impose restrictions. Underwood recommended that the Company could revive its right by issuing a proclamation.⁶²

The Board of Revenue questioned Underwood's recommendations. It doubted if the royalty after having been abandoned for a considerable period could be legally revived through a proclamation. The Board advised a reference to the legal authorities. It further circumscribed, even if a proclamation were issued. The Board was of the conviction that the term 'royalty' should be carefully defined to mean merely the right to prevent the indiscriminate felling of timber and not to include any right for the government. The Board, thus, conceded the possibility of prohibiting the felling of small and undersized timber. However, they were categorical that administration should be left in the hands of the revenue officers and no independent authority should be set up.⁶³

The Court of Directors were convinced that the Government had 'no pretension' to the proprietorship of the forests.⁶⁴ They rephrased Underwood to conclude,

...that in the time of the ancient rajahs the forests were held as private property. They were indeed seized by Tipoo Sahib after his conquest of

60 Underwood's Report.

61 Underwood's Report.

62 Underwood's Report.

63 MBOR, 7/11/1839, p/302/13, IOL.

64 CD to GOI, 30/11/1842, e/4/772, IOL.

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the country, and after its cession to the Company they were taken possession of on behalf of the latter...⁶⁵

The Court of Directors, however, conceded that having abandoned the forests to the original proprietors for many years,

it would be no less unjust than impolitic to revive a claim to them which seems never to have had any other foundation than Tippoo's usurpation.⁶⁶

Compare this formulation with that in 1800 where, despite counter-evidences, the Court had insisted on 'Tipu's right'. It now became 'Tipu's usurpation'. The Court of Directors was gratified to find that there was no intention of acting on the suggestion of Underwood to re-assert the right of the government.

Thus, the official discourses on forests were not independent of social practices in Malabar. Indeed, the official discourses picked up the strategies from the micro-site, elevated it to the status of legality and legitimated it as a practice. The Court of Directors followed the earlier recommendation of only imposing a duty.

Conclusion

The Conservator's establishment since its beginning in 1806 in Malabar and Kanara got into problems with the Madras administration. The Conservator felt justified in intervening and imposing on the local people to guard forests and levy duty. This was unacceptable to the Madras government. The Madras government considered dealing with the local people its exclusive concern. The relationship deteriorated further with a new Conservator who disrupted the delicate balance by extending the Company's monopoly and extracting timber without paying 'pension' to the local people. By 1815,

⁶⁵ *ibid* .

⁶⁶ *ibid* .

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the Madras Presidency became insistent on the abolition of the Conservatorship and regaining control of the Malabar and Kanara forests. The Bombay Presidency tried to retain the control but was unsuccessful. The Conservatorship was abolished in 1823. The Madras government left the forests for the original proprietors to take control.

In this chapter I have shown that the pronouncements of the upper layers of the administration (the texts) on forest law, should not be privileged as representative of the entire field of social life. These need to be seen in conjunction with what they represent--the social practices. The Court of Directors could pronounce the 'sovereign' right over 'public' forests in Malabar. But it could not arbitrarily dispossess the local proprietors of their forests. 'Pension' for the 'alleged' proprietors was the link between the official discourse and social practice. The local people constructed the pension as a continuation of their *kutty kanam* rights while the Bombay government and the Court of Directors claimed that the Conservatorship had established the 'sovereign right over 'public' forests.

These gaps, confusion, ambivalence between discourse and practice and the co-existence of contradictory constructions are not a matter for regret. These were productive of law. Law got into motion because of these contradictions and ambiguities. Further, the linkages between official discourses and practices were not static. The conflicting interpretations tended to extend their domains. We see two illustrations of this process. Firstly, social practices subverted the extension of official discourses. The Company could not establish its rights over forests. Secondly, official discourses extended over practices to establish the categories of public and private for understanding the property rights. I will summarise below how these processes worked.

The Madras government contested with the Bombay Presidency over the continuation of the Conservatorship. The communication could take place only in the language of sovereign and 'public-private'. It was the only authorised category for understanding and

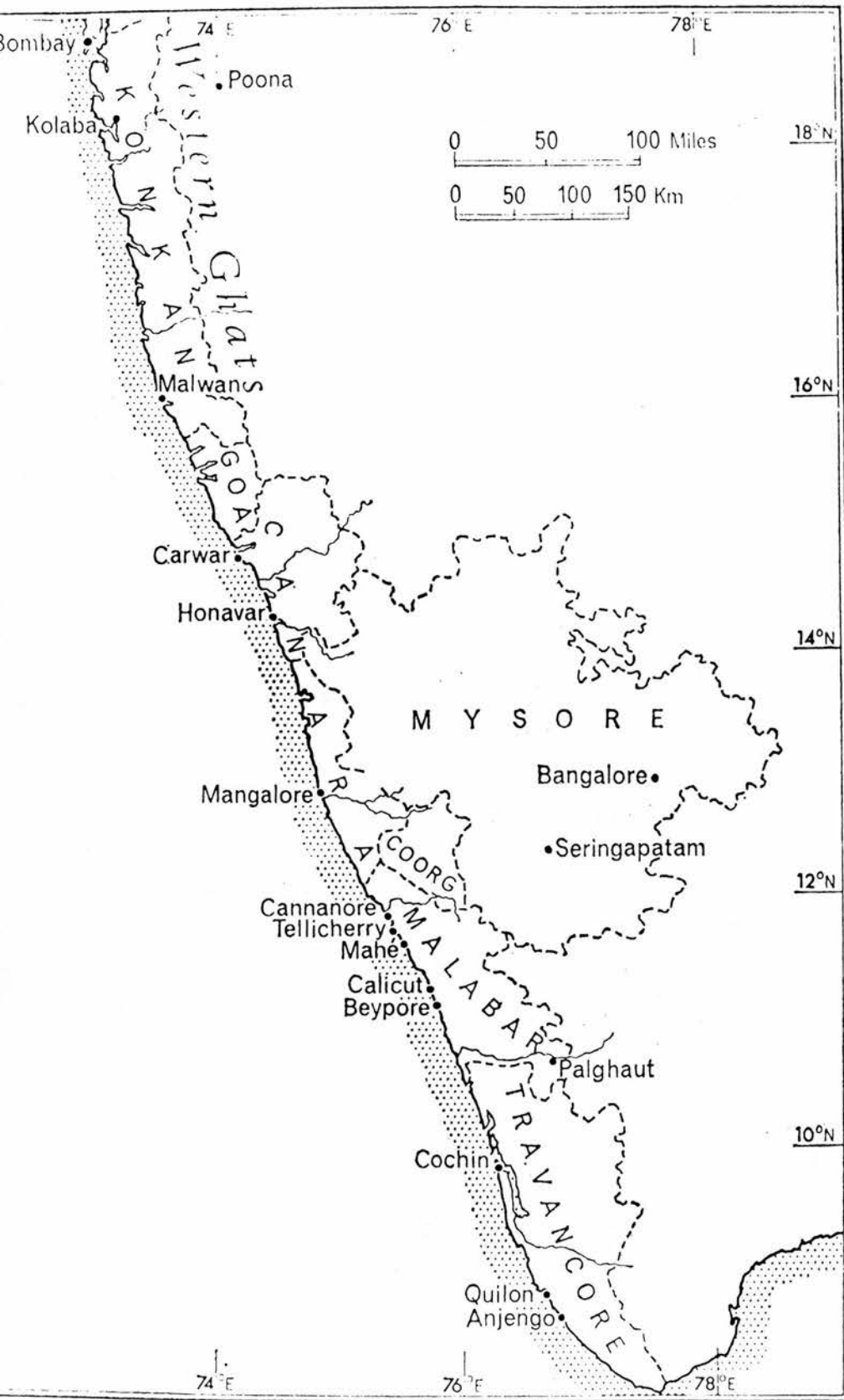
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discussing property rights in Malabar. By 1840, the negotiations had changed the way property rights on forests were understood within the state. The conception of *jenm* property had slowly faded away. From being a conceptual-functional category for understanding property relations, it became a vague diffused statement of past practices. In the earlier accounts, the concept of *jenm* was located in history and social and political relations in Malabar. Property owning classes, *rajas* and chieftains and *jenms*, were well defined and discernible. In the discourses of 1807-40, time became subsumed under the indistinguishable category of 'past', and social location became loose like 'native', 'inhabitants' and proprietors.

Alongside, the notion of sovereign and public-private gained ascendancy. In discerning the 'sovereign' domain of the company, the extent of forests in Malabar was discussed, debated, contested, asserted and revised in the categories of public and private. The more the governments communicated with and negotiated each other, the more the notion of public-private became a reality and the notion of *jenm* receded. Ownership rights could then be thought of, imagined, talked about, explained and judged in the category of public and private. Through these processes, the concept became a habit, a reflex, and an inner voice. Thus, the notion of 'public-private' won but the 'sovereign' lost the forests.

Thus, in Malabar, where the Company had constructed its claim over forests and even effected it, the Company completely reversed its position and constituted forests as private property. In Kanara district, just the opposite happened. Since the inception of the Company rule in 1800, it was maintained that that forests were private property of the landholders. By 1860, the Company reversed the law and claimed rights for itself over forests. I explore how this came about in the next chapter.

MAP 3



CHAPTER 3

TURNING OWNERS INTO ENCROACHERS: OFFICIAL DISCOURSES ON KANARA FORESTS, 1800-1860

Introduction

I have so far explored how official discourses and social and administrative practices worked in conjunction. The declarations in official discourses on the ownership of forests were received and evaluated in social practices in Malabar and Kanara. This process was dynamic. Official discourses do not conclusively declare the law. The official discourses are continually at work, assessing, evaluating, supervising and reformulating the law and legal ideas. Officials revise and reformulate the ideas which others had pronounced earlier. I have argued that the production of ideas in the official discourses was to produce certain effects. The revisions and reformulation are to bring about new results. In this chapter, I move to the next level of complexity of working of official discourses, and explore how official discourses revised and reformulated their pronouncements in the light of the practices. These ideas were selectively deployed, unfolded and produced to secure certain desired results.

With the fall of Tipu Sultan at Seringapatnam, in May 1799, Kanara was ceded to the East India Company. Captain Thomas Munro, who later became the Governor of the Madras Presidency, was appointed Collector to administer the province. Munro 'discovered' that in Kanara all lands, including wastes and forests, belonged to the landholders. The recognition of the private ownership of all lands became the foundation for the Company administration. The arrangement served well in the early years. But by 1840, its disadvantages for the Company administration became apparent and pressing.

Between 1800 and 1840, the landholders had extended cultivation significantly. Also, the earlier inaccessible forests, due to increased communication and demands for timber from Bombay, became valuable merchandise. But within the existing legal arrangement, the Company could neither demand additional revenue nor benefit from timber trade. The Company administration struggled during 1840 to 1860 to invent a more favourable theory of property arrangement. Blane, the Collector of Kanara in the late 1840s, formulated a new theory of the ownership of wastes and forests. This entirely reversed the theory laid down by Munro. In the new theory, forests and wastes were constructed as the property of the state. In the following ten years, the position was taken further. Finally in 1860, the Madras government adopted Blane's theory and claimed rights of the Company over the forests. The earlier position was described as a 'mistake'.

3.1. Munro's Construction

On resuming the Collectorship of Kanara in 1800, Munro found the petty chieftains, the *poligars*, creating a state of anarchy in Kanara. Agricultural lands were abandoned and one-third of the population had fled the area. Munro's task as Collector was to identify the persons who were to pay revenue and fix the assessment. Munro investigated the relations that had subsisted between the landholders and successive governments from the earlier times. Relying on this 'ancient' system, Munro established a basis for the ownership of agricultural lands, wastes and forests. This was crucial for determining the quantum of assessment and the person who was to pay it. Munro reported his findings to the Madras Board of Revenue in two Minutes dated May 31, 1800 and 19 November, 1800. The two Minutes became the foundation of the land revenue administration in the district for years to come.¹

¹ The minutes were titled 'The Condition and Assessment of Canara', printed in Arbuthnot ed. (1886). Hereafter, Munro's Minute (May 31, 1800) and Munro's Minute (November 16, 1800).

3.1.1 'Ancient' Land Revenue System

According to Munro, the *Nairs* were the original landlords or *mulvargadars*. *Varg* was an estate or a holding. The holders of estates were known as *vargadars*. *Mulvarg* meant original proprietary right in land and *mulvargadar* the proprietor of an ancestral hereditary estate. Under the proprietors, there were two classes of tenants, the *mul-gainis* (permanent tenants) and *chali-gainis* (temporary tenants). Lands originally waste or which had devolved upon the state by escheat or abandonment, when let to a tenant by the state, was called *gaini-varg*.

Munro claimed that *kurnums* and *shanboghs* (accountants) had preserved the accounts in black books to furnish a complete abstract of the land rent during a preceding period of more than 400 years. Munro reported that Kanara had an ancient land revenue system, in which, one-sixth of the crop was the share exacted by the government. The system continued till 1336, when the area came under the Vijaynagar dynasty. The account books gave the proportion in which the resources were to be shared between the sovereign, landlord and cultivator. The ratio of seed and crop was assumed to be 1:12. Half the produce was to be retained by the cultivator towards the cost of agricultural operations and as the share of the cultivator. One-fourth was to accrue to the proprietor. The balance one-fourth accrued to the sovereign, *brahmins* and others. This was known as the settlement of Harihar Rai. The settlement was not based on an actual assessment of the crop, but from a rough estimate of the quantity of seed reported to have been usually sown in each field. This was called the *bjavari* mode of computation.

This system continued in operation till 1618 when an additional assessment of 50% was imposed by one of the Bednaur princes. In 1660, a tax was imposed on coconuts and other fruit trees. The Vijanagar assessment (with the 50% addition just mentioned) was considered the standard rent or *rekah* of all lands cultivated or waste. Until the end of Bednaur rule, till 1763, cess was frequently imposed, being fixed at a percentage of

standard assessment. According to the above calculation, government's share amounted to one-third of gross produce but it was taken on a rough estimate of seed sown. According to Munro, the state's demand was considered light, people were happy, prosperous and there were no overdue on land revenue.

Against the name of each *ryot*, a standard *rekah* was written; this was the Vijaynagar assessment. Deductions were made for waste and over assessed land. The details of these remissions are important as these pertain to forests and waste. The wastes in the *varg* of the proprietors included the following. *Kulnasht* meant agricultural lands abandoned or deserted by the proprietary cultivator. *Rekahnasht* meant land fit for cultivation but it was primeval or immemorial waste. In respect of *kulnasht* and *rekahnasht*, a remission was made by the Vijaynagar government from *rekah* in ascertaining the *shist*. *Shist* was the revenue charge of the state on the *ryot*. The term *nasht* was applied to lands flooded by rivers, or land never cultivated since the time of Vijaynagar government. These lands, from their location amongst hills and jungles, were deemed unlikely to ever be cultivated again, and were withdrawn from the sum of the general assessment of the country. From this, the temporary remission was deducted to give *shist* of the holder of the *varg*. By totalling *vargs*, the *shist* of a village was calculated.

According to Munro, the *shist* was considered the only legitimate demand of the state. The extra assessment was listed separately and known by oppressive names like *chauth*, impost and fines. These were always opposed by the inhabitants. These were not fixed on land but on the capacity of the cultivator to pay, and were highly fluctuating.

In 1763, Haider's government took possession of Kanara and ordered an investigation of sources of revenue in order to augment it. Haider's government made numerous increases but could not collect them. Haider tried to extract as much as possible without diminishing cultivation, and Tipu Sultan marked an even heavier assessment. When revenue fell into arrears, according to Munro,

He knew no way of making up the failures, but by compelling one part of the ryots to pay for the deficiencies of the others; he made them pay not only for those which arose from upon the cultivation of the current year, but also for those which arose from the waste lands of dead and deserted ryots, which were annually increasing.²

Generally, the people could not pay either the rent of their own or of the defaulters' lands. Not more than half of the nominal demand could be collected. The exaction led to the flight of the population and abandonment of land. The result of this system, according to Munro, was that the population diminished by one-third. The ancient proprietors were extinguished and land abandoned.

3.1.2 Construction of Ownership of Land

According to Munro, land was clearly private property in ancient Kanara. He highlighted the extent, as well as the firm and secured basis of the private ownership of *mulvargadars*. He noted,

The alienation of land, by sale or otherwise, was unrestrained. Nothing but gift, or sale, or non-payment of rent could take it from the owner. If he absconded with balances standing against him, it was transferred to another person; but if he or his heir returned at ever so distant a period, it was restored, on either of them paying a reasonable compensation for balance, and such extra expenses as might have been incurred on account of improvements.³

Munro found the 'ancient' revenue system so ingrained that even the disruption by the Mysorean rule could not alter it. Munro emphasised,

The lands of Canara are still to be considered as held under the same conditions, and governed by the same rules of transfer, as they were

² Munro's Minute (May 31, 1800): p65.

³ *ibid*: p66.

under the ancient government. The increase of assessment by Hyder and Tippoo Sultan has, in some places, annihilated the old proprietors; and it has everywhere diminished the quantity, but not altered the nature of the property.⁴

Munro's reference to property in 'land', included not only agricultural lands but all lands, cultivated and uncultivated, within the *varg* of a *mulvargadar*. The ownership of *vargadars* excluded the ownership of the state over land. Munro was categorical,

The only land in Canara that can in any way come under the description of sircar lands is unclaimed waste, to a great deal of which it is very likely claimants would appear, were it once brought under cultivation. There are also some uncultivated lands, particularly in the Northern districts, which may be reckoned public. There are lands which were originally unproductive, and which, from the death or absence of the owners, would have been allowed to run waste... But exclusive of this land, cultivated by compulsion, and unclaimed waste, all other is private property.⁵

Munro was constructing the *mulvargadar* as the owner of all lands, that is, cultivated lands and the *kulnasht* and *rekahnasht* included within his *varg*. Furthermore, the *vargs* was extensive. The government land was to be constituted by the principle of exclusion and residual rights. Only the lands that no *vargadar* claimed were to be government land. Even in this, Munro's view was that at some time in the past, everything belonged to *vargadars*. From this state, the government acquired the estates when abandoned by the *vargadars*. Munro further declared the absence of government lands by asserting that 'all public documents convincingly testify that sircar land was altogether unknown'⁶ and substantiated the private ownership of wastes,

As all land was private property, no man would occupy or cultivate waste, until he had obtained a patta, either to secure him in the possession, or if turned out, to indemnify him for his expenses; because

⁴ *ibid*: p68.

⁵ *ibid*: p68.

⁶ *ibid*: p68.

he was liable, if he neglected this precaution, to be turned out at any time by the owner, without compensation.⁷

The private ownership of land was reiterated subsequently in official accounts. In the Fifth Report, tabled to the British Parliament in 1812, was a review of land administration in India. The Report noted on Malabar and Kanara,

The lands in general appear to have constituted a clear private property, more ancient, and probably more perfect, than that of England. The tenure, as well as the transfer, of this property, by descend, sale, gift and mortgage, is fortified by a series of regular deeds, equally various and curious, and which bear a very strong resemblance, in both parts of the country...In Cannara ... Even when they do not pay tax or land is mortgaged, the land will always return back to them on satisfaction of dues.⁸

The above view was approved and sanctioned by the authorities in London. The Court of Directors, in relation to Kanara, directed the government of Madras in 1813, 'We have no property in land to confer, with the exception of some forfeited estates'.⁹ We need to bear in mind that Kanara was constructed to have a tenurial system different from other parts of the country. But even in those other parts, the Court of Directors had taken a similar position on ownership of land. There were conflicting positions. One position was that the state was the owner of all lands. The opposing point was that the ruling power had no proprietary right but only a right to a share of the produce. The Court of Directors had settled for the second position.¹⁰

The construction of private ownership, through its circulation in the official discourses, had come to be firmly established. We have already noted in chapter 2 that The Collectors of Kanara in 1810s and 20s, Read and Harris, had emphasised the private

⁷ *ibid*: p67.

⁸ Parliamentary Papers, 1812 (VII)-II, (Hereafter Fifth Report): p130.

⁹ Letter dated December 17/12/1813 see in East India Company (1820).

¹⁰ CD to Bengal Government, 6/1/1815, East India Company (1820): p283.

ownership of forests.¹¹ Also, in 1822, as the Governor of Madras Presidency, Munro again alluded to private ownership over shifting cultivation land in Malabar and Kanara.¹²

3.2. Private Right on Forests: In Theory and Practice

The Company, by its own construction, could assert property right over only the unclaimed wastes and escheated estates. In practice, the Company administration gave away the rights even on these lands. The concern of the administration was not to assert right on forests and wastelands, rather, it was to see that cultivated lands did not turn into waste.

In 1799, in relation to wastelands in the Northern Sirkars, The Madras Board of Revenue issued instructions to the Collectors dated October 15, 1799 that these to be given up in perpetuity to the *zamindars* free of any additional assessment.¹³ The order of Lord Wellesley in 1800, on which the legislation and administration of the Madras Presidency were based, ordered the conversion of government lands into private estates.¹⁴ In 1808, to a suggestion to reserve wastelands towards augmenting revenue, the Board of Revenue replied,

the government does not look to any advantage of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the increased resources of the country.¹⁵

Read, Collector of the Northern divisions of Kanara, remarked in 1801 on the great extent of wasteland. This was not with the view to assert state's right but with regret that

¹¹ See Section 2 in Chapter 2.

¹² See section 3 in Chapter 2.

¹³ Appendix 18 in Fifth Report: p725.

¹⁴ *ibid*: p725, 729.

¹⁵ Appendix 30 in Fifth Report: p902.

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the land 'would require more than ordinary labour and expense to bring under cultivation'.¹⁶ The Collector of South Kanara wrote in 1802 to the same effect of the hill tracts within his division.¹⁷ Collector of Southern Division of Kanara reported,

Nearly all the wastelands of Canara, are lying close under the range of ghauts... I fear it must naturally, therefore, take a considerable time... to ... extend cultivation ... induced to go and take land in that quarter.... The rents are cheaper near the ghats to induce them to remain in such jungly and unhealthy situations.¹⁸

Munro, as the Collector of Kanara in 1800, described the forested parts of Kanara with the same disdain. He commented,

... Sunda Payanghat, is nearly in the same state, with respect to cultivation, as the most desolate districts of Canara; but Sunda Balaghat is much worse than either. It is nearly a complete desert. It has not throughout its whole extent a cultivated spot of a mile square, except a few small openings thinly scattered; all the rest of the country is overgrown with so thick a forest, that it can only be penetrated in the few places where roads have been made.¹⁹

Read, in 1802, regretted that in Sonda the 'largeness of the trees' had prevented the extension of agriculture.²⁰ Referring to Ankola, Read commented,

Ankola is in the worst condition; contains less inhabitants, is more overrun with jungles, and possesses fewer private estates than any district in Kanara.²¹

In 1814, as the Collector of Kanara, he spoke of the advantage of inducing the people to cultivate the wastes and occupy the inland parts of the province.²² Towards this end, he

¹⁶ Appendix 24 in Fifth Report: p814.

¹⁷ Collector of Southern Division of Canara, 30/4/1802, Appendix 24, Fifth Report: p818.

¹⁸ *ibid*: p818.

¹⁹ Munro's Minute (May 31, 1800): 70-1.

²⁰ Collector Northern Division of Canara, 25/4/1802, Appendix 24, Fifth Report: p820.

²¹ *ibid*: p822.

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dwelt on the imprudence of a tax on the felling of timber. He recommended the removal of the tax on financial considerations: the advantages from extension of cultivation would soon set off the loss of revenue from the tax.²³

In 1817, Harris, the Collector of Kanara proposed that the deserted estates in Ankola should be let out on a low rent.²⁴ In 1821, he recommended that in remote areas cultivation should be encouraged by the allowance of clearing.²⁵ Further, leasehold *ryots* were to have the right on timber on their holding. He considered shifting cultivation as a recognised mode of preparing the ground for continuous cultivation, and as we have seen in an earlier chapter, in 1823, he succeeded in getting the approval of the government for abolition of the tax on felling of timber in the forests of Soopa and Sonda.²⁶

Earlier, *ryots* were invited to apply for and cultivate wastelands to any extent at half assessment for the first year. They were guaranteed against claims of *mulvargadars* after the first year. Harris, in 1820, earnestly invited the *ryot* to come forward and apply for *muli* tenancies of lands abandoned for 12 years by the former *mulvargadars*.²⁷

As late as 1836, it was lamented that in the inland part of Kanara, land was still being abandoned. Sub-Collector Anderson noted,

The effect of this want of population in the country under the Ghauts is, that much land lays waste, not from over assessment, but from want of people to cultivate it.²⁸

²² Baskarapa V/s The Collector of North Kanara, judgement of the Bombay High Court, reported in Indian Law Reports, Vol III, 1878. (Hereafter Kanara Forest Case: p551.

²³ *ibid*: p551.

²⁴ *ibid*: p551.

²⁵ *ibid*: p551-2.

²⁶ See Chapter 4.

²⁷ Kanara Forest Case: p552.

²⁸ Anderson (1890): p21.

The intention of the Government was apparent in the *mulpattas* (documents conferring ownership on land) granted by the Collectors. The boundaries of the granted estates included a considerable extent of forests and wastelands.²⁹ Clearly, the concern was not to assert the state's right over unclaimed waste, which Munro considered the only Government property in Kanara. Just the opposite, the agricultural lands were turning into wastes and this trend had to be reversed.

3.3. Owner to Encroacher: Administrative Concerns On Land Revenue in Kanara

After giving a complete account of land revenue practices in Kanara, Munro urged the Board of Revenue in 1800 to reduce the revenue.³⁰ He suggested that the assessment should be fixed at not more than 30% of the amount charged by Haider. The subsequent Collectors maintained this assertion. Read, the Collector from 1801 to 1816, claimed that more revenue was drawn from the area than it could bear. He informed the Madras Board of Revenue that most of the lands were rated at more than 75% of Haider's additions. As a result of the exaction, agriculture was on the decline. He suggested that the government's share should not be more than 33% of gross produce. This was in contrast to the prevailing charge of 30-50% of the gross produce. He also complained that the original and extra assessment of different *vargs* were grossly unequal and there was no guide to how to equalise government demand.³¹

In consideration of Read's suggestions, the Board of Revenue made a reference to the Collector of Kanara to fix the maximum rate of assessment. Harris, the next

²⁹ Fisher to the Board of Revenue, dated August 30, 1858 in Board Proceedings, 13/10/1858, TNA. Hereafter Fisher's Report (1858).

³⁰ This section is based on Gazetteer of the Bombay Presidency, Vol. XV-Part II, Kanara, Bombay, Government Central Press, 1883, hereafter Gazetteer of North Kanara. *Vyakunta Bapuji v/s The Government of Bombay*, judgement of the Bombay High Court, reported in Bombay High Court Reports, in Appendix to Volume 12, May 1875, hereafter Kanara Land Assessment Case. This judgement is a valuable repository of correspondence on land revenue administration in Kanara.

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collector(1817-22), noted that the low rated lands were no more being taken up for cultivation. Also, several lands were charged at full Haider's assessment. Munro, who was then in Kanara again, clarified that he had expected escheated estates to be taken up. However, this would have happened only if the assessment on neighbouring estates were kept lower than Haider's assessment to induce cultivators to take up such lands. He adhered to the opinion of reduction of assessment.³²

Harris reiterated that *shist* was varying and unequal in neighbouring estates creating a state of oppression. He claimed that this was due to corruption of the officials in the governments preceding the Company. The Board of Revenue replied that their concern was not to equalise *shist* but to limit government demand. In the Board's opinion, the inequality in the neighbouring estates would always be a result of good management practice and industry of the landholder. To equalise the assessment would be to annihilate the entire basis for industry and labour. The Board recommended that the best means would be to collect the average assessment paid on an estate since the start of British Rule.³³

Harris stipulated that the guiding factor in fixing the assessment should be the productive power of land, rather than a fixed percentage of Haider's assessment. He said that he was already following this. He further claimed that Munro himself had fixed assessment in hundreds of cases higher than 75% of Haider's assessment. Harris had also started a survey of some villages, which could give the productive capacity of land. After determining the productive power of land, Harris fixed the assessment at 30% of the gross produce.³⁴

³¹ Gazetteer of North Kanara: p160.

³² *ibid*: p160-2.

³³ *ibid*: p160-2.

³⁴ *ibid*: p160-2.

Babington (1822-27), the next Collector, objected to the survey and to fixing assessment at 30% of the gross produce. He was concerned that it left different profits for different persons. As a result, inferior lands were being given up. Further, a revised assessment could force the *vargadars* to abandon their land, indirectly annihilating their private property. Babington also feared that frequent re-assessments would create discontent.³⁵

The Board of Revenue, however, was convinced of the necessity of a survey and re-assessment. It argued that there was no other way of putting the revenue on a sound footing. Further, tax on industry was everywhere even if it changed the ownership. To the fear of discontent, the Board replied that once the assessment was equalised, it would take a great time for it to become different. The Government of Madras approved the proposal of the Board but noted that to equalise revenue at a standard of 30% was erroneous. For the government, the main idea was to regulate to induce cultivation.³⁶

In 1830, riotous meetings broke out in Kanara. Some attributed it to a specific episode which spread³⁷ and others to failure of crops.³⁸ A member of the Board, Stokes, was deputed to report on the condition of Kanara. Stoke indicated that the successive Collectors had exaggerated the excessiveness of the revenue demand. To the contrary, he found the revenue light. There was rising prosperity. Land had acquired a sale value and was changing hands. This could have happened only if the assessment, at least on some lands, was light enough to leave surpluses with the proprietors. However, he highlighted unequal assessment across the *vargs*. Several measures were suggested including adjusting assessment with reference to neighbouring estates.³⁹

It had been evident since Munro's time that only a survey and settlement could be an enduring means of settling the land revenue of Kanara. But survey operations were

³⁵ *ibid*: p163-5.

³⁶ *ibid*: p163-5.

³⁷ Stokes (1855).

³⁸ Gazetteer of North Kanara: p165.

expensive and thus could not be contemplated. From 1800 to 1830, the extent of cultivation had greatly increased. However, there were no additions to the revenue. This was making the administration exasperated. The administrators were convinced that the *rekah* fixed by the previous governments were not accurate, as these were manipulated by the local accountants. According to the officials, this had lowered the revenue of the state. Further, during Company rule, many landholders had made 'fraudulent' and 'clandestine' encroachments to extend cultivation.⁴⁰ Such lands paid no revenue at all.⁴¹

The only strategy was to settle for a survey. The Board in 1843 argued that the expense incurred in a survey would be more than compensated by the exposure of concealed and misappropriated land. The Board also had to contend with the objection, earlier raised by Babington, that a survey would affect the property right of *vargadars*. The Board dismissed the objection by arguing that the government was not bound by property obtained by fraud and encroachment. The Governor in Council agreed with the imperative of a survey. However, they feared a survey could create discontent. Blane, the Collector of Kanara, was asked to report on the proposed survey and its possible implications.⁴²

3.3.1 Blane's Report

Blane questioned the very legal basis on which the ownership of the *vargadars* rested. According to him, the entire basis of administration of revenue by the Company was flawed. The rights of *vargadars*, on a 'logical' interpretation, vested only on agricultural lands. But even before Blane presented an alternate conception of ownership of land, a certain consensus among the officials in undermining the earlier basis of ownership had already become established. When Munro took charge in 1800, the Malabar coast was in

³⁹ Stokes (1833).

⁴⁰ Gazetteer of North Kanara: p167-8.

⁴¹ *ibid*: p167-8.

⁴² *ibid*: p167-8.

a state of rebellion. There were many contenders for independent authority and political power.⁴³ In the succeeding years, the Company managed to consolidate its position. In the next section I shall show how the construction of *vargadars* as ‘ancient’ owners by Munro was itself a means of conciliating the local population. Having gained political stability, however, the Company found itself bound by the legality created in the earlier years. To wrestle with this, the officials vilified *mulvargadars* as ‘fraudulent encroachers’.⁴⁴ The unequal assessment was attributed to collusion of *vargadars* and *shanbhogs* during the Mysorean rule.

If forests were earlier ‘barren’ and ‘desolate’ tracts, in the context of timber demands, and increasing extension of agriculture, these had acquired value. Forests were being felled since the abolition of the Conservatorship, to supply fuelwood to Bombay and other markets.⁴⁵ The Company was making desperate attempts to extract timber from Kanara.⁴⁶ The government regretted that the fee was being appropriated by ‘alleged’ proprietors.⁴⁷ Arguments to undermine the property in forests were finding expression. In 1839, Maltby, an officer in Kanara, reported to the Board of Revenue,

The extent of the Government right in the jungles and waste has never been very clearly defined, and some extensive tracts have been gradually included by persons whose right is extremely doubtful. In many cases the just claim to the right of pasturage or of gathering leaves for manure preferred by the holders of the neighbouring estates, to the exclusion of other villagers, has been changed to a claim of proprietary right in soil; and many secret encroachments have been made upon waste to which the parties have no title whatever.⁴⁸

⁴³ Munro’s Minute (May 31, 1800).

⁴⁴ Gazetteer of North Kanara: p165-8. Stokes (1833).

⁴⁵ Blane to the Board, 31/8/1847, MBOR, 8/11/1847, TNA. Hereafter Blane’s First Report (August 31, 1847).

⁴⁶ Blair to the Board of Revenue, 18/8/1838, MBOR, 6/9/1838, TNA.

⁴⁷ Kanara Forest Case: p744.

⁴⁸ *ibid*: p744.

Blair, the Collector of Kanara, in 1838 referring to forests added to Kanara from Coorg noted,

... in most instances claimed private property but this claim is founded more on prescriptive right established by previous enjoyment than in the possession of sunnads or other documents conferring proprietary title.⁴⁹

In 1843, Blair recognised the value of forests in Kanara, and issued a proclamation prohibiting the felling of five species in government forests.⁵⁰

If the Company administration was staking its claims on forests, the *mulvargadars* considered themselves owners of the agricultural and wastelands in their *varg*. *Vargadars* claimed they were felling what belonged to them. In fact, they had earned their right over forests. The Conservator, between 1807 and 1822, had prohibited felling of valuable timber from their private lands. After the abolition of the Conservatorship, a proclamation was issued permitting *vargadars* to fell what they liked standing on their estates. By the same argument, they considered themselves free to put any land in their *varg* under cultivation or shifting cultivation without paying any additional revenue. They claimed that *rekah* assessment had already constituted estates and fixed the revenue on the entire estate, cultivated and waste.⁵¹

Blane was forming his judgement in this context of contestation over the ownership. He lamented that despite the population of Kanara having doubled and that there was much prosperity, the state was the loser as there was no enhancement in revenue. The interest of getting additional revenue was connected with the question of ownership and use of forests. Blane was aware that if the *vargadars* could successfully claim ownership over wastes, no additional revenue could accrue to the Company. To enhance land revenue in

⁴⁹ Blair to the Board of Revenue, 18/8/1838, MBOR, 6/9/1838, TNA.

⁵⁰ Blane's First Report (August 31, 1847).

Kanara, the existing basis of ownership needed to be engaged with.⁵² Blane had an additional concern. This was to do with *kumri* (shifting) cultivation.

Kumri cultivation had two juridical forms, *sarkar kumri* and *varg kumri*. The shifting cultivators farming government forests paid taxes directly to the government. Each year, the cultivation was assessed and a tax imposed on the cultivators. The shifting cultivation done on government land was called *sarkar kumri*. While *varg kumri* was cultivated on the waste within the *varg* of the *mulvargadars*. The charges for *kumri*, entered as a separate head, *kumri shist*, were included in the total assessment of the estate. Blane was concerned that cultivators from the plains and Mahratta country were adopting it as a form of livelihood.⁵³ Furthermore, in Mysore, on the initiative of Cleghorn, who was later to be an influential figure on the forest question, shifting cultivation was banned. Blane was sure there would be an exodus of such cultivators from Mysore into Kanara.⁵⁴ Since *vargadars* were claiming the forests within their *varg*, they and not the Company would have been the major beneficiaries of the enhancement.

Blane, in addition to the concerns of revenue, was apprehensive that the extension of shifting cultivation might destroy valuable timber altogether. Blane identified the increasing incidence of shifting cultivation as a major cause of a growing scarcity of timber. He reported to the Board of Revenue in a letter dated August 31, 1847,

The practice of kumari cultivation is one of so wasteful and improvident a nature, that it appears to me it ought not to be tolerated except in a very wild and unpopulated country, and the time seems to have arrived, when it would be most advisable to place it under considerable check and regulation.⁵⁵

⁵¹ Blane's First Report (August 31, 1847). Blane to the Board of Revenue, 20/9/1848, MBOR, August, 1850, TNA. Hereafter Blane's Second Report (September 20, 1848). And Blane to the Board of Revenue, 31/8/1849, MBOR, 4/4/1850, TNA. Hereafter Blane's Third Report (August 31, 1849).

⁵² Blane's Second Report (September 20, 1848).

⁵³ Blane's First Report (August 31, 1847).

⁵⁴ *ibid.*

⁵⁵ *ibid.*

He then elaborated the economic rationale for his conviction:

The revenue paid upon this destructive kind of cultivation is very trifling; and if the wood were preserved in accessible spots, the duty upon the export of timber and firewood would, under proper regulation, exceed tenfold.⁵⁶

Blane did not have any significant objection to the existing population continuing with shifting cultivation. His concern was the additional population which would bring virgin forests under cultivation. The economic and revenue considerations, in conjunction with threat of its rampant expansion, had led to a general condemnation of shifting cultivation. Blane noted,

It was formerly confined entirely to the race of wild and uncivilised people who dwelt habitually in the jungles; others have since taken it up... it is not a pursuit which it is at all desirable to encourage the people newly to engage in. It has no doubt some attraction for those who are impatient of control, and are fond of roving life; but it leads to unsettled habits, and takes many away from the regular cultivation of a fixed spot.⁵⁷

Blane knew that it was beyond the surveillance of the state to prevent 'wild' forest dwellers, 'impatient of control' from cutting *kumri*. And for others, as long as *vargadars* could claim the right of use of the forests in their *varg*, shifting cultivation could not be prohibited. Blane thus opted for a more strategic intervention, primarily guarding the forests close to the coast which could be turned into a merchandise. He suggested:

I am not disposed at present to recommend its entire prohibition; but I think it would be well to do so in all places accessible to the seaports whence timber and firewood could be brought down, and to place it under regulation in every other part of the district.⁵⁸

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

On Blane's suggestion, the Government authorised the Collector of Kanara to restrict *kumri* cultivation to 'such places as to such an extent as might, in his opinion, be expedient for the preservation of the forests and general well being of the province'.⁵⁹ Blane had bitterly complained, 'There is nothing scarcely which the people of Kanara will not claim as a right if they think there is any chance of it being conceded'.⁶⁰ The Madras Board of Revenue directed him to assert the right of government to all forest lands, to which title could not be clearly established by private individuals.⁶¹ Thus, Blane had successfully inverted the entire conception of public and private property. In contrast to earlier years, where only unclaimed lands were public property, now, what could not be proved to be private property was to be public property.

Blane had to face considerable embarrassment in implementing his policy. A *vargadar*, Narna Cumpti, raised an objection that he was owner of extensive forest subject to *kumri* cultivation, and for which he was assessed to land revenue. The sub-collector solved the difficulty by directly settling with *kumri* cutters, 693 in number, regardless of the *vargadar's* rights.⁶² Blane requested the Board to approve the direct settlement with the *kumri* cultivators.⁶³

3.4. Reorganisation of Legal Theory by Blane

The task before Blane, then, was to re-organise the very legality of ownership of wastes and forests to solve the problems of enhancement of assessment, revenue from forests and regulation of shifting cultivation. The legality was established by Munro and it was very much observed in practice in Kanara. If Blane was subject to prior official

⁵⁹ MBOR, 8/11/1847, TNA.

⁶⁰ Blane's First Report (August 31, 1847).

⁶¹ MBOR, 8/11/1847, TNA.

⁶² Blane's Third Report (August 31, 1849).

⁶³ *ibid.*

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discourses, he was also a bearer of a consciousness to bring about newer administrative practices. The law was completely meshed in these administrative practices and processes. Certain effects could be brought about only if the law was re-organised. However, the law could be re-organised only if those effects were imperative, logical and imminent.

One way of bringing this about was to erode the very foundation on which the existing law was based. Munro had based the law on 'ancient' system, and Blane's strategy was to show that this system was non-existent or that it had not been properly derived into law. I will only in passing summarise his argument dealing with agricultural land and then deal with that part dealing forests and wastelands.

Blane doubted the entire basis for the revenue administration by the Company administration. He argued that during Tipu's reign, everything was suspended and records were falsified with the collusion of accountants and *vargadars*. He wondered how the original assessment and extra impositions had been accepted as if the documents were of ascertained authenticity. He objected to the reliance on the 'ancient' system of revenue which was constructed by Munro. He asserted that even before the Company took over administration, the 'ancient' assessment had become notional. In the system of average assessment, followed since Harris' Collectorship, Company rule in the preceding 22 years had become the base. The average of those 22 years was taken as the Company's revenue demand. Blane questioned the soundness of the average assessment. He argued that those were the most depressed years, lowering the demands of the Company. Blane alleged that there were no estimates of the extent of estates. Thus, the *mulvargadars* had the facility to encroach on land. The system of seed measurement was indefinite and did not help. For Blane the question thus, resolved into this: The Government had to decide whether it considered itself limited to a total demand. If not,

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and Blane was sure the answer could not have been otherwise, it should go ahead addressing these questions.⁶⁴

For Blane, the property rights of the *vargadars* extended only to the lands under cultivation. Blane argued that there used to be revenue from the culturable wastes (*kulnasht*) before the average settlement. The method of averaging since the beginning of company rule removed any reference to lands which were actually cultivated in any year. Thus, the average also implied that any land which was ever cultivated or could be cultivated was paid for and included in the average.⁶⁵ Similarly, as we will see later, Blane argued that the *vargadars* had no property rights on *rekahnasht* (immemorial waste). This was the opposite to the theory advanced by the *vargadars*. The *vargadars* argued that their estates included fallow waste and immemorial waste. Further, that they had a right to bring both under cultivation without paying any extra assessment.⁶⁶

As we have seen before, in Harris's time, when the average settlement was introduced, it was very well understood that the estate of a *vargadar* included *kulnasht* and *rekahnasht*. In any case, the *rekah* assessment included both kinds of waste. Besides, the question was not what the *vargadar* paid for, but what was actually his. In the minds of the Company officers, the *varg* undoubtedly included *rekahnasht* and *kulnasht*. Blane made what was clear doubtful,

The practice does not here exist, as in other districts, of a raiyat only occupying the land he pays for, and throwing the waste land given up or left uncultivated in to the general aycat bunzar, or waste land of the village; but whatever be the amount of waste it still continues attached to the estate... There has never been any application, in Kanara, of the simple rule, that a man has only a right to as much land as he pays for...⁶⁷

⁶⁴ Blane's Second Report (September 20, 1848).

⁶⁵ *ibid.*

⁶⁶ Blane's Second Report (September 20, 1848); and Blane's Third Report (August 31, 1849).

⁶⁷ Blane's Second Report (September 20, 1848).

Munro had categorically stated that a *varg* included agricultural land, agricultural wastes (*kulnasht*) and immemorial waste (*rekahnasht*) and the assessment included for all the lands of the *vargadar*, cultivated and waste. According to Munro, the temporary holders were granted remissions on account of bad crops. This was, however, never allowed in the cases where land was private property.⁶⁸ Munro reported,

When a man agrees to become the proprietor of Sarkar land, he shows at the same time a confidence both in the forbearance of Government and in his own means of improvement, because by the custom of the country, whatever may happen, he has from this moment no claim to remission.⁶⁹

For the *mulvargadars* with a proprietary right in their lands, Munro said,

The accounts contained a register of the number of landholders and the fixed assessment of their respective estates, the total of which formed the jama, but they took no notice of waste lands when there was a proprietary in existence. As long as he was present he was responsible for the full rent, whether he cultivated or not.... It was never inquired what portion of his estate a landlord cultivated or left waste. It was expected that, in whatever state they were, he was to pay the whole rent.⁷⁰

Munro reiterated the point and insisted that the same considerations would apply still more strongly to the case of a person holding under a *kowl*, a *mulpatta* or other description of lease, stipulating for a fixed annual rent.

Blane completely ignored the foundation on which Munro had rested the *mulvargadar's* ownership. This can be one of the techniques of displacing an existing law. In its place, an alternate construction of law could be created. Blane picked up different elements to create a new foundation for ownership of immemorial waste. After recognising that these were attached to the estates of *vargadars*, he detracted,

⁶⁸ Munro's Minute (May 31, 1800): p80.

⁶⁹ *ibid*: p80.

They are often termed 'kumeki' lands, or land allowed to assist in the cultivation, and they were intended to afford to the raiyats the means of procuring leaves from the brushwood or jungles growing on them as manure for their fields, and to furnish grass as fodder for their cattle...⁷¹

Having enumerated the use of the wastes, Blane moves towards a legal displacement by contrasting it with other areas,

... but they do not appear originally to have differed materially from the wastelands used for similar purposes in other parts of the country, except that, in place of being common to the whole village, they were divided and enjoyed in separate portions by the individual landholders.⁷²

Munro had forewarned against this construction by asserting that Malabar and Kanara were entirely different from the rest of the country. It was only in Malabar and Kanara that private property was secured on a sound foundation. Munro stated that the landowners in Malabar and Kanara were,

...possessing their lands as private property,- circumstances which distinguish Canara in a remarkable manner from all the countries beyond the ghats, and which must be attended to in whatever system may hereafter be framed for its management.⁷³

Even within Kanara, Munro said that the ownership of land above the *ghats* followed a different system of property. He confided in Cockburn, a senior Company official,

It cannot be supposed that I yet know much of the state of landed property. I have seen enough, however, to convince me that it is very different in different parts of the country.⁷⁴

Munro elaborated the different property arrangement in a part of Kanara, called Sonda:

⁷⁰ Kanara Forest Case: p527.

⁷¹ Blane's Second Report (September 20, 1848).

⁷² *ibid.*

⁷³ Munro's Minute (May 31, 1800): P 58-9.

Gardens or plantations of cocoa-nut, betel-nut and pepper are considered private property, and follow the same rule as in Canara; but all other land is supposed to belong to the *sirkar*.⁷⁵

Thus, in Sonda the agricultural lands had belonged to the state, and *ryots* cultivated it as the tenants of the state. Ordinarily, they were not removed as long as they paid rent. However, if another person offered *nuzzarana* (a sum of money) to the state, he could become an owner of the land.⁷⁶ The intention of Munro was clearly to emphasise that the property regime of Malabar and Kanara could not be compared with a general universal notion of wastelands in India.

Blane evaded engaging with Munro by merely alleging that Munro was wrongly constructed by the later officers. For example, Munro had said that only 'unclaimed' land was state property. Despite the eagerness of the administration to give away forests (which we noticed earlier), Blane argued that the 'claims' had to be valid and not fictitious. Blane then interposed that Munro may have intended to use the word 'reclaimed waste'. In this case, the claims of *vargadars* would be confined to waste which was earlier cultivated. He further suggested that Munro may not have intended to make 'allusion at all to immemorial or unreclaimed waste, but referred exclusively to that which had been formerly under cultivation'.⁷⁷

My insistence on counter-posing Munro to Blane is not to suggest that Munro had constructed an 'authentic' and 'true' account of ownership in Kanara. He himself constructed and invented an ownership in the context of the exigencies of administering

⁷⁴ Letter to Cockburn, 20/12/1799, printed in Gleigh (1830): p240.

⁷⁵ Munro's Minute (May 31, 1800): p70.

⁷⁶ *ibid*: p70.

⁷⁷ Blane's Second Report (September 20, 1848).

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politically unsettled Kanara, of his ambition of advancing his promising career, and of tussles within the Company administration.⁷⁸

I will not dwell at length on this here. We have already seen in Chapter 1 how the Company administration 'discovered' the local law. I will only highlight some features of Munro's construction. Munro was clearly instructed to 'reconcile the inhabitants to our authority by the utmost degree of indulgence to their prejudice and customs, and by refraining from any other changes of system'.⁷⁹ Munro found that the *poligars* were in rebellion and had 'pretensions of independent authority'.⁸⁰ He apprehended that he might suddenly be called upon to make a Permanent Settlement.⁸¹ This was before he wrote the two important letters of 31st May and 9 Nov., 1800. He had already worked out a critique of the Permanent Settlement in his work with Read in Baramahal. This critique took shape as the *ryotwari* system and presented a formidable challenge to the Permanent Settlement.

Thus, politically, if the *poligars* could not be reconciled, the best recourse was to strengthen the *vargadars*, the 'principal inhabitants'. To settle the lands directly with the *ryots* was also consistent with the emergent theory of *ryotwari*. The political and administrative exigencies, to be acceptable and legitimate within the administration, needed to be in conformity with 'local custom'. Thus, Munro 'discovered' the 'ancient' system of Kanara, privileging the rights of the *vargadars*. The later Collectors regretted that they could not find a single copy of the famous account books on which Munro had based his entire theory!⁸²

My interest, thus, is not to take Munro's account as 'truth' and demonstrate how Blane evades this truth. I am interested in exploring the tools and modalities that Blane deploys

⁷⁸ See Stein (1989).

⁷⁹ Wellesley Quoted in Kanara Land Assessment Case: p102.

⁸⁰ Munro's Minute (May 31, 1800): p57.

⁸¹ See Kanara Land Assessment Case.

to displace an existing legal theory of ownership. Munro had forbidden a comparison of Kanara with other parts of the Country. Blane conveniently ignores it. He created parallels between Kanara and other areas from which he could thus hypothesise,

The original terms upon which they were held, then, I conceive to have been essentially as an adjunct to, and in connection with, the cultivated lands; and the right to them to have been a modified right, and only to be enjoyed for the purposes for which they were held as above stated. The usufruct of them for such purposes was a necessary concession; but I do not conceive them to have been on that account the less Government lands, but only lands which they were permitted to occupy for particular purposes.⁸³

Blane quickly turned a hypothesis and conjecture into a conclusion,

If such were, in general terms, the nature of the tenure under which they were held, it has become entirely altered under our administration. The raiyats now claim the absolute proprietary right in them the same as to their cultivated lands, and, as a necessary consequences of such a right, the liberty to bring them under cultivation without the payment of additional assessment, and even of selling or letting them, thus separating them, if they choose, from the cultivation, and alienating them from the original purposes for which they were intended.⁸⁴

Munro, as late as 1822, in opposition to the initiatives of the Conservator to appropriate timber from such lands, had reaffirmed his position on the question of ownership. He recognised that the immemorial wastes were primarily used for fuel and manure. However, the use was not to decide the ownership. He had emphasised that private property existed in these wastes,

They constituted a material part of the property by which he was enabled to pay his revenue... The ryot had complete control over his wood of every kind, whether on the hills or in villages, because it could not be

⁸² Sturrock (1894): p95.

⁸³ Blane's Second Report (September 20, 1848).

⁸⁴ *ibid.*

taken from him without a violation of private property and administration both of his income and of the revenue.⁸⁵

Blane further objected that through this pretension of ownership, the *vargadars* prevented others from taking them up on a *patta* (lease) from the government.⁸⁶ The person occupying them paid the rent to the landlord not to the Government, and was in every respect his tenant. Blane upheld his newly created theory,

... the claim to these lands ... has been incautiously admitted, or, at least, not opposed...It is necessary to observe, however, that the right to cultivate such lands is not admitted in theory, but it is, as a general rule, actually enjoyed in practice...⁸⁷

Blane thus created a duality between law and social practice, and privileged law over practice to bring a new interpretation of law.

3.5. Rent Theory of Shifting Cultivation

Blane, as mentioned in an earlier section, had submitted for the Board's approval a proposal for direct settlement with *kumri* cultivators. Blane also expressed his opinion on the question of the rights of *mulvargadars* over shifting cultivation land in their *varg*. Shifting cultivation was done on the *rekahnasht* (immemorial waste). Blane argued that the entry of a *kumri shist* in the *patta* of a *vargadar* gave no proprietary right over the forests.

Blane argued that shifting cultivation was of 'uncertain' and 'transient' nature formerly carried exclusively by 'wild' and 'little civilised' people.⁸⁸ Blane suggested that these people had no fixed habitation. They built temporary huts on the spot, which they

⁸⁵ Munro's minute (1822): p184.

⁸⁶ Blane's Second Report (September 20, 1848).

⁸⁷ *ibid.*

⁸⁸ Blane's Third Report (August 31, 1849).

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occupied for the year, and shifted their place of residence with their cultivation. As a result, it was difficult for the government to fix the spot liable for assessment and collect revenue from the cultivators directly. The easiest mode was to rent out the collection to one or more of the principal inhabitants of the village, who could make their own terms with the cultivators.⁸⁹

Blane recounted that during the Company rule, the estate holders were issued yearly *patta* specifying the demand against them on the fixed land revenue for their permanent cultivation. He argued that for convenience, the payments made on account of *kumri* were entered in their *patta*. In course of time, such forests came to be claimed by *vargadars* as a part of their *varg*. Blane argued that the sum was not land revenue but only rent,

The same system was adopted with regard to many other items of demand which were not strictly land revenue, such as the moturpha, honey farm, fishery, and other petty farms, which were all entered as portion of the *varg* of the raiyat; but they have been subsequently struck out of the *patta* and collected separately as extra revenue.⁹⁰

To conclude Blane's position,

... the *kumri* cultivation was, and still continues to be, of the nature of a rent similar to other rents, such as the *puleri* or grazing rents in other parts of the country, or privileges of collecting honey or felling timber in the forests themselves.⁹¹

Blane had no basis for making this assertion. The Bombay High Court noted in a case decided in 1878,

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

As to the mode of entering miscellaneous charges in the *pattas* of the *vargdars*, Mr. Blane's description is not supported by any evidence produced in the present case. A large number of *pattas* have been recorded, but the *vargadar* is not in that character charged for any thing but the rate at which his land has been assessed.⁹²

Blane knew that law does not declare itself legal. The Board had to take a position. A pre-condition for the validity of law is its effects. The new theory of law could be propagated by highlighting its effects. Blane systematically created the conditions for upholding his construction of the law. He declared that if the proprietary right of *vargadars* were affirmed, the shifting cultivators would be tenants of the *vargadars*. Thus, the Collectors would have no power to prevent the destruction of the forest and no authority to protect the *kumri* cutters from the exaction and oppressions of the *vargadars*.⁹³

To illustrate the loss of revenue to the Company on account of payment of *kumri shist*, Blane instanced the case of Martab Rao, a *vargadar*. According to Blane, Martab Rao claimed jurisdiction over more than 50 square miles of forest. The number of *ryots* cutting *kumri* under him had so much increased that he collected from them 1,000 per cent of what he paid as *kumri shist* to the Company. It was important for Blane to trace the ancestry of the family who formerly held the office of *naib shanbhog* in the Ankola Taluka, to show the scheming and manipulating nature of the claims of the *vargadars*. Blane further warned that with increasing influx, large number of people would settle in these thinly-peopled tracts and become the tenants-at-will of such men as Martab Rao and Narma Cumpti. As a consequence, they might have ten or twenty thousand dependants on their estate.⁹⁴

In addition, Blane attempted to annihilate the very category of *varg*. Blane cited a Kanarese Scholar, Mr. H Stokes, who had mentioned that in a tradesman's books in

⁹² Kanara Forest Case: p572.

⁹³ Blane's Third Report (August 31, 1849).

Kanara his account with a customer was headed the 'varg of that customer'. Following this, Blane argued that the term 'varg' has come to mean 'estate', but originally it meant 'account' of the *ryot* with government. Hence Blane concluded that by a *ryot's varg* was formerly understood his 'account with the Government', and comprised, therefore, not only his landed property, but 'anything for which he had to make a payment to Government; but that the entry did not necessarily imply that he had an absolute indefeasible proprietary right in the thing for which he paid'.⁹⁵ In this manner, Blane argued that the rent of the collections from the *kumri* cutters came to be entered in the *varg patta*. While the term 'varg' came to mean 'estate', the forests in which the *kumri* was cut came to be claimed and considered a portion of the estate.⁹⁶ If Munro had traced the origins of the 'ancient' system to uphold the ownership of *vargadars*, the origin of origins could be traced to a point to find a contrary meaning.

3.5.1 Gaps In Theory and Practice

Blane, despite his theoretical arguments, had to confront the social practices and reconcile the two. He identified the principal reason for the gap between theory and practice by pointing out that there was no estimate of the extent of the original estates. Therefore, it was difficult to tell what was a new cultivation and what was old. Further, according to Blane, there was no rate or rule for the Collectors to determine the assessment. Blane complained,

It is of no avail for him to say, you have three or four times as much land as is equivalent to the assessment you pay; the simple answer is, that it is within the limits of his varg...⁹⁷

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Blane's Second Report (September 20, 1848).

Blane, similarly for shifting cultivation, as we have seen before, had identified the vagueness of the extent of the estate of a *vargadars*. However, Bombay High Court, in the Forest Case, endorsing an earlier *Sheristedar* (revenue office, sub-ordinate to the Collector) noted,

The vargdar was charged and deductions were allowed on the aggregate holding; and vagueness as to the precise areas held, if it prevented the growth of a right, through recognition, in the case of kumri lands, would very often have equally prevented its arising in the case of rice fields, especially those which paid only for occasional cultivation.⁹⁸

If Blane had to confront the prior legality of ownership and its well ingrained basis in social practices, he also had to contend with the official sanction given to private ownership by the very interpreters and upholders of the law--the courts. Blane lamented that the *vargadars* fortified their 'alleged' rights, on 'evidence of friendly neighbours' or 'some document'.⁹⁹ Further, any opposition or attempt to restrain 'encroachment' to protect 'government' property, involved a protracted contest in a law suit 'if there be the most slender grounds for disputing the award'.¹⁰⁰

In 1800, Munro had described the attachment of the *ryots* to their estate,

... the destruction of part of the property by the heavy demands of the sirkar seems rather to have increased than impaired the attachment of the proprietor to the remainder. He never quits the estates of his ancestors while he can live upon it as a farmer or a labour; but if, after paying the Sarkar rent, and what is due to him for his labour, there remains the most trifling surplus, he will almost as soon part with his life as with his estate. Disputes concerning land, where the property frequently does not amount to ten pagodas, are often carried before every successive amildar for twenty years.¹⁰¹

⁹⁸ Kanara Forest Case: p573.

⁹⁹ Blane's Second Report (September 20, 1848).

¹⁰⁰ *ibid.*

¹⁰¹ Munro's Minute (May 31, 1800): p68.

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Vargadars, so zealous of their property, were unlikely to have conceded their property by being 'friendly neighbours' even if the property was in forests.

Blane comments on the awards made by the courts,

In suits between individuals the rights of Government do not come under discussion; and the production of an admitted sale, or mortgage deed, or other evidence of a like nature has always led to the land being decreed to one party.¹⁰²

Blane delegitimated the court decrees. Finally, he tarnished the *vargadars* as litigious, scheming and colluding persons, vitiating the very sanctity of the court by their native ways.

The second plank of Blane's argument was to demonstrate the inadequate grounds for the decree by the courts themselves. Blane argued that the courts had not taken the legal rights of the state and thus, the decrees should have limited validity.¹⁰³ In this, Blane was making a double attack. The target was not only the decree but also the court and the judges. Under the *ryotwari* system, Munro had proposed that all the functions of a district, that is, revenue collection, judiciary and law and order, were to be with one person, the Collector. This system was adopted but later discontinued. Blane was using the opportunity to demonstrate the inefficacy of separating the judicature from the office of the Collector. The third ground for displacement was that a theory of law always prevailed over practice, even if it was the practice of the courts which were supposed to give a firm and settled meaning to law. The courts were to be bound by the theory rather than the theory to be bound by the courts.

¹⁰² Blane's Second Report (September 20, 1848).

¹⁰³ *ibid.*

3.5.2 Comments on Blane's Theory

Blane was not deriving his theory from the vantage point of another theory or idea. He did not deploy any work developed in the West either on land or property or colonial difference between the ruler and the ruled. He was struggling with the administrative exigencies and the obstacles posed by the prevalent conception of the property of the *vargadars* in Kanara. He did not employ hegemonic theories or ideas, irrespective of their end effects. Rather, he tried to forge certain ideas together, in order to dispossess the *vargadars* of their claims. Ideas were elaborated only to the extent necessary to produce the effect of creating property in forests for the state. But where did these ideas, no doubt selectively employed, come from?

Blane explicitly refers to the arrangement of use of wastes by village communities in other parts of India. He contrasts Kanara with these areas to derive that the *vargadar* had no rights over it. Blane had learnt this in other parts of the Madras Presidency.¹⁰⁴ Blane made the distinction between 'rent/tax' and revenue to dispossess *vargadars* of their claim to ownership of shifting cultivation land. The distinction between the categories 'revenue' and 'rent' was well established. Blane deployed this categorisation to produce certain results. He was not overwhelmed by hegemonic ideas and their logical coherence. Instead, in the context of social and administrative processes and contestation, he produced some ideas locally and selectively borrowed others. The ideas were strategically grafted to produce certain effects.

3.5.3 The Madras Board of Revenue's Response to Blane

The Board was in agreement with Blane that the *vargadars* had eroded the powers of the Collector to preserve forests. Blane's proposal also involved the welfare of the jungle

tribes, who were completely subjugated by the *vargadars*. However, Blane's views were different from the settlement reports of former Collectors. After all, as late as 1841, Sullivan stated that 'in Malabar and Canara, all land is private property, and the owners have an absolute property in the waste'.¹⁰⁵ And, in 1847 Blane himself had acknowledged that the revenue officers and courts had recognised the right of *vargadars* to cut timber from forests.¹⁰⁶ The Board asked him to examine the old accounts of the district.¹⁰⁷ The Collector was required to ask the *vargadars* to produce the old records upon which they claimed the privilege of cutting and clearing forests. The Board thought that the entries in old records on *kumri shist* would allow them to distinguish the assessment on *kumri* from the demand on the regular estate in each individual case.¹⁰⁸ In other words, the Board was completely at variance with what Blane was proposing. The Board was clear that the *vargadars* had an undisputed right to cut *kumri* on forests included within their estate. The Board thought that the *vargadars* asserted rights over an indefinite extent of forests which were the property of the government! After all, as late as 1844, the Board of Revenue was saying, 'there is no foot of unappropriated ground' in Kanara.¹⁰⁹ In the Board's opinion, the accounts would have given them ground to present a charge against the *vargadars* on accounts of *kumri* distinct from that on account of 'regular estate' that is, the estate recognised as a defined aggregate, and subjected to assessment according to ordinary rules.¹¹⁰

In 1849, Blane had called for the information suggested by the Board but soon he moved out of Kanara. Maltby became the Collector and was succeeded by Fisher. A final report was submitted by Fisher ten years later in 1858.

¹⁰⁴ MBOR, 21/3/1871, TNA.

¹⁰⁵ Sullivan (1916): p9

¹⁰⁶ Blane's First Report (August 31, 1847).

¹⁰⁷ MBOR, 10/6/1850, p/309/10.

¹⁰⁸ *ibid.*

¹⁰⁹ Quoted in Kanara Forest Case: p745.

¹¹⁰ MBOR, 10/6/1850, p/309/10.

3.6. Circulation of Rent Theory

Fisher declared that in these years, 'the whole process was brought under the control of the Government'.¹¹¹ As we have seen, the Board, despite agreeing with Blane, was not yet ready to settle with the *kumri* cultivators directly. In this while, the *vargadars* were allowed to let out to *kumri* cutters on the lands they 'averred' were their property included within their *vargs*. However, they could let out only as much to earn twice the *kumri shist* paid by them. This was described as the 'customary' rate. For any transgression, they were fined a double assessment on the excess.¹¹² Other controls were introduced. Maltby, the Collector following Blane, introduced a standard rate for *kumri* cultivation. Further, he introduced more accurate measurements for the extent of shifting cultivation.¹¹³

Fisher took forward the construction that he had inherited from Blane. An alternate conception of property on waste and forest emerged and gestated as a question mark. Blane grafted on it from as many approaches as could undermine the ownership of *vargadar*. Fisher now was fully working within the construction of Blane. Fisher rephrased the misunderstanding between the Board and Blane,

The question at issue ... was not ... the right to hold *kumri* cultivation not within the limits of the *varg* or proprietary estate of the landholders, but whether the payment of *Kumri shist* created a proprietary right in the soil of any forest tract brought under *kumri* cultivation;- in fact, whether the entry of *kumri shist* confers any proprietary right at all, such as a similar entry would be held to do in regard to regular cultivation, or whether it is a mere rent paid for certain forest privileges, which can be resumed at pleasure by a remission of the Government demand.¹¹⁴

¹¹¹ Fisher's Report (1858).

¹¹² *ibid.*

¹¹³ Maltby (1911), Maltby (1907) and Maltby (1909).

¹¹⁴ Fisher's Report (1858).

Fisher picked up one element of Blane's construction and developed, refined and elaborated it. Thus, the question of right over forests now was to be constructed on the alternate basis of ownership advanced by Blane. Fisher had made the question sharper by removing reference to forests in and out of *varg*. The question was more general—whether payment of *shist* creates any property right.

Fisher, having recast the problem, reviewed the arrangement in the pre-British period. He argued that the pre-British governments, wherever the opportunities for exaction arose, taxed all forms of agriculture. Thus, a mere taxation could not have been the basis for ownership. He alleged,

As under native governments all cultivation was taxed according to the description and value of its produce, the Government having a recognised right to a certain share in that produce, whatever it might be, there is good reason to suppose that the kumri shist was but a rent for certain forest privileges, and did not confer any proprietary right in the soil on the kumri cultivator.¹¹⁵

The only 'good' reason Fisher could think of was,

Had it been otherwise, most of the garden in the country, and much of the rice land also, would necessarily have been entered as kumri.¹¹⁶

He continued,

Probably almost all the estates in the country have, at one time or other, been under kumri cultivation and in the most wooded portions of the district it is still usual to kumri land about to be held as garden or under rice cultivation.¹¹⁷

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

A supposition was then turned into a conclusion. With equal ease and comfort he declared,

There can be no doubt as to forest tracts generally being in this district the property of Government, as, with the exception of one taluka, kumri holdings are altogether undefined, though this is not the case with the regular cultivated portion of estates, and there has always been Sarkar kumri as well as that attached to estates. The collections made by former Governments on this account were entered as poll-tax, and there is little reason to doubt that the only difference between Sarkar kumri karlaya and the karlaya paid by vargdars consisted in the one being levied direct from the kumri cutters themselves, whereas vargdars were allowed to collect this from those people either cultivating portions of their land or otherwise under their influence, on paying a specified sum as part of the demand on their estates. This shist, moreover, was increased when a new tenant or other individual took kumri cultivation under a vargdar, but the shist on the regular estate was fixed.¹¹⁸

Fisher's argument, therefore, was that since the amount of *kumri shist* was proportional to the number of cultivators doing *kumri* cultivation, it was a tax. In the Forest Assessment case, 1878, however, the Bombay High Court could not find a basis for this conclusion by Fisher,

I may observe that no instance, though it was asked for, has been brought to our notice in the present case in which the vargdar's *kumri shist* has been immediately increased in consequence of a new tenant cultivating *kumri* under him. Where there was an *azmaish* or estimate of what an estate could bear, its productiveness in kumri as well as in rice cultivation seems to have been taken account of, and its productiveness in *kumri* was estimated by the number of hatchets employed. The occasional increases and decreases of the *jamabandi* for a particular year seem to be justified by a reckoning of *kumri* gains, as well as other gains, as greater or less than before; but no distinction of treatment is perceptible until Mr. Blane felt authorized not to increase the assessment on account of increased *kumri* cultivation; but to cut down the cultivation to a production of double the assessment.¹¹⁹

¹¹⁸ *ibid.*

¹¹⁹ Kanara Forest Case: p572.

The alternate theory of Blane was tentatively employed on the grounds of administrative exigencies of restricting *kumri* cultivation, pending the resolution of larger question of ownership. Fisher was citing this practice to uphold the theory itself.

Inheriting from Blane, Fisher continued putting into practice the opinion that *kumri shist* was basically a tax. As an administrator, his primary job was not the generation of theories. Blane had already done it. Fisher had to elaborate, substantiate and refine the theory of 'tax' in the context of social practices in Kanara. He needed to generate facts and evidences to strengthen the theory.

From the experiences of regulating shifting cultivation, Fisher noted that different areas had different claims to shifting cultivation. In Supa, the *vargdar* cut *kumri* in the forest just where he pleased, without reference to village or any other boundaries, and could not, therefore, claim any particular spot as his *kumri* ground.¹²⁰ The *vargadar* in Payengat boldly claimed all the unoccupied forest lands in their respective villages, and sometimes even in whole *magnis*, because they alone of all the *vargars* in these villages or *magnis* happened to pay *kumri shist*.¹²¹ *Vargadars* argued that as forest was necessary to *kumri* cultivation, and they were the only parties who paid *kumri shist*, the whole of the forest belonged to them.¹²²

He contrasted this with the situation prevailing in Bekan *taluka* (an administrative sub unit of a district). The quantity of *kumri* cut by a *vargdar* depended on the opportunities open to a *vargadar* rather than to the *kumri shist* entered in government records. In consequence of land suitable to garden and rice cultivation being insufficient for the support of the population, *kumri* in Bekal had long assumed the character of regular cultivation. Due to pressure of land and population, they treated them in every way as the

¹²⁰ Fisher's Report (1858).

¹²¹ *ibid.*

¹²² *ibid.*

bonafide property of the *ryots*. These lands were sold and mortgaged like settled agriculture.

Blane had employed the strategy of creating a duality of law and social practice to appropriate the law. Fisher tactically moved from law to practice. Since social practices differed within the district, Fisher claimed that the law could not have been definite, settled and uniform. Interestingly, relying on the account books Munro had endorsed the argument that a *varg* was often composed of unconnected parts situated in different villages without having a specific rent fixed to different parts. Instead, there was one general rent for the entire holding.¹²³ Fisher relied on the diversity of practices to argue,

...(rights) claimed on account of *kumri shist* vary in different parts of the district... the difference observable raises doubts as to any proprietary rights being claimable on account of this *shist*, and rather goes to show that those who have claimed most and been loudest in defence of rights, real or assumed, have, at any rate, had more conceded to them than their neighbours.¹²⁴

Fisher, thus, had firmly established the 'rent' theory in official discourses.

3.6.1 The Government of Madras and Rent Theory

The construction that *kumri shist* was a rent and conferred no property right on *vargadars* had been in circulation in official discourses since 1848. The discourses making this construction legal, consistent and logical had already been sustained. The Board had appreciated that if *vargadars* were the owners of forests, the Collectors would have had no powers to protect forests and *kumri* cultivators from the exaction of *vargadars*. The succeeding ten years were a long time for the new theory to appear consistent and logical. The Board in a Proceeding on 16 April, 1859 ruled,

¹²³ Kanara Forest Case: p572.

¹²⁴ Fisher's Report (1858).

... the entry of the kumri shist in the accounts of any varg does not confer a proprietary right in the forests, but only the rent of the privilege of cutting kumri therein, which rent may be discontinued on surrender of the yearly sum paid for it...¹²⁵

The Government of Madras endorsed the legality laid down by Blane. The proceedings of the Government of Madras 23 May, 1860 ordered,

It appears that certain proprietors of land in parts of Kanara and some persons not holding land at all, claim to have exclusive and proprietary rights of Kumri over extensive tracts of forest land, so that no other persons can cut Kumri within these tracts without their permission; while they allege that their own rights to make or allow kumri there at pleasure can no more be interfered with by Government than their rights over their ordinary estates. These claims appear to have been acquiesced in for many years by the revenue authorities of the district; but when, subjected to investigation by a later collector (Mr. Blane), they were found to stand on no good foundation.¹²⁶

The Madras Government adopted the views of the Board on the question of legal rights. But the Board had proposed lenient measures for the ultimate discontinuance of the practice. The Government described it as a political indulgence and ordered that 'the proper course will be to remit the shist' which was a euphemism for extinguishing the right, or abolishing the practice for which it was paid. Finally, the rights of the *vargadars* over forests as well as *varg kumri* was brought to an end in the official discourses.

Conclusion

In 1799, Munro took charge of Kanara district. He constructed the *vargadars* as the owners of all lands, including wastes and forests. By 1830s, the Madras government realised that there was much extension of cultivation and a flourishing timber trade. But

¹²⁵ MBOR, 16/4/1859, p/314/49, IOL.

¹²⁶ Government Order 830, 23 May, 1860 in Madras Government, Revenue Department Proceedings, May 1860.

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within the law that the *vargadars* were owners of wastes and forests, the government could not benefit from the extension of cultivation and timber trade. The government resented this loss. It expressed its bitterness by alleging that the *vargadars* had acquired title to the land through collusion with *sanboghs* and other fraudulent means. Gradually, there were responses within the administration to undermine the existing law. Blane, the Collector of Kanara in 1840s made the most effort. He reorganised the existing and prevalent theory. Through this, he denied Munro's theory and replaced it one more favourable to the Company. The Collectors following Blane, Maltby and Fisher, gradually extended this theory into practice. In 1860, the Madras Presidency upheld the new legal theory and declared forests as its property and thus, prohibited shifting cultivation in most of the district.

In this chapter, I have established how the prevalent ideas on forest ownership in Kanara were eroded and replaced by newer ones. It is commonplace that law changes with the changing social and material conditions. But we have to locate the changes and these processes in discourses. The changes in social and material conditions in Kanara had to register in official discourses for the change in law to become possible. In the official discourses, the incongruity between the law and imperative of the situation was highlighted. Through this, the desirability of changing the law was established. This process was not sudden and abrupt. It seeped in gradually and accumulates over a period of time. Following this, Blane and others worked to demonstrate the law as incoherent, ruptured and illogical.

Blane used several techniques to do this. He outright denied and disclaimed the right of the *vargadars*. This was initially borne out of anxiety and a desire. But the circulation of this denial served a useful function. It facilitated other simultaneous processes of changes in legal ideas. Subsequently, the denial was incessantly circulated and asserted emphatically to get it accepted as the 'truth'. There were several strategies to undermine the existing law. This included a demonstration that the law was based on wrong facts, it

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was wrongly derived or the issues were not adequately understood (a defect which time and experience and progress can rectify). Another modality was to search deeper into the 'foundations' and 'origin' to find a basis to demolish the existing law.

Alongside this, Blane constructed an alternate legal theory. He pieced together elements from diverse practices and ideas. The important thing was not to derive it from a cogent coherent idea. Instead, having settled on the outcome, the challenge was to find ideas to justify it. To take this further, Fisher created a duality between legal theory and social practice. If social practices were convenient to the Company interest, practice was privileged over theory. It was argued that a right, which was never exercised, was not a right at all. In other situations, 'law' as theory and idea was privileged over social practices and through this, the space to displace the existing legal idea was created.

PART II

MANAGING FORESTS, 1860-1882

In the preceding chapters, I have explored the discourses on ownership of forests from 1792 to 1860 in Malabar and Kanara. By 1860, several changes had taken place in the field of forest administration in the Madras and Bombay Presidencies. The environmental functions of forests were emphasised by the Surgeons, who also acted as scientists and experts. They argued that destruction of forests deteriorated the climate and reduced the rainfall. These adverse results, the scientists threatened, could disrupt the entire agrarian economy. The Railway expansion, started in India in 1850s, exacerbated the demands for timber. Thus, Madras and Bombay Presidencies during this period developed an interest in managing their forests. The two Presidencies created separate establishments of the Conservator of Forests to organise timber supplies and manage the forests. By the 1860s, the concern for management of forests and timber supplies had transcended the local limits to draw the attention of the Government of India. The Government of India created a forest establishment in 1862 to promote forest management all over India.

The nascent Forest Departments pressed for the creation of exclusive government reserves to meet the supplies and conserve the forests for future needs. Towards this, it demanded enactment of legislation declaring and vesting forests in the state. In achieving its ends, the forest officers encountered intense opposition from the civil officers who had managed the revenue and administration of India. The established revenue administration considered the new department an intrusion into its function and power. The contests between the adversaries were over the ideology of environment, the politics of ruling the population, the cost effectiveness of different ways of meeting timber demands, and the nature of the rights of the local people. At different layers of the administration, the issue took different forms.

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On the insistence of the forest establishment, a Forest Act was passed in 1865. But the Forest Departments found it grossly inadequate. The drafting of another Act started almost immediately after the enactment of the Act of 1865. The civil officers and local governments turned down three successive drafts. Finally, after 13 years, an all-India Act was enacted in 1878. The forest law arose from intense tussles within the state. A crucial issue here was how the idea of environment and conservation was forged, deployed, understood and accommodated within the administration. In the following chapter, I explore the relations within the state over the management of forests. This then becomes the base for us to detail the formation of ideological basis of the Acts and formulation of the detailed provisions. This will be the subject for the subsequent chapters.

Changes in the administration of the government from 1833 onwards are significant factors. In 1833, the East India Company became a purely administrative body. The legislative and financial powers were centralised in the Government of India, headed by the Council of the Governor-General. The additional territories which were acquired after 1830s were not placed under the Presidencies. For example, Punjab, the North West Provinces, the Central Provinces, were placed under the Control of the Government of India. These were headed by Lieutenant Governors. These were called 'local governments'. Thus, there were the three Presidencies and the local governments. Following the war of Independence by the local people in 1857, the administration was transferred to the Crown. A Secretary of State was appointed in London to supervise and control the administration in India. The Secretary of State took over the powers of the earlier Board of Control and the Court of Directors. The legislative functions of the Presidencies were restored.

CHAPTER 4

STATE, 'MANAGEMENT' OF FORESTS AND THE IDEOLOGY OF CONSERVATION

Introduction

Most of the literature on environmental history of India posits a binary duality between western, modern, rational and commercial; and 'traditional' and pre-colonial. It is also argued that in the imagination of the colonial officials, agriculture was productive, ordered and soothing. To the colonial officials, forests represented untamed nature, and thus, these were described as ugly, desolate and barren. Following this line of reasoning, the approach of the colonial officers to forests was hostile. Grove questions this binary duality. As I reviewed at length in the Introductory chapter, he brings to notice that the Colonial state had initiated forest conservation following the expert opinion of the Company Surgeons.

In my opinion, Grove by showing that there were conservationist ideas and practise during the colonial rule, questions the factual basis of the dualism of modern and tradition. I, however, disagree with both the positions. I show in this chapter that both the positions are evaluative. Further, Grove privileges the expert knowledge and thus, assumes that the state simply accepted it. I will show that the doctors produced the idea of conservation within the prevailing power relations within the state. In its dissemination, the idea of environment was received differently by different layers of the administration.

To displace both the positions discussed above, I start from the early years of Company rule in Malabar and Kanara, the supposed beginning of the contact between 'modern' and 'traditional'. Section 1 is an account of the period 1800 to 1810 of the ideas the Company official held on forests. Company officials were far from hostile to the forests. The assumed duality between agriculture and forests in the literature is generalised and

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overarching. Company officials, charged with governing the area, were actually more specific in their understanding of the territory. The Company administration was already describing its understanding of ways of husbanding forests as a 'science' of forest management. For me, this is neither a cause for celebration nor disbelief. I am more interested in how this idea was produced, understood, disseminated and deployed. The idea was put forward and negotiated in the context of tussles within the Company administration. The early propagation of ideas of conservation was from the Bombay Presidency, eager to get the Malabar forests from the Madras Presidency.

Section 2 is an account of how after Bombay government got the forests from Madras, the idea of conservation crystallised and was bureaucratised in the office of the Conservator of Forests. In section 3, I will show that after the abolition of the Conservatorship, the Bombay government again started propagating the idea that the forests in Malabar were getting degraded. It pressed for the institution of the Conservatorship while Madras was trying to ward off the encroachment. Madras government, nevertheless, had to engage with the question of timber supplies. Thus, conservation of forests became a matter of administrative discourse again. In section 4, I take up the question of the rise of the science of environment in the 1840s. I show that the idea of conservation arose in the context of and was imprinted by the power relations within the state. Cleghorn, the Father of 'scientific forestry' in India, pledged to the Madras government his commitment to forest extraction and organising timber supplies. He expressed the idea of conservation differently to different layers of the administration, and different layers understood and adopted the idea of conservation differently.

In this early period the Company was not wantonly destroying forests in Malabar and Canara. It was instead discussing conservation of resources. To the contrary, it was the local people who were blamed for destroying forests and felling under-sized timber. I will argue that forests entered the colonial imagination in a complex and fractured way. The forest at one level, was the 'other' of agriculture. But it entered the imagination in many

other forms. It was a land that could be brought under agriculture, the abode of wild animals and an 'internal frontier' where the ruler's power ended.

4.1. Company Administration and Forests, 1800-1810

How were the resources, particularly agriculture, land and forests categorised, understood and assigned meaning within the Company administration, and how did these perceptions and categories change? I start the narrative at the very juncture where the colonial rule first came in contact with the pre-colonial in relation to forests, that is, 1800 in Malabar and Kanara.

The text of Buchanan's journey through Malabar and Kanara in 1800 is representative of the opinion of the Company officials. The basis for my reliance of Buchanan's text is that the Governor-General had commissioned Hamilton Buchanan in 1800 to conduct a special survey of Malabar, Kanara and the Ceded districts to understand the resources and people with the view to acquiring knowledge for better administration. Not only was the report much appreciated by the Company, leading to its publication, but also, methodologically, the report was representative of the opinion of the colonial officials in Malabar, Kanara and Ceded districts. Buchanan had solicited written reports from the local officials. Since his stay in each location was short, just a few days, he acquired information primarily by talking to the local administrators. In assimilating opinions and judgements of the local officials, he reproduced their categories.

4.1.1 Forests, the 'Other' of Agriculture: A Collage of Images

Buchanan described an area in Malabar,

The whole of this district may be divided into two portions; the one which is well inhabited, and much cultivated; the other is covered with thick

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uninterrupted forests, among which are scattered a few villages of the rude tribes, who subsist by collecting the productions of these wilds.¹

The colonial officials cognitively mapped the geographical spaces into a duality of cultivated lands and the 'other'. The agricultural lands were productive, occupied by humans, yielded revenue and thus, brought feelings of satisfaction, happiness and oneness with it. Agriculture represented civilisation. The rest, an undistinguished mass 'forests', was wild and unproductive. The rude tribes did not live in forests. Rather, the tribes who lived in forests were 'rude'. This duality, constructed by colonial officials, has been commented on and theorised.² The point, however, is that these constructions are not static and monolithic. If the construction of the duality is a representation of the geography, it is as much to bring about change and reorganisation of the spaces. If the categories are constituted by the space, the categories constitute the space.

The boundary between cultivated lands and forests had changed in the past and could always possibly be changed by the Company administration. Buchanan regretted that on once agricultural fields,

Teak and other forest trees are now fast springing up ... and this part of the country will soon be no longer distinguishable from the surrounding forests.³

The opposing categories of cultivated lands and forests were not a simple watertight duality. These entered the imagination of Company officials in a more complex way. What was forest could become agriculture and the reverse, the agricultural land could turn into a forest. The space was not a given one but crystallisation and representation of administration and polity. Referring to rice fields which had become forests, Buchanan noted,

¹ Buchanan (Vol. II, 1870): p60.

² Bhattacharya (1995); and Pouchepadass (1995).

³ Buchanan (Vol. II, 1870): p49.

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Owing to the persecution of the *Hindus* by the late Sultan, and to incessant warfare between them and the *Moplays* ... one-fourth of the rice fields in *Curumbara Nada* is estimated to be waste.⁴

The space was a testimony of the virtues of the Company administration in contrast to the prior rule of the 'despotic' local rulers and warring groups. Reclaiming the agricultural lands was to restore 'peace' and 'justice' in the province. Geographical space was political. A well cultivated area was a sign of good and just governance and civilisation.

In one sense, the categories of cultivated lands and forests were a representation of the space. But also, there was a memory to what the space in a prior period was. The thrust was to restore the landscape to the prior period. The reclaiming of agriculture was not an arbitrary act of destroying and clearing forests. It was self-evident that agriculture could be done only on certain kinds of soil and slopes. Referring to an area in Malabar, Buchanan regretted, 'Although the soil of these hills appears to be good, yet scarcely any part of them is cultivated'.⁵ Referring to another area, Coiote in Malabar, Buchanan observed, 'not more than one-thirtieth part of the two districts is too steep, rocky or barren for cultivation'.⁶

Buchanan thus concluded that in Coiote 'by far the greater part of what is fit for cultivation is covered with forests'.⁷ One of the contradistinctions of agriculture with forests was about productive and unproductive use of resources. Commercial plantation of spices was more than a welcome change. Thus, Buchanan was estimating the extent of land on which plantation could be done in Coiote.

Interestingly, while Buchanan had started his journey, Thomas Munro was already in Kanara. Munro's accounts are full of forests and hills as wild, wretched, desolate and barren.⁸ He resented his journey through the *ghats* where he could not see any cultivation

⁴ Buchanan (Vol. II, 1870): p153.

⁵ Buchanan (Vol. II, 1870): p81.

⁶ Buchanan (Vol. II, 1870): p184.

⁷ Buchanan (Vol. II, 1870): p184.

⁸ Munro to his sister in a Journal which came to hand on October 4, 1800, see in Gleigh (1830): p273-288.

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but only the uninterrupted stretch of forest. The forests and *ghats* thus, alluded, defied and were present as a disturbing, distancing field.

Munro had his reasons for feeling miserable in Kanara. Family misfortunes had forced him to come to India as a soldier at a young age of 17. Despite his hard work, brilliance and shrewdness, Munro could not find any support in the patronage oriented Company administration. After years of struggle and insecurity, he was noted for his capabilities and rewarded with the Collectorship of Kanara. But for Munro, to be in one of the most difficult and unsettled areas, was not a reward but punishment, particularly, when he had come after a similar stint elsewhere.⁹ Munro later in his life, secured and successful, could be more philosophical about the serenity of the forests and hills.¹⁰

Interestingly, shifting cultivation was not condemned in the early years. Buchanan described it in a matter of fact way.¹¹ Similarly, Munro plainly described shifting cultivation. In fact, the hill tribes were described as 'rude'¹², but the method of agriculture, even if associated with such 'rude' tribes, was not described as rude. To the contrary, the very act of doing agriculture amidst the forests was ameliorating the rudeness of the tribes and thus, an act of civility. Munro recognised the shifting cultivators as owners of land, much the way other cultivators owned land.¹³

Forests figured in yet another sense in the imagination of the Company officials. The forests symbolised the internal frontier. The colonial rulers had conquered the local population and the plains. But the hill people were not in the control of the Company or the local chiefs, at least directly. In the colonial mind, *ghats* stood as the boundary where their authority ended. Referring to a tract between Malabar and Coimbatore, Buchanan noted that the *Nairs* had no authority over its inhabitants. The area was subject to heredity chief. Buchanan reported,

⁹ Munro had worked in Baramahal where he fashioned the Ryotwari system with Read.

¹⁰ Letter from Munro to his wife, 2/4/1826, see in Volume 2, Gleigh (1830): p1920-2.

¹¹ Buchanan (Vol. I, 1870): p414.

¹² Buchanan (Vol. I, 1870): p414

¹³ Gleigh (Vol I, 1830): p273-288.

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The manner in which these chiefs manage their country, or raise the revenue, is here totally unknown; as the natives seldom venture up to the hills, on account of the unhealthiness of their air.¹⁴

There were several reasons for this isolation. Forests were perceived as an abode of wild and dangerous animals. Buchanan reported that even the villages on the fringes of forests were abandoned due to the menace of elephants. Local people did not venture into the thick forests out of fear of the wild animals. Even in the fringes, Buchanan reported, it was dangerous to venture as walking through tall grass, one could step on a tiger.¹⁵ Munro had reported that while camping on his tours in Kanara, the attendants would light fire and keep awake the whole night in the fear of tigers.¹⁶ People living in such wild environment were obviously 'rude' and wild. Perhaps the people in the plains had already constructed this difference between the hills and plains. The Company officials only reiterated it. Buchanan observed,

The inhabitants of the plains cannot live on these mountains; nor can the highlanders live on plains, without the greatest danger to their health.¹⁷

The 'difference' had led to an imagined construction of each other. Buchanan noted,

The love of the marvellous, so prevalent in India, has made it commonly reported, that these poor people go absolutely naked, sleep under trees without any covering, and possess the power of charming tigers, so as to prevent these ferocious animals from doing them any injury. My interpreter, although a very shrewd man, gravely related that the *Eriligaru* women, when they go into the woods to collect roots, entrust their children to the care of a tiger.¹⁸

In these accounts, interestingly, the natives are always in the fear of the wild animals. The colonial officials do not talk of their own fears. The commentary on the fear of the

¹⁴ Buchanan (Vol. II, 1870): p112.

¹⁵ Buchanan (Vol. I, 1870): p376-7.

¹⁶ Gleigh (Vol I, 1830): p277.

¹⁷ Buchanan (Vol. I, 1870): p427.

¹⁸ Buchanan (Vol. I, 1870): p462.

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'natives', by its absence for the colonial officials constituted them as brave and daring. Buchanan recorded how he ventured on a 'disagreeable and dangerous' journey into the jungles invested with tigers and snakes, where the native would not dare to venture. He proudly proclaimed,

...I saw neither elephant, tiger, nor serpent, and escaped without any other injury than a fall over a rotten tree.¹⁹

If the plains people were feminised as cowardly, the hill people in contrast were described as rude, backward but nevertheless brave. Buchanan narrated the daring acts of *Carubaru* chasing elephants with torches,

The animal sometimes turns, waiting till the *Curubaru* comes close up; but these poor people, taught by experience, push boldly on, dash their torches against the elephant's head, who never fails to take immediate flight. Should their courage fail, and should they attempt to run away, the elephant would immediately pursue, and put them to death.²⁰

But their bravery could not surmount their environment. They were helpless before tigers.²¹

Forests were differentiated from agriculture. But it did not necessarily enter the colonial imagination as an ugly site to be demolished and destroyed. The depiction of forests as desolate, irritable, dull and dreary, typically associated with the British rule, was not universally true. Buchanan described the forests as beautiful particularly when it was in conjunction with agricultural lands.²²

¹⁹ Buchanan (Vol. I, 1870): P377.

²⁰ Buchanan (Vol. II, 1870): p380.

²¹ Buchanan (Vol. I, 1870): p380.

²² Buchanan (Vol. II, 1870): p49-50.

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4.1.2 Forests, an Economic Resource: Conservationist Ideas

If in one sense, forests were the 'other' of agriculture, there was an economic value to forests too. It was neither possible, nor desirable to decimate forests wantonly. The forests were valued for their commercial value and utility, the preservation of valuable trees was a consideration. Buchanan identified teak as the most valuable species and lamented, 'to the increase of preservation of this, little or no attention has been paid'.²³ Despite the early hopes of finding the treasures of timber in Malabar, it was increasingly realised that the accessible timber was already felled during Tipu's period.²⁴ Walker was aware that if forest resources were not prudently conserved, they would get exhausted. Walker cautioned,

It is of little use to enquire whether this has been occasioned by an unnecessary waste under Tipoo's government, or has arisen from a more ancient gradual expenditure, which in time must exhaust the most productive repository when the means of keeping up the original funds are neglected.²⁵

The colonial officials were of the opinion that the local people were destroying forests.

Buchanan noted,

... but these people are so ignorant, that, without compulsion, it could not be expected that any such plans should be carried into effect. At present, every man who chooses to give the landlord a *Fanam* may cut down a tree, and all the valuable trees being cut, while the useless ones are allowed to remain and come to seed, the consequence is, that in all places of easy access the valuable kinds have become almost entirely extinct.²⁶

The only solution, in the opinion of some officials, was to forcibly prohibit felling of young trees. Thus, Walker insisted on rules to prevent 'wanton destruction' of trees by prohibiting the felling of trees below a certain age and size. He further insisted,

²³ Buchanan (Vol. II, 1870): p77.

²⁴ Bryce Moncreiff to GOB, 14/6/1801, MSS 13602, Walker Papers, NLS.

²⁵ Walker to GOB, 6/6/1800, MSS 13609, Walker Papers, NLS.

²⁶ Buchanan (Vol. II, 1870): p78.

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... wherever we may obtain a supply of timber from Malabar, if we mean to be provident with respect to futurity, a provision should be made to plant young trees in the room of those cut down.²⁷

As we saw in Chapter 1, Macknochie, undoubtedly motivated by his private interest, raised the alarm on the destruction of forests.²⁸ In response, the Commissioners had to order an enquiry. The arguments of conservation must have been a good ground to claim and be heard. The Court of Directors had endorsed a request for an additional loan on the grounds that Macknochie had countered the practice of felling of small timber prematurely.²⁹ John Spencer, the President of the Second Malabar Commission recommended that,

Jenmkars should also be made to plant young trees for every one cut down otherwise the present stock will be completely exhausted.³⁰

The Court of Directors were apprehensive,

...the present custom of felling timber of small dimensions is carried to such an extent as to annihilate the forests in a few years.³¹

As a result of these concerns within the administration, a proclamation was issued prohibiting the cutting down of young teak in Malabar.³² Buchanan was suggesting in 1800 what the foresters did after 1870,

...cut down every other kind of timber allowing the *Teak* to spring up naturally, which it will every where do; and to enforce the commissioners' regulation concerning the size of the trees. In the course of fifty or sixty years, very excellent forests might thus be formed near water carriage, very much to the advantage of their proprietors and of the nation ...³³

²⁷ Walker to GOB, 6/6/1800, MSS 13609, Walker Papers, NLS.

²⁸ Government in Malabar to CD (Revenue), 1/1/1798, f/4/39/965, IOL.

²⁹ CD to GinC (Revenue), 28/8/1800, e/4/1015, IOL.

³⁰ Waddell to Spencer, 29/8/1799, f/4/89/1843, IOL.

³¹ GinC to CD (Revenue), 21/1/1801, f/4/89/1843, IOL.

³² Logan (1891).

³³ Buchanan (Vol. II, 1870): p78.

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In 1805, the Bombay government, through the report prepared by Wrede, made the 'science' of forest preservation clear,

... why do we not at once resolve to husband and manage our forests methodically, after obvious and long known principles, universally attended to in all European countries, and at once secure... the best management of the forests with a view to the preservation of the forests so as to afford us, permanently the supplies we require.³⁴

The report described the principle of this science,

The principle object of this science, of foresting or administering forests after principles- is the obtaining, as nearly as possible, a complete knowledge of the quantity and quality of timber contained in the forests- so as to determine the quantity that can be annually cut down, and to know, where to fetch the timber of such particular sort or quality ... b) the preservation of the forests, new planting of young trees to ensure permanent supplies and to improve the forests, by foresting the growth of the most valuable species of timber.³⁵

4.1.3 Ideas and Contestation within the Company

The idea of preservation of valuable timber, like any other idea, was not fixed and given. Ideas acquire a hegemonic position within certain power relations. In these relations, ideas can be selectively advanced as representation of some other interest. Through these processes, an idea acquires a currency, gets into circulation and acquires legitimacy.

For example, Macknochie highlighted the preservation of teak for his own partisan ends. The Bombay government, by upholding the 'science' of conservation, was arguing for a Conservator's establishment. Wrede in his report even went about listing the posts, mostly for Europeans, and even fixing their salaries. In the report, Macknochie was recommended as the most suited person for the post of Conservator. And more, he was

³⁴ BPP, 26/2/1805, p/343/20, IOL.

granted double the salary fixed for the post of Conservator. This was justified as a means to attract someone of his talent.³⁶ Our reading of the intentions of the officials is not far fetched. Company officials in Malabar were told by the Bombay government that the 'principle of the present government is not to seek emolument or create places for persons'.³⁷ As we have seen, such practices had led to the removal from Bombay of the Malabar district and later, the abolition of the Conservator's establishment.

Why has the literature completely ignored these discourses on preservation and given us just the opposite construction? Most of the environmental historians have dealt with the post-1860 period. In this period, the government was exploiting timber to supply the incipient railway expansion. Thus, resource exploitation was visible and apparent. Further, the forest officials in their writings were continuously reiterating the wanton destruction of forests during the Company rule. This was taken at its face value and amounted to a self-description and confession of the colonial rule in its proclivities for forest destruction. As a result, the Company period was assumed to be settled and unproblematic for any exploration. More plausibly, the forest officials were exaggerating the destruction of forests during the Company rule, and its consequent environmental implications, to carve space for themselves within the administration.

We live in and with ideas, and yet, ideas are not always explicitly contested. The period from 1792 to 1807 was an unsettled one. The Bombay Presidency first got Malabar and then lost it in 1800. It could claim the forests back in 1805. In this turbulent period, ideas had to be struggled for overtly and explicitly. In the course of this, the idea of preservation of valuable timber acquired a hegemonic position. Once ideas become hegemonic, these crystallise in administrative policy, practices and procedures. The crystallisation of the ideology was in vesting the forests in the Bombay Presidency and in creating the Conservatorship. It was through the functioning of the Conservator's establishment that the preservation of forests was to be effected.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Logan (1951): p487

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As we saw in Chapter 2, Madras opposed the Conservator's establishment and finally succeeded in abolishing it in 1823. The Madras Presidency was not opposing the idea of preservation. It was attempting to displace the Conservatorship in which the idea of preservation had crystallised. These tussles, however, were not worked out with the intention of keeping ideas intact. Instead, in the conversion of idea into administrative mechanisms, the ideas themselves were modified, abridged and refined. In the struggle to displace the Conservatorship, the idea of preservation was not held sacrosanct. Rather, it was to displace the Conservatorship with or without the idea of preservation. In the contestation within the administration, arguments for preservation emerged in a new form. Bombay became the bearer of the interests of preservation and Madras opposed the Conservatorship with every means it had at its disposal.

The Bombay government reiterated the relevance of preservation through the Conservatorship. The Conservator's establishment fixed 28 March, 1810 as the date by which all immature timber already felled in Malabar forests had to be moved out of forests. After this, the Conservator pledged, 'small trees in the forests will be allowed to attain their full growth'.³⁸ The draft of the regulation framed by Bombay for regulating the Conservatorship boldly declared 'regulation for management and preservation of forests' in its preamble. It found further regulation necessary on 'account of devastation committed on forests'.³⁹

The Madras Presidency, whether out of concern or to outflank the Bombay Presidency, did not detract from the argument of preservation. It was a Madras official who first raised in 1815 the baneful effect of shifting cultivation.⁴⁰ In Kanara, the concern of the administration was to reclaim agricultural lands. However, Read, as Collector of Kanara,

³⁸ See BPP, 9/7/1811, f/4/8156, IOL.

³⁹ GOB to GOM, 27/4/1815, MJC, 23/6/1815, f/4/524/12513, IOL.

⁴⁰ Pearson, Judge and Magistrate, South Malabar to GOM, 24/6/1815, MJC, 4/8/1815, p/323/18, IOL.

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recommended that *ryot* should not be allowed to fell teak and *poon* (a local timber tree) while clearing the land.⁴¹

Harris, the next Collector of Kanara fully accepted the complaint of the Marine Board on the injury to forests from shifting cultivation. He himself reported that fire from shifting cultivation spread to other forests and damaged them. He also reported that the revenue from shifting cultivation was insignificant. However, he defended shifting cultivation on grounds of equity and good governance.⁴²

Further, Harris endorsed the argument that if preservation of forests was a concern, the extension of cultivation was equally a concern. He put forward the constraint that Teak and forests were so interspersed that 'the most beneficial extension of agriculture will never take place'.⁴³ Towards preservation of forests, Harris proposed that rules should be made to preserve trees on hills. He first suggested that no part of the hills should be cultivated. Second, no hill land was to be cleared without previous permission of the *Tehsildar*. He had further suggested measures for encouraging planting of teak and *poon*.⁴⁴ Thackeray, in his minute of 1822, did not question the value of preservation but justified better and more efficient means to strengthen preservation through the 'information and influence' of Collector than of the 'insulated' Conservator.⁴⁵

The interests in conservation had crystallised differently in Madras and Bombay Presidency due to the peculiarities of the administrative arrangements. The Bombay Presidency was charged with the supplies of timber and control over forests but no other administrative responsibilities on the Malabar Coast. It was, thus, emphasising and strengthening the ideology of preservation. In contrast, the Madras Presidency, charged with the responsibility of revenue collection, needed to encourage cultivation and enhance the revenue. But the Madras Presidency, in opposing the Conservatorship, premised on

⁴¹ Read, Collector of Canara to the Board of Revenue, 18/8/1815, MBOR, 28/8/1815, p/291/50, IOL.

⁴² Harris, Collector of Canara to the Board of Revenue, 13/9/1820, MBOR, 25/9/1820, p/293/64, IOL.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Thackeray's Minute (1822).

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preservation of forests, could not detract from the argument of preservation. It had to work in and around it. However, once the Conservatorship was abolished, it could be uninhibited in its motivation. Harris, Collector of Kanara in 1823, after the abolition of the Conservatorship, recommended the removal of duty on the forests of Sonda and Soopah. He provided the reasons for the Company's interest in preservation,

The only object of government in laying an exclusive claim to teak and other woods or in the preservation of the forests, was to obtain timber for maritime...⁴⁶

Since the forests of Soopah and Sonda were inaccessible to be brought to the coast to be taken to Bombay, Harris suggested,

... prohibition be removed, this would open a new source of trade and would also I am inclined to think tend towards the extension of cultivation by removing any obstacle to this extension, the only case in which teak would be required... public building...enough forests for these purposes...⁴⁷

Harris in another letter to the Board of Revenue rejoiced on the abolition of the Conservatorship:

It has spread throughout the desolate forest tracts of Soopa-- confidence and safety, for it has enabled the cultivator of land to labour in security by removing trees and jungle bordering in his cultivation where to my own knowledge a father, and son and slave were in a day carried off by tigers, concealed therein.⁴⁸

The Board did not differ with Harris on clearing of forests. It was concerned about potential of corruption in the system of farming. The government, however, endorsed the suggestion and withdrew restrictions on felling in Sonda and Soopah.⁴⁹

⁴⁶ Collector Canara to the Board of Revenue, 10/7/1823, MBOR, 21/7/1823, f/4/777/21016, IOL.

⁴⁷ *ibid.*

⁴⁸ Collector Canara to the Board of Revenue, 9/5/1823, MBOR, see 19/5/1823, f/4/777/21016, IOL.

⁴⁹ MRC, 17/10/1823, f/4/777/21016, IOL.

Thus, the ideology of preservation, after being dominant in early 1800s, subsided after the abolition of the Conservatorship in 1822. The preservation ideology was not hegemonic across sites, in an unquestioned form. Like every other ideology, it was in relation to other interests and ideas, and in this network of ideas and power relations it was continually fashioned as an ideology. In practice, many conflicting ideologies inhabited together the domain of the administration. For example, extension of agriculture, revenue from timber, and preservation of forests for future revenue were not exclusive. How did one ideology become dominating in relation to the others?

4.2. Contesting Forests and Environment, 1830-1850

The Navy Board, primarily interested in timber supplies and resentful of having lost the Conservatorship of forests, continued to highlight the felling of immature timber in Malabar.⁵⁰ Through this, it mounted pressure to keep the ideology of preservation alive. The Madras officials did not disagree with the need for preservation of timber in Malabar. It was apparent to them also that immature timber was being felled and the prices of quality timber were soaring up. Even before the complaint of the Navy Board, Sheffield, the Collector of Malabar, in a letter to the Board, dated Dec. 25, 1828 had proposed prohibition of cutting young teak trees under a heavy penalty.⁵¹

Clemenston, the Collector in Malabar in 1838, who had raised questions of legality in prohibiting felling of immature timber, was not opposed to the measure itself. He repeated, what had been said for the past 40 years, that mature timber near rivers was already felled and immature trees were being exploited to earn money. Clemenston suggested the indirect route of imposition of a high duty on immature timber. In this, the interests of preservation and revenue coincided.⁵² Madras government derived Rs. 27,000 as revenue on export of timber in Malabar in 1837!⁵³ Clemenston's opposition was to the

⁵⁰ See Chapter 2.

⁵¹ MBOR, 17/4/1834, p/299/35, IOL.

⁵² See discussion in Chapter 2.

⁵³ Stebbing (1922): p75

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encroachment from the Bombay officials and the threat of re-introduction of the Conservatorship.

There were perpetual problems in finding quality timber at a reasonable price for shipbuilding in Bombay. The prices were rising and available timber was often drawn from young trees. In the 1830s, the Bombay Presidency commissioned its own investigation in Malabar to assess the timber availability and how to extract it. Further, the reports of timber shortages and exploitation of immature timber were being passed on to the Court of Directors. Thus, the Malabar officials had to engage with the question of timber supplies and felling of immature timber.⁵⁴

Underwood, the Collector of Malabar in 1840, concerned with the problem of felling of young timber, tried hard to re-organise the legality to permit at least the imposition on felling of young timber. Similarly, the Board of Revenue was not opposed to imposition on felling of young timber. It, in fact, endorsed restrictions on felling of young trees in Malabar. It only had reservations on the creation of an 'independent authority' and encroachment from Bombay. To dismiss any possibility of re-introduction of Conservatorship, Underwood noted that he could not discover any record that any of the conservators had taken any steps to propitiate the forests, or planted a single tree.

The prospect of timber supplies became bleak enough for Farish, the Governor of Bombay Presidency in 1839, to strongly suggest that forests near rivers in Malabar should be leased and resources husbanded and conserved for the next 30 years to ensure future supplies.⁵⁵ Underwood, the Collector in Malabar, endorsed the recommendation to purchase exhausted forests and replant and conserve them.⁵⁶ The Board of Revenue, however, was not in favour of purchase.⁵⁷ This seemed to be making a demand on the revenue. It warded off the question by saying that further experience was needed.

⁵⁴ See Chapter two.

⁵⁵ MBOR, 23/5/1839, p/301/61, IOL.

⁵⁶ Underwood's Report.

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The Court of Directors reviewed the forest question in 1840 and endorsed the need for forest preservation. However, they recommended that the forests should be bought only to the extent necessary for the requirements of the government. The rest should be left in private hands. The consideration, clearly, was on the grounds of investment required in the venture of raising forests.⁵⁸ The investment, however, had become inevitable. As a result, Conolly, the Collector of Malabar in 1842, was given a small establishment and money to lease forests and initiate preservation. Conolly's plantation later became a subject of much praise and discussion.

The concern for preservation of forests was gaining grounds. Blair, the Collector of Kanara, in 1838, lamented the need of trained people 'to improve the trees and to plant young ones when required'.⁵⁹ Blane, the Collector in Kanara in the late 40s, created a small forest establishment in Kanara.

With the depletion of accessible teak in the past 50 years, however, timber supplies continuously became constrained. If one strategy was to explore newer accessible areas like the Anaimalai hills in Coimbatore and the natives states in Gujarat, the other was to accommodate the assertion that forests had to be protected to maintain the timber supplies. Thus, if the imposition of duty on immature timber was one risk, which had to be taken despite the fear of dissatisfaction, the newer thrusts were for protection directly. It was in this context that the government of Bombay in 1847 appointed Dr. Gibson as the Conservator with a separate office to supervise forests.⁶⁰

4.3. Rise of 'Science' of Environment

Gibson was the superintendent of the Botanical garden and held the concurrent charge of the Conservator. Madras followed suit in 1858 by appointing Dr. Cleghorn as the

⁵⁷ MBOR, 7/11/1839, p/302/13, IOL.

⁵⁸ CD to GinC (Marine), 26/2/1840, e/4/761, IOL. And CD to GinC (Marine), 30/11/1842, e/4/772, IOL.

⁵⁹ Collector of Kanara to the Board of Revenue, 18/8/1838, MBOR, 6/9/1838, TNA.

⁶⁰ Stebbing (1922): p118.

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Conservator. Cleghorn and Gibson were two of the 'experts', who according to Grove, brought about the decisive shift in Company policy towards forest conservation.

It is undoubtedly true that the surgeons like Balfour, Gibson and Cleghorn adopted and elaborated the researches produced in Europe on linkages, in the context of India, between trees, forests and climate. Balfour published a memorandum in 1840 drawing linkages between forests and climate in the territories under the Madras Presidency. He observed that the depletion of tree cover had reduced rainfall and moisture content in the air.⁶¹ Following him, Gibson pointed out the same effects of clearance of forests on the climate.⁶² He also noted that destruction of forests led to siltation of rivers and creeks. The subject of depletion of forests in India was taken up in 1851 as a theme by the British Society for Advancement of Science. A committee on the subject was appointed to make a report, which emphasised the need for forest conservation.⁶³ Cleghorn contributed a report on India. Dalzell, the Conservator after Gibson, reiterated the arguments.⁶⁴

However, that doctors were respected people was no guarantee of the 'expert knowledge' acquiring a hegemonic position. To the contrary, the 'expert' knowledge was subservient to the power relations within which it was produced. This knowledge of environment and ideology of conservation was articulated differently to the different layers of administration in search of legitimation. Different layers of the administration understood, assimilated and gave meaning to these ideas in the context of their own exigencies and functions. The ideas of conservation was continually in formation through these overlapping and contradictory discourses. I explore these questions with reference to the most prominent expert of all, Cleghorn, honoured as the father of forest conservancy in India.

⁶¹ Balfour (1878).

⁶² MBOR, 19/7/1847, TNA.

⁶³ Cleghorn and others (1852).

⁶⁴ Dalzell (1863).

4.3.1 Experts in the Service of Timber Exploitation

Gibson and Cleghorn were 'experts', but they were not appointed and paid to develop the science of the environment. The supply of quality timber was rapidly diminishing. The Madras and Bombay governments were interested in a more segmented and specific focus on forests to assess their capabilities and make available timber for immediate and future needs. The creation of the forest establishment did not have much to do with the environmental arguments. The Collectors, particularly in Kanara and Malabar, since the 1830s were under pressure to attend to the timber supplies. This was detracting from their functions of revenue administration.⁶⁵ Further, the Collectors disliked visiting inaccessible, backward and 'uncivilised' tracts.⁶⁶ The task, in their opinion, was better done by a forest establishment who could visit and engage with such tracts, of course, under the powers and control of the Collector. As we have noted earlier, in Malabar and Kanara, forest establishments were created much before the appointments of the Conservators.

Cleghorn himself recognised that the initiation of forest administration was in 'maintaining a supply of first-class timber,'⁶⁷ and he was committed to the tasks. While reporting on his first year's work as the Conservator, Cleghorn specifically reported on the 'wants of Public Departments'. This included the Indian Navy, the Madras and Bombay railways, the public works and telegraph departments. He regretted the difficulties and constraints in meeting the heavy demands, particularly of the railways. Cleghorn was equally alive to the concerns of augmenting revenue from the forests. On every occasion, where demands were heavy, he recommended charging higher duty on timber.⁶⁸

⁶⁵ Collector Canara to the Board of Revenue, 21/3/1848, MBOR, 16/6/1848, TNA.

⁶⁶ Blane's First Report (August 31, 1847).

⁶⁷ Cleghorn (1861): pvii.

⁶⁸ See for example the first progress report on the Madras forests submitted by Cleghorn to the Madras government in Cleghorn (1861): p1-23.

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Exploitation of timber to meet the demands was a major concern for the administration. Cleghorn obediently pledged in relation to teak timber,

This invaluable wood has received the special attention of the department, and I may say has occupied two-thirds of my own time during the past year.⁶⁹

Cleghorn was producing a 'science' useful to the administration. He was surveying the forests, estimating the supplies and working out the modalities and costs of transportation. For example, with reference to Wainad teak forests, Cleghorn reported,

From the situation and natural slope of the country the timber must be carried eastward, and will be extremely valuable for military purposes in Bangalore. ...it is probable that this timber will come into use also to meet the increasing demand at Utakamand. It is much to be regretted that no means of transport exists by which the crooks and other naval timber found in this tract can be conveyed to the coast, where they would be extremely valuable.⁷⁰

In order to strengthen timber supplies, Cleghorn organised timber depots. The forest tracts were unhealthy and thus, labour was a problem. Cleghorn negotiated to get jail convicts to work in the forests as labour.⁷¹

He was much concerned in exploiting teak from an inaccessible location in Kanara. The forest was an unmixed teak and exploitation would have denuded the patch which was also the source of water streams. Cleghorn keenly worked to develop options like building a road or blasting streams to facilitate water carriage.⁷² The other aspects of this 'science', which Cleghorn was developing, were the techniques of eliminating waste of timber, sawing, girdling and preserving fallen timber.

⁶⁹ Cleghorn (1861): p6.

⁷⁰ Cleghorn (1861): p8.

⁷¹ Cleghorn (1861): p7.

⁷² Cleghorn (1861): p10.

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4.3.2 Insertion of Environmental Arguments

Cleghorn advocated conservation of forests but within the economy of power relations in the administration and society. He accused the local population of bringing destruction of forests,

... large and valuable forest tracts were exposed to the careless rapacity of the native population, and especially unscrupulous contractors and traders, who cut and clear them without reference to ultimate results, and who did so, moreover, without being in any way under the control or regulation of authority.⁷³

For Cleghorn, this 'threatened speedily to exhaust the forests, and thereby to deprive the State of those supplies which were indispensable to the public service'.⁷⁴ In this political economy of conservation, 'natives' were to be condemned while the exploitation of forests by the state was to be celebrated in the interest of 'public service'. And it was this 'principal evil' which had rendered it 'imperative' to organise 'a system of forest administration'.⁷⁵ Cleghorn did note the 'vast clearance' of forests by the coffee planters (exclusively Europeans). But this was justified 'as endeavouring to rescue the soil for legitimate purposes'. And further, 'it is important to give *every facility* for the cultivation of coffee'.⁷⁶ In contrast, he described shifting cultivation, which was done on hill slopes similar to coffee plantation, as a 'rude' and 'barbarous' system.⁷⁷ According to him, the practice not only affected the climate but also deprived the state of the valuable timber urgently needed for shipbuilding and railways.

Cleghorn's intention was to 'educate' the administrators. In his opinion, it was 'extremely desirable that correct information on this subject should be promulgated among the revenue officers of India'.⁷⁸ However, Cleghorn could do this only by being useful to the

⁷³ Cleghorn (1861): p iii.

⁷⁴ Cleghorn (1861): p vii.

⁷⁵ Cleghorn (1861): p vii.

⁷⁶ Cleghorn (1861): p17.

⁷⁷ Cleghorn (1861): p 137 and 140

⁷⁸ Cleghorn (1861): p ix.

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interests of the administration. Having fulfilled the task of timber supplies, Cleghorn suggested that first-class timber should be marked and only such proportion should be cut down as would be replaced by other trees. This was to prevent exhaustion of forests.⁷⁹ Further, coffee plantations were to be encouraged but not on the crest of mountains, where, it was argued, it would not grow anyway.⁸⁰

Along with supplying timber, Cleghorn highlighted the pressure on forests. Referring to a letter from the Secretary of State for supply of timber for the Royal Navy from the forests of Kanara, Cochin, Travancore and Malabar, Cleghorn said,

If the forests of this presidency are called upon to any extent to meet the demands of the Home Government, it is evident that the conservancy of all reserved tracts must be rigorously enforced. There are many temptations to rob the forests of the young trees; and the result is, that mature timber (teak especially) is becoming everywhere more scarce.⁸¹

Cleghorn, contemplating the prospective demands for the railway expansion, recommended,

... that immediate steps should be taken to raise large numbers of hard-wood trees suitable for sleepers, especially as sleepers of indigenous woods may be estimated at one-half the cost of those obtained from England.⁸²

Thus, Cleghorn was using the authority of a superior officer, the Secretary of State's desire for timber supplies for shipbuilding, to accommodate preservation of forests. Similarly, he was trying to impress the point by creating the fear of possible obstruction in the railway expansion.

Cleghorn had described shifting cultivation as 'barbarous'. However, when the Madras government asked him for his opinion in 1860, he fully endorsed the suggestion of the

⁷⁹ Cleghorn (1861): p5.

⁸⁰ Cleghorn (1861): p16

⁸¹ Cleghorn (1861): p61.

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Board of Revenue of a liberal treatment, endorsing only the need to protect strategic places from where timber could be exploited. He was conscious of the spaces within the administration in which he was working. Perhaps, realising from the earlier bitter experience of the Conservatorship, he made it a point to concede the needs of the cultivators and not to step on the toes of the revenue officers. He said,

... when forest management appears to affect the revenue or cultivation of the district, I immediately avail myself of the advice and counsel of the collector; and throughout I have desired to be in the position of his adviser, and not an executive trenching upon his authority.⁸³

At the same time, where opportunities arose, he would impress the 'expert' knowledge. He noted, 'In India, there is no class of persons who have made it their business to attend to forestry as a branch of rural economy'.⁸⁴ He commented that of the two hundred applicants for the post of sub-conservator, 'there was not one who could be considered an intelligent forester'. He made exception of two persons, one trained in the Black forest of Germany; and another who had worked as a forester in England.⁸⁵ He found soldiers and artificers most suitable as 'well disciplined' and to whom 'obedience comes naturally'.⁸⁶

4.3.3 Court of Directors and Environmental Arguments

The 'expert' knowledge, thus, attempted to accommodate itself by being useful to the administration. The address of this knowledge, however, was different to the different hierarchies of the administration. Balfour emphasised that deforestation had led to reduction of rainfall, dryness in the air, and increase in temperature. This had adversely affected agriculture. Bringing the spectre of the great Bengal famine where half a million had perished, he concluded that the result of deforestation could only be famines.⁸⁷ Later, Gibson also pointed out that deforestation led to siltation of rivers and creeks. This would

⁸² Cleghorn (1861): p33.

⁸³ Cleghorn (1861): p22.

⁸⁴ Cleghorn (1861): p18-19.

⁸⁵ Cleghorn (1861): p19.

⁸⁶ Cleghorn (1861): p19.

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affect sea navigation and therefore, trade. Thus, the nascent science was trying to impress others with the serious effects of deforestation on trade, commerce and agriculture and therefore, the very stability of the British rule.⁸⁸

The Court of Directors found the subject 'one of having a strong practical bearing on the mankind'. But the Court, just five years back, had instructed that only as many forests were to be leased for protection as was absolutely necessary for meeting government supply. The rest were to be left in private hands.⁸⁹ Forest conservation required expenditure which the Court was not prepared to incur. Pronouncements announcing impending catastrophe, like the ones brought out by the researchers, were not to be rebuked or ignored. But nor were these to completely displace all past practices and considerations. The Court observed, 'the modes in which the presence or absence of tree influence the climate of a country are by no means so clear as the fact itself'. The Court, thus, respectfully dismissed the plea by directing the Presidencies to furnish 'extensive and accurate information'.⁹⁰

One should not read too much into such instances of the Court taking note of environmental concerns. The Court had only asked for more information. Second, even a superior layer of the administration cannot be privileged as the exclusive site where ideologies crystallise and policies emanate from. At the best, it is one of the sites in the multiple layers of the administration. We need to see the accommodation of environmental arguments in the subordinate locations.

4.3.4 Madras Presidency and Environmental Ideas

In reviewing the first year of work of Cleghorn, the government of Madras in August 1858 noted that the Forest Department had 'scarcely been able to meet the demands made

⁸⁷ Balfour (1878).

⁸⁸ Balfour (1878).

⁸⁹ CD to GinC (Marine), 26/2/1840, e/4/761, IOL; and CD to GinC (Marine), 30/11/1842, e/4/772, IOL.

⁹⁰ CD to GinC (Financial-Statistical), 7/7/1847, e/4/792, IOL.

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upon it'. However, it condoned its inability to supply to various departments due to the Mutiny of 1857 and other factors. Nevertheless, this was to be an exception. The government noted, 'the operation of the past year do not afford a fair criterion of the prospective effectiveness of the Forest Department'.⁹¹ Evidently, for the government, the primary purpose of the forestry establishment was to make available supplies to the various departments. The government specifically pointed out that in the reports the details of disbursements of the department should be placed alongside receipts. This was to readily show the profits, and thus, efficiency of the forest establishment.⁹²

Using the imperative of the Secretary of State's request for timber for the King's Navy, Cleghorn had threateningly suggested that a patch of forests rich in teak would not last for more than 15 years. According to Cleghorn, this was 'a serious consideration, as it is the only forest from which long plants suitable for a man-of-war can be produced'. Cleghorn was suggesting that the patch of forests should be reserved. The government of Madras detracted that the proposed arrangement was 'not clear'.⁹³

It has been suggested that Blane, the Collector of Kanara in 1847, was elaborating the linkages between forest clearance and climate with encouragement and help from Gibson.⁹⁴ Blane has been highlighted as the one who entirely adopted the arguments of Gibson. Blane undoubtedly condemned shifting cultivation and used the arguments of environmental destruction.⁹⁵ But the Board of Revenue had called upon Blane to report on the effect of trees on climate. This was in response to the Court's directive to furnish information on the subject. Blane was only fulfilling his task. In the course of it, he seized it as an opportunity to weaken the position of the *vargdars* and shifting cultivators.

⁹¹ Cleghorn (1861): p24.

⁹² Cleghorn (1861): p31.

⁹³ Cleghorn (1861): p30.

⁹⁴ Grove (1995): 440 and Stebbing (1922): p222.

⁹⁵ Blane's First Report (August 31, 1847).

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Blane was responding in a larger context of revenue management in Kanara where the benefits of agriculture were not passing on to the state.⁹⁶ We have already seen this in detail in chapter 2. Further, he condemned shifting cultivation, but only its extension by population migrating to the district. He did not have any objection to the people who were already doing it.⁹⁷ Similarly, on the initiative of Blane, the measures the Board took to prevent shifting cultivation were not guided by environmental considerations but considerations of supplying timber and generating revenue. Thus, shifting cultivation was prohibited only near the coast and rivers from where timber could be exploited as merchandise. It was also prohibited in virgin forests which had a good stock of timber. This could become of value later.

4.3.5 Cleghorn and Forest Department Staff

If Cleghorn engaged with the primary task of timber supplies and revenue generation from forests, his subordinate staff understood even less the 'environmental' arguments. They considered their duty only in extracting and supplying timber and in realising revenue. The report of sub-Conservators only dealt with statement of expenditure, receipts and profits⁹⁸, and highlighted difficulties in getting axemen, and other constraints in exploiting timber.⁹⁹ For example, Assistant Conservator Beddome reported,

Owing to the impossibility of procuring many axeman in the past season, very little timber has been felled; this, however, had been advantageous in one way; it enabled me to employ the elephants in getting out much of the old timber lying about the forests.¹⁰⁰

⁹⁶ For details, see Chapter 2

⁹⁷ Blane's First Report (August 31, 1847).

⁹⁸ Cleghorn (1861): p49-53.

⁹⁹ Cleghorn (1861): p54-58.

¹⁰⁰ Cleghorn (1861): p107.

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A Sub-Conservator's establishment considered planting of teak to be 'forced upon us' who was happy exploiting timber.¹⁰¹ Further, one Sub-conservator was found of sedentary habits dispatching peons to the forests.¹⁰²

4.3.6 Triumph of Forest Conservation

By 1860, the forest question was perceived to have become significant all over India. This cannot be ascribed to a single cause. The environmental arguments, shortage of timber for railway expansion, future needs and revenue considerations worked together, with different emphasis and thrust, in different layers of the state. The Madras and Bombay Presidencies had taken appropriate steps¹⁰³ but forest conservancy in other provinces was non-existent.¹⁰⁴ In 1862, it was decided to create a separate establishment with the Government of India for the promotion of forest conservancy. The meaning and import of 'forest conservancy' was negotiated within and across different layers of the administration.

For example, the Government of India ordered local governments and presidencies of Bombay and Madras to exercise caution in regard to disposal of forest lands. It thus directed,

... such lands should be reserved until it can be more clearly seen that it is at present what may be required from them in the interest of general public. ... Already great difficulties have been encountered in wood for railway sleepers ... expedient that local governments should be very careful in regard to the further alienation of the forest lands...¹⁰⁵

The government of India was thus concerned about the shortages of timber and future requirements. At the same time, finance was as much a concern. All matters affecting

¹⁰¹ Cleghorn (1861): p107.

¹⁰² Cleghorn (1861): p19.

¹⁰³ GGinC to SS, 1/11/1862, see in Parliamentary Papers (1871) (LII): p7.

¹⁰⁴ *ibid*: p7.

¹⁰⁵ Parliamentary Papers (1871) (LII): p11.

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expenditure of public money on forest management had to come under the scrutiny of the Finance Department.¹⁰⁶ Forests could be seen purely as a source of revenue. A member of the Council of the Governor-General demanded in February 1863 that since forest was a 'revenue', it should not be with the Public Works Department but the Finance Department.¹⁰⁷ Interestingly, 'forest' was with the Public Works Department because they were the major users of the resource.

And yet, another perspective on forest could at the same time be accommodated. In a minute dated April 27, 1863, the Governor-General cautioned not to be too concerned about revenue,

... forests here have manifestly a most important part to play in the development of our national resources, and it is probable that the revenue which they yield directly, may be by no means a just measure of the wealth they contribute to the state.¹⁰⁸

The Secretary of State in a reply to the Governor-General of India in Council thus endorsed the Council's wish to,

... carry on its forest administration on a really sound basis ... to ensure, for the future, a sufficient and permanent supply of timber from the various provinces of India.¹⁰⁹

This was to be achieved by 'conservancy' but 'at less cost', by limiting the area over which it was exercised', thus endorsing the proposal of the Governor-General, the Secretary of State who directed,

... but even in that case, care must be taken to preserve a sufficient quantity of timber in other parts of the province to attract the rainfall and protect the soil and climate.¹¹⁰

¹⁰⁶ Resolution by the GOI (PWD), 21/10/1862, in Parliamentary Papers (1871) (LII): p14.

¹⁰⁷ Parliamentary Papers (1871) (LII): p16.

¹⁰⁸ *ibid*: p17.

¹⁰⁹ SS to GGinC, see in Parliamentary Papers (1871) (LII): p89.

¹¹⁰ SS to GGinC, 25/1/1865, in Parliamentary Papers (1871) (LII): p89.

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Thus, together with meeting immediate and future needs and generating revenue, environmental interests could also be accommodated or inserted.

The indeterminacy in meaning at different layers was exacerbated by tension between the Forest and Revenue officials; and the Government of India and the presidencies. The Secretary of State in a despatch dated 24 March 1862 had admonished the Governor-General in Council for privatising the forests of Burma. Brandis, then the Conservator of Forests of Burma, had recommended against it. The Secretary reprimanded Government of India, and described Brandis in the most glorious terms, stating that the

... views of that experienced and zealous officer, whose practical knowledge of the subject, and incessant labours in this department for many years, entitle his opinion to great weight.¹¹¹

If the Secretary of State was upholding the 'expert' labour of Brandis, Strachey, the Secretary to the Government of India in the Public Works Department, was firmly asserting his control over Brandis. On Brandis' appointment as advisor to the government on forests, the Secretary permitted him to visit forest areas, but cut him to size, ordering,

If you find it desirable yourself to visit any particular forest districts you will of course do so, but you will clearly understand that the object of your journey is not to furnish a scientific detailed report on the forests, but to frame practical proposals of a general character for their improved management.¹¹²

Scientific knowledge was to be completely subjugated and dominated by the administrators.

¹¹¹ Parliamentary Papers (1871) (LII): p2.

¹¹² *ibid*: p19.

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Conclusion

I have shown in this chapter that neither posing a binary duality of modern and traditional, nor showing the colonial state to be conservationist, are adequate formulations. Representing colonial policy and practice as 'appropriation' or 'conservation' are fragmentary facets and static depiction of a complex interplay of ideologies and practices. The working of the colonial administration cannot be resolved into the binary duality of modern and tradition or destruction and conservation. Instead, what I show here is how use and interest over forests has to be constructed within multiple power relations.

The idea of preservation was present since the early Company rule. For me, this in itself is neither good or bad. What is of interest is to explore how these ideas were produced and disseminated. Through contestation within the state, at times the idea became dominant. At other times it receded away. During 1800-10, the idea became prominent on the insistence of the Bombay Presidency, interested in getting control of the Malabar forests. The idea receded when Bombay got control of Malabar forests. Again, after Bombay lost the Malabar forests in 1823, it started highlighting the need for conservation. Bombay was campaigning for reinstatement of the Conservatorship while Madras was trying to discredit the option.

Similarly, for the period after 1840, I have established that the 'experts' were caught in multiple power negotiations. The 'science' of forests was learnt, developed and deployed in the context of the prevalent power relations. The 'science' expressed itself in the language and terms of the power relations to gain legitimacy. Cleghorn reported his commitment to organising timber supplies. For him, the local use of forest was 'native' 'recklessness', while extraction for the government was 'public service'. Clearance of forests for coffee plantation was a 'legitimate purpose' while shifting cultivation, the livelihood of the forest dwellers, was a 'rude' and 'barbarous' system of cultivation. The 'respect' for the 'expert' knowledge was contingent on its usefulness, and 'expert' knowledge was to be valued and adopted within these bounds.

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The very possibility of the conception of the ideology of forest conservation was in the context of pressing timber shortages. The ideology sought to acquire a hegemonic position not by its disinterested articulation of science but by making it subservient to the power relations. Much the way the ideology of conservation expressed itself in the language of the dominant, so do the dominant receive and read the ideology in a modified form shaped by their own tussles and exigencies.

The idea of conservation was addressed to and received by different layers of the administration differently. Broader claims, like climatic effects of deforestation, would have been more influential at the higher levels of administrations, entrusted with the overall interest of the state. At the micro-levels, more specific and functional issues dominated. This included revenue generation, timber supplies and appeasing the landholders. We can think of it like a pyramid from the lowest rung at the bottom to the court of Directors/Secretary of State at the apex. What mattered to the Sub-Conservator was the revenue from forests and logistics of organising axemen, while the Court of Directors could represent forest conservation in the interest of 'humankind'. It is only through circulation of such facts, observations and opinions in discourses that an ideology is accommodated within a given structure. In this accommodation of 'environmentalism', the forest department emerged as the bearer of environmental interest. The Forest Departments endlessly re-produced it.

In this chapter, I have traced general questions on the ideology of environment and interests of the emergent Forest Departments. In the next chapter, I will show how law was invented, deployed and devised through these contests during the 1860s, drawing on the micro details in the different sites and locations of the administration. In these micro sites, we can find the genealogy of legal provisions and ideas in the strategies and counter-strategies of the contestants. Before moving to this, I need to take stock of the administrative organisation dealing with the question of forests. A summary here will serve a guide to the subsequent chapters.

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The forest establishment within the Government of India, initiated in 1862, was attached to the Public Works Department. In 1870s, it was moved to the Revenue and Agriculture Department. The forest establishment with the Government of India was primarily to promote forest conservation in the Presidencies and local governments. In the Presidencies and local governments, administration of forests was vested in a Conservator of Forests. The Conservator, for example in the Madras Presidency, reported directly to the Governor in Council. In other administrative arrangement, he could be attached to a department. The forest establishment with the Government of India forged linkages with its counterparts in the local governments and Presidencies. The forest officers developed a solidarity, often undermining the authority of the local governments. In the subsequent chapters, I will show that these arrangements were intensely contested and mobile. All these establishments were referred as 'Forest Department'. Technically, these were not full-fledged departments. Often, the business of forest administration was attached to a bigger department like Agriculture or Public Works Department. In the following Chapters, I will refer to the entire network of forest administration as 'the Forest Departments'. 'Forest Department' will be mostly used for the forest establishment with the Government of India. It was this body which was taking initiatives on the behalf of all other forest establishments in initiative measures for making of legislation. 'Forest Department' will also be used to represent the generalised interest of this branch of administration.

CHAPTER 5

LAW, IDEOLOGY, STRATEGY AND PRACTICES: EARLY ENCOUNTERS IN LAW MAKING

Introduction

The nascent Forest Departments in their project of creating government reserves encountered two opposing forces, people living in the vicinity of forests and civil officers. The forest users, silent and not directly represented in official discourses, were ever present through their day-to-day practices, making an impossibility of the Forest Department's ambition. The civil officers opposed the Forest Department through different modalities at different levels. Legal ideology and provisions of law emerged out of these strategies and practices.

In the Introductory chapter, I formulated a relationship between law, strategy and ideology. I posited that the social is about conflict and co-operation but law is more concerned with conflict. The dispersed sites are locations for the formation of strategies and counter-strategies. These strategies are formed in certain context of believe, values and Ideologies (including legal ideas). The prevailing ideologies condition and shape strategies. At the same time, strategic devices are accommodated by redefining ideologies. My argument is that legal ideas and provisions of law emerge from these practices. In this chapter, I will show how the forest officials, civil officers and the local people, were trying to outflank one another in operations in the field. The legal ideas and specific provisions that were put forward by the Forest Department arose from these practices.

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In 1865, the Forest Department with the Government of India was still finding its feet but it knew the effects it wanted the law to create. Despite the efforts of Brandis, the Act of 1865 could not go beyond the prevailing legal ideology. It thus did not live up to the expectations of the Forest Department. The Forest Departments went ahead creating reserves and forged techniques and procedures to counter the effects of the local use of forests. Often, these practices went far beyond the legal competencies created by the Act of 1865.

Just three years after the enactment of the Act of 1865, the Forest Department started pressing for a new legislation. The Forest Department with the Government of India circulated two memoranda, including draft bills, in 1868 and 1869 to the local governments. This was to seek their comments and consent before sending the draft bill to the Governor-General's Council for enactment. The draft bills incorporated the strategies worked out in the field by the Forest Departments to outflank the local people and marginalise the role of the civil officers in the management of forests. Not surprising, the local governments were hostile to the proposals. They severely critiqued the draft bills and rejected them. The Madras Presidency went even further, presenting an opposing construction of the nature of property rights in forests. In this chapter, I recount these early developments in law making.

5.1. Formation of the Forest Act, 1865

The forest Act of 1865 provided for the constitution of government reserves. At the same time, the Act prohibited the administration from tampering with the existing rights of the local people. Law is forever always there. District administration in different presidencies and local governments already had some regulation over the use and control of forests. The regulations were legitimate in the context of prevailing ideas and law. In this already existing network of law and ideas on law, the newer legal provisions were forged.

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The Forest Department pressed for the creation of exclusive reserves. The Governor-General, at the behest of the forest interest, recognised the imperative: 'it will be important to record forest boundaries, and to set forest land apart in a very strict and formal manner'. The question of separation of the domains, however, was primarily a question of rights and thus, he suggested, 'it seems even possible that the object might be best attained by an Act of the legislature'.¹ The Secretary for State agreed with the need to establish the boundaries of forests but doubted the need for a legislative enactment for the purpose. The matter was temporarily put off. But in the field, in the practices to 'set forest land apart', the Forest Departments found legal competence wanting.

The Forest Departments had drafted rules to facilitate the creation of reserves. With the approval of the respective local governments, these rules were sent to the Government of India for its legislative sanction. In 1863-64, the Chief Commissioner of Burmah sent up a set of rules. The Central Provinces also had sent in a set of rules. Instead of legalising a set of these rules, the Forest Department desired a general Act, which would not only legalise these rules but also give similar powers to all local governments.²

For the Forest Departments, in the strategies to form reserves, the existing law was a block. Brandis was just a few months into the new position of Inspector General. But he had already spent 14 years on the forest question. He had definite ideas about the effects that he wanted to create through an enactment. It was clear to him that the creation of state reserves would result in curtailment of the existing rights in forests. In a memorandum submitted to the Government of India in September 1864, he set forth his proposal:

¹ Stebbing (1922): p527.

² Baden-Powell (1875): p21.

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... it is intended to demarcate certain tracts as reserved forests which are to be strictly conserved and where the rules are to be enforced. Wherever any existing rights will be interfered with by the establishment of those reserved forests, it is intended to give compensation, either in land or otherwise, to the parties concerned.³

Irrespective of the legality, Brandis was clear about the requirements of managing forests. Even if the above were to be accepted, there were more problems. He was aware that the demarcation would require considerable time and could not be effected for all forests. He submitted that 'a certain supervision must be exercised over the great mass of forests in which Government has any rights'.⁴

In the field, the practices of setting these reserves had already started in the previous years. But the strategies, abstracted from the field, could be taken only so far. Brandis himself conceded his helplessness that his role in framing legislation was confined to submitting memoranda.⁵ Within the administrative arrangements, the concerned department (here the Public Works Department) developed proposals for enactment. Thereafter, the proposals were submitted to the Legislative Department. The Legislative Department in turn prepared a draft bill and submitted it to the Governor-General's Council for further proceedings. The Legislative Council had five members. One of them was a 'Law Member' appointed directly by the Crown. The 'Law Member' had to be present and had powers to vote to constitute the 'Governor General's Council Assembled for Making Legislations'. The Law Member also had the charge of the Legislative Department. Henry Maine, then the Law Member, noted in the statement on the objects and reasons for the Forest Act of 1865,

³ Memorandum by Brandis, 5/9/1864, submitted to the PWD. Printed as an enclosure in letter to SS, 3/8/1864. See in Despatches to the Secretary of State, 1861-70 combined volume, NAI. Hereafter Brandis' Memorandum (1864).

⁴ Brandis' Memorandum (1864).

⁵ Brandis (1994): p132.

But while almost the whole of domainial right over Forest lands has been vested in Her Majesty for the purposes of the Government of India by the Act of Parliament transferring the Government of India to the Crown, it would appear that various petty rights over soil or produce of Forests have been prescriptively acquired by individuals, villages or wandering tribes.⁶

The proclamation of the Queen on the transfer of administration from the East India Company to the Crown had explicitly pledged to respect all the existing local rights, including rights acquired through ‘prescription’. In the given legality, the proclamation stood as a binding direction. Not surprisingly, the Act of 1865 provided for the creation of government reserves, but it also added a proviso the prescriptive rights were not to be affected or abridged.⁷ The Forest Departments, thus, were restrained by the local rights.

5.2. Forest Department and the Local People

Irrespective of the Act, the Forest Departments continued with their task of creating exclusive reserves and in the process, found solutions to curtail the local use of forests. As Brandis explained the strategy towards a ‘systematic management’,

... separation of what ultimately to be the Forest domain of the State, from the large mass hitherto more or less open to the public. As these State Forests will not be available for sale as wastelands, they were called reserved forests.⁸

In the words of Brandis, forests were ‘extensive’. But ‘reserved forests’ could not be created anywhere. As we have noted earlier, several arguments led to the endorsement

⁶ Maine, Henry, ‘Statement of Objects and Reasons’, 14/9/1864, ‘A’ Proceedings, Nos. 1-6, October 1864, LD, NAI.

⁷ Maine, Henry, ‘Statement of Objects and Reasons’, dated September 14, 1864, in A Proceedings, Nos. 1-6, October 1864, LD, NAI.

⁸ Memorandum by Brandis, 31/10/1868, in Proceedings Nos. 24-29, December 1868, PWD(R-F). Hereafter Brandis’ Memorandum (1868).

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of the policy for creation of government reserves. This included environmental reasons, requirements for timber by the state itself and the fact that forests had a long gestation and therefore, these could not be left in the private hands. But the Forest Departments, had to earn revenue to justify their establishment. Every report had to have a table showing the financial layout, revenue and surplus. Despite the arguments that forestry was a long gestation activity and immediate surpluses could not be expected, there was nevertheless pressure to perform. The Annual report on the forests for 1870-71 by the Government of India questioned,

... whether in some parts of the country the vast tracts of jungle which exist are worth preserving, even if it were possible to do it...⁹

On an inspection of the forests of Central Provinces, Brandis noticed 'considerable areas' of reserves but regretted that these were 'in remote localities and at a considerable distance from the principal centres of consumption' and 'main lines of communication'.¹⁰ The mistake was recognised and the principle established that reserves should be 'conveniently situated' for the export of their produce.¹¹ Even if reserves were constituted, protection, which would have curtailed local use, was to be extended to only selected patches. Thus, intensive management was to be done only on patches which held 'promise of good production of timber' and 'facilities for the export and utilisation of their produce'.¹²

The Forest Departments had limited personnel and financial outlay and thus could not extend to large areas. Further, despite the vast demands created by railway expansion,

⁹ *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*, Calcutta, Office of the Superintendent of Government Printing, Calcutta, 1872: P27. Hereafter the Annual forest reports are referred as *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* by the year under consideration.

¹⁰ Brandis (1876): p1.

¹¹ Brandis (1876): p3.

¹² Brandis (1876): p3.

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the market demands for forest products were limited.¹³ Inaccessible locations further exacerbated the problem by raising the costs of extraction and of bringing the product to the market. Thus, the forests that attracted the attention of the Forest Departments were also the ones closer to habitation and in use by local people. The strategy thus was to constitute only valuable forest tracts as 'reserved' forests.¹⁴

The uncertain nature of the market, a tentative beginning and inability to be certain about the future requirements made the Forest Department claim a limited interest in the other forests. The other forests were to be classed as 'unreserved' under the supervision of the government 'with the view of guarding against improvident working and devastation'.¹⁵

The State brought its might to bear on the people to guard the newly carved-out state property. The Act of 1865 had already prescribed penalties, including imprisonment, and vested the powers for enforcement in the Forest Departments. Besides, forest officials had the power to arrest a person without a warrant. Forest officers were authorised to confiscate forest property and seize implements and carts. The forest officers were clamouring for magisterial powers, and in some cases even succeeding in getting it.¹⁶ Brandis prided in announcing that the forest establishment was modelled on the lines of the Police code.¹⁷ The exercise of police and state power had to be visible in its most minute and subtle manifestation and penetrate the consciousness of the ruled. The Conservator of Forests of Punjab, Baden-Powell, who later played a vital role in the making of forest law, noted,

¹³ See *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* for the period from 1870 to 1880.

¹⁴ Memorandum by Brandis, 31/10/1868, in Proceedings Nos. 24-29, December 1868, PWD(R-F).

¹⁵ Memorandum by Brandis, 31/10/1868, in Proceedings Nos. 24-29, December 1868, PWD(R-F).

¹⁶ See the report on Punjab in *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* for the years 1870-71 and 1871-72.

¹⁷ Explanatory Memorandum on draft Forest Bill by Brandis, 3/8/1869, printed in MBOR, March, 1871, No. 1224. Hereafter Brandis' Memorandum (1869).

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The subject of uniform for 'Foresters' and 'Forest-watchers' has been under consideration. It is evident that it is just as important for the 'Foresters' and 'Watchers' on their beats to have a distinctive official dress and badge, as for the civil police; for Forest Watchers are a sort of forest police. I have visited many forests and found only a dirty looking individual prowling about, whose position and authority no one could be expected to recognise. I have therefore adopted a neat uniform which was devised by Major Bachelor, as it is perfectly inexpensive.¹⁸

Economy was the key word. Everything had to be done with the least demand on revenue. Despite the police powers, and intimidation through dress and badges, the efficacy of this modality was limited. A forest officer said in relation to Simla forests,

the urgency of the evil might excuse such heavy penalties, but I do not see how they could be enforced in the interior districts, without a large establishment...It would appear to me, that any penal enactments of the kind, applied to the interior, would necessarily be inoperative.¹⁹

In practices, actors do not follow the neat schematisation in which narratives, like the one here, have to be structured. The Forest Departments did not begin by using force, subsequently realise its futility, and as a result, forge other modalities to secure their ends. For the colonial administration, it was always clear that an entirely repressive arrangement was expensive and unworkable. Thus, from the beginning other modalities of vacating local usage were being forged simultaneously.

Even if their voices were never heard in the official discourses, the forest dwellers were always present through their day-to-day practices. A forest officer, Horsley, pleaded for a sober understanding of the prevailing political relations. He cautioned that the *Bhils* (a tribal group) were in a chronic state of rebellion and a conflict with them would destroy

¹⁸ See Chapter on Punjab forests in, *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* for the year 1871-72: p15.

¹⁹ Quoted in Cleghorn (1864): p27-28.

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all past achievements. His suggestion was to win over *Bhils* by giving them permits to cut wood and supply to the plains.²⁰

Following Horsley's suggestions would have amounted to the state abandoning all interests of the state in forests. But significant modifications had to be made in the schema of creation of exclusive reserves. The schema had to make itself fit in the local contexts. The reserves were to be small in area. But even in these reserves, it was inevitable to permit local usage. Brandis permitted grazing and grass cutting in the reserves in the Central Provinces provided the use was not turned into a prescriptive right. Such pressures were also turned into an opportunity to earn revenue. The users had to pay a charge for using the forests.²¹

If reserves could not be completely insulated from local use, the unreserved forests were any way a relatively free category. Brandis had hoped to regulate the use of unreserved forests. But he conceded, for example in Central Provinces, that the local pressure made this impossible. The Forest Department could not prevent the local people from cultivating and building dwellings on these lands. Finally, improvement of stock was not even seriously contemplated.²²

The reason for keeping the reserves small, and confining intensive management in even smaller blocks, was the limited resources and personnel.²³ The caution was to minimise the local opposition. In Brandis' scheme,

... it will enable us considerably to increase the area of permanent reserves without making it difficult for the surrounding population to provide themselves with the forest produce they require.²⁴

²⁰ Paper presented by Horsley in the Forest Conference in 1875 at Shimla, see Horsley (1876): p25-26.

²¹ Brandis (1876): p3.

²² Brandis (1876): p2.

²³ Brandis and Smythies (1876): p26

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Everything was to be done cautiously, working out political solutions in the field, apart from keeping an eye on the market and revenue and coping with administrative pressures. Brandis noted,

The selection of these Forest reserves, or exclusive Government Forests, is necessarily a matter of time, it must be done gradually, and it would not be possible at once to fix their final boundaries. Fresh tracts may from time to time have to be taken up to meet the requirements of the country, others may be abandoned, and the boundaries of all will for some time to come require occasional rectification.²⁵

The people living in the vicinity of forests were in the habit of setting fire to the forests. It was a means for clearing land and ensuring a good coppice of grass for the next season. Forest fires were greatly resented by the Forest Departments. It was their conviction that fire damaged and stunted the standing timber. Thus, fire prevention was an important task for the Forest Departments. The forest officers considered the access of the people to the reserves as a nuisance in preventing fire. At the same time, the cost of fire prevention was an equally constraining concern. Towards this, many strategies were worked out.

Talking of Satpura reserve in Central Provinces, Brandis said, 'cut a line through forests for people to walk, it will serve as fire line'.²⁶ Passage of the people on the road would have trampled the grass and created a natural barrier for the fire to spread to the forests. Others planned to encourage traffic on the road as it would kill the grass and keep the road clear as a deterrent to the spread of fire.²⁷ But the strategy had a problem. Brandis himself recognised, 'but then the problems of safety of the forests to a great

²⁴ Brandis (1876): p4.

²⁵ Brandis' Memorandum (1868).

²⁶ Brandis (1876): p8.

²⁷ Brandis and Smythies (1876): p4-18.

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extent depends on the exclusion from it of human beings'.²⁸ But the creation of roads had additional advantage. A forest officer recommended,

Formation of roads are useful for inspection, of export of forest produce, of police ... Roads should be straight and curving roads should be closed. People can be watched better on straight road.²⁹

This strategy was much appreciated. However, this could have succeeded only in plain country like Audh.³⁰ For the hilly areas, different strategies needed to be conceived. Even forest fire, which was considered by the forest officers as the most destructive of forests, was conceded to the local people. Brandis recognised that it had been a long standing custom to set forests on fire. The question, for him, however, only concerned imperial reserves, which formed a small part of forests. Brandis elaborated,

... outside our reserves we had no interest in wishing the people not to burn their grass except in so far as fires outside endanger the reserves; but that inside our reserves we must strenuously endeavour to keep out fires ... by every possible means.³¹

Other strategies were being worked out to free the reserves from local use. As the Inspector General reported,

In Punjab, through the exertions of Mr. Baden-Powell ... Great progress has been made ... in the adjustment of rights, by the adoption of the "give and take" system, by which, in return for making total concessions to the population of definite rights in certain portions of forests where they formerly possessed only uncertain privileges, Government reserve to itself absolute rights in the rest.³²

²⁸ Brandis (1876): p8.

²⁹ Paper presented by Captain Wood in the Forest Conference in 1875 at Shimla, see Wood (1876): p14

³⁰ Brandis pointed this out. See Brandis and Smythies (1876): p14.

³¹ Brandis and Smythies (1876): p23.

³² *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*: p21.

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Baden-Powell himself explained the modality,

... we have given up desultory right over the whole of forest, securing in return the 'absolute' proprietary right in certain compact tracts free of all grazing and other rights.³³

Baden-Powell further noted,

The extinction of obnoxious rights appears only to be possible in this country through... Conceding certain tracts of open forests for the exercise of rights in exchange for a complete reservation of the remainder of the forests...³⁴

Thus, in practice, the Forest Department was firming up on two categories of forests, reserved and unreserved. The strategy was to relocate claims out of reserved forests and give a free hand to the local people in the unreserved forests.

In the context of prevailing and widespread local use, penal measures could have only limited effect. Thus, instead of repression, moderation was to be the rule. This was also due to the persistent complaint of the civil officers that the Forest Departments were harsh and repressive. The government also hoped that people would gradually make a habit of the new order. The 'necessity for moderation' was impressed on all forest officers.³⁵

The penal clauses were not to be enforced severely. A high number of forest offences had to be justified and explained. The Report of 1870-71 justified that offences reported and persons convicted were a very small percentage of the population. And thus, there

³³ See the report on Punjab in *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*: p3.

³⁴ See the report on Punjab in *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*: p6.

³⁵ *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*: p21.

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was no undue severity.³⁶ The Forest Department was always on guard against accusations of repression. It legitimated its practices, thus:

... progress has been made without inflicting any considerable hardship upon the population in the vicinity of the forests. The best proof of this is the small number of offences committed in these reserves ... people have now become accustomed to the new order of things.³⁷

The report of 1871-72 summarised the situation that the local people were 'unaccustomed to any restriction of their forest privileges'. Reservation aroused suspicion of 'infringement of their long-established rights in the forest'. The Forest Department adopted the strategy of conceding rights for the local people on other patches and modality,

... if the undoubted rights of Government to the forests be thus gradually and judiciously established, any sudden enquiry into, or absolute definition of, the question of forest rights being avoided, rather than prematurely forced on, it will be quite possible to accustom the minds of the people to the administration of the forests on fixed rules by Government officers, and to dispel their preconceived ideas of quiet and undisturbed right to the brushwood and jungle.³⁸

5.3. Law Reform

The more the Forest Departments went ahead forging strategies and techniques of dealing with the local population, the more they found incongruity between the strategies and the existing law and legal ideas. After all, the Act of 1865 had recognised only demarcated forests as government reserves. It was entirely silent over 'unreserved' forests. Further, within the demarcated forests, it had prohibited the Forest Departments

³⁶ See *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1870-71*.

³⁷ Brandis (1876): p6.

³⁸ *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India, 1871-72*: p39-40.

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from tampering with local rights. As Brandis lamented, under the Act of 1865 and rules under it, grazing and setting of fire to forests in the reserves could not be excluded. These were 'existing rights' which could not be extinguished. This made creation of reserves themselves meaningless.³⁹

This inability to accommodate strategies in the prevalent legal ideas created an initiative to engage with the legal ideas and attempt to displace them. An early attempt was to allege that 'existing rights' and 'prescribed rights', mentioned in the Queen's proclamation, were 'vague' expressions.⁴⁰ The Forest Department gradually worked out a detailed legal theory on the nature of the existing rights on forests in India. The desired effect was to marginalise the theory of 'prescriptive right' and make the forest use a subject for 'regulation, commutation and extinction'.

The Forest Departments, in practice, had already gone ahead in forging its distinction of reserved and unreserved forests. This was despite the Act of 1865, which recognised only one category of forests, and that too subject to local rights. The practices, not in conformity with the Act of 1865, were put down on paper to constitute the rules under the Act. Brandis reported,

Under the present Act, separate rules for the Reserved and Unreserved Forests have been passed for the Central Provinces, British Burmah, and the Hyderabad Assigned Districts (Berar).⁴¹

The Forest Department started pressing for a revision of the Act of 1865. Brandis first submitted a memorandum on 31st October 1868 followed with a revised memorandum and draft of a bill in 1869. The proposals were dossiers of tools and techniques already developed in the field. Brandis emphasised the inadequacy of the Act of 1865. It could apply to a patch only after it was notified to be a government forest. The government

³⁹ Brandis' Memorandum (1868).

⁴⁰ Brandis' Memorandum (1868).

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had to declare a patch of forests as it's property through a notification. But Brandis' concern was that in most of the provinces forests were not notified. The only means of protecting forests was to create powers to regulate the local rights even before notification.⁴²

Some local administrations, like Burma and Central Provinces had framed rules under the Act of 1865. These rules were approved by the Advocate General, and promulgated with the sanction of the Governor-General in Council⁴³. The rules had incorporated the strategic practices of controlling the forests even if these were not in conformity with the Act of 1865. The problem of the illegality of the Rules was subsequently noted by the Advocate General.⁴⁴ Brandis, who was instrumental in getting the rules endorsed, then, was happy at the emerging legal crisis. Interestingly, one of the comments of the Advocate general was that the Act of 1865 recognised only one category of forests, as opposed to 'reserved' and 'unreserved' as was followed by the Forest Departments.⁴⁵

Brandis' intention was to have a law which could permit restriction on use of forests even before their notification as contemplated in the Act of 1865. Brandis reiterated the inadequacy of the Act of 1865,

... the most important omission being the absence of all provisions regarding the definition, regulation, commutation, and extinction of customary forest rights. The Act merely provides that the notification, defining Government forests, shall not abridge or affect any existing rights of individuals or communities.⁴⁶

Brandis continued,

⁴¹ Brandis' Memorandum (1868).

⁴² Brandis' Memorandum (1869).

⁴³ The rules were made in the following years British Burmah (August 1865), the Central Provinces (August 1865), Oudh (September 1866), Coorg (September 1865), and British Sikkim in Bengal (August 1866).

⁴⁴ See Attorney General's report in Proceedings Nos. 24-29, December 1868, PWD(R-F).

⁴⁵ Brandis' Memorandum (1869).

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It seems necessary that some procedure should be fixed for defining and regulating these rights, otherwise they will render nugatory the operation of any Forest rules, and impossible the protection of any forest. The attempt has been made to supply this omission in the draft Bill now submitted.⁴⁷

Brandis explained that the provisions of the Bill were intended to apply to only those forests which were either the property of government, or in which government has forest rights. Brandis understood different extents of property rights on forests. The first were the cases where the property right of the government was complete and exclusive. This was the case in Sindh and Central Provinces. In Central Provinces the operation of settlements had given this result while in Sindh forests were inherited from the *Ameers* (the ruling family of Sindh).⁴⁸ But in other provinces, Brandis lamented,

... proprietary right of Government is limited by the customary forest rights of individuals or communities.⁴⁹

And in yet other situations, the land belonged to private persons but the government had rights over forests. For example, in Punjab, under the provisions of the settlement, the proprietary right in the land was given to the cultivators, while the government claimed the ownership of the trees.

Brandis' first concern was to give powers to the local governments to demarcate the forests. Once the forests were demarcated and their boundaries defined, the customary rights on these forests were to be regulated. This included the following restrictions of exercise of customary rights. One, no fresh rights were to accrue. Two, no rights were to be recognised unless a formal claim was preferred within three years from the date of notification of boundary. Three, no right could be exercised in forests closed for its

⁴⁶ Brandis' Memorandum (1869).

⁴⁷ Brandis' Memorandum (1869).

⁴⁸ Brandis' Memorandum (1869).

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management and regeneration. And four, roads and paths passing through demarcated forests could be closed from time to time.⁵⁰

With these proposals, Brandis was closer to his aspiration. He expressed his hope that if accepted by local governments it,

... will constitute demarcated forests a species of privileged property, whether they be the property of the State, or of communities, or of public institutions.⁵¹

Brandis was conscious about the subversion of prevalent law and ideas. He conceded, 'To a small extent these provisions will interfere with the free exercise of the customary forest rights without compensation'.⁵² However, he justified this illegality on the grounds of benefit to those whose very rights were affected. Further, he considered these rights insignificant. Brandis assured the government that any interference with the customary rights of the local people was to be 'only temporary'. He hoped to 'free most forests of customary forest rights' through compensation like 'grant of forest rights in other lands' and 'grant of land'.⁵³ Brandis feared flak from his administrative superiors, for example, the Secretary to the government in the Public Works Department, if he even had a hint of suggestion of a drain on the exchequer by suggesting cash compensation. He clarified,

Money compensation will, I trust, be necessary in exceptional cases only. But in some cases it may be found expedient to remit or to reduce taxes, or other Government demands⁵⁴

⁴⁹ Brandis' Memorandum (1869).

⁵⁰ Brandis' Memorandum (1869).

⁵¹ Brandis' Memorandum (1869).

⁵² Brandis' Memorandum (1869).

⁵³ Brandis' Memorandum (1869).

⁵⁴ Brandis' Memorandum (1869).

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He anticipated opposition to the idea from the civil officers. He thus, pledged to make arrangement for the 'actual requirements of the population in the vicinity of the forests'. Further, the demarcated forests were to be a 'small proportion only of the total forest area'.⁵⁵ Besides this, in Brandis' opinion, if 'protection and improvement of demarcated forests' was intended, interference with customary rights was 'unavoidable'.⁵⁶ Brandis foresaw the possibility that the attempts to conciliate the local claims might not work. In such cases, according to Brandis, if the Forest Department did not have the powers to close forests and curtail the use of forests, the 'productiveness' of forests could not be improved.⁵⁷ Within the draft rules, such curtailment, like closing of grazing or roads, was not to be compensated. This would have led to 'endless petty claims' arising every year and month wasting the time of forest officers. Brandis' justification was that such improvement would help the right holders themselves in better fodder and forest products.⁵⁸ Thus, Brandis attempted to persuade the governments that forests could be conserved without the 'risk of injustice and oppression'.⁵⁹

5.3.1 Law: Dossier of Strategies against Civil Officers

If the Forest Departments were struggling with the local people in the field, they had another power to contend with, the civil officers. The proposal for law reforms were again a similar dossier for outflanking the civil officers in the field, who were an impediment in the Forest Departments realising its aspirations. Within the Act, Brandis constituted and vested the forest officers, who were to be the main functionaries within the Act, with some important powers. Brandis had modelled the powers on the Forest officers in the bill on the 'Police Code'.⁶⁰

⁵⁵ Brandis' Memorandum (1869).

⁵⁶ Brandis' Memorandum (1869).

⁵⁷ Brandis' Memorandum (1869).

⁵⁸ Brandis' Memorandum (1869).

⁵⁹ Brandis' Memorandum (1869).

⁶⁰ Brandis' Memorandum (1869).

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The draft bill provided the procedure for the working of the law. The local government was to move on a proposal from the Conservator of Forests for constitution of demarcated forests. The Conservator was then to 'endeavour to effect an agreement with the parties interested'. If these endeavours failed, he was to refer the matter to a special commission appointed for the purpose. On a reference from the Conservator, the commission was to settle all matters connected with 'regulating, commuting, and extinguishing forest rights'. The commission also had other functions. It could define the existing forest rights and settle all boundary disputes. The decision of the commission in this respect was to be final. The commission could also 'determine the nature and amount of compensation to be given in the case of any expropriation of forest lands in which Government has forest rights'.

Brandis was emphatic about the settlement of disputes through a commission. This was on the grounds that the 'inquiries will necessarily be of a peculiar character'. Only a specialised commission could acquire the 'knowledge' which was 'indispensable' for a 'satisfactory' settlement. Reference to a commission was to be the 'rule'. Only in exceptional situations, modalities other than dispute settlement by the commission were to be followed. In that event, the power of commission was to be exercised by the ordinary civil courts.

In addition to this, the bill had provisions for the government to control private forests in exceptional cases. The bill had provisions for the regulation of the transit of timber. It also provided that all drifted timber was to be government property unless it could be proved to be otherwise. The bill introduced several refinements in the penal parts. It required assistance to be given in the detection and extinction of jungle fires by all persons who exercised forest rights in any forest, or held a lease of timber, pasture, or other forest produce. The bill provided for confiscation of timber and implements and a fine not exceeding Rs.500, and in default of payment, simple imprisonment for a term not exceeding six months. Brandis further provided that up to half the imposed fine

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could go to the 'informer', to be awarded by the Magistrate.⁶¹ Thus, Brandis made strategic moves to reduce the influence of the civil officers in forest administration. This was through vesting more powers in forest officers and subterfuge, like appointment of a commission, to erode the role of the civil officers.

5.4. Comments on the Draft Bill by Local Governments

5.4.1 Central Provinces

The bill was circulated to the local governments for comments. The local governments vehemently opposed the draft bill. The Central Provinces rebuked Brandis, saying that the bill had in view 'totally different conditions of forest tenure than exists in the Central Provinces'.⁶² Central Provinces, of which Brandis had assumed a complete ownership of forests, asserted that in only one of the categories of forest, right of state was absolute. In others, it coexisted with private rights. As a result 'various degrees of complication ensue'. The Central Provinces complained about the usurpation of rights without even paying any compensation. It noted,

It may be said to place almost unlimited power in the hands of Government, to deal with all forests (and the definition of forests is a very wide one) in any manner it may please and to provide only for compensation being given in a few extreme cases.⁶³

Indicting the law as 'foreign to experience', the Central Provinces observed that 'in India there is a tradition that the forest is a common property'.⁶⁴ It teased the Forest

⁶¹ Brandis' Memorandum (1869).

⁶² Comments from the Government in Central Provinces on the draft forest bill, 4/7/1871, in B Proceedings, Nos. 37-47, December, 1875, RA(F), NAI.

⁶³ *ibid.*

⁶⁴ *ibid.*

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Departments by suggesting they should plant trees and conserve resources before they tried to acquire a 'right to interfere on a large scale with the management of the forests in which private rights pre-dominate'.⁶⁵ It found the bill 'clumsy' and 'obscure'.⁶⁶ Further, in the opinion of the government of Central Provinces, the draft bill was 'alien to the spirit of our law' and to general policy of government and was certainly not a 'worthy addition to our statute book'.⁶⁷

5.4.2 Bengal Presidency

The Bengal officials also had serious misgivings about the powers vested in the forest officers and treatments of rights in the forests. The Commissioner of Cooch Behar, in response to the bill, commented, 'I deem it my duty to protest, in the strongest term' that the proposed draft gave powers to 'confiscate' forest land, and its prohibitions would deprive the owners of all use of the forest and soil. According to the Commissioner, even if compensation were paid, it would be looked upon by the owners and population as an act of 'injustice'. He was categorical, 'I would not admit the right of government to interfere with private property on the grounds of mismanagement'.⁶⁸

The Commissioner of Chotanagpur also objected to the proposed powers of the forest officers,

The officers of the Forest Department are masters of the situation even in the settlement of disputes between themselves and the parties who have to complain against their interference.⁶⁹

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Commissioner Cooch Behar to Government of Bengal, 19/1/1871, in B Proceedings, Nos. 37-47, December, 1875, NAI.

⁶⁹ Commissioner of Chotanagpur, to Government of Bengal, 24/4/1871, in B Proceedings, Nos. 37-47, December, 1875, NAI.

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The arrangement of settlement of disputes by a commission was also severely objected to. The Commissioner of Chotanagpur said,

I deprecate new tribunals, all disputes between the officers of the Forest Department and the people should be settled by the revenue authorities or the courts of law.⁷⁰

The Lieutenant Governor of Bengal objected to the powers vested in the forest officers. He was emphatic that the Collector and not the Conservator was the proper person to take cognisance of any dispute on forest boundaries or decide on forest rights. He found the provision 'objectionable' that the 'Conservator of forests in the first instance to ascertain and determine the nature of existing rights'.⁷¹

The Bengal government refuted the construction of rights of the local people over forests. It noted,

There are many prescriptive rights which cannot be very clearly proved, and which certainly would not be admitted by a forest officer with little or no regard for anything but the financial interests of his own department. Provisions should be made, too, to meet the case of joomiahs and other migratory cultivators who possess very strong claims to consideration, from early occupation and clearance of waste and forest lands, though they might perhaps be unable to prove any legal right.⁷²

The Bengal government then made a scathing attack on the Forest Department. It upheld the position of the Collector and urged for the vesting of the powers in the collectors. The Lieutenant Governor cautioned,

⁷⁰ *ibid.*

⁷¹ Government of Bengal to GOI, 17/7/1871, on the bill and Memorandum of Brandis, in Revenue and Agriculture (Forests), in B Proceedings, Nos. 37-47, December, 1875, NAI.

⁷² *ibid.*

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... it is necessary that extreme care should be used in giving extraordinary powers to the officers of such a department as forests... Collector, who is more than a tax collector, being in fact, an officer educated from his youth in civil administration.⁷³

In contrast, at least the subordinate forest officers were 'men of little or no education' and had 'generally but a limited acquaintance with landed tenures and customs'.⁷⁴ The collector was 'a protector of the people'. He contrasted this with the Forest Department, 'who are too apt to look exclusively to the interest of their own departments'.⁷⁵ According to the Lieutenant Governor, the Forest Department not only struggled to 'show a tolerable balance sheet' by 'making a most of their resources', but also by taking credit for revenues which would have come through Collectors if there was no Forest Department.⁷⁶ But the worst result of their desperation and zeal to augment revenue was,

... when people, whose claim to the soil rests only on the possession of a few thousand years, before Europeans or Hindoos or any one else came on the scene, are treated as squatters and trespassers, and when grazing and similar privileges are suddenly put a stop to or curtailed...⁷⁷

The tension in the districts was visible. According to Lieutenant Governor,

... a sort of antagonism between the civil and forest departments is created, which certainly hinders the useful operation of all the department... the civil officers of Government seem to have some repugnance to the approach of the forest department.⁷⁸

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

5.4.3 Madras Presidency

Other local governments, like the North-West Provinces, made a similar and spirited objection to the draft bill.⁷⁹ But the Madras Presidency was hostile in its opposition to the bill. The Madras Board of Revenue found many substantive problems with the draft bill, observing:

The provisions of the bill are more arbitrary than any which can now be found in the Statute book ... It gives executive Governments and Forest Commissions the power of making an unlimited number of 'laws', all of which will restrain or destroy rights which are essential to the comfort and welfare of the people.⁸⁰

The Madras Board of Revenue exposed the designs of the Forest Department, in having the substantive questions of people's access determined through courts and a commission 'placed outside the pale of the law and settled by special courts appointed by Government, acting of course under the advice of the Conservator'. In their opinion, the Conservator was given oppressive powers to settle boundaries and claims of the people.⁸¹ In this,

... the contest will be between a powerful Government on the one hand, and petty cultivators, wood-cutters, honey-gatherers, and hill-tribes on the other, the Civil Courts will be powerless, for their jurisdiction is expressly barred, and a department which acquires new importance by every forest right which it strangles will be the arbitrator.⁸²

Its indictment of the Forest Department was total. It noted,

⁷⁹ Government of North-West Province to GOI, 10/2/1872, in B Proceedings, Nos. 37-47, December, 1875, NAI.

⁸⁰ MBOR, 21/3/1871, No. 1224.

⁸¹ *ibid.*

⁸² *ibid.*

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... its principles, scope and purpose are inconsistent with the existing facts of forest property and its history... its provisions are too arbitrary, setting the law of property at open defiance, and leaving the determination of the forest rights of the people to a department which, in this Presidency at all events, has always shown itself eager to destroy all forest rights but those of Government.⁸³

In, thus commenting, Madras was no different from the other local governments. But Madras went further, eroding the very basis of the proposed law. Madras accused Brandis of relying on the continental system of forest management, which was a remnant of 'a long feudal tyranny'. Madras claimed,

The system is based on the assumption that most of the forest property belongs to the State, and that the rights of the people in forests of which the State is the proprietor are few and easily defined. No system could be more opposed either in its history or its provisions, to the corresponding circumstances in India. It should have been taken as a warning instead of a model, and yet it is now proposed to make the most repulsive and arbitrary portions of it law...⁸⁴

The Madras Board of Revenue went ahead in constructing an entirely contrary construction of forest rights,

There is a scarcely a forest in the whole of the Presidency of Madras which is not within the limits of some village ... All of them, without exception, are subject to tribal or communal rights which have existed from time immemorial, and which are difficult to define and value as they are 'necessary' to the rural population... Nor can it be said that these rights are susceptible of compensation, for in innumerable cases the right to fuel, manure and pasturage will be as much necessity of life to unborn generations as it is to the present.⁸⁵

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

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Brandis' memorandum had proposed translocation of forest rights. This was in transferring the rights to other locations to free a patch to constitute it as a reserve. The Madras Board of Revenue negated this strategy,

Now in this presidency the rights which are to be interfered with exist in 'all' forests... The compensation which the bill contemplates will therefore be generally impossible.⁸⁶

Similarly, the Madras Board of Revenue noted,

The peculiarity of Southern India consists in the fact that in all or nearly all its forests, though the State may claim to be the proprietor, the State right is reduced to very narrow limits by numerous valuable and contestable communal rights, which may be regulated, but cannot from their nature be commuted or extinguished.⁸⁷

On these grounds the Board felt that it was right in rejecting the bill in its entirety. What then were the suggestions of Madras for a forest law? The Madras Board of Revenue proposed to significantly reduce the powers of the Forest Department and make the forest officers sub-ordinate to the Collectors. The Collectors were to ascertain in relation to forests 'what use of each of them the people are now making, or had been making from time immemorial before the Forest Department was created'.⁸⁸ Madras government chided Brandis, saying that the Conservator had already made proposal for 'restraining and extinguishing popular rights'. But he will have to redo them.⁸⁹ And thereafter, the

... (bill) must be based on the concession that in the forests in which there are communal or tribal rights the people are co-proprietors with

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

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Government. All instances of the use of forests by the people should be taken as presumptive evidence of 'property' therein.⁹⁰

It further proposed the liquidation of the Forest Department. The Conservators were to act under the orders of the Collector. 'Propositions for the commutation and regulation' and 'extinguishing' should emanate from Collectors.⁹¹

Conclusion

In this chapter, I have described the relationship between law, strategy and ideology in relation to forests in colonial India in the 1860s. I have illustrated that the legal ideas and provisions emerged in and through protracted multiple struggles between the local people, Forest Department and the Revenue Department. Strategies emerged from practices in the field. The Forest Department worked to outflank the local people in creating exclusive government reserves. In the field, the strategies for policing the forests, preventing local people from setting forest fire and techniques of settling and extinguishing local rights were worked out. Similarly, the Forest Department learnt from experience the means of minimising the weight of its opponent, the civil officers. The key functions in creation of forest reserves were given to the Conservator of Forests. A Commission was proposed to displace the ordinary courts.

The Forest Departments abstracted these strategies and attempted to accommodate them in the given law and legal ideas. In this process, two things happened. Strategies contrary to the given legal ideas were accommodated and legal ideology was redefined to justify the assimilation. Alternately, legal ideology itself became the subject for contestation in efforts to displace it. The Forest Department was working at both the fronts. The practices forged by the Forest Department encountered the prevailing notion of 'prescriptive right'. Contrary to this notion, the Forest Department desired to

⁹⁰ *ibid.*

⁹¹ *ibid.*

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'regulate, commute and extinguish' the rights. Further, Madras had posed an entirely different notion of right over forests. It questioned the very existence of state's property in forests. In the next chapter, I will explore in detail how the ideas on the ownership of forests and the nature of local rights on forests developed, in the context of strategies and practices, through the 1860s to 1880s.

CHAPTER 6

FORGING LEGAL THEORIES

Introduction

In the course of chapter five, I noted that the legal idea of prescriptive right became a constraint for the Forest Department in assimilating strategies formed in the field. It struggled to displace the idea of prescriptive right. In this chapter, as a part of a larger story running through this part of the dissertation, I explore how the theory of prescriptive right was displaced by a new theory of forest right.

Ideas do not arise from idle speculation of thinkers and philosophers, nor are they necessarily invented in the apex locations of the state, though often they are expressed from those sites. The impetus to displace an idea by another one is towards achieving certain ends in specific social contexts. The context for production of ideas is the concrete problems which people encounter in their situations. The Forest Department found the prevailing legal idea of 'prescriptive right', incorporated in the Act of 1865 an impediment. Over a period of ten years, a new theory was constructed to displace it. The theory was built by trial and error and by forging disparate elements from prevailing theories in India and Europe. The effort was directed towards creating a legal theory that could justify curtailing and extinguishing local use of forests.

Brandis was already describing the prescriptive rights as 'vague' and 'obscure'. In his efforts to displace the theory of prescriptive rights, he was joined by Baden-Powell, the Conservator of Forests of Punjab. Unlike other forest officers, Baden-Powell was not only a civil officer but also had worked as a judge. He soon became the only expert on forest law. Baden-Powell argued that before the British rule, the local rulers had owned the forests in India. Following this precedent, in his view, the state was the exclusive

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owner of forests. The prevalent uses of forests were not rights but only 'privileges' which could be revoked at will. The theory could be a good substitute for the prevalent legal ideas. But as Baden-Powell himself realised, there were problems in putting it into practice. It was impossible to significantly curtail the local use of forests. Brandis had another problem with the theory. If local uses were to be not 'rights' but only 'privileges', these would be subject to only administrative discretion, not law making. But the Forest Departments wanted a law giving them powers to curtail and extinguish local use.

Brandis suggested another approach. Taking his cue, Baden-Powell elaborated it, arguing that local use of forests in India was similar to 'customary right' prevalent in Europe. Within the law on 'customary rights' in Europe, there were several restrictions on their exercise. Creating this parallel solved the defects of the earlier theory of Baden-Powell. In the new theory, the state continued to be the owner of the forests. The local people had a 'customary right' and thus, local use could be a subject for legislation. The theory promised what the Forest Department desired the most. Local rights could be 'defined, regulated and extinguished' by bringing in all the restrictions known to exist in the European law on customary rights.

While Brandis and Baden-Powell were developing theories to curtail local use, Madras officials took a generous view of the matter. They argued that the village communities had developed a right over the forests through long prescription. In their view, the rights the state had created over forests in the Madras Presidency were without legal foundation. As a result, much controversy developed within the state over the nature of forest rights in India. In this chapter, I will explore the formation of different ideas on the nature of forest rights in India. Before this, however, I want to review the current knowledge on the subject.

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The only work on the subject of legal ideas and making of the Forest Act of 1878 is that of Guha. In the introduction, I noted how Guha sees ideas not as contributing to producing effects, but as existing in themselves. He constructs his categories around 'ideas in themselves'. As a result, he cannot take stock of the multiple relationship of the ideas with the effects which were intended to be created. Guha groups the opinions within the colonial administration on the question of local rights, and consequent policies and approaches, into three fixed and firm categories. One, 'annexationist' was spear-headed by Baden-Powell who 'held out for nothing less than *total* state control over all forests'.¹ Second, 'pragmatic' represented by Brandis who supported 'state management of ecologically sensitive and strategically valuable forests, allowing other areas to remain under common system of management'.² The third, 'populist' position, was that of the Madras Presidency who 'completely rejected state intervention, holding that tribal and peasants must exercise sovereign rights over woodland'.³

Guha sees a conflict and debate between Brandis and Baden-Powell. According to Guha, Brandis was a champion of local rights and local institutions and struggled for the creation of 'village forests', against the might of the 'annexationists'. Baden-Powell was hostile to this and argued to apply the distinction of 'right' and 'privileges' rigidly to appropriate all forests to the ownership of the state. Guha's account, however, exaggerates the differences between Baden-Powell and Brandis, and misunderstands the basis of Madras Presidencies alternative position.

6.1. Forest as State Property: Government Of India

It was apparent almost immediately after the enactment of the Act of 1865 that the notion of 'prescriptive right' would need to be displaced. Brandis shifted his gaze to the

¹ Guha (1990): p67.

² Guha (1990): p67-8.

³ Guha (1990): p67-8.

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‘existing rights’, stipulated in the Act. He alleged, ‘The words ‘existing rights’ are vague, especially in India, and admit of a variety of interpretation.’⁴ Brandis had so far referred to the local use as ‘rights’. Brandis then referred to these rights as ‘customary’ and ‘vague’. For Brandis, customary rights were obscure, inferior and merely relics of the past. Brandis clarified,

Now it must be borne in mind that forest rights are necessarily vague and undefined. They are the result of long established custom under the old state of things, when the forests were to a certain extent regarded as the common property of everybody, and when the people in the vicinity of a forest were in the habit, under varying restrictions and taxes imposed by the former rulers, of resorting to it for wood, timber, grass, and pasture for their cattle, and for a variety of other forest produce.⁵

The outstanding problem, therefore, was to ‘define, regulate and extinguish’ the local rights.⁶ In thinking of the right over forests, Brandis was later joined by Baden-Powell, a civil officer.

6.1.1 State’s ‘Right’, People’s ‘Privilege’: Baden-Powell

Baden-Powell, just 25 years of age, who was serving as a Judge of the small cause court in Lahore, was appointed as the Conservator for Punjab in 1869. Brandis was trying to get a forest officer for Punjab from another province. But the proposed arrangement failed. The best alternative then was to get a civil officer familiar with the province. Baden-Powell was appointed the Conservator of Forests in 1869 and was instructed to work strictly under the control and supervision of Brandis, the Inspector General of Forests. The first concern Baden-Powell had was his allowance for the new post.⁷ In just a few years, Baden-Powell acquired a prominent visibility as a bearer of ‘expert’

⁴ Brandis’ Memorandum (1868).

⁵ Brandis’ Memorandum (1869).

⁶ Brandis’ Memorandum (1869).

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knowledge on the question of law and rights over forests.⁸ As a civil officer, he also had a prominent role in accommodating the interests of the Forest Department within the administration from 1870 to 1880.

Ideas are not imagined and invented by erudite and gifted individuals. Rather, people in their struggles within specific contexts produce ideas to achieve specific results. Brandis and Baden-Powell were not the only ones engaging with the production of ideas that could extinguish local usage. There were others too in the Forest Department. Amery, a forest officer, was a self confessed novice on the question of law and rights. In a paper read at the Second Forest Conference, he found the opinion that private persons could acquire 'rights by prescription in public land' was contrary to 'English institutions'.⁹

Amery attempted to demonstrate the forest rights through a hypothetical illustration. In this, a person who owned agricultural land along with a moor and forests farmed out the land to many tenants and permitted them to use the moor and the forests. He continued to be the owner even if there was a widespread and unhindered use of the moor. The use was only a 'privilege' given to the tenants by the owner. The owner could withdraw this privilege at any moment. The property arrangement on forests in India could be derived from this illustration. The state was the owner of forests and local usage was only 'privilege' not a right. And thus the solution, 'where rights are found to exist, confirm them, but where pretended rights are found on investigation to be mere privileges conceded or usurped, rescind them.'¹⁰ Other forest officers

⁷ These details have been constructed from several notes and communication from the records of the Revenue (Forests) for years 1868-70, NAI.

⁸ *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* for the years 1871-72.

⁹ Paper read by Amery in the Forest Conferent held at Allahabad in 1876, see Amery (1876): p28.

¹⁰ Paper read by Amery in the Forest Conferent held at Shimla in 1875, see Amery (1875): p 127.

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supported this emergent theory. Schlich, another forest officer, said, 'Privileges are conceded because of a sort of moral though not legal right'¹¹

Baden-Powell, like Amery, was searching for legal ideas to justify certain practices and produce certain effects. As if to make it clear that legal ideas do not have a domain of their own but that legal ideas should be derived from materiality and practices, Baden-Powell started,

I should begin with the political economy of forestry and ask the question, "Why should Government cultivate forests? Why not leave it to private persons, as is done in the case of cereal crops?"¹²

The answer to this question, in Baden-Powell's opinion, was 'well known and established'.¹³ But since this course of deriving the law from political economy would have 'lengthened' his remarks too much, Baden-Powell decided to achieve the same conclusion by engaging with the nature of the 'existing law' itself. Baden-Powell was confident that the experience the Forest Department had gained in the previous past ten years in drafting several proposals and in seeing the working of the law in the field meant that he knew 'pretty well the real principles of what we want the law to lay down'.¹⁴

The production of his ideas was thoroughly enmeshed in practices. He complained that the ideas of the Forest Department encountered a hostile legal culture prevalent within the governments. He was aggrieved with the treatment meted since the beginning, from to the very first memorandum by Brandis in 1864,

¹¹ Comments by Schlich on Amery's paper, in eds. Baden-Powell and Gamble (1875): p130.

¹² Baden-Powell (1875): p 3.

¹³ Baden-Powell (1875): p3.

¹⁴ Baden-Powell (1875): p22.

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Mr. Brandis's report distinctly contemplates the regulation of obnoxious rights ... But these things and many others were overlooked or misunderstood when the draft of the Act was made.¹⁵

Indirectly ridiculing Henry Maine, Baden-Powell claimed that,

... it was quite clear that the Act was drafted by a lawyer who had no adequate conception of the subject or of its requirements, and this is not to be wondered at.¹⁶

To recognise the legal reasoning of Maine and concede 'prescription' was to block options for displacing it. It was convenient to call it an oversight and mistake. The mistake could be subsequently 'corrected'.

Baden-Powell declared that most of the uses of the forests were not based on rights at all. Since in practice people were making unhindered use of the forests, approaching the question of law from practices was fatal for achieving his desired conclusion. The best course was to take the question to the domain of 'theory'. Baden-Powell declared,

A very large proportion of them are admitted to be the absolute property of the State, at any rate in theory. The State had not, it is true, exercised that full right; the forest was left open to any one who chose to use it, *but the right was there.*¹⁷ [Emphasis his]

The unsubstantiated precedence for Baden-Powell for this right of the state, in theory, was,

Every native ruler closed, when he chose, whole areas of forests to preserve the game, and as in the well known instance of the forests of the Amirs of Sindh, and in other parts, punished with the utmost cruelty

¹⁵ Baden-Powell (1875): p22.

¹⁶ Baden-Powell (1875): p22.

¹⁷ Baden-Powell (1875): p4.

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the slightest trespass within the forest limits. Whenever this was not the case, people were *in the habit of doing* what they pleased, no one caring to stop them.¹⁸ [Emphasis his]

The nature of pre-colonial society and rule was being invented to legitimate the contingent interests of the present. Baden-Powell then derived the other rights from this theoretical 'absolute property of the State'. The first category was where the State explicitly granted rights at the time of settlements or through *sanads* (a grant in writing) by the native rulers. As Baden-Powell noted,

The Government ... granted ... though in all cases undefined, *rights* properly so-called, in these forests, by solemn record at settlement. Here we have *forests in which the property of the State is burdened with real legal rights*¹⁹ [Emphasis his]

Another kind of private right on forests arose, according to Baden-Powell, due to the short-sightedness and folly of the early British revenue officers. He noted,

In other cases the Government settlement officers and collectors in early times granted away the forest land, reserving certain rights in it only to the State ... the settlement officers, acting with that ignorance of forest conservancy which characterized those and many subsequent years, voluntarily let go the forest lands, reserving only the right of the State to the existing or growing stock on the ground.²⁰

Baden-Powell instanced parts of Ratnagiri district of Bombay, Kangra, Gurdaspore and Hazra where the lands vested in the private proprietors but the forests in the state. Following Baden-Powell's general statement of theory, forests 'naturally' fell into three categories: state forests in which no rights exist; State Forest in which rights exist; and Private or communal forests, which once were State forests, but which the action of the

¹⁸ Baden-Powell (1875): p4.

¹⁹ Baden-Powell (1875): p4. For Baden-Powell, these rights were 'undefined'. The grants or settlements mentioned a general right to graze or extract timber from a forest without specifying the number of cattle that could graze or the amount of timber which could be extracted.

²⁰ Baden-Powell (1875): p4.

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officers of Government so affected, that now they can only be called private or communal estates.²¹

Baden-Powell reassures himself,

That this is the normal *legal* condition (in one or other class) of all forests in all India, there cannot be the slightest doubt.²² [Emphasis his]

The exercise of theory building was to declare the prevalent use of forests illegal. However, the very exercise in theory was to bring certain effects, to change the practices. The transition from theory to practice had to be made at some stage. Baden-Powell made the shift by calling the prevalent use, which in his theory were not 'rights', as 'certain other influences (that) had a practical bearing on the state of the forest'.²³ Baden-Powell grudgingly conceded the 'obnoxious rights' which were already conceded by earlier British officers.²⁴

According to Baden-Powell, the local people were freely using the forests but this was,

... not in pursuance of what could be called a legal, prescriptive, or granted right ... In all these the right is absolute in theory, but by the "laissez-aller" action of the state and by its practical every-day policy, it has never been fully acted on.²⁵

At the level of theory and practice, Baden-Powell had to displace the notion of 'prescriptive' rights, which were pronounced in the Queen's proclamation, re-affirmed by the Council through the Act of 1865 and shared by the civil officers. To assert that the prevalent use did not constitute a right acquired through prescription, Baden-Powell conceded the immemorial use of forests by the local people. However, he argued,

²¹ Baden-Powell (1875): p5.

²² Baden-Powell (1875): p5.

²³ Baden-Powell (1875): p5.

²⁴ Baden-Powell (1875): p5.

*without any distinct grant or license, and without any idea of asserting a right as against the ruling power, or against other individuals or communities, everybody got accustomed to graze and cut in the nearest jungle lands, because nobody cared whether he did nor not.*²⁶
[Emphasis his]

Having traced the formation of the local practices, Baden-Powell could then rule out prescription on technical legal grounds that as opposed to ‘a long known principle of law’, for it to be prescriptive right,

... the right should have been peaceably and openly enjoyed by any *person claiming title thereto as an easement (servitude), and as of right without interruption for 20 years.*²⁷

Baden-Powell could, thus, sustain his theory,

Hence, while the forests were, and are still, over-run with people cutting and doing what they like, they are nevertheless, in *theory*, the absolute and unrestricted property of the State.²⁸

Baden-Powell needed to bring his theory to practice. But in practice, the use of forests by the local people was widespread. Baden-Powell conceded to the widespread prevalent use, ‘it is this circumstance that causes the practical difficulty’. But this difficulty still had to be surmounted: in theory local people had no right, but in practice they considered themselves using forests from time immemorial. Baden-Powell lamented that ‘Government *will not* interfere’ in the ‘destruction’ of forests till it was visible and complete.²⁹

²⁵ Baden-Powell (1875): p5.

²⁶ Baden-Powell (1875): p6.

²⁷ Baden-Powell (1875): p6.

²⁸ Baden-Powell (1875): p6.

²⁹ Baden-Powell (1875): p6.

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He was aware that his theory was entirely unacceptable within the administration. He posed the question to himself as to what use of forests should be allowed, and debated,

If you reply, I will regard only what are *legal rights* and knock all the loose and vague privileges on the head at once— I answer, that for any practical purpose, it is useless discussing such a proposal, because no one, either inside or outside of the Legislative Council, would listen to you; and we must hope to win our way by gaining people to our side, and be satisfied with the nearest approach of what is right that we can get.³⁰

The problem again had moved from theory to managing the politics of the situation. How was Baden-Powell to get 'people to our side' and get 'what is right' for the creation of forest reserves? Baden-Powell's proposal was to constitute forests into three categories, Special Reserve, Ordinary Reserve and District Forest. Special Reserves were to be of a 'very valuable forest destined to produce timber, fuel, & c., for the market'.³¹ In Special Reserves no 'privileges' were to be allowed. In exceptional circumstances, if allowed, these were to be defined and recorded and 'exercised under supervision, and strictly confined to certain limits'. The Special Reserves were to be small areas.³²

In Ordinary Reserves, 'privileges' were to be allowed but after settlement and recording and defining their extent and nature.³³ In Baden-Powell's proposal, the District Forests were to be 'made over absolutely for the use of villages and communities'.³⁴

He had, thus, created a theory of ownership over forests and proposed its translation into practice. However, the theory and practice were entirely unrelated. In theory building, there came a stage where instead of 'rights', he had to shift to the politics and

³⁰ Baden-Powell (1875): p8.

³¹ Baden-Powell (1875): p24.

³² Baden-Powell (1875): p24.

³³ Baden-Powell (1875): p24.

³⁴ Baden-Powell (1875): p24.

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practice of 'gaining people to our side'. In reconciling his theory and practice, he could offer no better suggestion than leave it to the legislature to '*prescribe the principle on which this balance is to be struck*'³⁵

6.1.2 'Right' and 'Privilege' or Customary Right: Brandis

Baden-Powell had given a more detailed and theoretical basis to what Brandis had proposed in the earlier drafts. However, in Brandis' opinion, the theory had not solved any problem. For Brandis, the problem was that if the most prevalent use of forests were not to be a 'right' but merely 'privilege', it would never be a subject of legislation. And in the absence of legislation, which bound not only the local people but also the civil officers, the existing practices would continue. The 'principle' for permitting 'privileges' in forests would leave the matter entirely in the hands of the district and local administration. And in the context of hostility to the Forest Department, particularly at the local level, the creation of government reserves would be vitiated. Brandis was thus interested in making the local use a subject of legislation. He candidly put it,

If this view of the case could be maintained, forest legislation in India would be a very easy task, for the forests in which Government have granted specific rights at settlement are limited in extent and are not numerous. Act VII of 1865 would in that case be sufficient for the great mass of Government forests.³⁶

But the entire problem was that the Act of 1865 was not adequate. The concern was, what theory could be propounded to justify 'definition, regulation and extinguishing' of the existing use? Baden-Powell's theory needed re-working. The imperative was, keeping the right of the state firm, as Baden-Powell had worked out, how could the local use of forests be 'defined' so that it would lead to their 'regulation' and

³⁵ Baden-Powell (1875): p8.

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'extinction'? Brandis tried another line. He emphasised parallels between the Indian situation and Europe that 'time immemorial' use of forests in India 'have the character of rights of common'.³⁷

Brandis quoted from the common law of Britain and concluded that the same principles were recognised in French and German law,

"It is the right which one or more persons may have to take or use some portion of that which another person's soil naturally produces;" and if we enquire into the origin of these rights, it will be found that in most cases they may be compared to what is called "the right of common appendant", by which the owner or occupier of arable land, or, in the case of commons of estovers and turbary, the owner or occupier of a house is entitled to the use of the manorial waste for such purposes as are necessary to the maintenance of his husbandry or premises.³⁸

Brandis re-worked the origin of customary right in India,

... the custom to graze the village cattle and to cut wood for the requirements of the village have grown up in a manner in every respect similar to the growth of rights of common or of forest rights in Europe.³⁹

Having established local usage as customary rights, Brandis could then import all the restraints customary rights were subjected to in Europe. Brandis was quick to move to the points of his interest,

Now, as regards the common of pasture, it is I believe agreed that the right of common appendant is limited to such cattle as the land can maintain during the winter by its produce, or requires to plough and

³⁶ Brandis (Memorandum) (1875) : p 13

³⁷ Brandis (1875).

³⁸ Brandis' Memorandum (1875): p12.

³⁹ Brandis' Memorandum (1875): p13.

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compester (manure) it. The commoner cannot pasture the cattle of a stranger for hire; he cannot rent his right.⁴⁰

Brandis similarly quoted authority for the use of timber and firewood and concluded that such use was limited to 'reasonable quantity for the fuel of the chimneys' and 'repair of his own fences or farm implements'.⁴¹ He buttressed this by quoting several French and European sources.⁴²

Brandis could then further detail the restraints on local use and bring in the Forest Department by relying on 'Continental Forest laws' exemplified in '*Code Forestier*'. He summarised the restrictions,

... pasture in any blocks which have not been declared ... safe against cattle, by the forest administration. The blocks open for the admission of cattle and the number of cattle which each right-holder may send to graze are fixed by the forest administration. The principle upon which these provisions are based is, as regards wood, that right-holders cannot claim more in one year than the normal permanent annual yield of the forest, and as regards pasture, that the exercise of the right must not diminish the productiveness of the forest in wood or timber.⁴³

In Baden-Powell's formulation, the principle for restraining local use was the political pressure of the local people. The civil administrators were the sole judge of this. Through the manipulation of 'customary right' Brandis changed this in favour of the Forest Department. The criterion for permitting customary use was yield and sustainability of forests, and the judge of this was not the civil administrator but the expert, the forest officer.

Brandis did not care about any theory, as long as certain desired results were produced,

⁴⁰ Brandis' Memorandum (1875): p12.

⁴¹ Brandis' Memorandum (1875): p12.

⁴² Brandis' Memorandum (1875): p12.

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It is obviously impossible to come to a final decision at present on the general question raised by Mr. Baden-Powell. Meanwhile forest legislation should sanction a mode of procedure by which the exercise of rights injurious to the forest may with due regard to the requirements and convenience of the people who now have a beneficial interest in the use of the forest be regulated, restricted or extinguished...⁴⁴

Brandis knew he was writing a memorandum which, like previous memoranda (for example memorandum of 1868 and 1869) would be circulated to the local governments. In responding to the previous memoranda, the local governments had much agitated over the negation of 'prescriptive right'. In Brandis' framework, it did not matter how the customary rights were acquired. The important concern was that the use had to be regulated. It was thus best to explicitly recognise the prescriptive right and insist it to be 'customary' and thus, subject to 'regulation, commutation and extinction'. He thus reconstituted prescriptive rights. He argued, 'there are numerous forest tracts in which the inhabitants of the vicinity have exercised these rights peaceably and openly without interruption for more than 20 years'⁴⁵ But at the same time, he imposed all the restraints he had derived from Continental law. This included the use of demarcated forests only for domestic use and not for sale and barter. Even these were to be used only in patches provided by the Forest Department.⁴⁶

The memorandum was written for the civil officers in the local administration. It was just as well if they were deceived by this apparent act of generosity. When Brandis was not constrained to produce these effects through his texts, he was absolutely forthright. Amery, as we noted earlier, had dabbled in the nature of law on forests in India. Like Baden-Powell, he had applied the distinction between 'right' and 'privilege' and re-worked it to 'alienable rights' and 'inalienable rights'.⁴⁷ Brandis ruthlessly destroyed this unnecessary distraction. He ridiculed Amery, saying that the subject was only for

⁴³ Brandis' Memorandum (1875): p 12-13.

⁴⁴ Brandis' Memorandum (1875): p 14.

⁴⁵ Brandis' Memorandum (1875): p13-4.

⁴⁶ Brandis' Memorandum (1875): p 14.

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those with 'sufficient acquaintance with jurisprudence'.⁴⁸ He sarcastically described him as an 'intellectual forester' interested in the 'theoretical study of the origin of right and property' whereas other ordinary foresters were concerned with what 'practically exists' and can be used in 'controlling obnoxious practices in forests'.⁴⁹

Brandis' thrust was to find evidence 'to even so slight a degree'⁵⁰ of a precedence of restraint on local use by the previous rulers which could then be consolidated.⁵¹

Brandis' reprimand was,

If you choose to call the use a "privilege" in the former case, and a "right" in the latter, do so without quarrelling about terms; but do not lose the distinction on which your power of conserving the forest practically depends.⁵²

Baden-Powell had declared that they had learnt a good deal from experience in the past ten years.⁵³ He was aware of his own value. The Annual report of the Government of India on forests for 1870-71 had made a special mention of his legal knowledge of forest property. Perhaps he had no clue that in continuously stumbling upon practices and strategies, he was going to invigorate himself further and move on to an illustrious career which would lead to production of several seminal and authoritative texts. The Baden-Powell we all know was still in the making.

⁴⁷ Amery (1875) and Amery (1876).

⁴⁸ Brandis reviewed the paper of Amery presented at the Second Conference for the Indian Forester. See Brandis (1876 b).

⁴⁹ Brandis (1876 b).

⁵⁰ Brandis (1876 b).

⁵¹ Brandis (1876 b).

⁵² Brandis (1876 b).

⁵³ Baden-Powell (1875): p22.

6.1.3 Local Use as 'Customary Right': Baden-Powell

Baden-Powell did realise the efficacy of Brandis's strategy of selectively grafting European law onto the India context. Thereafter, he laboured to become familiar with European law, particularly the law on forests and waste lands. In any case, he had already a reputation as an expert on forest law. In late 1870s, he was commissioned by the Government of India to write a manual on forest law for forest officers. So far, Baden-Powell was attempting to forge a legal ideology exclusively in relation to India. Towards this end, his starting points were the concerns of political economy or the practices of the native rulers. In the Manual,⁵⁴ Baden-Powell changed tracks. His starting point now was European law.

While elaborating forest law, Baden-Powell began by justifying how the prevailing legal system of Europe could hold clues for administering forests in India. This was, according to Baden-Powell,

... partly because it is always instructive to compare one law with another; partly to show that the great principles on which forest law must always proceed, are fundamentally the same, no matter how local circumstances may require variations and additions in matters of detail. It will be, I think, a strong ground for confidence in the general wisdom and reasonableness of our legal provisions,- even those which seem at first sight to persons unaccustomed to deal with these questions, arbitrary or too extensive- if I can show that they are supported by a *consensus* of skilled opinion in Europe.⁵⁵ [Emphasis his]

Baden-Powell clarified,

It is true that the countries of Europe exhibit a degree of civilisation so much higher than that of India that provisions which are acceptable in the one may be viewed as ill adapted to the other. But this argument is

⁵⁴ Baden-Powell (1882).

⁵⁵ Baden-Powell (1882): p79.

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least applicable where those who object to forest legislation in India most require to use it. The objection to forest law is chiefly that it is an interference with the rights of the villagers, and here the difference of civilisation does not tell. It is surprising how much alike in regard to wants of grazing, firewood, &c., the peasantry of all countries are. The Swiss, French, and Italian peasantry, after generations of forest conservancy, are as much opposed to the necessary restrictions on the exercise of rights, and often make objections to them as unreasonable, as the peasantry of an Indian province.⁵⁶

Baden-Powell was revising his opinion to bring in customary right. He began by puzzling over the problem of *property of* and *right in*. He dwells on this distinction,

..while the property itself remains to the owner, and while his ownership is *not in itself* reduced or altered, still, some of the rights which go to make up a perfect or unrestricted ownership, have been as it were detached and vested in other persons. The detached rights are of the nature of "ownership" *in this sense only* "that they are rights over a specific thing available against the world at large" (He quotes Markby here)⁵⁷

Following Roman law, Baden-Powell extracted "servitude", the right to serve. He noted that in English law there was no general term for servitude but "rights of common" came close to it. Following this, he further elaborated the distinction between ownership and servitude. He noted,

...a servitude or right residing in one person over the property of another person, may exist without any way touching the ownership (though limiting its enjoyment), it follows that no right-holder has any share in the property, or is a *co-owner of the estate*. Nor will the exercise of mere rights of user or separate servitudes, however extensive, however long enjoyed, ever give rise to a claim to ownership of the estate.⁵⁸

⁵⁶ Baden-Powell (1882): p79 (f.n.).

⁵⁷ He also relies on Markby, an authority on common law. Baden-Powell (1882): p26.

⁵⁸ Baden-Powell (1882): p35.

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Here he was anxious to dispel the contention raised by Madras. Before conceding that the local people had acquired rights to use forests through prescription, he wanted to be sure that this was not misused by Madras to argue for a co-ownership. It had to be confined to servitude and 'common rights'. He further buttressed it by quoting German and French sources to assert that co-ownership did not exist, it was only servitude.⁵⁹

Baden-Powell then takes a completely different position from that argued in his paper presented to the forest conference in 1873. He declared that his earlier distinction and conception of 'right' and 'privilege' 'now must be abandoned'. He stated explicitly,

In a paper read before the Forest Conference in 1873, I endeavoured to classify forest 'rights' into (1) strict rights and (2) privileges, urging that the latter are of course always limitable at the will and pleasure of the Government. I now think, however, that the natural, legal and equitable limitation which is inherent in all rights as exercised over another's property, is quite sufficient in all cases...⁶⁰

Consistent with this, he reinstated 'prescriptive rights'. In his new position,

...in India, forest rights are nearly always "prescriptive", or have grown up by long customary exercise.⁶¹

Having constituted local use as customary right, he moved to make its implications clear. According to Baden-Powell, the distinction between ownership and right of user,

... has a very practical consequence, namely, that a right of user not being a proprietary right, it *can only be exercised or exist to an extent which is compatible with the safe existence of the estate itself*. For the right to destroy a thing (*abusus*) is a part of the proprietary right, and it is a contradiction in terms to suppose that a person who has not the ownership should have a right to destroy the thing owned.⁶²

⁵⁹ Baden-Powell (1882): p37-40.

⁶⁰ Baden-Powell (1882): p112 (f.n.).

⁶¹ Baden-Powell (1882): p111.

⁶² Baden-Powell (1882): p40.

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Then came the question of how much the rights could be restrained,

.. the question whether a given forest can or cannot properly bear such and such rights ... is ultimately a question of fact, which must necessarily be decided on the basis of the best professional advice which is available.⁶³

Through the 'professional advice', the Forest Department was inserted at the helm of the affairs. Baden-Powell's ideas on forest law were not fixed but always in formation. In his later years, Baden-Powell grafted his theory onto the network of other prevailing ideas. What was a strategic ruse was turned into the best tradition of western law and administration. To do this, Baden-Powell again contrasted the pre-British with the British period. Baden-Powell repeated his earlier views,

We have rarely or never any cases, where a right has originated in a special contract, or where it binds the forest-owner absolutely to specific terms, or where it derives additional strength from having been granted for a valuable consideration. In reality our forest rights in India, are not *legal* rights at all. Under an Oriental Government no such thing as a prescriptive right would be practically possible.⁶⁴

Baden-Powell could now contrast the 'oriental despotism' with liberating 'western law' and ideas,

Nevertheless, when western law and western ideas were applied to property and rights in India, there was no other course possible—certainly none that would have been equitable and befitting a civilized Government than that which has in fact been followed, namely, to treat existing ancient practices and users of the forest in the matter of grazing, wood cutting and so forth, exactly as if they were true 'servitude' under the modern legal conception of the thing.⁶⁵

⁶³ Baden-Powell (1882): p116.

⁶⁴ Baden-Powell (1885): p401.

⁶⁵ Baden-Powell (1885): p401-2.

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There were still loose ends between theory and practice. What were recognised as 'customary' rights were far more extensive than followed within Western law,

Under such conditions it has happened that forest-rights are in India by no means *always* rights *in rem*, or "real-rights". The text-books on the Continent always define a forest-right as one that belongs to some *estate*, and is enjoyable- never apart from that estate but- only by direct owner or holder of the estate for the time being.⁶⁶

The only way this dichotomy could be explained was by recognising that the insertion of customary rights was a strategic device. But the best Baden-Powell could do was leave it open,

In India, however, we draw no distinction; and the forest right is dealt with in practice on the same basis whether it is attached to an estate ... or is a personal right ... or attached to a person as being a member of a village community.⁶⁷

The ideas propounded by Baden-Powell were still not hegemonic. He acknowledged in 1885 that the relations between the right-holder and forest-owner (in most cases the State or some community) was an unsettled matter. Disputes frequently came before the law courts, and Baden-Powell noted,

Consequently, we have as yet neither definite statute law nor the authority of a series of High Court precedents on the subject.⁶⁸

He was, thus, insisting that the forest officers should learn the theory of customary rights so that they could educate the magistrates and the courts. Baden-Powell urged the forest officers,

⁶⁶ Baden-Powell (1885): p402.

⁶⁷ Baden-Powell (1885): p402.

⁶⁸ Baden-Powell (1885): p400.

It is absolutely necessary to understand what I may call the true or complete theory, even though circumstances do not as yet enable us to apply it frequently... Magistrates and Courts are not perfect, and in any case, as I have said, they are so little accustomed to deal, in practice, with questions of forest rights, that it is not surprising, if they should often make mistakes, or fail to appreciate points, or imagine that a rule derived from foreign text-books is necessarily inapplicable in India.⁶⁹

While Baden-Powell forged this theory, Madras continued to assert the construction that forests in Madras Presidency were owned by village communities.

6.2. Madras Presidency and the Denial of State's Rights

As I have shown, Brandis and Baden-Powell constituted local use as customary right. By contrast Madras recognised a 'co-ownership' of forests by local people. The Madras Presidency called every use a right. It not only took the position of co-ownership of forests and recognised the prescriptive right of use of forests as a right over forest itself, it also denied any possibility of translocating rights over forests. According to Madras, every patch of forest was subject to the ownership of the local people. The Government of India was opposed to this position. It attempted to demonstrate ruptures in Madras's claims.

The Government of India alleged that Madras was inconsistent in its description of tenurial relations in Madras. It alleged that Madras had simultaneously described them as co-ownership, communal rights, and the existence of state's rights but limited by local use. The Government of India alleged,

This description as a whole appears to indicate a singular confusion of ideas as to rights of property and rights user. The two, of course, are

⁶⁹ Baden-Powell (1885): p402.

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perfectly distinct things, and may be co-existent over any land. But the fact of user is no evidence of a right of property also,- rather the reverse.⁷⁰

For the Government of India's legal department even this was a charitable interpretation of Madras's position. According to the reports of the Madras Government itself, 'extensive reserves' were formed and placed in charge of the Forest Department. The Government of India noted,

Form statements 3 and 4 of the Madras Conservator's Annual Report for 1875-76 find that the Forest Department had in its charge 84 fuel reserves containing 134,315 acres, and 68, plantations containing 15,383 acres, besides 76 new "acquisitions" during the year, the area of some of which amounted to 45,995 acres, while that of the rest had not been ascertained. In addition to this, there are "Government Forest" some of which amount to 5,801 square miles, while the greater part are still unsurveyed and the area is consequently unknown. There are also extensive reserves still in charge of the Revenue officers.⁷¹

There were other reasons why Madras was so opposed to every proposal from the Government of India. The ultimate conclusion of Madras always was not so much what the law should be but who was authorised to make it. Madras demanded that,

... a Forest Bill which aims at the regulation of local usages ought to be framed, discussed and passed by the Local Legislature.⁷²

And the Madras Board of Revenue had said,

The Board are strongly of opinion that any Forest Act for this Presidency- and they admit that common rights being wasteful things

⁷⁰ Note by T.C Hope, 9/10/1877, on the Indian Forest Bill, see in Appendix YY, Proceedings Nos. 'A' 43-142, March 1878, LD, NAI.

⁷¹ *ibid*.

⁷² MBOR, 5/8/1871, No. 3284.

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are proper subject for legislation- should be framed, discussed, and passed by the local Legislative Council.⁷³

These statements give us vital clues to look at the preceding period and the overall relations between Madras and the Government of India within which the forest question was being negotiated.

6.2.1 Madras Versus the Government Of India

In the beginning of the Company rule, the Presidencies of Bengal, Madras and Bombay were almost independent with their own 'Presidents' and councils. The Regulation Act, 1773 created a kind of central government consisting of a Governor-General and four councillors. The Governor of Bengal was also to act as the Governor-General. But its powers over the Presidencies were only in matters of waging wars, and over diplomatic and political relations with local rulers. The Charter Act of 1833 centralised the administration and vested all authority in the Governor-General to 'supervise, direct and control' over all India.⁷⁴ This included legislative functions. No Governor in Council could make or suspend any law or regulation. They could only propose drafts of law and regulation to the Central Government. A principal reason for these reforms was the abolition of the trading privileges of the East India Company and the huge losses the Company had accumulated. To control the revenue, a centralised authority was needed. In this system, a centralised budget was prepared and all the revenue accrued to the Imperial exchequer.

The Presidencies much resented the centralised control which was imposed on them after 1833. The Mutiny of 1857 created a means for the Bombay and Madras Presidencies to express their simmering resentment. On the termination of the

⁷³ *ibid.*

⁷⁴ Misra (1970): p13-22.

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Company's government in 1858, Indian administration came directly under the British Crown.

Trevelyan, the Governor of Madras Presidency, wrote a harsh minute in July, 1859 against the erosion of the freedom of the local governments. He alleged that the Central government had appropriated power contrary to and far in excess of the intention of the previous reform. He attacked the centralisation,

... the result of the attempt has been to paralyse the local governments, without providing any effectual support for them ... especially when the south of India differs from the North as much as France does from Germany.⁷⁵

He alleged that the terms used for referring to the local governments, 'subordinate' and 'Minor Presidencies', revealed the condescending approach of the Central government. He thus demanded the restoration of the 'authority and honour' of the Presidencies.⁷⁶

The Government of Bombay was equally enraged. The Governor of Bombay lamented that the tendency of the process of centralization since 1833 was to assimilate every part of India to the practice of Bengal –

... to judge everything by a Bengal standard – to circumscribe the powers and weaken the authority of the subordinate governments and to deaden the energies of all who are employed under them.⁷⁷

The Income Tax Bill was introduced in the Governor-General's Council in 1860. The Bill was much criticised by Charles Trevelyan, who asked his representative to place his views before the council. While the matter was under the consideration of the Council, Trevelyan published all the confidential correspondence that had transpired on

⁷⁵ Minute of Charles Trevelyan, 13/7/1859, see in No. 11/12, Home (Public) Consultation, 12/8/1859, NAI.

⁷⁶ *ibid.*

⁷⁷ Minutes of the Governor of Bombay, Elphinstone, dated, January, 1860, See Proceedings Nos. 9-18, 8/9/1860, Home (Public), NAI.

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the subject between Madras and Government of India. Canning, the Governor-General, took a serious view of this and demanded from the Secretary of State that Trevelyan should be recalled from the Governorship for this breach. The Secretary of State did indeed recall Trevelyan, but only to put him in the Governor-General's Council.⁷⁸

The Indian Councils Act, 1861 restored the power of legislation to the Government of Madras and Bombay that they had before 1833. Except for certain subjects⁷⁹, the local governments were free to legislate on any subject. However, every legislative measure of local interest was subject to the assent of the Governor-General in addition to that of the local Governor.

Madras was zealous in defending the new freedom it had acquired. But the Government of India was not entirely generous in foregoing its powers. In this relationship, the Secretary of State had become a powerful person. The Government of India Act placed all superior appointments of a political nature in the hands of the Secretary of State for India, a Minister of Cabinet rank, assisted by an under secretary and a Council of 15 members. The Secretary of State had acquired all the powers that were earlier with the Court of Directors and Board of Control put together. The Secretary had the power to override the decisions of his Council. Further, his establishment was run from the accounts of India and he was not responsible to Parliament for their budget. The secretary of State, thus, was more or less a 'despot', individually responsible for the administration of India.⁸⁰ Further, the establishment of an overland cable in 1868, the opening of the Suez Canal in 1869, and the completion of submarine cable in 1870 enhanced the control of the Secretary of State over the administration of India.⁸¹

⁷⁸ Mishra (1970): p25-26.

⁷⁹ Public debt, public revenues, coinage, post and telegraph affairs, the penal code, religion, armed forces, patents and copy rights, and relations with foreign governments and Indian states.

⁸⁰ Misra (1970): p22-24.

⁸¹ Misra (1970): p22-24.

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After 1860, the Secretary of State tried to consolidate his position, even dictating legislation to the Government of India. Lord Curzon, a Governor-General in India complained,

Govt. at home cannot go on treating the Government of India as though we were a negligible quantity or a Govt. Dept. ... Of course we are subordinate and the S. of S. and the Ministry are ultimately supreme. But there are two ways of doing things – a wise and unwise⁸²

On the prompting of the Presidencies through the Secretary of State, the Government of India had to formally announce in 1862 the independence of the Madras and Bombay Presidencies on the forest question. Since a centralised financial system had continued, the only constraint on Madras and Bombay was that they had to submit annual budgets to the Government of India for a preparation of a consolidated budget.⁸³

Trevelyan had moved to the Governor-General's council and continued his tirade from the Centre. In 1863 'forest' was placed under the Public Works Department. He objected,

It is entirely an executive Department ... If it is not employed in actively directing executive details, it is doing nothing, and this executive activity is precisely what brings it into conflict with the Local Governments.⁸⁴

He further emphasised the independence of the Local administration,

The Local Governments are now quite alive to the importance of looking after their Forests. I am confident that our object will be more fully attained by leaving the Local Administrations to follow their own

⁸² S. and S. referred to the Secretary of State. Lord Curzon quoted in Mishra (1970): p37-8.

⁸³ This was resolved through a resolution, dated 21/10/1862 of the PWD, GOI.

⁸⁴ Minute by Charles Trevelyan in Proceeding Nos. 11-13, June , 1863, PWD (F).

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plans with only a general and indulgent supervision on the part of the Central Government, than any amount of interference.⁸⁵

Madras always saw a design in the moves of the Government of India to subjugate and dominate it. In official pronouncements of the Secretary of State and even the Government of India, the independence of Madras and Bombay was declared. But Madras was apprehensive that the government of India was unwilling to concede the freedom.

The Government of India appointed Brandis as the Inspector General of forests in 1864. In the terms and conditions of his appointment, apart from other things, he was allowed to correspond directly with the Conservators in the local administration and Presidencies. Madras opposed vehemently the terms of appointment of the Inspector General. It complained,

It was only on the 26th January last this Government were assured that by the 'temporary' employment for one year of Dr. Cleghorn and Brandis as commissioners for forests to Government of India, 'no interference whatever' with the management of the Forests in the Madras Presidency is contemplated. In the present Resolution not only is an officer with the significant title of "Inspector General of Forests permanently" appointed, but the Government of India state their intention of deputing him from time to time to examine 'personally' into the conditions of Forests in the various Provinces. Of all the methods in which the Imperial Government can exercise its supremacy, the one which is most subversive of the legitimate authority of a Local Government, which lowers it most in the estimation of the public and of its own officers, and is most prejudicial to the public interest, is the placing over it an officer whose very title implies mistrust, and whose duty necessarily involve interference, in manner and degree wholly inconsistent with the position and independence of a Government.⁸⁶

⁸⁵ *ibid* .

⁸⁶ Proceeding Nos. 22-5, December, 1864, PWD (F), NAI.

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The Secretary of State sent a letter to the Governor-General dated 15th August, 1863 where he had expressed the 'desire that the administration of the Forests should be left 'as hitherto entirely' to the Local Governments.' The Supreme Government being furnished 'with such statements showing the receipt and expenditure, past, present and prospective, as may enable', the Governor-General in Council 'to see and notice, if necessary, the state of the Forest Revenue of each Presidency.'⁸⁷ The Secretary of state agreed with Madras' apprehensions.⁸⁸

Similarly, Bombay had made a scheme to raise plantations to supply railways and other towns. Within this, the Forest Department was to enter in the market directly as a dealer. The Governor in Council rebuked the proposal.⁸⁹ Bombay had already taken the approval of the Secretary of State. The Secretary of State admonished the Government of India that the Presidencies were independent except for submitting a budget for the preparation of a consolidated budget for the whole of India.⁹⁰

Bombay prepared a draft forest bill in 1864. Since the Bill could have a bearing on Imperial finance and also pertained to criminal provisions, they sent it to the Government of India for comments. The Government of India cleared it on these grounds but said that since the Bill of 1865 was already introduced, they were not being 'forced' but they could adopt it instead.⁹¹

The disinclination of the Presidencies to allow the Government of India to dictate the law was apparent. The Government of India had designs to make a law for the whole of India. As it was noted in the Council's proceedings on the making of the Forest Act of 1865,

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ Proceeding No. 9, July 11, 1864, PWD (F), NAI.

⁹⁰ Parliamentary Papers (1871) (LII).

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The Bill originally applied to the whole of India. But when it was last before the Council ... the Government had no information to show whether it would be favourably received by the Governments of Madras and Bombay.⁹²

The Governor found it necessary to assure the Presidencies of their newly found legislative freedom. It was reported in the Council Proceedings, the assurance that the bill,

... would not stand in their way to make any other local enactments which they might think desirable.⁹³

6.2.2 Forests as Property of Local People

Despite the pressure from the Government of India, Madras refused to adopt the Forest Act of 1865. The Conservator of Madras, Cleghorn, on deputation to the Government of India, recommended the introduction of the Act. He was also of the opinion that forest officers should be given magisterial Powers. But the Collectors and the Board of Revenue were opposed to the introduction of the Act. The Board found the Act 'unnecessary' and thought that it could not 'facilitate conservancy' as,

... no forest land can be placed within the scope of it, which is not absolutely the property of Government, free from private rights of every kind, for section 2 specially enacts that its application 'shall not abridge or affect any existing rights'.⁹⁴

The Board by this time had developed a distinct hostility to the Forest Department. They noted,

⁹¹ 'A' Proceedings Nos. 32-38, February, 1865, LD, NAI..

⁹² GOI (1866): p81.

⁹³ GOI (1866): p82.

⁹⁴ MBOR, 16/4/1868, No. 2777.

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The Forest officers naturally desire to have ample powers, but the Board should observe that there are other things to be considered besides the value and preservation of timber.⁹⁵

A corollary of this was emphasis on local rights to ward off the legislation,

All the jungles and forests of this Presidency are within village boundaries and the people residing in or near them, have, from time immemorial, had the right to take leaves for manure, firewood for their own use, and timber for agricultural purposes, to graze their cattle at certain periods.⁹⁶

The Board criticised Brandis by alleging that he was only familiar with Burma and was imposing his ideas on other parts where there were valuable 'rights' and 'privileges' of the villagers to be respected.⁹⁷ The Governor in Council of Madras was categorical in his explanation to the Secretary of State,

... the introduction of the Forest Act into Madras Presidency is uncalled for at present, and would be inexpedient ... The tenure of land in Southern India differs vastly from that of those portions of the continent where the Act is said to have been introduced with success... where nearly all the jungles and forests are within village boundaries, and are subject to the prescriptive rights of the villagers, without causing much popular discontent and serious risk of oppression.⁹⁸

Despite Madras's unwillingness, the Government of India kept raising the question of forest law for the Madras Presidency,⁹⁹ till the Government of India forwarded the draft bill and Memorandum of Brandis of 1869. The memorandum upheld 'the regulation and settlement of forest rights in Government forests'.¹⁰⁰ While forwarding the bill and memorandum to the Collectors for their opinion, the Board requested the Collectors to

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ GOM to SS, 22/6/1869, reproduced in Stebbing (1923): p17.

⁹⁹ Proceedings No. 30-1, September, 1868, PWD (F), NAI., and Proceeding Nos. 1-4, August, 1867, PWD (F), NAI.

¹⁰⁰ GOI to GOM, 28/11/1870, see in MBOR, 21/3/1871, No. 1224.

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'report with special reference to what they have seen of Forest Conservancy and to the communal rights of the people'!¹⁰¹ In reviewing the previous draft bill, it had already declared that in Madras Presidency all forests were common property. The responses of the Collectors were no surprise.

6.2.3 Madras and the Politics of Difference

Madras was not fighting for the rights of the local people so much as for the autonomy of the Madras government vis-à-vis the Government of India. I am not suggesting that the Madras officials did not believe that the tenurial systems of South India varied from the rest of India. It was not a mere fabrication. In fact, since early Company years, Madras had come to believe in its own peculiarities and differences from the rest of India.

Munro, as we noted in an earlier chapter, emphasised in 1800 the peculiarities of tenures in Canara. He, thus, argued that the Permanent Settlement could not be introduced. The *ryotwari* system was instead forged. Similarities and differences are not innate. These are constituted and maintained through discourses, in the context of prevalent power relations. We have also explored the politics within which Munro had forged this ideology of difference. While introducing *ryotwari* settlement on the western coast, several difficulties arose which made it appear very much like the *zamindari* areas where Permanent settlement was introduced. The land-holders were certainly not small and self-cultivators. Thus, the ideology of *ryotwari* was reshuffled to recognise such land-holders as *ryotwar*. This alleged difference and introduction of *ryotwari* was bitterly opposed within the Company administration.¹⁰²

¹⁰¹ MBOR, 21/3/1871, No. 1224.

¹⁰² Stein (1989).

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Such differences, once constituted, are not fixed and given. Much the same way these were constituted, these can get de-constituted. The differences themselves have to be maintained and sustained in discourses. We see this happening through the entire period. We have already noted that Trevelyan had alleged that the South of India was as different from the north as France was from Germany.

The Madras government found itself in a bind. It had taken the initiative to create a Forest Department, primarily an as appendage to the civil officer. The Forest Department later acquired prominence and endorsement from the Secretary of State. The Government of India became the bearer of the interest of forest conservancy. Foresters became or at least pretended to be the bearers of 'scientific knowledge' and thus, 'experts' beyond the comprehension and control of general administration. Cleghorn, the Conservator of Madras, joined hands with Brandis, the Inspector General to demand demarcation of forests in Madras. An Inspector General, despite Madras' protest, was made to preside over their heads. Madras had realised that it had created a Frankenstein.

Thus, by 1865, the Forest department appeared as a force independent of Madras with roots and linkages in many places. Its interest was in collaborating with the Government of India in undermining the authority of Madras. Madras had already developed immunity from attacks on the question of forests. It had regained forests from Bombay in 1822 and been vigilant on their numerous attempted encroachments. The loss of North Canara to the Bombay Presidency, partly on the grounds that it was timber rich, was still fresh. Thus, the arguments against a Forest Department and conservation, to the extent that it threatened the powers of Madras, were alive among the Madras officials.

As if to prove its point, it condemned the discourses through which it had created state's property in forests in Kanara in 1850s and 60s through the labours of Blane. In

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1874, it reversed its previous decision to acknowledge the existence of State's property in forests in Kanara and upheld the rights of the landholders. Madras stubbornly refused to adopt the Forest Act of 1878 and described it as arbitrary and tyrannical. It further realised that the best course of asserting its freedom was in enacting legislation itself. In chapter 8, I explore further the politics of Madras in upholding local rights.

Conclusion

In this chapter I have shown that Guha makes his three categories prematurely. Having made these categories, he gets caught up in their web. In the end, his categories, annexationist (Baden-Powell) and pragmatist (Brandis), seem entirely imagined, without any factual foundation. According to Guha, Brandis was the champion of village forests, against the might of the annexationists. But we have noted that Baden-Powell had explicitly provided for the category of forests to be 'made over absolutely for the use of villages and communities'¹⁰³

Guha praises Brandis as a man of 'noble' 'sentiments', helpless but zealously struggling for equity and justice for the local people by asserting 'forest rights in India' as 'customary rights' 'analogous to the growth of similar rights of user in Europe'.¹⁰⁴ Baden-Powell, the 'annexationist', becomes the villain in this history, insisting on the conception of 'right' and 'privileges' to deny the benefit of 'customary rights' available in Europe. Guha laments that within the colonial administration the 'annexationists' outweighed others and 'a policy of state annexation of forest land was embarked upon'.¹⁰⁵

According to Guha,

¹⁰³ Baden-Powell (1875):24

¹⁰⁴ Guha (1990): p73.

¹⁰⁵ Guha (1990): p78.

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Based on Baden-Powell's distinction between 'rights' and 'privileges' the Act was a comprehensive piece of legislation, that by one stroke of the executive pen attempted to obliterate centuries of customary use by rural population all over India.¹⁰⁶

Nothing of this sort happened. The Forest Act of 1878 was not based on Baden-Powell's distinction. Baden-Powell himself was relieved that his theory of 'right' and 'privilege' was not taken seriously in making the Act,

... the legislature has done wisely in saying nothing of privileges, which in fact have no place in law at all, and treating the whole question as practically one of rights...¹⁰⁷

Baden-Powell and Brandis, far from being in tussle, shared a co-operative and mutual admiration. Brandis acknowledged Baden-Powell as a 'friend' of the department, and always implied him to be the expert on forest law.¹⁰⁸ Baden-Powell dedicated his most celebrated work, *The Land Systems of British India* to Brandis, as follows:

as a tribute of personal friendship and of admiration for an official career which, marked throughout by devotion to the public good has borne fruit in lasting benefits to the Indian empire.¹⁰⁹

The third category of Guha, 'populist' was a caricature of Madras officials by Baden-Powell. Guha uncritically makes it his own and turns it into an analytical category. Madras was not fighting for a particular legal construction of use of forests. It was 'proposing a 'mirror image' of the 'annexationist' to make its point over its legislative independence from the Government of India.

Guha arouses, in relation to his three imagined categories, grand expectations of theoretical and conceptual advances,

¹⁰⁶ Guha (1990): p78.

¹⁰⁷ Baden-Powell (1882): p112 (f.n.).

¹⁰⁸ Brandis and Smythies (1876): p32.

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These three perspectives on state control dovetailed with three distinct views on the sociology, history, politics and ecology of forest resource use. They deserve to be reconstructed in *full*, for the issues they raised and debated with such intensity a hundred years ago are very much with us today. [Emphasis mine]

But 'full' reconstruction of 'sociology', 'history' or 'politics' are not done by indifferent and casual perusal of the material.

To summarise, the Forest Department encountered the idea of prescriptive right as a stumbling block. Forest officials attempted to discredit the idea and advance alternate embryonic ideas. These ideas were elaborated towards dislodging the idea of prescriptive right. Eventually, the idea of customary law applicable in Europe served the purpose the best and was deployed. In this process, strategic devices were assimilated and re-defined. For example, what had emerged as a strategy to outflank the forest dwellers, Baden-Powell was describing as the best tradition of Western law. Even further, specific provisions of law had only a loose relationship with the development of these ideas. Baden-Powell was in fact happy that legislatures had not followed any of the theory he had advanced. The purpose of legal ideas is to make the practices acceptable and justifiable. In the next chapter, I turn to see how the provisions of the Forest Act of 1878 were not derived from legal ideas. Rather, the provisions arose as a register of conflicts and power of different groups within the state and society.

¹⁰⁹ Baden-Powell (1988).

CHAPTER 7

GENEALOGY OF FOREST PROVISIONS: LAW AS REGISTER OF PRACTICES

Introduction

In the introductory chapter and chapter 5, I have provided examples of how legal provisions arise from strategies forged in the field. Strategies are justified and accommodated within the prevailing legal ideas. In the course of the ascendancy of these strategies, legal ideas are re-organised to accommodate them. Thus, a genealogy of a legal provision will show it arising as a base and mundane concern in a specific context. In this chapter, I provide an example of this by exploring the formation of some of the key provisions of the Forest Act of 1878.

A Forest Act was finally passed by the Governor-General's Council in 1878. The Act constituted three categories of forests: reserved forests, protected forests and village forests. The Act imposed several restrictions on the transit of forest produce. It also provided comprehensive penal provisions for forest offences. The negotiations over these provisions were at many levels within the administration. This included tussles between the Government of India and local governments (particularly the Madras Presidency); and Forest Department and civil officers.

In his proposal in 1869, Brandis suggested the creation of reserved and unreserved forests. The proposal was severely criticised by the local governments. Thereafter, Baden-Powell acquired prominence not only as an 'expert' on forest law but more. Baden-Powell officiated for Brandis as the Inspector-General during December 1872 to April 1874. From this position of power, he negotiated to overcome the opposition of

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the local governments to the suggestions of the Forest Department. He prepared a revised draft bill and supporting explanatory memorandum. He was joined again by Brandis who took the charge back. Brandis produced another memorandum in 1875.¹ In the memorandum, he further refined Baden-Powell's proposals.

The memorandum was submitted to the Legislative Department and the proceedings for making of law started. In this Chapter, I will explore the genealogy of the provisions on reserved forests, protected forests and village forests; procedures for creation of state property in forests; transit restrictions; and penal provisions. In the first part, I explore the cumulative working of Baden-Powell and Brandis in making the proposals submitted to the Legislative Department. The treatment meted out to the proposal by the Legislative Council needs to be understood in the context of details of power relations within the administration. I do this in part two. Finally, in Part three, I detail the treatment of the proposal by the Governor-General's Council and local governments.

7. 1. Formation of the Memorandum

The final proposal submitted by Brandis to the Legislative Council in 1875 categorised the forests into three: reserved forests, protected forests and village forests. Restrictions on transit of forest produce were devised to protect the forests from pilferage. Breach of the law was an offence and penal provisions formed an integral part of the proposed law. I take up these themes here. In each section, I will explore how Baden-Powell worked on the proposals formed by Brandis in 1869, and how in turn, Brandis refined the proposal of Baden-Powell to produce the memorandum in 1875 which he submitted to the Legislative Department.

¹ Brandis (1875).

7.1.1 Reserved Forests

Baden-Powell's Proposal

The creation of reserves was principally a question of respective rights of the state and local people. As we noted in the last chapter, Baden-Powell categorised the forests according to ownership as follows,

1st.- Forests, the property of Government, in which the proprietary right of Government is absolute and unencumbered.

2nd.- Forests, the property of Government, in which the proprietary right is limited or encumbered by the existence of other forest rights.

3rd.- Forests which are the property of village or other communities, public institutes, religious establishments, or other persons, in which Government has forest rights.²

He announced that the first was the commonest kind of forest. This was not surprising for him, 'because, observe, we are talking of *rights*, not of what Government *will out of kindness allow*' [emphasis his].³ Baden-Powell made a distinction between rights and privileges. The prevalent uses were only 'privileges'. He attempted to define 'right' and 'privileges' in the draft bill. 'Forest right' was every conceivable use of forests which accrued as a 'right'. And 'privileges' were use of forests 'when such is exercised by permission and at the pleasure of the Local Government and not as of right'.⁴

² Draft Forest Bill framed by Baden-Powell in 1874, incorporated in Brandis (1875). Hereafter Baden-Powell (Draft Bill): p102.

³ 'Statement of Objects and Reasons', Or Explanatory Memorandum, By B. H. Baden-Powell, Officiating Inspector General of Forests: To Accompany his Proposed Draft for Forest Law', 31/3/1874, see in Brandis (1875). Hereafter Baden-Powell's Memorandum (1874): p112.

⁴ Section 4, Baden-Powell (Draft Bill): p101.

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Having claimed the state's ownership over forests, Baden-Powell could then put forward his proposal to create reserves,

Any forest of the first two classes is Government property, soil and all; so that, provided existing rights are respected inside them, and privileges duly provided for where needed, there can be no objection to constitute them "reserved" forests.⁵

The Forest Department could not prevent the local use of forests. The best it could hope to do was concede whatever was in use and guard against any further extension. To do this, the informality of the prevailing practices needed to be stopped. This could happen only through official records and documents. Official documents and records were a pre-condition to the power of the state. The first element of this process was to demarcate the forests and record the boundaries. The second was to record all rights and privileges within this boundary. The third was to attempt to commute or extinguish as many rights and privileges as possible.

Baden-Powell's primary concern was to physically settle the boundaries of the forests and demarcate the land. In fact, the Forest Department had a fetish about bringing this effect in geography, to constitute the space into 'ours' against the others. After demarcation, the important task was to define and settle all use of forests. Baden-Powell noted,

In fact, the distinctive feature of the Forest Code, I propose, is, that the first organisation of the forest area should be effected by a settlement as in the case of land revenue, and that a "misl," or record of such settlement should be formed and be used as a settlement record is. The "forest settlement" consists in determining the boundaries as already intimated, and then in settling all questions of *privileges* and rights, and

⁵ Baden-Powell's Memorandum (1874): p113.

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in determining to what class the forest shall belong as regards its use and treatment.⁶

On the basis of the settlement report, forests were to be constituted into three categories, Special Reserve, Ordinary Reserve and District Forest. Baden-Powell followed his distinction between right and privileges. He said,

In "special reserves" it will be necessary to refuse all privileges; and if, owing to exceptional circumstances it is necessary to allow such, they must all be defined, must be exercised under supervision, and strictly confined to certain limits.⁷

Baden-Powell had constituted other forests into ordinary reserves and district forests. Since 'privileges' could not be denied all together, the best was to concede them. He proposed,

Ordinary Reserve will be an additional area, in which privileges as well as unavoidable rights will be allowed when settled or permanently stated, and which is designed to supplement the climatic effect of the otherwise insufficient area of special reserve. ... *District Forest* will be forests made over absolutely for the use of villages and communities.⁸

He was emphatic that at settlement, forest privileges were to be recorded⁹. Since privileges were only a goodwill gesture, the state could consider what was a legitimate use of the forests. Baden-Powell, thus, felt justified in insisting that privileges were to be granted for personal or individual use of the grantee, and not for sale and merchandise.¹⁰ 'Sale and Merchandise' would obviously have made the local people a competitor of the Forest Department. Further, the exercise of privilege was to cease if

⁶ Baden-Powell (1875): p23.

⁷ Baden-Powell (1875): p24.

⁸ Baden-Powell (1875): p24.

⁹ Baden-Powell (1875): p24.

¹⁰ Section 30 in Baden-Powell (Draft Bill): p104.

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forests were closed for reproduction, planting or conservancy.¹¹ Through this scheme of 'privilege', the most extensive category of use of forests was to be brought under the control of the Forest Department.

Baden-Powell was uncomfortable with the nomenclature of forests. He was apprehensive,

At present forests are called "reserved" and "unreserved" or "open", but these names are indifferent in themselves, have different meanings in different provinces...¹²

He feared a (mis)signification of 'unreserved' forests,

... because if we say "unreserved," it implies that no kind of protection is extended; whereas to the "unreserved forest"... protection is extended...¹³

Every word in the law needed to be imprinted with this self-consciousness of the Forest Department to assert itself vis-à-vis others. Thus, Baden-Powell preferred 'special reserves' and 'ordinary reserves' which signified government property in all forests.¹⁴

Baden-Powell had abstracted these from practices in the field. He noted,

The constitution of special and ordinary reserve is in fact, in principle, exactly what is done now, only that it avoids the objection attaching to the "unreserve", as it exists in some places.¹⁵

Baden-Powell had, thus, taken care of the most extensive use of the forests by fixing the label 'privileges' to them. He now needed to deal with the 'rights'. In his scheme,

¹¹ Section 30 in Baden-Powell (Draft Bill): p104.

¹² Baden-Powell's Memorandum (1874): p113.

¹³ Baden-Powell's Memorandum (1874): p113.

¹⁴ Baden-Powell's Memorandum (1874): p113.

¹⁵ Baden-Powell's Memorandum (1874): p113.

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after the demarcation of the forests, individuals had to make claims of their rights within three months. Baden-Powell lamented that wherever 'rights' were conceded through earlier settlements or by native rulers, these were 'undefined'. He explained,

... an undefined privilege to a hamlet of four houses to take wood for repairs of the houses; this right may be worth Rs.5 a year, but being undefined, in time the four houses become 400, and the wood for repairs is no longer the mere poles that thinning would supply without loss, but the whole produce of the forest is swallowed up, and the right is now worth Rs.50,000!¹⁶

By defining rights, he meant to specify the number of cattle which could graze and the exact amount of timber which could be extracted. He was erudite,

I have to apologise for dwelling on these common topics, to be found in treatises on forest political economy; but the subject has been overlooked hitherto.¹⁷

Brandis, in his memorandum had suggested 'regulation, extinction and commutation' of the rights.¹⁸ Baden-Powell argued that the 'rights' should be so firmly defined that there should be no occasion for 'regulation'. He observed,

... if the right is once accurately defined, we must put up with it, or else, if it is so bad that conservancy is impossible in the face of it, we must commute or extinguish it. ... "Regulation," it may be replied, is really a sort of restriction or half extinction of the right; in that case I say the provision about extinction applies, and compensation must be given.¹⁹

Baden-Powell concluded that if the settlement officers considered extinction or commutation necessary, they were to prepare a statement of forest rights and submit it to the local government. Like Brandis' draft, commutation or extinction was to be on

¹⁶ Baden-Powell's Memorandum (1874): p114.

¹⁷ Baden-Powell's Memorandum (1874): p114.

¹⁸ Brandis (Memorandum) (1869).

¹⁹ Baden-Powell's Memorandum (1874): p115.

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full and fair compensation. Compensation could be through grant of land; exercise of forest right on neighbouring patches; payment of cash; or remission or reduction of tax.

Brandis' Proposal

Baden-Powell had worked on the earlier draft of Brandis, weighing and assimilating objections to make it acceptable to the local governments. Brandis, in turn, worked on Baden-Powell's draft, amplifying, manipulating and detailing the provisions further. The proposals were developed through this process of contestation.

Brandis introduced restraints on the use of forests once a patch was demarcated, that is, even before settlement of the rights. He termed it as 'Legal effects of the demarcation of a public forest'.²⁰ No fresh rights of user or easement was to accrue. The local government could not sale or lease a demarcated forest without permission from the Government of India. Brandis reiterated the suggestion of Baden-Powell that the privileges granted in forests were to be only for individual and personal use and not for sale, lease or merchandise. This was now a 'legal effect' of demarcation. Further, the Forest Department could fix and move the area on which privileges could be exercised.²¹

Thus, in practice, the initiative for curtailing the local use of the forests was to be on the grounds of conservancy and on the initiative of the Forest Department. Brandis then settled down to minutely list all the prevalent use of the forests and manner in which these could be curtailed.²²

Passage of the people through the forests was another sore point for the forest administration. Brandis in his earlier proposal had suggested that the local government

²⁰ Brandis (1875): p11.

²¹ Brandis (1875): p11 and 14.

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could order closure of roads on the recommendation of the forest officer. Before closure, alternate and adequate passage had to be provided for.²³ The proposal was severely criticised by the local governments. Closure of passage, without adequate compensation, was asserted to be a violation of private rights. Baden-Powell, nevertheless, retained the provision.²⁴ But Brandis, in his Memorandum of 1875 conceded the claims of the local governments and added that wherever paths were closed, compensation would be provided.²⁵

7.1.2 Unreserved Forests

Brandis and Baden-Powell intended to assert the control of the state on forests which were not demarcated. We saw in the previous section that Baden-Powell had objected to the nomenclature of 'unreserved' forest. Brandis made another move. He called these forests 'undemarcated' instead. According to Brandis,

These forests not being demarcated, their boundaries cannot, as a rule, be defined as precisely as those of the reserves. ... the definition of undemarcated forests will, in most cases, remain somewhat vague and undefined. Yet it is essential that Government should not relinquish all control over the forest growth in lands, which are its property, or in which it possesses forest rights.²⁶

The concern of Brandis was to keep the option of further extension of reserved forests open. Thus, 'legislation must at present provide for the continuance of a certain control over the so-called open, unreserved, or district forests'.²⁷

²² Brandis (1875): p17-20.

²³ Brandis' Memorandum (1869).

²⁴ Baden-Powell's Memorandum (1874): p115

²⁵ Brandis (1875): p11.

²⁶ Brandis (1875): p121.

²⁷ Brandis (1875): p21.

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Brandis inserted a number of restrictions on the local use of these unreserved forests. The local government could declare certain species (mainly commercially valuable species) as 'reserved', and restrict their cutting and lopping. The government could also impose restrictions on the use of other trees. Further, the local government could regulate the disposal of timber and other produce. It could levy dues on the felling, cutting, removing, or otherwise using of trees or bamboo, or on the collection or export of gums, fruits, grass, or any forest produce. Further, clearing of land without permission could be prohibited.²⁸

The most significant power, however, which the local government could vest in the forest officer was,

Power to close certain portions of the forests, to declare all rules of demarcated public forests applicable to the blocks thus closed, and specially to prohibit all ingress of men and cattle except on authorized roads, the setting of fire to the grass and forest, and interference with the forest without authority.²⁹

Through an exercise of this provision, an undemarcated forest could be turned into a demarcated forest, even without the demarcation procedures and settlement of the rights. The above mentioned restrictions could be imposed through a notification of the government declaring a forest 'protected'. After the declaration, the local Governments could frame rules to give effect to any of the above mentioned restraints.³⁰

The different provisions were abstracted from practices already developed in the field. As Brandis stated,

²⁸ Brandis (1875): p20-22.

²⁹ Brandis (1875): p20.

³⁰ Brandis (1875): p20-22.

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The provisions ... have been taken from existing rules in the different provinces, they have been found necessary by actual experience...³¹

Brandis further detailed the abstraction of the law from practices in the field,

... the protection of certain reserved kinds, such as teak, blackwood, sandalwood, sal, deodar, and others- is intended to legalize the continuance of the system of royal trees which has existed for ages in many parts of India long before forest administration was ever thought of. ... power to close certain blocks, has been inserted with special reference to the system lately initiated in the unreserved forests of the Central Provinces, of closing certain blocks for a time in order to guard against the impending denudation of these lands. Whether the system will prove practicable and useful is another question; the needful legal provision, however, should be made.³²

Understandably, the above restrictions, without even settlement of rights, would have been opposed by the local administration. Brandis was conscious of the possible opposition that he was curtailing rights even before their definition and settlement. He justified it as practices which were already being followed in the field without infringing local rights. Further, he declared the provisions 'unobjectionable' 'on condition that no rights of persons or communities shall be affected'.³³ Thus, a condition was attached in the proposed law that no rights of communities or other persons was to be affected or abridged by these rules. The rights were not to be interfered with since there was no procedure for recording and settling the rights, as was the case for reserved forests. Brandis clarified,

Provisions for recording, regulating, or extinguishing adverse rights in the undemarcated forests are not required, and would not lead to any satisfactory result.³⁴

³¹ Brandis (1875): p21.

³² Brandis (1875): p21.

³³ Brandis (1875): p21.

³⁴ Brandis (1875): p21.

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What then was the import of the rules, if the rights were to not to be interfered with? It was not clarified but the import was that the most extensive use, which still constituted privileges or customary right, would still be out of the ambit of 'right'. Thus, despite the proviso to leave the 'rights' alone, significant restraints could be imposed on the use of forests in the field.

7.1.3 Procedure and Powers of Officers

The powers and procedures for constituting the reserves and managing forests were highly contested. Three things were important. One, fixing the boundary of a forest, second, recording the rights and 'privileges' on forests. Third, extinguishing and commuting of the rights.

Baden-Powell's Proposal

Brandis' draft had proposed that the Conservator of Forests would demarcate the forest boundary, and if any dispute arose, the Conservator alone could refer it to a 'Commission' for its settlement. The excessive powers to the forest officers and the constitution of a Commission were strongly objected to by the local governments. Baden-Powell conceded some of the objections,

All Local Governments nearly objected to this, and I am now convinced myself that it would not work.³⁵

He instead adopted a system which was already in practice in Punjab. In this, the objections to the excessive powers to the forest officer could be mitigated without losing control altogether. He provided,

³⁵ Baden-Powell's Memorandum (1874): p113.

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I refer to the appointment of two experienced officers of Government. The Local Government has its whole staff to select from – one a civil or Settlement Officer, the other a Forest Officer; and these two shall go out to the place, and shall effect what for brevity I may call a “forest settlement.”... You cannot have a Civil Officer alone, for he does not know what the forest requirements are, and the result will be as in Bombay, where certain forest demarcations were made by Revenue Officers alone, that now prove utterly useless for any forest purpose whatever.³⁶

The forest officer, in opposition to the civil officer, was the guardian of the interest of Forest Department. Baden-Powell noted,

The forest officer will indicate what *he* wants from a forest point of view, and the civil officer will see how far these requirements can be met. If the two officers differ (which in the Punjab, where the system has been in force with excellent results, I have *never* known to be the case), a reference to the Conservator of Forests and to the chief revenue authority will easily settle the difference.³⁷

Baden-Powell also changed the arrangement for settlement of boundary disputes. He described the procedure in the North-West revenue law for demarcation of wastelands as excellent.³⁸ The Act made provision for settlement of boundary disputes through arbitrators. Baden-Powell adopted this. Boundary disputes were to be referred to arbitrators.³⁹ The contesting parties were to nominate their arbitrators.⁴⁰ Appeals against the arbitrators’ awards were barred.⁴¹

Compared to a court proceeding, arbitration retained the flexibility and control for the Forest Department. The Forest Department had a strong dislike for the courts and its procedures. Baden-Powell was certain that the court would not understand the

³⁶ Baden-Powell’s Memorandum (1874): p113.

³⁷ Baden-Powell (1875): p23.

³⁸ Baden-Powell (1875): p23.

³⁹ Section 16 to Section 31, Baden-Powell (Draft Bill): p103-104.

⁴⁰ Section 16 to Section 31, Baden-Powell (Draft Bill): p103-104.

⁴¹ Section 16 to Section 31, Baden-Powell (Draft Bill): p103-104.

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intricacies of forest management and the bearing of forest right on it.⁴² He considered magistrates ‘ always opposed to forest work in most violent way’ .⁴³

Baden-Powell did not even find it necessary to justify the adoption of arbitration. He could, as a right, extend a provision forged elsewhere in a different context and power relations,

I presume there is no need for comment on provisions which are details already passed by the Legislature.⁴⁴

These strategies, once abstracted as law from a particular local context, acquired a degree of universal force. What emerged as a special exceptional case was legitimately extended in other contexts.

In the scheme of Baden-Powell, after demarcation of forests users had to make claims of their rights on forests within three months to the settlement officers. If the settlement officers did not admit these, parties could prefer a claim in a civil court. The provision of moving the claim to a civil court was admitted because the proposal of a ‘Commission’ was unacceptable to the local governments. But Baden-Powell did not trust the courts with the interests of the Forest Department. He added that if the courts left the forest rights ‘undefined’, the settlement officer could specify and list them out.⁴⁵ A person aggrieved with this definition could appeal to the Chief revenue authority.⁴⁶

⁴² Section 35 of Baden-Powell (Draft Bill): p104 and Baden-Powell (Memorandum): p114-5.

⁴³ Baden-Powell and Gamble (1874): P44.

⁴⁴ Baden-Powell’s Memorandum (1874): p114.

⁴⁵ Section 35 of Baden-Powell (Draft Bill): p104 and Baden-Powell (Memorandum) (1874): p114-5.

⁴⁶ Baden-Powell (Memorandum) (1874): p114-5.

Brandis' Memorandum

Brandis considered that only one settlement officer, a civil officer, to be styled the demarcating officer, acting in communication with a forest officer, would be more effective. In this, he was improving upon Baden-Powell. He was of the opinion that 'clear and undivided responsibility is a great advantage, provided due care is taken to place the contrary opinion of the Forest Department on record'.⁴⁷

If Baden-Powell had picked up the provision for arbitration from the revenue law in the North-West Province, Brandis was grafting another set of provisions from the same law. Brandis borrowed,

The demarcating officer is to assign to the adjoining villages so much of the waste land as he may consider requisite for their pastoral or agricultural purposes, and shall mark off the remainder and declare it to be the property of Government. This duty must obviously be entrusted to an officer familiar with the husbandry and pasturage requirements of the people who resort to the forest, and for this reason the responsibility of deciding what boundaries to select, must rest with a civil or settlement officer specially selected for that purpose.⁴⁸

Having, on the face of it, conceded to the objections of the civil officers, Brandis inserted the countervailing powers of forest officers,

But the proposals regarding the boundaries to be selected must be prepared and laid before him by the forest officer, and both the original proposals of the forest officer, as well as any objection which he may raise to the proceedings of the demarcating officer, must be recorded. In case of a difference of opinion between the forest and demarcating officer, this provision will give the Local Government an opportunity of ordering revision of the demarcation, and in the case of bad work it will make it clear who is responsible for it. This arrangement will ensure

⁴⁷ Brandis (1875): p10.

⁴⁸ Brandis (1875): p10.

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prompt action, and at the same time Government will have the full benefit of the forest officer's professional knowledge and experience.⁴⁹

In the proceedings after the demarcation, Brandis vested significant powers in the forest officers. The forest officers were to negotiate with the right-holders for commuting the rights. He proposed that,

The proposals for the commutation of forest rights by means of an exchange of land or other compensation must in the first instance be made by the forest officers acting in concert with the local civil officers. If the parties interested consent to these proposals, or if any objection made to them be adjusted by mutual agreement, then the consent or agreement should be recorded, and the forest law should prescribe the form of such record and its value as evidence.⁵⁰

A comprehensive law needed to provide for cases where a commutation with the agreement of the right-holders did not materialise. Brandis recognised two different kinds of rights in forests, one, right over land, and two, right over produce. These needed to be treated differently. If the settlement officer could not settle dispute over land, an appeal could be preferred to a civil court. If necessary, it could be acquired under the Land Acquisition Act.⁵¹ So far, he was following Baden-Powell's proposal. But Baden-Powell had recommended the same procedure for extinguishing or commuting other forests rights, like right to graze and drawn timber. Brandis revised it,

The peculiar feature of this business is that the number of interested persons is large,- that the arrangements which must be made to satisfy their requirements are complicated, and that in many cases the decision will be not only whether certain proposals shall be admitted or rejected, but that the local officers making the proposal will during the course of the enquiry be called upon to modify in order to enable the authority with whom the final decision rests to sanction the arrangement. It is essential that matters of this kind should be settled on the spot in the

⁴⁹ Brandis (1875): p10.

⁵⁰ Brandis (1875): p16.

⁵¹ Brandis (1875): p16.

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presence of the interested parties and with that perfect knowledge of the details of the case which cannot be acquired without an examination the locality.⁵²

On this count, Brandis found the suggested arrangement wanting,

The issues submitted to the decision of the Court and Assessors under the Land Acquisition Act are of a much more simple nature and can be determined without necessitating the examination of the locality by the Court and its Assessors.⁵³

Brandis, thus, retained his earlier proposal for a commission,

Under these circumstances the only plan that I can suggest is that proposed in the draft Bills of 1868 and 1869, *viz.*, to entrust the decision of these matters either to a single officer specially selected or to a commission...⁵⁴

But the local governments had objected to the suggestion of a Commission. They had accused that the forest officers would fill up the Commission and that the rights of the local people would be infringed with impunity. Brandis took care to ward off the criticism. He provided on the membership of the Commission,

... the selection of the members, mode of procedure and form of decision being regulated by rules to be framed by Local Government under the sanction of the Government of India. It should be considered whether the decision of the officer or commission should be final when sanctioned by the Local Government, or whether it should be final after the lapse of two years from the date of publication, unless reversed during that time by a decree of a Court specially designated to bear appeals from such decisions.⁵⁵

⁵² Brandis (1875): p16.

⁵³ Brandis (1875): p16.

⁵⁴ Brandis (1875): p16.

⁵⁵ Brandis (1875): p16.

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In this also, he retained the interest of Forest Department. The clause that rules had to be sanctioned by the Government of India implied that the Inspector General's office would have a say in the composition of the Commission.

7.1.4 Transit Restrictions

In the draft bill submitted in 1869, Brandis had elaborate provisions on transit of forest produce. Subsequently, he learnt more from correspondence with the Bombay Presidency. Bombay had prepared draft rules for its forests and submitted it to the Government of India for its approval. The rules had elaborate provisions on transit. In the Bombay Presidency, the government forests were interlaced with private forests and foreign territory. This made the pilferage of government forests easy. Persons could claim that timber was drawn from private land or foreign territory. The presidency had devised a system of issuing permits for felling and removing timber growing on private land. It also controlled movement of all timber whether drawn from private or foreign territory. The timber had to be accompanied with a pass and could be moved only through certain specified routes.⁵⁶

Brandis had proposed restrictions on only timber drawn from government land. It was an established practice to require timber drawn from public land to pass through tolls where charges could be collected or pilferage detected. But Brandis' proposal did not apply to timber drawn from private lands. Brandis was impressed with this new control and said,

There is no provision, however, in the bill by me that would authorize the issue of permits for cutting and removing timber grown on private lands in which government has no forest rights. That would be an

⁵⁶ Proceedings Nos. 32-34, December, 1870, PWD (F), NAI.

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interference with the management of private forest lands, which was not contemplated when the bill was framed.⁵⁷

Brandis, however, considered it to be a 'minor matter' to revise the bill 'interfering' with the private rights. He assured the Government that if the principle were approved of, the needful addition might easily be made.⁵⁸ To manipulate this addition, he touched on the raw nerves of the Government of India officials. He knew that a proposal of independent legislation from Bombay would be considered offensive by the Government of India. He provoked,

... if the principles of these sections are not approved, and Bombay thinks essential, then it will have to be considered whether the needful should be done by the Bombay Legislative Council.⁵⁹

The Government of India discouraged Bombay from making its own law.⁶⁰ In the next round of the draft bill, prepared by Baden-Powell, the restriction on transit of timber drawn from private land was adopted. In addition to the experience of Bombay, Baden-Powell learnt things from the North-West Provinces and Central Provinces. In these provinces, the route through which timber could be drawn from public forests was specified. This was to ensure that the levy for collecting timber was realised.⁶¹ Baden-Powell justified the provisions on transit as 'a limited interference with private right and liberty'.⁶²

We again see here that strategies are fashioned in dispersed sites in their local context. The Bombay government imposed the transit restriction as a counter-strategy to the persons pilfering forests. This was in the specific context of Bombay where public

⁵⁷ See 'Keep With' 'Not for Record' section in Proceedings Nos. 32-34, December, 1870, PWD (F), NAI.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Baden-Powell's Memorandum (1874): p117.

⁶² Baden-Powell (1875): p12.

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forests were interlaced with private forests and foreign territory. Bombay had abstracted the strategy as a provision in the draft rule. All legal provisions arise somewhere in a local context, are abstracted and extended to other locations.

Brandis had earlier pleaded and gauged the mood to introduce the new restriction on transit of forest produce. In the next round, following Baden-Powell's draft, he was emphatic:

The Local Government must be empowered, within certain districts or territorial limits, to prescribe the routes by land or by water, by which timber, bamboos, or other forest produce, whatever their origin, shall be removed or conveyed, as well as to close any such route.⁶³

7.1.5 Penal Provisions

Brandis' memo of 1869 had introduced several modifications on the penal parts in the act of 1865. These were again practices abstracted from the field. Section 58 in the draft bill required all persons who used forests to assist the Forest Department in detection of offences and extinguishing forest fires. It was a duty of every person and communities to prevent the occurrence of fire, extinguish fire; prevent commission of offence; and bring to justice the offenders. Any cattle straying into government forest could be seized. Cattle pounds were already there. Sections 59 and 60 legalised the establishment of cattle-pounds by Forest Officers, and authorised the seizure and detention of cattle trespassing in any forest. Brandis proposed a penalty for an offender or any one abetting an offence. It could be a fine up to Rupees 500, and in default of payment, simple imprisonment up to six months. Half the imposed fine could be awarded to the informer on whose information the prosecution was secured.⁶⁴

⁶³ Brandis (1875): p23.

⁶⁴ Brandis' Memorandum (1869).

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Brandis also vested powers in forest-officers to arrest any person without a warrant. He had proposed seizure and confiscation in addition to the fine. Within the Act of 1865, there was a bar on initiating prosecution after six months of the commission of the offence. Brandis modified it to six months from the date the commission of offence was discovered.⁶⁵

Baden-Powell's Revisions

Baden-Powell further sharpened the penal provisions. He suggested that the local governments should be given power through the Act to impose imprisonment and fine concurrently.⁶⁶ As Baden-Powell expressed his concern,

For the rest, there is no reason why the penalty for breach of forest and timber rules should only be met with fine. It has been found in Burma that while timber thieves will pay a fine, the fear of jail, even for a few days, is a more powerful deterrent. ... it seems much wiser to leave the Local Government the option of imposing fine or imprisonment, or both.⁶⁷

In the Second Forest Conference, a person had suggested a higher penalty for offence between sunset and sunrise. He was borrowing it from a German law. The German law also provided harsher penalties for habitual offenders.⁶⁸ Baden-Powell found this impressive. He proposed a double penalty if the offence was committed between sunset and sunrise. Similarly, a double penalty was imposed on a person who had committed the same offence the second time.⁶⁹

⁶⁵ Brandis' Memorandum (1869).

⁶⁶ Section 66 of Baden-Powell (Draft Bill): p110.

⁶⁷ Baden-Powell's Memorandum (1874): p118.

⁶⁸ Baden-Powell (1875): p20.

⁶⁹ Section 66 of Baden-Powell (Draft Bill): p110.

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The only provision in the Act of 1865 that was not defective, according to Baden-Powell, was the power vested in a forest officer to arrest without a warrant. Baden-Powell noted,

Section 8 gives the one satisfactory power in the Act, and must be maintained in a new law; arrest without warrant is *absolutely essential*. In all timber cases you cannot, do what you will, keep the issue of warrant secret; and the moment it is known, every trace of the crime disappears like magic.⁷⁰

In the Second Forest Conference, some participants had expressed doubts about vesting forest officers with the powers to arrest without a warrant. Baden-Powell was not fully in agreement. He entertained the doubt as it presented 'certain difficulties'. He said,

... the power, as expressed in the formal wording of a Section, looks formidable, and it seems an extreme measure to allow a subordinate police or forest official to arrest without warrant...⁷¹

Having said this, he brushed it aside,

... this provision has actually stood on the Code for nine years, and its operation in practice has never been found productive of any oppression, and it would be perfectly impossible to punish a forest offence if the police or forest officer seeing a breach of the rules committed before his face, were unable to take any action till he obtained a warrant from a Magistrate, perhaps thirty miles distant.⁷²

The participants made several suggestions to strike a balance between the two opposing concerns. One suggestion was to limit the powers to arrest only if the offender was caught within the bounds of forests.⁷³ But there were problems with this suggestion.⁷⁴ It

⁷⁰ Baden-Powell (1875): p19.

⁷¹ Baden-Powell (1875): p19.

⁷² Baden-Powell (1875): p19.

⁷³ Baden-Powell (1875): p19.

⁷⁴ Baden-Powell (1875): p19.

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was just as common to find people on the road or outside forests with stolen timber.⁷⁵ Another suggestion was to follow the Railway Act, where an offender was arrested only if his correct name and address could not be obtained.⁷⁶ Yet another suggestion was to restrict the power of arrest to offences of only grave nature.⁷⁷

Baden-Powell could not be indifferent to the unlimited powers to arrest without a warrant. The real 'difficulty' was that the local governments, particularly Madras, had strongly condemned the provision. Baden-Powell could brush them aside by observing, 'The power of arrest without warrant in all cases has stood on the law (Act VII of 1865) for nine years without any complaint of hardship'.⁷⁸ He gave a similar argument to Madras on their critique of the Act of 1878. But Baden-Powell was aware that the Act of 1865 had only given powers to the local administration to make rules. In practice, the local governments were always opposed to vesting such powers in the hands of the forest officers. For example, the Proceedings of the Lt. Governor of Punjab noted,

... the people would prefer the inconvenience of having to attend a Magistrate's Court several miles distance, to the alternative of being tried and punished by an official who had a direct interest in their conviction.⁷⁹

Baden-Powell, thus, accommodated the suggestions. Persons could be arrested without warrant for offences related to demarcation of forests and their protection; violation of transit restrictions; and setting of fire to forests and wilful mischief. The provision pretended to apply to only 'grave' offences but effectively applied to any offence. In other cases, the forest officer could arrest if he could not obtain the correct name and

⁷⁵ Baden-Powell (1875): p19.

⁷⁶ Baden-Powell (1875): p19-20.

⁷⁷ Baden-Powell (1875): p20.

⁷⁸ Baden-Powell's Memorandum (1874): p118.

⁷⁹ Section on Punjab in *Report on the Administration of the Forest Department in the Several Provinces Under the Government of India* for the year 1870-71.

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address of the offender. Baden-Powell also adopted double penalty for commission of an offence between sunset and sunrise and commission of the same offence second time.⁸⁰

In several instances, Magistrates had not given orders for disposal of seized timber as it was not produced before the court. Baden-Powell made it binding on the Magistrates to order disposal even if timber was not produced before them.⁸¹ He imposed a fine up to Rs. 50 for erasing or removing boundary marks. The fine was primarily to defray the expenses of restoring the boundary mark.⁸² Baden-Powell said this was 'copied' from another act.⁸³ Baden-Powell 'copied' another provision from Consolidated Custom Act.⁸⁴ A forest officer or police officer could apply to a magistrate for a search warrant. A Search warrant was to be issued for recovering stolen timber or other forest produce and realising duty or royalty on timber.⁸⁵

Baden-Powell was most concerned with the clauses on confiscation in the Act of 1865. Section 5 of the Act had provided for a penalty only in cases where confiscation was not provided for. Further, where confiscation was provided for, it was mandatory for the forest-officer to effect it. Confiscation was of two things, 1) tools and implements used in committing a forest offence, and 2) the produce obtained. To Baden-Powell it was obvious that only the first was real confiscation.⁸⁶ He asserted that the word confiscation was wrongly used. He further argued that the stolen timber was anyway government's property. It was, in effect, not being confiscated. It was only being restored to the lawful owner. What was actually being confiscated were the tools and

⁸⁰ Section 66 of Baden-Powell (Draft Bill): p110.

⁸¹ Section 70 of Baden-Powell (Draft Bill): p110.

⁸² Section 78 of Baden-Powell (Draft Bill): p111.

⁸³ Baden-Powell's Memorandum (1874): p118.

⁸⁴ Baden-Powell's Memorandum (1874): p118.

⁸⁵ Section 77 of Baden-Powell (Draft Bill): p111.

⁸⁶ Baden-Powell (1875): p18.

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implements. But these were, according to Baden-Powell, only 'an *axe*, or such like' and thus, of insignificant value.⁸⁷

Baden-Powell re-organised the part on confiscation and separated confiscation from restoring the property to lawful owner. He also explicitly provided for confiscation of 'boats, carts and cattle' used for committing an offence.⁸⁸ He further strengthened the freedom of forest officers. Brandis had put restraints on misuse of powers of the forest officer, for example, vexatious confiscation. Baden-Powell removed all such clauses on the grounds that such restraints were already there in other laws like service rules and Criminal Procedure Code.⁸⁹

It would be an error to think that the strategies were always draconian and arbitrary. The purpose of these revisions, after all, was to come up with a draft which could be accepted by the local governments. For this, it needed to be in the prevailing best tradition of law and its ideologies. Brandis had omitted to mention the clause for the bail of an offender. In fact, the Act of 1865 had no clause for bail.⁹⁰ The provision for bail was there in the Criminal Procedure Code under which the offence was to be tried. But not explicitly mentioning it could have led to the confusion that bail was not applicable in forest offences. Baden-Powell supplied the omission and inserted a clause that the offender could be released on bail.

Brandis's Memorandum of 1875

Brandis found Baden-Powell's draft to 'meet most requirements' and only had 'a few remarks to add and modifications to suggest'.⁹¹ Brandis would have felt happier with

⁸⁷ Baden-Powell (1875): p18.

⁸⁸ Section 71 of Baden-Powell (Draft Bill): p110.

⁸⁹ Baden-Powell's Memorandum (1874): p118-9.

⁹⁰ see Act 1865.

⁹¹ Brandis (1875): p25.

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unlimited powers to arrest without warrant. The justification for this was, ' Act VII of 1865 does not limit the power of arrest without warrant'.⁹² Brandis was of the opinion that the power of arrest without warrant should be unlimited as Magistrates can often be far off from forest areas.⁹³

He recommended the restoration of unlimited power as it was in the Act of 1865. Local governments could, through rules, decide the districts or circumstances in which the powers were to be vested in the forest officers.⁹⁴ Probably, Brandis was reminded of the criticism the provision would attract. For the proposal to be acceptable, further safeguards were necessary. He added that 'no officers below a certain rank' should be vested with the power to arrest without a warrant.⁹⁵

In addition, he restored the penalties for vexatious or unnecessary arrest from his previous proposal, which was omitted by Baden-Powell.⁹⁶ If Baden-Powell had introduced the provision on search warrant, Brandis expanded the power. Brandis claimed,

The object of this section would, in most cases, be defeated if it was necessary to apply to the local magistrate for a search warrant. I would prefer the provisions of Sections 19 to 21 of the Inland Customs Act of 1875, and authorize Local Governments to grant the power of search to forest officers above a certain rank, and to provide that the search be made in the presence of a police officer.⁹⁷

We again see how strategies incorporated in law are treated as legitimate and thus, fit for adoption without any justification. Brandis further manipulated the local communities. In Baden-Powell's draft, it was a duty of the communities to prevent

⁹² Brandis (1875): p26.

⁹³ Brandis (1875): p26-27.

⁹⁴ Brandis (1875): p 27.

⁹⁵ Brandis (1875): p27.

⁹⁶ Brandis (1875): p27.

⁹⁷ Brandis (1875): p27.

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forest fire. But mentioning it as a duty was of no help. Brandis proposed that the local Governments should have the power to close the exercise of all rights and privileges in a forest to which fire had been set. Brandis was aware 'in the tropical and subtropical provinces of India where jungle fires are annual institution', the power would not be exercised.⁹⁸ He was still satisfied with at least an enabling provision.

In the penalty part, Brandis recommended that power to impose fine or imprisonment should be in addition to confiscation. Brandis was reflecting on the 'economy' of punishment,

As the forest rules made under this Act become more perfected, and more experience is gained regarding their working, it will be possible to specify more accurately than can at present be done, the penalty to be assigned to each offence. A beginning in this direction will be to provide that the penalties prescribed shall, as much as can be, be proportionate to the damage done by the offence, and shall be increased when the offence was committed between sunset and sunrise, or in case of resistance to lawful authority, or when the offender had previously been convicted for the same offence.⁹⁹

Brandis made further improvisations in the penal administration of the forest law. He introduced a clause where the forest officers, instead of preferring a complaint before a Magistrate, could make a compromise with the offender.¹⁰⁰

Brandis had got the idea from the French law. The law in France was introduced in 1859.¹⁰¹ He stated,

... its effect has been most beneficial in saving the time of forest officers and diminishing bad feeling against the forest administration. During a tour which I made through the public forests of France in 1866, I

⁹⁸ Brandis (1875): p27.

⁹⁹ Brandis (1875): p 27.

¹⁰⁰ Brandis (1875): p28.

¹⁰¹ Brandis (1875): p28.

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became acquainted with the great advantages of this system, but refrained from proposing any similar provision when framing the draft Forest Bills of 1868 and 1869, because I could not at the time trace any provisions of similar character in Indian legislation.¹⁰²

The introduction of a similar provision in the Inland Customs Act provided the justification for Brandis to introduce the provision.¹⁰³ Brandis introduced further provisions on protection of boundaries. He noted several cases of tampering with the boundaries. This was serious as it undermined the very foundation of the state's property.¹⁰⁴ Brandis intended to make it harsher by making the offence liable to the same penalties as other forest offences.¹⁰⁵

Submission of Draft

The revised draft by Brandis was submitted to the Legislative Department. As was the practice, the comments of the local governments were solicited, as the draft bill went through three revisions with the select committee. The approach of the local governments, after the revisions by Baden-Powell and Brandis, was not of outright rejection. They still had comments to make. But overall, they were describing the draft as 'satisfactory'. Madras was an exception. It continued to maintain that the changes were insignificant. Thus, all its criticism of the earlier draft applied to the present one too. We will take up the case of Madras separately in the next chapter. Here, we need to explore the relations within the administration to understand the shift from hostility to consent.

¹⁰² Brandis (1875): p28.

¹⁰³ Brandis (1875): p28.

¹⁰⁴ Brandis (1875): p28.

¹⁰⁵ Brandis (1875): p28.

7.2. Political Economy of Administrative Relations

I have already noted in an earlier chapter that the accommodation of forest conservancy meant different things to different people at different levels. Even at one level, it did not have a single cause but several mutually contradictory interests. Since 1862, successive Secretaries of State had emphasised the role of forest protection. At the apex of the administrative hierarchy, the governing power in England, the totality of interest of the Empire had to be kept in view. Several claims were made for the need for forest preservation. This included the present and future demands for timber for the government; the potential to earn revenue from state reserves; and the arguments that destruction of forests could affect the agricultural production and general climate, and thus, the stability of the empire. For example, the Secretary of State had strongly emphasised these on the Madras Government, which was reluctant to form reserves.¹⁰⁶

In another instance, again in relation to Southern India, the Secretary of State noted,

When we look to the frequent prevalence, of late years in Southern India, both of drought and of floods sometimes in the same year, I must say that the subject is one which appears to me to demand more earnest consideration...¹⁰⁷

But in the routine functioning of the administration, several reports, including the annual reviews of each of the local governments, were sent to the Secretary of State. The format of the report had acquired a structure which clearly emphasised the importance of revenue gains. Shortfall in revenue was always a concern and the Secretary of State could point this out.¹⁰⁸ The claims on forests were mutually contradictory. Attempts were made to reconcile the claims, for example, between the

¹⁰⁶ SS to GOM, 27/1/1870, See in Proceeding No.28, March, 1870, PWD (F), NAI.

¹⁰⁷ SS to GOI, 23/5/1878, Despatches from the SS, vol. 1877-1880, RA (F), NAI.

¹⁰⁸ There are numerous instances of the SS pointed out disappointing financial performance. See Parliamentary Papers, 1871 (III, IV and V)

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interest of forest conservation and revenue from forests. But the contradictory claims aggregated for the powers in London to instruct creation of the state reserves. The creation of forest reserves, and as a corollary, the support to the bearers of the 'scientific enterprise', the Forest Department, was clear. Very early, in 1862, when the Forest Department was being created, the Secretary of State had strongly emphasised the need to create space for the Department.

In the previous chapter, I noted the overriding powers of the Secretary of State over the Government of India. But the Government of India were not mute followers of orders.. The instability in meaning was in the power relations within the administration. Within this, the Government of India interpreted orders and implemented policies by its own logic. As a governing and controlling power, responsibilities fell on them for direct management. This included the timber shortage for the present and future. Further, the Government of India could not be oblivious to the assertions that deforestation contributed to famines. Thus, its inclination for forest preservation was not entirely imposed. In any case, we cannot separate these influences entirely. The administration, in executing orders of a superior, cannot maintain two faces for ever. That is, one, what it actually believes in, and the other, what it actually engages with day and night. In implementing ideas, it can internalise the idea and makes it its own. Of course, instead of internalising it, it can also oppose it and see to it that the policy is reversed. But ideas and actions are in discourses, forming and shaping each other. Forest preservation became one project of the Government of India in the 1870s.

For the Government of India, by 1870, if not earlier, the Forest Department and creation of the state's interests in forests became a part of the administrative reality. But in crystallisation of the interest of forest preservation, the accommodation of Forest Department was not unconditional. The Government of India, explicitly and implicitly, supported the Forest Department in its dealings with the local governments and presidencies. However, the Government of India, run by civil officers, did not recognise

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the Forest Department as bearers of scientific knowledge and 'experts'. Doing this would have amounted to conceding partial independence to the 'expert' to their detriment. Thus, the civil officers in the Government of India tried to ensure their domination over the Forest Department.

Brandis was trying to carve out an independent position for the 'professional' skills of the forest officers. Hume, the Secretary to the Government of India in Revenue and Agriculture Department was blunt in demolishing all the ambitions Brandis harboured for the Forest Department,

The root of all these controversies now continually cropping up lies in a nutshell. Mr. Brandis is not content, like other members and subordinates of the Government of India, to merge his identity in the one governing power,- he wants to stand out an independent authority, doing things on his own hook and in his own name.¹⁰⁹

Brandis' 'own' authority was as an 'advisor' to the Government of India to furnish technical and expert knowledge. Foucault suggests that we give a prominent position to the 'expert' and 'expert knowledge' in the relations of power. This should not hurry us in according a prominent position to the Forest Department. For recognising the power of the 'expert', we would need to tell when an 'expert' or 'expert knowledge' has been constituted. Despite ambivalence in Foucault's work, it is certain that expert knowledge is created in discourses when certain utterances acquire the status of the truth at the exclusion of others.¹¹⁰ The Forest Department represented itself as a bearer of scientific knowledge and 'experts'. But for Foucault, experts are not created through self-representation alone. In the discourses, far from being experts, foresters were only, as Hume said, 'subordinate' appendages to work within and in conformity with 'one governing power'. This 'governing power', undoubtedly, was of the civil officers.

¹⁰⁹ See Hume's reply to Brandis in an office note dated 15/8 1874 in 'Keep With' 'Not for Record' section in Proceedings Nos. 43-55, March, 1875, RAC (F), NAI.

¹¹⁰ Foucault (1980).

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Brandis had been cautioned by his superior while taking charge of the office of the Inspector General not to produce a 'scientific treatise' but 'practical proposals', proposals which a civil officer could assess and judge.

The civil officers never missed an opportunity to show Brandis and the rest of the Forest Department their place within the schema of the administration. The first forest conference, attended by forest officers, had passed several resolutions on the administration of forests. The resolution was forwarded to the Government of India for consideration. Hume replied,

During the discussions which are recorded in this report, many ideas were broached and resolutions passed which the Government of India is not prepared to adopt or endorse. Nevertheless Governor General in Council cordially acknowledges the contribution.¹¹¹

That not a single resolution was even worthy of the consideration of the Government was a polite way of telling the Forest Department that decision making, even if it related to forests, was to be done by the civil officers. Forest officers were made to appear entirely ignorant of the significant aspects of administration, the land tenures. A commission was being forced on the Madras presidency for demarcation of government forests. Brandis tried to insert a member familiar with the forest question. Hope brushed aside the suggestion. He said,

The duty will be one requiring knowledge of law and of the history and revenue system of the Western coast, and not of mere forestry.¹¹²

Brandis frequently complained of exclusion of forest officers in the administrative decision making.

¹¹¹ Letter from Hume, Secretary to the GOI, printed in ed. Baden-Powell and Gamble (1874).

¹¹² Office note by Hope, 6/10/1876, in Proceedings 'A', 32-52, RA (F), May 1879, NAI

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Away from the sites of policy, in the field, the civil officers and forest officers were often at loggerheads, trading charges against each other. We have already noted the antagonism of the civil officers. The forest officers were no less critical of the civil officers. Amery, a forest officer, bitterly complained of 'an antagonism based both on antagonism of interest and difference of stand-point'.¹¹³ Civil officers had complete control over land. Forests had no value and breaking land for agriculture was not only a means of patronage but also 'became the recognised measure of a district officer's capability and tact'.¹¹⁴

In contrast, the Forest Department had insisted on the preservation of forests. Amery lamented that the Collectors believed that forest officers were 'animated by no higher motive than a satisfactory balance sheet'.¹¹⁵ As a result, the Forest officer sees in the Collector 'a man willing to sacrifice the lasting well-being of the empire'.¹¹⁶

Baden-Powell was a civil officer but his professional interests, being a Conservator, coincided with the other officers of the Forest Department. He bitterly complained,

I have known instances of district officers who have warned all their native officials to be very careful to suppress what they call oppressions on the part of forest officials. ... [a] district officer does not wish to have any one punished no matter what forest offences he commits; at least, that is what the tehsildars and native police officers instantly understand by it. ... The forest officer, instead of receiving assistance from the district officials, is snubbed on every possible occasion, and finds himself powerless...¹¹⁷

The distrust of and a sense of harassment by the civil officers was articulated among the forest officers. Baden-Powell narrated,

¹¹³ Amery (1876): p294.

¹¹⁴ Amery (1876): p295.

¹¹⁵ Amery (1876): p296.

¹¹⁶ Amery (1876): p296.

¹¹⁷ Baden-Powell and Gamble (1874): P32.

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I have met with one or two, and one or two only in the Punjab, and have heard of others, to whom the subject of forests was always sure to be misunderstood; they were perfectly unreasonable on the subject. Whether this proceeded from a disbelief in the exhaustibility of forest products, or in an intense dislike to having anybody in the district besides themselves, I cannot say, but it is a fact.¹¹⁸

Baden-Powell also alleged that district officers

... not knowing anything about the subject, and not very impressed with the necessity of what the professional man well knew was indispensable would turn rather a cold and indifferent ear to it, readily take refuge in excuses about interfering with the people...¹¹⁹

The rivalry and bitterness was intense and manifested in many forums. Anticipating heated exchanges, Baden-Powell and Schlich, the editors of the inaugural issue of the *Indian Forester* noted,

We will impress on ourselves and our contributors the absolute maintenance of courtesy and good temper in the thick of the hottest discussion.¹²⁰

The forest officers thus represented the civil officers as uninformed, short-sighted and interested in unrestrained self aggrandisement. Meanwhile, the civil officers represented themselves as bearers of people's interest which a repressive Forest Department was encroaching upon. The civil officers celebrated themselves by creating their other, the forest officer as uneducated, inexperienced in managing people and interested solely in revenue generation.

¹¹⁸ Baden-Powell and Gamble (1874): P44.

¹¹⁹ Baden-Powell and Gamble (1874): P39

¹²⁰ Baden-Powell and Schlich (1975): p1.

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Administrative rivalry was at the core of these representations. However, all of it was not being invented. Different interests crystallised in the different administrative organs of the state. Since the civil officers were charged with the general administration of the district, it was their duty to maintain at least a non-rebellious, if not contented and prosperous, population. British rule was not based on control through armed coercion and repression.¹²¹ To compromise, align with and appease different local interests was at the foundation of the rule. The civil officers, particularly District Officers charged with land revenue and law and order, were bearers of these interests. The raw jealousy of the civil officers could not be expressed in the administrative discourses. Thus, the effects of the Forest Department on the local people were accentuated and exaggerated and dramatised. The same was true of the representation of the civil officers by the forest officers.

In this relationship, all the parties had to accommodate the others. As we have noticed, the draft submitted in 1869 was revised many times, conceding to the opposition of the civil officers and local governments. Brandis accepted the subordination of the civil officers. Despite Baden-Powell being younger to him by many years, being a civil officer, he had more legitimacy with the government. While making any suggestion, Brandis would, one way or the other, communicate that the proposal had the endorsement of Baden-Powell. For example, even while making some minor additional changes in the bill, after it was submitted to the Legislative Department, Brandis added, 'I may mention that I have discussed these remarks with Mr. Baden-Powell'¹²²

Brandis was carving out space within the administrative and power relations in which he found himself. His colleagues, the other foresters, could not fully comprehend this politics and accused Brandis of abandoning the interests of the Forest Department. Amery regretted that Brandis rebuked those complaining against the civil officers as

¹²¹ Yang (1992); and Bhattacharya (1992).

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'officer unfitted for his position who was unable to get along with the district authorities'.¹²³

If the Forest Department was conceding its sub-ordination to the civil officers, it was too late for the civil officers to wish that the Forest Department did not exist. In the light of the existing relations, the creation of reserves and existence of the Forest Department was a forgone conclusion. Officers in the field could still quarrel, but at the level of the Presidencies and local governments, Forest Department had to be accommodated. Even the recalcitrant Madras Presidency had to punctuate its outright attack by pledging itself to the need for forest conservancy and a role for the Forest Department. The other local governments were anyway directly under the Government of India.

Within these limits, that is, as long as liquidation of the Forest Department and denying state's interests in forests was not being proposed, opposition to the Forest Department was tolerated and even respected. Through several revisions, Brandis and Baden-Powell had restored the power of the civil officers which they had curtailed in the earlier proposals. The local governments could not maintain a tone of outrage and outright opposition. The thrust thus shifted to a constructive reading of the draft bill, in the perspective of the local context and experience, to improve it. Another response was to comment on the words, phrases and organisation of the text. We can thus make sense of the early antagonism and subsequent shifting of position to refine the law. However, the contestation did not end. It shifted its site to the micro provisions of law to wrest further control and power from the Forest Department.

¹²² Proposed additions to draft Forest bill by Brandis, 6/11/1876, see in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹²³ Amery (1876): p294.

7.3. The Bill and the Legislative Council

The draft bill was put before the Legislative Council. As was the practice, a select committee was constituted to finalise the bill. The select committee further solicited the comments from the local governments on successive drafts prepared by it. Hope, a member of the Governor-General's Council, in moving the bill before the Council, had anticipated opposition from other members in the Council. He attempted to pre-empt by recognising local peculiarities in India. He maintained,

... these peculiarities in different parts of India were not so very formidable in themselves as was supposed, and it would appear to be very practicable to have a law embodying general principles applicable to the whole of India, and to provide for local peculiarities by means of rules to be framed by Government under it.¹²⁴

Hope's suspicion was not unfounded. In the next round of proceedings of the Council, before the bill could be referred to select committee, Dalyell, a member of the Council, objected to the arrangement. Referring to the diversity of forest tenures, as in the land-tenures, he was of the opinion that the Local governments should make Acts. He found the bill before the Council very different from the Act of 1865. In the Act, the local rights were explicitly protected through a proviso. But the present proposal was to 'define, to regulate, to commute and to extinguish all customary forest rights'.¹²⁵

Dalyell's recommendation was to question the very authority of the Council. He ruled, a bill of this nature 'was essentially a measure which should be framed, discussed and passed by the local legislatures'. He wondered what made the Bombay government drop its own legislation and be covered by the imperial legislation. He said he had 'no knowledge of the circumstances which had led that Government to come to this

¹²⁴ Abstract of the Proceedings of the Legislative Council of the Governor General of India, 24/1/1877, see in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹²⁵ *ibid.*

conclusion'. According to him, this was particularly surprising when Madras had stood its ground.¹²⁶ He objected,

Probably the most objectionable feature in the draft was... as regards all forest-rights and privileges, and the determination of the manner in which those privileges or rights were to be exercised in the future, were left to an officer who was, presumably under the Bill, a Forest Officer, and who, so far as the Bill was concerned, might be altogether wanting in that judicial experience and training which were essential to the proper appreciation or adjudication of such questions.¹²⁷

This sounded very much as if it had come from the Madras Presidency. The comments had not come from Madras but Mr. Dalyell had. Prior to his position in the Council, he was a Madras officer, in the Madras Board of Revenue. For the present bill, he reiterated and attributed the comments of his earlier colleagues in the Board which was made for the Brandis' draft of 1869,

...altogether too arbitrary, setting the laws of property at defiance, and leaving the determination of the forest-rights of the people to a Department which, in that Presidency at all events, had always shown itself eager to destroy all forest-rights except those of Government.¹²⁸

No wonder, he was imputing motives to the Government of India in denying local legislation by the Presidencies. He commented,

... if His Lordship's Government came to the decision that this was the better plan [local legislation], the local councils of Bombay and Bengal would be quite prepared to take up the question.¹²⁹ [comments in bracket mine]

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

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Hope, anticipating trouble, had already clarified during the proceedings that the use of the word 'Forest Settlement Officers' in the bill was to distinguish the process from other Settlement Officers engaged in the settlement of land-revenue. He noted,

It was not intended that the Forest Settlement Officers should be a Forest Officer; perhaps quite the contrary. The Executive would probably select for the duty a person not in the Forest Department who had some particular qualifications.¹³⁰

Despite this, Dalzell insisted the 'natural conclusion from the draft before them was that he would be a Forest Officer'. And thus insisted that the point should be clarified in the bill itself. Further, he objected to the definition of forests. He noted that under its provisions, 'any waste-land in the country in which a few trees were growing', even if the land belonged to individuals, could be brought under the control of the Government.¹³¹

Dalzell made many more points. These points also came from the local governments. The local governments described the bill as worthy of 'hearty approval'¹³² and 'sufficient to meet the requirements'¹³³ Nevertheless, the local governments further refined the provisions to fine tune the power relations. A significant concern was with the procedure for settlement of the claims. Several Bombay Presidency Collectors made the point that the demarcation procedure was too elaborate for 'use in wild forest-tracts inhabited only by jungle-tribes'. The 'jungle tribes' in the opinion of the officers, were hardly likely to answer to the proclamation and thus their rights would be extinguished. The 'jungle tribes', in the opinion of the Collector of North Canara, were hardly likely

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Central Provinces to GOI, 16/12/1876, see Appendix II in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹³³ Government of Bengal to GOI, 1/12/1876, See Appendix HH in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

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to answer to the proclamation. He thus feared that their rights would be extinguished.¹³⁴ The Collector of Nasik observed that the procedure was suitable for 'civilised' part of India, not the forest tracts. Poor and illiterate forest dwellers could never give a written notice of their claims. He emphasised the defect by asking, Could we then hold that all his rights had lapsed?¹³⁵

Bombay had an additional reason for the objection to the procedure in the bill. In the Bombay Presidency, according to Horsley, an Assistant Collector entrusted with Forest Demarcation, forest demarcation was already completed not under any law in force but merely under government sanction. The new procedure would have bound them to repeat the process.¹³⁶ He was thus suggesting that for such jungle tracts, local governments should be free to design their own procedures.¹³⁷

Dalyell, also made this point on requiring people to prefer their claim in writing. His objection was that the settlement officer could ignore a right which was actually not exercised at the time of settlement. The settlement officer could also ignore a right, if in the opinion of the officer, it was not essential for the beneficial use of the land or of the person claiming the right. He described the provision as iniquitous.¹³⁸ The Collector of Kanara also objected to the clause of recording only the existing rights in use then. His argument was that land holdings were small and changing and therefore, occupancy kept changing. There was injustice in fixing the right to the land in use at the time of settlement.¹³⁹

¹³⁴ Assistant Collector Canara to Chief Secretary, Government of Bombay, 30/11/1876, see in Appendix RR Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹³⁵ Collector of Nasik to Government of Bombay, 5/12/1876, see in Appendix RR Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹³⁶ Assistant Collector Forest Demarcation, Khandesh to Government of Bombay, 6/11/1876, , see in Appendix RR Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹³⁷ *ibid.*

¹³⁸ Abstract of the Proceedings of the Legislative Council of the Governor General, 31/1/1877, see in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹³⁹ Assistant Collector Canara to Chief Secretary, Government of Bombay, 30/11/1876, see in Appendix RR Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

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The Conservator of Bengal, Schlich, was proposing fine tuning to protect the interest of the Forest Department. The Bill had made provisions for settlement of forest rights. This was by (a) setting aside some other forest-tract for the exercise of the rights or, (b) by altering the limits of the proposed reserve, or (c) by allowing the right to be exercised within the reserve. The settlement officer had the option to follow any course. Schlich suggested that it should be compulsory for the Settlement Officer to try (a) and (b) only then he could opt for (c), that is, permit the exercise of rights within reserves.¹⁴⁰

Punjab checked the expansion of the powers of the forest officers. Baden-Powell's draft had suggested deposition of records of forest settlement in the office of the Conservator, and not in the Collectors office where all other records of right were deposited. The Punjab government objected,

The safe custody of such records is a matter requiring much vigilance and public confidence in them depends largely on the system adopted for this purpose. It is moreover necessary that they should be easily accessible both to the Courts of justice and to the public at large, which would not be the case if they were deposited in the office of the Conservator of Forests.¹⁴¹

Further, Brandis, following the suggestion of the local governments earlier, had accepted compensation if passage through forest was closed. Punjab suggested that villagers did not want money or other compensation, they wanted passage. Their suggestion was that there was no need for compensation, just provision of appropriate passage.¹⁴²

¹⁴⁰ From Conservator of Forests, Bengal, to Government of Bengal, 18/11/1876, see in Appendix HH in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹⁴¹ Report of the Committee constituted by the Punjab Government to consider the Memorandum by Brandis on proposed forest legislation, the report forwarded to the GOI through letter dated 31/1/1877, see report in Appendix PP in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹⁴² *ibid.*

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The provision on forest fire drew much support and appreciation from the local governments. Section 23 empowered the government to close reserved forests against rights and privileges if fire was caused wilfully. The Chief Commissioner of the Central Provinces was of the opinion that the penalty should also be extended to gross negligence and carelessness.¹⁴³ Punjab went even further. It noted,

The only chance of extinguishing such conflagrations lies in the prompt and hearty assistance of the residents of the vicinity in which they occur¹⁴⁴

They thus considered it necessary to add a provision which would make non-assistance an offence punishable under the Act including closure of forests against rights and other users.¹⁴⁵ The Collector of Kanara also suggested enlargement of penalty for setting forests on fire. He recommended,

... like Bombay District Police Act, extra manpower could be deployed at the expense of communities in the cases of flagrant cases of mischief.¹⁴⁶

In the same vein, the payment of reward to the informer was wholeheartedly approved.¹⁴⁷

Madras Presidency continued to push ahead with its own agenda of freedom from the Government of India. It alleged that they had seen a similar draft earlier and

¹⁴³ Central Provinces to GOI, 16/12/1876, see Appendix II in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹⁴⁴ see Appendix PP in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹⁴⁵ *ibid.*

¹⁴⁶ Assistant Collector Canara to Chief Secretary, Government of Bombay, 30/11/1876, see in Appendix RR Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

¹⁴⁷ From Commissioner and Superintendent, Mooltan division, to Registrar, Chief Court Punjab, 29/5/1877 see in Appendix VV in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

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commented on it. They, thus, did not even consider it important to engage with the provisions.¹⁴⁸

As the members of the Governor-General's Council were busy in other urgent work, an informal committee consisting of Schlich, Baden-Powell and Hope, with others was formed. The committee, according to Hope, a member of the select committee, revised the bill thoroughly. Hope was satisfied that the comments from local government were favourable and wherever there were objections, these were considered and incorporated.

In the earlier occasions, the local governments had strongly condemned the draft proposals on the same or similar provisions. The situation was different now. The suggestions did not have a common thrust and strong opinion. Different officers had highlighted different provisions. In such contexts, the opinion seeker acquires a degree of freedom. He can retain what he likes and yet claim to be participatory and accommodating. After all, a suggestion would come from just one person.

But the committee members had their constraints. Despite all attempts of the Government of India to impress upon the Madras government to accept the imperial law, Madras had continued to be recalcitrant. The Government of India, as I show in the next chapter, was continuously trying to convince the Secretary of State, under one pretext or the other, to bear down upon the Madras Presidency. The Secretary of State had refused to be an ally of the Government of India in this war. At the same time, the Secretary of State was impressing upon the Madras Presidency the need for forest legislation and demarcation of forests. The Secretary of State had written to the Government of India,

¹⁴⁸ GOM to GOI, 23/12/1876, see in Appendix KK in Proceedings Nos, 'A'43-142, March, 1878, LD, NAI.

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you will no doubt think it right, before the Bill is finally passed into law, to consider and dispose of the objections of the Madras Government¹⁴⁹

Thus, the Secretary of State had almost put the satisfaction of the Madras Presidency as a condition to the ambitions of the Government of India. There were additional concerns. Even if Madras were not to accept the imperial law, their comments had to be accommodated and engaged with to the satisfaction of Madras. To introduce a law, which in the very opinion of a part of the administration, was despotic and obnoxious, would have been embarrassing for the Government of India. Madras loomed large in the mind of the Committee. Hope was thus reported in the proceeding reports of the Council,

The objections of Madras had not been forgotten. The Bill had been so materially altered to meet them that he had now every hope that the Madras Government... would find themselves able to accept it.¹⁵⁰

In the opinion of Hope, the significant objection Madras and other local governments on the question of local rights were taken care of. In effect, several of the suggestions of the local governments and even of Madras Presidency were incorporated in the bill finally prepared by the select committee. The select Committee furnished a long list of micro changes it had made in the bill. The Committee stated that the changes included,

...the Forest Settlement Officer should not, except under very special circumstances, be a Forest-officer.¹⁵¹ ... claims to be preferred orally to the Forest Settlement Officer and made it obligatory on him to take such statements down in writing.¹⁵² ... Forest Settlement officer to inquire into the existence of rights, by searching the Government records and taking evidence, even though the people themselves, through ignorance or neglect, may not appear to claim them.¹⁵³ ... the rejection of rights

¹⁴⁹ For SS to the GOI, 5/7/1877 in Proceedings Nos., 'A'43-142, March, 1878, LD, NAI.

¹⁵⁰ Hope reported and summarised in the Abstract of the Proceedings of the Legislative Council of the Governor General of India, 17/10/1877, in Proceedings Nos., 'A'43-142, March, 1878, LD, NAI.

¹⁵¹ Select Committee report, 17/10/1877, in Appendix ZZ, in Proceedings No. 43- 142, LD, GOI, NAI.

¹⁵² *ibid.*

¹⁵³ *ibid.*

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which were not habitually exercised by the claimants ... or which were not required for the beneficial use of the land or premises or of the person claiming the same, have been omitted.¹⁵⁴ ... no land shall be constituted as Protected Forest unless the nature and extent of the rights of Government and other persons in it have been inquired into and recorded at a survey or settlement or in some other sufficient manner.¹⁵⁵

In addition to this several other modifications were made. This included, empowering local governments to exempt particular classes of timber from transit restrictions. This was in order not to interfere with the collection of drift wood for fuel for the poorer classes. Power of compounding by forest officers was restricted.¹⁵⁶ Evidently, Madras had an overwhelming presence. The Select Committee report noted at the end that the bill was 'now not unsuitable to the circumstances of the Madras Presidency'.¹⁵⁷ The bill was finally put to the motion and passed.

Conclusion

In this chapter, I have shown that the legal provisions of 1878 arose from social practices. Further, that these were the strategies forged in the field to outflank the opponent. For example, the provisions on the transit restrictions arose from the practices of the Bombay government in preventing pilferage of forests. The categories of reserved and unreserved forests came from the strategies of the Forest Department in creating exclusive reserves. The provision of settlement of forest rights through exchange was a strategy worked out by the Punjab forest officers.

These strategies were abstracted from the field. In their raw form, these were still steeped in the peculiarity of the context. Also, these represented the power equation prevalent in that particular context. In the earlier proposals, the forest officers were entrusted with forest settlement. Later, two officers, one civil officer and another a

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

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forest officer was proposed. Finally, it was provided that the task of forest settlement should ordinarily not be entrusted to a forest officer. It was proposed that the forest settlement officer, having recorded and recognised rights on the forests, could commute, translocate, buy the rights, or leave them alone. The proposal was refined by taking away much discretion from the forest settlement officer. He was required by the law to exhaust all means of settling the right. Only failing this, he could leave alone the right to be exercised in the reserved forests.

These strategies were in opposition to other strategies. Each of the strategies was to outflank the opposing ones. The forest officers were trying to marginalise the local people and civil officers. The civil officers were conceding the creation of the new Department but trying to retain key functions in their hands. The provisions that emerged through this process of filtration were a register of the contending forces. It was worked out to the last detail. The forest records were not to be kept in the Conservator's office but the Collector's office. The forest dwellers were to assist in extinguishing forest fires. Failing this, their forest rights could be suspended. The provisions were crystallisation of the balance of the contending forces. The law that emerged was already legitimate power. Having completed explorations on the Forest Act of 1878, I am left with the question as to what happened to the claims of the Madras Presidency. I turn to this in the next chapter.

¹⁵⁷ *ibid.*

CHAPTER 8

LAW, REPRESENTATION AND POWER: MAKING OF MADRAS FOREST ACT, 1882

Introduction

In this chapter, I will show how law became the means for a struggle within the state, by exploring the political game played by the Madras Presidency and its culmination in the making of the Madras Forest Act of 1882. The Madras Presidency had all along presented a different construction, from that of the Government of India, of the nature of legal rights on forests. It had claimed that in the Madras Presidency, forests were communal property and thus, the rights of the local people could not be regulated, curtailed or extinguished. On these grounds, Madras stubbornly stood its ground and refused to accept the Act made by the Government of India. Alongside this, the Madras government provoked the Government of India by implementing its view that the state had no rights on the forests in the Presidency. In 1874, it reversed the orders of the Madras government taken in 1860 on the forests of Kanara. It restored the *vargadars* as owners of forests and started ceding it to them. While the Government of India was opposing this move, Madras went ahead and enacted a forest Act for the Madras Presidency. The Act was no different from the one made by the Government of India! For the Government of India, the issue no more was the law but the power to make law. The issue was the affront it had suffered from a recalcitrant Presidency. The Government of India continued a relentless pursuit till it won a symbolic victory over Madras and subjugated it.

In this chapter, I examine the power relations through which the Government of India achieved its ends. In part one, I explore the discourses on the reversal of the ownership of forests in Kanara by the Madras government in 1874. In part two, I excavate the

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intrigues by the Forest Department and the Government of India to put Madras in its place. In Part three, I explore the processes through which the Government of India won a symbolic victory over Madras on the making of a forest Act for the Madras Presidency.

8.1. Vargadars as Owners: Reversal of Law

In a lengthy minute recorded in 1871, Robinson, one of the members of the Board of Revenue Madras, reviewed the history of land tenures in Kanara. He emphasised that Munro had distinctly recognised the property of *Vargadars* on all lands, including forests and wastes. According to Robinson, this was the recognised principle of administration till Blane, in 1850s, misled the government. Robinson meted a harsh treatment to Blane,

It is obvious to remark that Mr. Blane here invited the Government to interfere with the established rights of property throughout the district in direct opposition to the law as then administered, and in summary supersession of the long fully-recognised usages and privileges of the landowners of a proprietary district. He further advised, as it appears to me, an illegal course. ... The course which the Collector recommended is one which leads directly to wholesale confiscation.¹

Robinson doubted Blane's knowledge and experience. Blane's opinion, which he himself had conceded to be an 'impression', Robinson alleged, was derived from the East Coast in 'the erroneous fancy of a stranger to these countries and their history'.² Robinson noted,

¹ Minute by W. Robinson, 3/12/1870, MBOR, 21/3/1871, No. 1222. Hereafter Robinson's Minute (1870).

² Robinson's Minute (1870).

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Mr. Blane, no doubt unwittingly, misled Government when he gave these lawless things the dress of historic fact...³

Robinson was dismayed that the Board of Revenue had followed Blane's 'unsound' report. He commented on the relevant proceeding of the Board dated April 16, 1856,

...their object that of pressing the foregone conclusion that somehow or other this species of agriculture must be repressed, and Mr. Blane's erroneous "impression" of 1848 and 1849 are accepted and urged as sound and authoritative.

Robinson restored the 'rule of law'. He argued,

The question here is not the good or evil of *Coomery* cultivation or the desirableness of placing it under some regulation-- if law for the purpose of inhibiting private rights could be obtained-- but it is the abstract question of right or wrong in respect to the titles of an ancient Proprietary. But this point has been lost sight of.⁴

Robinson, thus, argued that the 'Board's decision based on wrong premises was untenable⁵ and concluded,

I am quite satisfied that the recent action of the Board and Government is open to very serious doubt and question, both in law and in the minds of those whose rights and usages are affected thereby.⁶

He was thus giving the rightful place to law and the Rule of Law. The other members of the Board, however, were not in full concurrence with Robinson. The Madras Government gave its order in October 1874, after keeping the Board of Revenue's suggestions under consideration. By then, Robinson had become a member of the Governor's Council. The Madras Government ordered,

³ Robinson's Minute (1870).

⁴ Robinson's Minute (1870).

⁵ Robinson's Minute (1870).

⁶ Robinson's Minute (1870).

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There seems to be no sufficient ground for declining to accept in its literal sense the statement of Sir Thomas Munro that “the only land in Kanara that can in any way come under the description of Sirkar land is unclaimed waste.”⁷

Following the order of 1860, the government had asked the Collector of Kanara to scrutinise all title to delineate rights of *vargadars* and the government. The Government now considered that the proposal to call and register all titles to land would be wrong in principle and hard on the people. Also, the insistence on written documents of title to maintain property of *vargadars* appeared to them defective.⁸

Following the orders of the Madras Government, Webster, the Collector of Kanara, invited claims and conceded forests to the estate-holders. Webster had based his memorandum for the demarcation of state and private forests on the government’s order of 1874. It read,

... this memorandum is to re-affirm the old principle that *prima facie* all land is private property, and that only unclaimed waste, or land the claims to which were absolutely without foundation, could be declared the property of Government.⁹

The Board of Revenue commended Webster.¹⁰ But the Madras government went even further. Government had leased estates to tenants called *sirkar gueny*. The government described its rights over the forests in these estates as ‘long disused rights’. The

⁷ Order by the GOM, No. 1361, 23/10/1874. See in Brandis, D, ‘Demarcation of the Public Forests in the Madras Presidency’, in Proceedings ‘A’ 32-52, RAC(F), 1879, NAI. Hereafter Brandis (1879) and Madras Government Order (1874).

⁸ Madras Government Order (1874).

⁹ A. Webster, Collector of Kanara to the Board of Revenue, 21/9/1875 in Brandis (1879). Hereafter Webster’s Letter (1875).

¹⁰ MBOR, 11/2/1876, No. 413.

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government ordered to treat them 'precisely as mul Wargadars in the matter of the forests belonging to their wargs'.¹¹

In 1860, the Board had taken a harsh view of shifting cultivation. Cleghorn had described it as a 'barbarous' system and Government had endorsed the view by imposing restrictions on shifting cultivation. By 1875, the government had reversed the rights. Vargadars, as owners of forests, were free to do shifting cultivation. This was a matter for 'regret' for the Board.¹² The Board, however, could only hope that the *vargadars* in their own interest would put some check on the practice.¹³

One can at last solace that Robinson restored the legitimate place of the law. We can celebrate, that there may be mishaps, but eventually, law's inherent logic and power comes to play. Finally, law, triumphs. Historically, things keep improving. Robinson was restoring what the law was by the very dictates of law. But we have seen enough of law by now to accept this suggestion on its face value. Law has no domain of its own. It is always trapped in its others.

What was the political economy of this reversal? A pervasive cause for the colonial rule used to be the 'disaffection' of the local population. In this case, it was not this. In North Kanara, proprietors had moved the local court and gone in appeal to the High Court asserting their rights over forests. In South Kanara, proprietors were petitioning but there was no impending crisis, perhaps not even a serious friction. Webster, the Collector in 1876 noted that people while 'claiming jungles only ask for permission to use the jungle as hitherto, i.e. for leaves, trees, firewood, &c., for themselves'.¹⁴ Webster further noted, 'The very moderation in the wording of their petitions shows

¹¹ Order by the GOM, No. 479, 5/4/1876, in Brandis (1879).

¹² MBOR, 11/2/1876, No. 413.

¹³ *ibid.*

¹⁴ Webster's Letter (1875).

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that they are claiming no new rights'.¹⁵ Instead, it was the Board and the Government, far away from Kanara, on their own initiative who were inventing a crisis. Robinson pointed out that the present policy would lead to 'serious complication with a large body of influential Proprietors'.¹⁶ The Government of Madras was insisting that conflicts with the local people were 'certain to occur more frequently, and the danger must be put to an end'.¹⁷

The motive for the changes was elsewhere. It was resentment for the combination of the Government of India and the Forest Department. The two had come to represent each other, threatening to undermine the authority of Madras. Madras was defying the Government of India. It was provoking the Government of India by demolishing what it stood for-- state's right on forests. It was attempting its right to control and confine the domain of the Forest Department which appeared to be a nuisance to the Madras government.

Robinson was extremely resentful of the Forest Department. In his minute of 1871, he accused the Forest Department of 'unauthorized reservations and encroachments on immemorial private rights'.¹⁸ Cleghorn was described as entirely ignorant of the issues involved in land tenures and property on forests.¹⁹ It was the antagonism towards the Forest Department and the domination of the Government of India which united the Board, Government and other officers.

¹⁵ Webster's Letter (1875).

¹⁶ Robinson's Minute (1870).

¹⁷ Madras Government Order (1874).

¹⁸ Robinson's Minutes (1870).

¹⁹ Robinson's Minutes (1870).

8.2. Counter-Strategies of the Government of India

Not surprisingly, the Conservator of Forests of Madras complained that government forests were being given up in Kanara.²⁰ At this rate, the government will be 'without an acre of forest in South Kanara, either in the plains or line of Ghats'.²¹ Following the Conservator's report, The Forest Department with the Government of India took prompt note of the developments. Brandis, the Inspector General, created a depressing scenario before the civil officers in the Government of India, that if the Madras Presidency did not reverse its decision in relation to forests of South Kanara, the Government could lose the case from North Kanara pending before the Bombay High Court. He estimated the extent of damage in the two districts put together at 2,000 to 3,000 square miles of forests. Brandis provoked the officials of the Government of India, 'Apart from all other disadvantages, loss of prestige will be considerable'.²²

Brandis' scheme was to send a commission to Madras Presidency to investigate and judge the tenure of forests in Kanara. However, since Madras was independent, the ambition of interfering through a Commission could not be secured without the consent and support of the Secretary of State. The Government of India complained persistently to the Secretary of State about the mismanagement of forests in the Madras Presidency. But it could not find an endorsement from him for a Commission. The Secretary of State agreed with the Government of India. But a Commission would have created a crisis of administrative relations.

If Madras was determined in following the ideology and strategy it had worked out, the Government of India was full of zeal and ambition to vanquish Madras. The officers were scheming to put Madras government in place. Brandis, every now and then,

²⁰ GOI to GOM, 31/7/1876, in Brandis (1879).

²¹ *ibid.*

²² Office note by Brandis, 29/9/1876, in Proceedings 'A', 32-52, RA(F), May 1879, NAI.

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reiterated the urgency for the proposed Commission.²³ Brandis insisted on 'impartial' officers for the Commission, and predicting the outcome he stated,

Much would depend on the selection of the officer, and this selection Government of India must keep in its own hands.²⁴

Hume, the Secretary in the Revenue and Agriculture department, was building the mood for a direct intervention in the affairs of Madras to a crescendo. He described the views of Robinson on the subject of forest rights as 'violent and extreme'.²⁵ Hume lamented,

His sole idea in regard to Malabar forests seemed to be to yield them up to the tender mercies of petty hordes of semi-savages.²⁶

To Hume's dismay, Robinson condemned the actions of the Government of India, which were for proper conservation, as 'roguery and robbery'.²⁷ Hume was describing the situation to be a hopeless one. He referred to Robinson,

So long as he remains in the Government of Madras, I have no hopes of any peaceful solution of the question.²⁸

Madras Presidency had followed the strategy of not replying to letters. Hume found it exasperating,

...even if we write, Madras will not answer, unless it pleases her; and we may go on sending reminders for two years, or in fact till we are tired, without eliciting a reply.²⁹

²³ Office note by Brandis, 6/7/1877, in Proceedings 'A' 32-52, RA(F), May 1879.

²⁴ *ibid.*

²⁵ Office note by Hume, 29/5/1878, in Proceedings 'A' 32-52, RA(F), May 1879.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

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Arbuthnot, another member of the Governor-General's Council, joined the campaign against Madras. But it was too late. Arbuthnot was suspect. He had earlier discouraged the proposal for the Commission on some pretext or the other. His judgement, as the member in-charge of the forest portfolio, mattered. He was an old hand from Madras. He had spent all his years in Madras, including as a member of the Madras Council. Arbuthnot was writing the note marking his removal from the charge of the forest portfolio! The charge had been passed to another member. Arbuthnot considered it necessary to justify,

I had no doubt that some such commission would be necessary, from which, however, it would not do entirely to exclude the Madras revenue element; but the time was (and I fear still is) very inopportune for proposing such a commission to the Government of Madras...³⁰

Even if Arbuthnot considered a Commission, unlike Brandis' 'impartial officers', it had to have representation of the Madras Presidency. Arbuthnot then made excuses, including lack of details and a tour to Madras Presidency, and concluded,

I therefore abstained from recording any opinion as to the course which should be taken, and detained the papers with the intention of eventually recommending that a Commission somewhat of the character that suggested by Mr. Brandis should be appointed.³¹

Arbuthnot found it necessary to demonstrate his loyalty by talking against Madras Presidency. He described Madras' views on the forests of Kanara 'erroneous' and recommended,

... thorough investigation into the subject by a Commission, mainly composed of officers independent of the Local Government, has been held.³²

²⁹ *ibid.*

³⁰ Office note by Arbuthnot, 10/6/1878, in Proceedings 'A' 32-52, RA(F), May 1879.

³¹ *ibid.*

³² *ibid.*

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Perhaps, it was from the same guilt and desire to be a normal member as opposed to being marked, 'the one from Madras' that he raised the issue of Madras opposing the India forest bill. In the debates in the Council he noted that the Madras Presidency had a tradition of respecting 'privileges or prejudices of the people'. Self consciously he justified,

... he had been bred, he might say, in the same school as that to which he had been referring- that very great attention and very great respect should be paid to sentiments and feelings of that description.³³

With Thompson taking charge of the forest portfolio, the door was opened for a more aggressive treatment of Madras. Thompson first created a scenario that things were beyond redemption. He convinced others,

Things have come to that pass that it seems hopeless by any form of letter or correspondence to bring Madras Government to realise the immense injury that is being done to the country under their sanction: for letters remain systematically unanswered; and in the meantime a policy is being pursued which gives up proprietary rights in forests where no such rights had been even claimed...³⁴

Thompson was of the opinion that time had come to follow a course, which Hume had described as 'a downright rupture with the Government of Madras if we are to do anything substantial for the forests'.³⁵ If Brandis was struggling for the gains of the interests and power of the Forest Department, for others, forest was only a weapon to wage another war. For the Government of India, it was the powers of the Government vis-à-vis Madras Presidency. Arbuthnot, perhaps, to rehabilitate himself and shrug off the stigma of being an old Madras hand, noted,

³³ Abstract of the Proceedings of the Legislative Council of the Governor General of India, 6/3/1878 in 'A' 42-143, LD, March 1878.

³⁴ Office note by Thompson, 19/9/1878, in Proceedings 'A' 32-52, RA(F), May 1879.

³⁵ *ibid.*

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There is one question connected with this matter, and with other matters, bearing upon the relations of the Government of India, and the Government of Madras, which appears to me of very great importance. I refer to the question of the appointment of a successor to Sir W. Robinson in the Madras Council. The Duke of Buckingham has recently called into the Council, as a temporary Member, Mr. Carmichael, the permanent Chief Secretary,- an able man, but I fear very much imbued with the spirit of antagonism to the Government of India, which for the last four or five years has practically animated the Madras Government.³⁶

Arbuthnot went further. He desired the appointment of Mr. Puckle as successor to Robinson,

I don't know whether this is a matter in which the Viceroy could intervene [if he could] I feel sure that it would strengthen the Madras Administration, and would render the relations of that Government with the Government of India more harmonious than they have been for some time past.³⁷ (Additions in bracket mine)

Hume again revealed the struggle to be one for power between the two governments,

... but we are helpless and hopeless; and the only apparent remedy is a heroic one, neither more nor less than to take advantage of the existing great financial difficulties to abolish the Governorship of Madras and Bombay and subordinate those provinces to the Government of India in the same way that Bengal is subordinated. Give us the right to interfere and issue orders, and in three years we can engage to alter altogether the prospect for forest revenue in Madras.³⁸

The Government of India was all along complaining to the Secretary of State about the forest administration in Madras. The Secretary of State was not in disagreement with

³⁶ Office note by Arbuthnot, 8/10/1878, in Proceedings 'A' 32-52, RA(F), May 1879.

³⁷ *ibid.*

³⁸ Office note by Hume, 2/5/1879, in Proceedings Nos. 3-23, HRA(F), October 1879.

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the Government of India. Even without an investigation, which the Government of India was insisting on, he ordered Madras on Kanara forests,

... deal with all forest questions in accordance with the practice which was in force in the district up to 1874, and to take care that no further privileges are allowed the ryots, either in regard to “kumaki” lands or “kumri” cultivation, than were accorded to them at that date.³⁹

Madras attempted to clarify that it was only redressing wrong committed by the government earlier.⁴⁰ Madras argued that it had only reiterated the position taken by the Madras Government since the early period.⁴¹ But the Secretary of State was not impressed. He noted,

... I continue to regard the orders of your Government in 1874, as quoted by you, open to the construction of unduly relaxing the just claims of Government to forest waste.⁴²

8.3. Making of the Madras Forest Act

On a parallel track, Madras and the Government of India were wrestling over the forest legislation. Having won the first round by stubbornly refusing to follow the Indian Forest Act, 1878, Madras had created the space to make its own law. Madras drafted a bill and forwarded it to the Government of India for comments. The gesture was not voluntary. The draft bill had penal provisions. Within the administrative arrangement, introduction of penal provisions needed the sanction of the Governor-General's Council.

³⁹ SS to GOI, 20/2/1879, in Proceedings 'A' 32-52 RA(F), May 1879, NAI.

⁴⁰ GOM to SS, 16/5/1879, in Proceedings Nos. 8-23, HRA(F), October 1879.

⁴¹ *ibid.*

⁴² SS to GinC, Madras, 28/8/1879, in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

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As the Secretary of State noted, the draft bill was no different from the one made by the Government of India. Madras had waged war on the Government of India by raising questions over the ownership of the local people over forests. However, to have actually made a law to this effect, would have negated the very foundation of law and rule. For the Government to be a ruler, a necessary condition was to appropriate, control and supervise. A law which did not do this, would not be law at all. Law is power, power of the ruler to deploy its strategies on the ruled. It was for this that the Government of India and the Secretary of State were continually pressing the urgent necessity of a law. If the ruler gave away significantly to the ruled, there would have been no state and empire.

Madras pressed the Government of India for an immediate reply towards expediting a legislation.⁴³ But the Government of India was in no hurry. It was its turn now to defer, delay and create impediments. On receiving the bill, the Governor-General ordered a copy to be sent to Baden-Powell for comments. He directed the Secretary,

Send one copy demi-officially to Baden-Powell, and say I shall be 'much' obliged if he will carefully criticise it for me say it appears to me to be very confused, imperfect and inadequate measure.⁴⁴

Baden-Powell gladly obliged the Governor-General. Baden-Powell 'carefully criticise(d)' any and every provision and concluded,

The whole Bill is so confused and contradictory, that it is with great difficulty I have been able to make anything out of it at all.⁴⁵

⁴³ Governor of Madras to Viceroy, telegraph on 6/4/1879 and May 26/5/1879, in Proceedings 8-23, HRA(F), October 1879, NAI.

⁴⁴ Order communicated by Hume, 24/4/1879, in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

⁴⁵ Memorandum by Baden-Powell on the Madras Forest Bill, 1879 in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

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The only portion which Baden-Powell approved was the penal part. And this was because it was significantly drawn from the Indian Forest Act.⁴⁶

But most significantly, the Government of India pointed out that Madras had aggressively asserted that all forests in its domain were the property of village communities.⁴⁷ It then ridiculed,

It seems strange to the Governor General in Council that on preparing a Forest Act for the Madras Presidency, where the rights of the rural community in forest lands have been so long advocated, the position of the Communal Forests should be almost entirely ignored...⁴⁸

With this draft bill from Madras, the contention over forest tenure in Kanara got merged with the forest bill. The Government of India, instead of sending a Commission for investigating the Kanara issue, was now proposing to send Baden-Powell to dictate a forest law to Madras.⁴⁹ It was a pragmatic move. Compared to a Commission, this would have cost a lot less and had greater chances of approval by the Secretary of State.⁵⁰

The Government of India pressed again with the Secretary of State by describing the bill as 'utterly impracticable', 'confused', and 'impracticable'.⁵¹ The Government of India regretted,

We cannot believe that such a measure can have been made under the consideration of the Board of Revenue; and it seems to us that those who drafted it were ignorant of the practical working of the revenue and forest administration in the Madras Presidency.⁵²

⁴⁶ *ibid.*

⁴⁷ GOI to GOM, 29/9/1879, 1879 in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ Office note by Brandis, 9/6/1879, in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

⁵¹ GOI to SS, in Proceedings Nos. 8-23, HRA(F), October 1879, NAI.

⁵² *ibid.*

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There was a new Secretary of State. He concurred with his predecessor in deputing Baden-Powell but noted,

... I understand that a Bill, which is considered by Forest Officers in Madras as suitable, has already been sent up to your Government, and may be shortly expected to become law.⁵³

Madras in this while had revised the draft bill. The Secretary of State was alluding to the revised draft. Madras Government did not even share the revised draft with the Government of India. It enacted it and sent it to the Governor-General for his assent. Baden-Powell got into the Act the second time to nit-pick on every provision and criticise it. All the Madras Collectors and other revenue and forest officers had made sense out of the provision while the Select Committee sent the draft to them for comments. But Baden-Powell opted to be confused. He alleged that the meaning of the provisions could be guessed by 'straining' oneself or else one was 'left in doubt as to what is meant'.⁵⁴ All this would have, according to Baden-Powell, created confusion for the Madras officials in its implementation.

While the Government of India was exasperating Madras by playing the game of silence, Madras sent a minute recorded by the Governor responding to the comments of the Government of India on the earlier draft. On the accusation of absence of provisions on communal forests in the draft bill, the minute noted,

In reply to this it will suffice to state that this Government are satisfied that there is no communal proprietorship in forests in this Presidency.⁵⁵

⁵³ SS to GGenC, 16/12/1880, in Proceedings Nos. 1-37, HRA(F), October 1881, NAI.

⁵⁴ Memorandum by Baden-powell, 28/4/1881, in Proceedings Nos. 1-37, HRA(F), October 1881, NAI.

⁵⁵ Minute by Buckingham and Chandos, Governor, 2/12/1880, in Proceedings Nos. 1-37, HRA(F), October 1881, NAI.

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Thus, the notion of communal property of the villagers, argued for, defended and sustained over a decade vanished into thin air without any explanation. The Madras officials had overlooked to send the minute along with a copy of the Act! The minute was sent eight months later, after the Governor has ceased to be in office. But the Government of India was not going to let it go easily. It brought back the issue,

No reply has been given... (only)... a brief allusion... that the Government of Madras are now satisfied that there is no communal proprietorship in forests in that Presidency... no reasons in support of this view are advanced, nor is any attempt made to reconcile it with the previous statements of the Madras Government on the subject.⁵⁶(addition in bracket mine)

Government of India further took Madras to task,

The Government of India has not the means of determining whether the new position taken up by the Government of Madras in the Forest Act is in accordance with the facts of the case or not; but such a complete change of policy on so fundamental a principal clearly indicates that the whole subject of the rights of the village landholders demands full investigation, before the proposed classification of forests in the Act can be accepted by the Government of India as a sound basis for Forest legislation in the Madras Presidency.⁵⁷

The legislation by Madras, in the opinion of the Government of India, had made several legal and technical transgressions. Within the law, a local government could not modify an enactment of the Government of India. The bill passed by the Madras legislature had several such violations, including the Indian Evidence Act and Land Acquisition Act. Further, the Act contained penal provisions. Thus, technically, the local legislature should have submitted it to the Government of India for sanction before passing it in the local council.⁵⁸

⁵⁶ GOI to GOM, 28/9/1881, in Proceedings Nos. 1-37, HRA(F), October 1881, NAI.

⁵⁷ *ibid.*

⁵⁸ *ibid.*

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It was the turn of the Government of India to do what Madras had done to the India Forest Act. The Government of India alleged that the Act was the same as the earlier draft 'in all essential points' and thus 'open generally to the same objections'.⁵⁹ The Government of India dismissed the Act,

As a mere piece of legislative workmanship, the Governor General is advised that the Act is *ultra vires* of the Madras legislature, faulty in drafting, badly arranged as regards matter, full of real or apparent contradictions, and upon the whole calculated rather to raise doubts in the minds of the officers called upon to administer it than to furnish them with a clear code of instructions for their guidance.⁶⁰

The Government of India insisted on sending its representative to Madras to assist and educate them in making a forest Act. Baden-Powell, after waiting for years to head the Commission to Madras, had moved to another assignment. Instead, Brandis, the Inspector General of Forests to the Government of India was to be deputed to 'confer with the Madras Government on the whole subject of Forest conservancy in that Presidency'.⁶¹

Forest was not the only contested subject between the Madras Presidency and the Government of India. The two governments clashed over other administrative questions. The Madras government defied all directives of the Government of India on the measures for famine relief. In 1874, it bought huge amount of grain to meet the shortages. In the opinion of the Government of India, this was undesirable. It lowered the food grain prices. The Government of India was firm that 'the high prices, by stimulating import and limiting consumption, were the natural saviours of the situation'.⁶²

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² Viceroy Lytton, see Balfour (1899).

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The Viceroy Lytton noted,

We were unanimous that this must be stopped at once, and we have come to the conclusion that our best course is to send Sir Richard Temple in the character of our Commissioner, and with adequate power, to Madras.⁶³

In this while a new Governor had taken charge of the Presidency. The Madras Government appointed a Committee, headed by Brandis, to draft a forest bill. The Committee took the same position that Brandis had written down in a memorandum on forest law for Madras. In fact, it significantly copied from there.

The Committee completely aligned itself with the position of the Government of India on the question of rights of people, 'long agitate in this Presidency'.⁶⁴ Recognising that people had used forests for many years, the Committee reproduced the familiar view of the Government of India that 'the adjoining villages can exercise rights of user only so long as these lands are not allotted by the Government for cultivation, or required for other purposes.'⁶⁵ The Committee declared,

... there are no communal forests in this Presidency. The villagers are in the habit of collecting firewood, thorns for fences, and of pasturing their cattle on... Such rights of user, however, are vastly different from proprietary rights, and their existence does not constitute the forests in which they are exercised communal forests.⁶⁶

On the design and arrangement of the bill, Brandis was proud,

⁶³ Balfour (1899).

⁶⁴ Report on the Committee constituted for drafting forest bill, see in Appendix in Brandis (1883).

⁶⁵ *ibid.*

⁶⁶ *ibid.*

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Wherever possible the wording of the "Indian Forest Act," 1878, or that of the "Burma Forest Act," 1881, has been adopted.⁶⁷

The earlier draft by Madras had a chapter on village forests. The Committee deleted the entire chapter. Brandis gave the rationale for the provision in the Indian Forest Act and Burma Forest Act,

The chapters in these two Acts are of a prospective character. They have been framed in order to enable Government eventually to arrange for protection and management of forest and waste lands, which shall yield a permanent supply of wood and fodder to villages, without any expense to the State.⁶⁸

Brandis found Madras deficient in doing even the main task of creating state forests. A provision on village forests, even a prospective one, as in the Indian Forest Act, would have been a distraction. Brandis ruled,

Not only will it be necessary to indicate the correct policy which should be followed, but this policy must have been successfully followed for a considerable number of years, before a task so difficult and delicate as that of forming and managing village-forests can be undertaken.⁶⁹

Brandis must have feared the 'misuse' of the provision. Madras could have reverted to its earlier position by assigning state forests to villages. Further, it was symbolic. Madras all along had clamoured for village and communal forests. Annihilating the category was symbolic of the complete domination of the government of India.

Madras Government was entirely subjugated. Even the members of the Council were eager to satisfy Brandis. It was stated during discussions in the Council,

⁶⁷ Memorandum by Brandis on the Proposed Bill, 3/4/1882, in Proceedings Nos. 18-27, HRA(F), July 1882, NAI.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

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... since the select committee had issued their report, the Members, in their anxiety to meet the wishes, so far as might be, of the Forest authorities, had informally met Mr. Brandis, the Inspector General of Forests with the Government of India, and discussed with him the main alterations in the Bill as settled by the Committee.⁷⁰

The Government of India now readily endorsed the draft bill, and expressed satisfaction on it being based on the Acts of the Government of India. It commented,

It is certainly desirable that the Madras Forest Act should be framed on the general lines of the Indian Forest Act, 1878, and of the Burma Forest Act, 1881...⁷¹

There were several technical problems. Madras could not pass a bill whose provisions violated any law made by the Government of India. The Government of India was patronising. It told Madras to enact the law. And the Government of India would sanction it through a special Act. Thus, the Madras Forest Act was passed by the Madras Government and sanction by the Governor-General's Council through the Validation Act.⁷²

Conclusion

The Madras Presidency, since 1860, had opposed all initiatives of the Government of India towards forest conservation. It asserted that all forests in the Madras Presidency were in the ownership of village communities. Thus, according to the Madras Presidency, the law proposed by the Government of India, which was based on regulating, curtailing and extinguishing local rights, was entirely opposed to the existing arrangement. Despite the pressure brought to bear on it, the Madras Presidency did not accept the Forest Act of 1878. Instead, it implemented its version of forest law

⁷⁰ Abstract of the Proceedings of the Council of Governor, Madras, 26/8/1882, in Proceedings Nos. 9-31, HRA(F), NAI.

⁷¹ GOI to GOM, 18/7/1882, in Proceedings Nos. 18-27, HRA(F), July 1882, NAI.

⁷² *ibid.*

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and gave away the forests in Kanara, which the state had carved for itself, to the *vargadars*. Madras Presidency had taken a recalcitrant position to assert its autonomy.

The law making itself was a site for struggle affecting the law that was made. The Madras Presidency maintained its theory for twenty years without any factual support. This is another support for the argument that official discourses could be autonomous. I have also shown that if law has to do with grand ideas, it is as well enmeshed in petty and mundane interests. We have support for this in that the officials of the Government of India were conniving backstage to dominate the Madras Presidency.

Legal discourses do not act in isolation. Discourses have to share the terrain with counter discourses to come to a conclusion. The Government of India and Madras Presidency had ultimately to resolve their contrary construction of the nature of rights in Madras. This was done by going beyond what they were saying. The reliance was again on official discourses; for example documents produced by the forest officers or by the Madras Presidency itself. A survey was proposed which was by its constitution going to support the view of the Government of India. Thus, there was nothing that was not already a part of a discourse. But the two discourses had to keep expanding their boundaries, sharing the material and information to settle the question. In this sense, conflicting discourses have to keep stretching to find grounds for resolving their conflicts.

CONCLUSION

This dissertation was a study on the making of law, legal ideas and provisions on forests in colonial India during the period 1792 and 1882. I hoped to draw insights from the study in three concurrent fields, forest law in colonial India, law and the colonial state, and modern law in general. Most accounts of law in India have tended to treat law merely as an instrument of state power or ruling classes. In reviewing the literature on law in India, social theory, post-colonial theory, and environmental history, I developed ideas, arguments, suggestions and a hypothesis for the study. The aim of the study was to refine the ideas, strengthen and substantiate the arguments, modify the suggestions and check the hypothesis. In this concluding chapter, I discuss the key ideas from the introductory chapter again in the light of my findings.

In section one, I confirm that the official discourses had a degree of autonomy in producing legal knowledge but I re-emphasise that official discourses should be located in their social and material context. In section two, I conclude that the pronouncements from official discourses could not be imposed on social practices. Thus, there was always a gap, ambiguity and co-existence of contrary ideas. I find these productive of law. In section three, I discuss how legal provisions and ideas are generated in the dispersed sites, and from there, abstracted, refined and assimilated in the existing body of law. Section four asserts that the duality of traditional and modern law is misleading and untenable. Section five is less of a summary than a speculation. I take up the theme of the 'rule of law' and raise some questions on our understanding of law in colonial India.

Conclusion

1. Legal Knowledge and Official Discourse

Knowledge is produced in discourses, and I suggested that the colonial state had a monopoly on the production of legal ideas. It pronounced ideas which suited it the best, even if there was no clear support for them. The study confirms this. In 1800-1, the Court of Directors set aside the elaborate findings of Walker on the question of ownership rights over Malabar forests. It instead pronounced the theory that Tipu Sultan had a royalty right over forests. Further, the Court of Directors argued that by virtue of being the new ruler, the Company had acquired the 'sovereign' right over public forests. In Kanara, in the 1840s Blane dismissed Munro's theory of ownership which had been in use for the previous 40 years. It was declared to be a 'mistake' and a new construction of property right over forests and wastes was presented. The Madras government adopted this view in 1860. Just a decade later, the same government declared Blane's view erroneous, and restored the earlier arrangement. It also successfully maintained for twenty years, that the forests in the Madras Presidency were the communal property of the villagers. When called upon to substantiate its claims, it withdrew them. Similarly, in 1873 Baden-Powell was emphatic that there never was any prescriptive or customary right in India. Yet just a few years later, he was upholding that the local people have always had customary and prescriptive rights in India.

The official discourses were not only independent of what they represented, they were also arbitrary, but not the entire story of the social. They are only a part in constituting the social. Reviewing the literature from social theory, I had objected to the privileging of textual production. Privileging the textual or the official discourses gives us erroneous impressions. We could infer that the Court of Directors established sovereign rights over Malabar forest. As Guha falls in the trap and argues, relying only on a section of the text, that Baden-Powell imposed his theory that the local people had no rights but only privileges on forests. Or, we would conclude that in the Madras Presidency, local people were actually co-owners of forests. We know that none of this happened.

Conclusion

The official discourses should be located in their historical, social and material contexts. We should explore the conditions in which certain ideas were produced. Further, we should examine how these ideas were received, disseminated and taken to practices.

2. Official Discourse to Social Practice

The colonial state maintained a monopoly on the production of legal knowledge. It forged theories and ideas most suited to its needs. But the theories could not be imposed to significantly alter the practices. Thus, the social practices, irrespective of their representation, could continue without major restructuring. What then was the use of developing a theory if it could not change practices? Development of a theory was no guarantee of its success in practice. But it created the potential for circulation of the theory and the subsequent transformation of the social practices. I have suggested that these gaps are productive of law.

I illustrated this in chapter two. The pronouncements of the Company's 'sovereign' rights over public forests made in the official discourses were taken to the Malabar forests. A bridge was made between the discourses and practices through the provision of a pension for the 'alleged' proprietors. The local people constructed the pension as a continuation of their *kutty kanam* rights, while the Bombay government and the Court of Directors claimed that the Conservatorship had established the 'sovereign' right over 'public' forests. The conflicting interpretations tended to extend their domains. Through these processes, social practices subverted the extension of official discourses. The Company could not establish its rights over forests. At the same time, official discourses extended over practices to establish the categories of public and private for understanding the property rights.

Conclusion

I feel inclined to speculate from this about the nature of law in general. In this study, I have covered a very specific time, place and subject. With caution and qualification, I could ask if the monopoly of the state over production of legal knowledge and its relationship to social practice is a general condition of law.

Several sites for production of legal knowledge are situated within the state. In fact, the entirety of the state is synonymous with the production of law and legal knowledge. In other instances, an opinion can acquire the status of knowledge or truth only by passing the 'examination' and the endorsement of the state, most notably through the Courts. The procedures for who can scrutinise and 'authorise' legal knowledge have been laid out. Transgressions, for example, appropriating the role of examiner, by giving an opinion on a matter pending before a court; or examining the examiner by commenting on a judgement can attract 'contempt of the court' and other punitive clauses. Similarly, disagreement with the authorised legal knowledge as 'truth', manifested through defiance, is liable for punishment. I am not interested here in asking why the state must have this monopoly over law. In contemporary societies, state and law are synonymous. The very fact that the state rules, gives it control on the production of this truth. To problematise law at this level is to ask as to why should the state exist.

What does the state do with this monopoly? Law has a fascination for principles and theories. Specific cases and problems are brought by litigants or complainants before courts and governments. For these persons, the outcome of the case is important. After all, that is what they had come for. For the institutions of law, not the outcome in specific cases, but the principle and theory of law is important. These institutions are supposed to be disinterested in specific results. Their proclaimed concern is upholding the legal principles and precepts. For a court, it is the 'ratio' of a case that is important.

But the monopoly over production of legal knowledge is no guarantee of its success. The state can fabricate ingenious legal ideas but it cannot put them into immediate use. Thus,

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a perennial gap between the official discourses producing legal ideas, and social practices is created. The official discourses attempt to bridge the gap. I think, in general, these contradictions, ambiguities and co-existent of different ideas are productive and generative of law.

3. Law, Strategy and Ideology

The legal provisions are enacted by the state and legal ideas circulate on the initiative of an apex site within the state. These facts in themselves are important. But it would be inadequate if we were from this to say that the state was the author of provisions and ideas. I advanced the argument that both, the legal provisions and ideas, emerged from practices. These are abstracted from these sites, refined, assimilated and re-circulated. I will re-establish the different connections that work here.

3.1 Strategy and Ideology

Strategies are formed in certain context of ideas, belief and ideologies, including legal ideas. I have shown in the preceding chapters how legal ideas conditioned and shaped the strategies. The administration in Kanara had no means of realising revenue within the ideas on property set by Munro. The Forest Departments could not create exclusive reserves during the 1860s within the legal ideas which respected the prescriptive rights of the local people. Within the prevalent ideologies, forest officials could not be given powers of a Magistrate. Thus, ideologies constrained and facilitated the creation of strategies.

In this process, ideologies were also revised to facilitate accommodation of strategic devices. My suggestion is that the changes in ideologies are produced in the dispersed locations. For example, in Kanara, the Board of Revenue and Company officials,

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constrained by Munro's legal ideas, described the *vargadars* as fraudulent. They asserted that the records were produced by colluding with the local accountants and thus, unworthy. The forest officers were inhibited by the legal ideology of prescription. They were jostling with it. Brandis described local rights as 'vague' and 'undefined'. Amery argued that there could be no right of prescription on public property. Similarly, he was trying to create a new basis for understanding property. Thus, strategy and ideology are related to one another.

3.2 Abstraction of Ideologies

How do official discourses assimilate ideas? My general argument is that the top layer of the administration does not invent ideas. I will state different concepts related to the working of official discourses.

I argued in the introduction that the production of ideas is not idle and speculative. People in specific context engage with concrete situations to produce certain results. In this sense, knowledge is always interested. Macknochie insisted on 'royalty' and sovereign rights of the company on public forests to draw benefits from the Company. Walker privileged and advanced the theory of *jenmkar's* birthright in the soil. This was a means to favour the *jenmkars* to mobilise their support to neutralise the influence of the *rajas* in Malabar.

Baden-Powell advocated the use of the local theory from India. He argued that in India, local rulers were the exclusive owners of forests. Through deployment of this idea, he could claim that the use of forests by the local people was only a 'privilege' and not a right. Thus, the state was free to extinguish this use. This was to serve in the interest of the Forest Departments in creating exclusive reserves. It was for the same interest that he entirely abandoned this theory and embraced the idea that the use of forests in India by the local people was always based on prescriptive rights. Similarly, the Madras

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Presidency was holding on to the idea of the forests being communal property to wrest legislative powers from the Government of India.

So far, I have established two concepts. One, that ideas are generated to derive certain desired results, and two, that ideas are produced in dispersed sites. I will elaborate the working of these processes further. Ideas are not displaced entirely and at once by another well developed, pre-fabricated idea. Over time, several small things contribute to it. It is commonplace that the law changes with changing social and material conditions. The question, however, is the relationship between the two. We should not see the changes in social and material conditions from a distant 'objective' perspective, and from this, try to see the changes which constituted the law. Instead, we should explore how changes are registered in discourses. Law does not have logic of its own. Rather, the discourses invest it with logic. With the incongruity between the social and material condition and law, the settled law is made to seem incoherent, incongruent and illogical. The gaps and ruptures within the law are pointed out, discussed and analysed. The stage is then set for a systematic attempt to re-organise it to make it 'logical', 'consistent' and desirable'. The actors in the preceding chapters, particularly, Walker, Blane, Baden-Powell and Brandis were mastering these techniques.

One modality of bringing this about is to deny outright and disclaim the existing law. This can include a demonstration that the law was based on wrong facts, it was wrongly derived or the issues were not adequately understood. Another modality is to search deeper into the 'foundations' and 'origin' to find a basis to demolish the existing law. The questioning of the existing law creates the space for accommodation of alternatives to the legal ideas.

Alongside the demolition of the existing legal idea, an alternate idea is forged. Blane did not replace an entire theory in one block by a new one. Different ideas were taken and discarded in different ways. Blane argued that since *kumeki* land was for supporting

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agriculture, there could be no independent right on it for the *vargadars*. Thus, of the network of ideas, one was demolished by promoting this theory based on use. Similarly, Kanara was compared with the neighbouring areas to discredit the existing law. Another argument was to assert that *varg* was not a statement of ownership but only an account. Again, he raised the distinction of rent and tax to argue that the *vargadars* did not have a right on the shifting cultivation land.

During the 1860s and 1870s, the idea of prescriptive right was not replaced by another pre-developed coherent idea. Over a period of time, the idea was eroded and the new theory of forest rights developed. Baden-Powell asserted that for claiming prescriptive rights, a person should have exercised undisputed use for twenty years with the intention of creating the right. He argued that the forest users never intended to create a right for themselves. Baden-Powell, thus, alleged that the local use of forests was not a prescriptive right. Similarly, he made the distinction between right in 'theory' and practices to claim that even if the local people since the time immemorial used the forests, these were the exclusive property of the state. When this did not work, the theory of customary right was borrowed from the European law. Similarly, in Kanara, in 1850s, we saw that Fisher sometimes claimed that social practices were superior than abstract legal theory. In other situations, 'law' as theory and idea was privileged over social practices. Thus in the official discourses, from the womb of a given idea, new ideas emerge.

My argument is not that people like Baden-Powell, who were considered as legal experts, were mere collators of ideas developed in the dispersed sites. I do not doubt anyone's inventiveness. But this imaginativeness itself is in picking up ideas from practices, grafting then, refining then, and justifying them in the existing tradition of ideas and literature. I will summarise here how, for example Baden-Powell, did this.

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Baden-Powell relied on his experience as the Conservator of Forests of Punjab, meeting with forest officials and taking stock of reports from the different provinces. Baden-Powell first assimilated his theory under the well-accepted idea that India should be ruled according to its own laws. Brandis gave the disjointed idea that forest use in India was like customary use in Europe. Baden-Powell justified and systematised this idea. He argued that the European law had the advantage of rigorous scholarship. It would thus always be beneficial to compare and benefit from such a body of knowledge. He also justified the 'normality' of the law and mitigated its harshness by arguing that even the European peasants complained against these laws. The concept of customary law, which was introduced as the best means of imposing restrictions, was turned into a different ideological light. Baden-Powell later projected it as an example of the liberality and the humane tradition of Western law. The task of revising and taking stock is never complete. Baden-Powell then urged the forest officers that the Magistrates would be unaware of these theories and they should be educated.

3.3 Abstraction of Provision

I argued in the introductory chapter that legal provisions arise from practices. To take a few examples, the Bombay Presidency came up with restrictions on transit of forest products. Bombay Presidency was interspersed by the territory of the local rulers. As a result, it was becoming difficult to protect pilfering of timber and realisation of revenue. Imposition of transit restrictions was a strategy to outflank the person pilfering the forests. Brandis and Baden-Powell picked up the provision from there and assimilated it in the Forest Act of 1878. The elaborate provisions on commutation of forest offences came from the constraint that the Magistrate's courts were far away from the inaccessible forest areas. Taking a case before a Magistrate could lead to the forest officers being away from their forest jurisdiction for days. The strategy of commuting offences came from this constraint. The elaborate provisions for the settlement of forest

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rights came from intense measures by the forest officers and civil officers to outflank one another.

I also stated that after extraction, these strategies were refined. In the course of taking comments from the officers all over India, the proposed provisions, initially drawn from a particular location, were purged of their peculiarity by bringing in other experiences. There were minute details, for example, that records on forests would be kept in the Collector's office and not the Conservator's office. In this process of filtration, law was refined and became a register of social power. I want to state this more generally. We know that the state makes the law. But where do the legal provisions come from? The social is organised around law. Around the given law, in the latitudes of its interpretation, even violation, actors form their strategies and counter-strategies, to outflank one another. These become generative of the new legal provisions.

4. 'Modernity' and 'Tradition'

The binary duality which 'modern' law has created with 'traditional' gives a sense that we can specify a date and period from which we can see the inauguration of modern law. Prior to this, in the timelessness of 'tradition', there was no law as we would understand it. But 'modern' law did not install itself. Instead, it was forged together by picking up diverse elements from the local law. The colonial contact was not an encounter of two diverse spheres. Diverse elements from local society and what the British brought with them were selectively unfolded and strategically deployed to achieve certain results. The movement of law was towards producing specific results rather than the sanctity of western-modern ideas vis-à-vis local ideas. As this process went along, the positive attributes were paraded as a part of Western-Modern law, and a bleak past invented as tradition to demonstrate the triumph of modernity.

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In counter-posing itself to 'traditional' law, 'modern' law has lost its self-reflexivity and criticality. It has been asserted that the law in pre-colonial society was flexible and adaptable. In contrast, the colonial (modern) legal system was structured, written, given and thus, inflexible. The distinction is very much based on a dichotomy of traditional:modern and Pre-colonial:colonial. Thus, the traditional society could readily accommodate the rise of social forces, while, in the modern one, the rising social forces registered more distinctly, and were accommodated with many contradictions and tension.

The colonial administration completely overturned the forest law and its meaning several times. To categorise law in the duality of traditional:modern is misleading. Law has to be within two limits. If it is highly flexible and malleable, it forfeits its relevance and social life would be chaos. On the other hand, if law is rigid and inflexible, it again loses its relevance to interpret and bring order in social contradictions. No society can be completely unchanging and static. Instead of judging the flexibility of a legal system, it is more interesting to see how law manages to change and yet legitimate its relevance as given, fixed and definite.

But is it not true that these representation themselves are important? Do we not all the time make such summary statements and judgements? As Chakrabarty argues that 'Europe' and 'India' (Modern and Traditional) very much remain as figures of imagination and geographical referent even if the analyst have dissolved the notion of modern and tradition. He says that a phenomenon does not disappear simply because some have attained critical awareness of it. But we can be reflexive about it. We recognise that the colonial official could congratulate themselves for having introduced 'rule of law' by constructing India's past. An assertion that there was no 'rule of law' in colonial India is from the vantage point that coloniality is behind us and India is a democratic republic with a modern Constitution. And it is from the vantage point that

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India is supposed to have 'rule of law' that one laments at the contemporary 'Crisis of the Indian Legal System'.

GLOSSARY

Ameers	Rulers of Sindh.
Azmaish	Trial.
Bijavari	Estimate of crop from the amount of seed sown.
Brahmin	A social class, associated with priesthood and scriptures.
Chali-gainis	Temporary tenancy. Also written as 'gueny'.
Chauth	Fine.
Gaini-varg	A rented estate.
Ghats	Hill ranges.
Jamabandi	Statement of the amount of revenue assessed upon a estate or a village.
Jenmkar	Land owning class in Malabar. Related words, janmis, janman, and jenm.
Kawl	Contract document.
Kulnasht	Agricultural land deserted by cultivators.
Kumeki	Land in Kanara used for drawing fuelwood and manure.
Kumri	Shifting cultivation.
Kurnums	Accountant.
Kutty Kanam	Fee for felling a tree.
Magnis	A division of a district.
Moppilas	The Muslim population of Malabar.
Mul-gainis	Permanent tenants.
Muli	Original.
Mulpatta	Original lease document.
Mulvarg	Original estate.
Mulvargadars	Original owners of land.
Naib	Assistant.
Nair	A social group of Malabar.
Nuzzarana	Gift.
Pagoda	Temple, also a local currency in Malabar in 1800.

Patta	Lease document.
Piyamashee	Measurement or measured.
Poligar	A social group in the Southern India.
Rajas	Local rulers.
Rekah	Literally a line, referred to total assessment on land.
Rekahnasht	Immemorial wasteland.
Ryot	Cultivator.
Ryotwari	A system of land settlement where revenue charge was made directly on the cultivator.
Sanad	A written document of right.
Sarkar	Government.
Shanboghs	Accountants.
Sheristedar	A revenue officer.
Shist	Assessment.
Taluka	A division of a district, also spelled Talooka.
Talukdar	One who heads a Taluka
Tehsildar	A an official entrusted with revenue administration.
Varg	Estate.
Vargadar	Holder of a estate in Kanara.
Zamindar	A landholder.

CHRONOLOGY OF EVENTS

- 1792 Bombay Presidency gets the charge of Malabar; Joint Commissioners appointed for the administration of Malabar.
- 1799 Fall of Tipu Sultan at Seringapatnam. Kanara ceded to the Madras Presidency. Munro takes the charge of the Collectorship of Kanara.
- 1800 Court of Directors declare Company's rights over the Malabar forests. Munro writes two minutes on Kanara which become the basis for the administration.
- 1801 Read becomes the Collector of Kanara.
- 1806 Forests of Malabar and Kanara transferred to the Bombay Presidency. Watson appointed Conservator of Forests for Malabar and Kanara. Watson establishes office in Malabar.
- 1807 Conservatorship established in Malabar and Kanara.
- 1815 Bombay Presidency submits a draft regulation on Malabar forest.
- 1817 Harris becomes the Collector of Kanara.
- 1822 Munro becomes the Governor of the Madras Presidency. Babington takes charge of the Collectorship of Kanara.
- 1823 Abolition of Conservatorship in Malabar.
- 1830 Riots break out in Kanara.
- 1842 The Court of Director's disclaim rights of the Company on Malabar forests.
- 1847 Blane writes his first report to the Board of revenue. Gibson appointed the Conservator of Forests for the Bombay Presidency.
- 1848 Blane's second report to the Board of Revenue.
- 1849 Blane's third report to the Board of Revenue.

- 1857 Mutiny, war of Independence.
- 1858 Transfer of the administration of India to the Crown. Fisher submits report to the Board of Revenue. Cleghorn appointed the Conservator of Forests for the Madras Presidency.
- 1960 Madras Government rules that the forests in Kanara were the property of the state
- 1862 Creation of forest establishment within the Government of India.
- 1863 Brandis appointed the Inspector General of Forests with the Government of India.
- 1865 Enactment of the Forest Act of 1865.
- 1868 First draft forest bill and memorandum.
- 1869 Second draft forest bill and memorandum.
- 1870 Robinson's minute emphasising the rights of the landholders in forests in Kanara.
- 1874 Madras Government gave orders to give back forests to the landholders of Kanara.
- 1875 Third draft forest bill and memorandum.
- 1878 Enactment of the Indian Forest Act, 1878.
- 1882 Enactment of the Madras Forest Act.

APPENDIX 1

A NOTE ON THE STATE AND ADMINISTRATION IN COLONIAL INDIA, 1790-1880

The East India Company (EIC) started as a trading Company. Its structure was oriented towards trade than administration of a territory and population. When it acquired the provinces of Bengal, Bihar and Orissa in 1760s, it considered itself an inheritor rather than an innovator. The existing structures were stretched to accommodate the local arrangements for governance. With experience, the administrative arrangements of the Company changed in subsequent years. The first major change came with the Regulation Act of 1773.¹

1. ADMINISTRATIVE RELATIONS

1.1. REGULATION ACT OF 1773

The Regulation Act of 1773, (enacted by the British Parliament), provided for a Supreme Government of India with a Governor-General and four Councillors. The Governor-General's Council had the primary responsibility for governing the revenues, territories and administration of the Bengal Presidency. The Governor-General and Councillors were appointed for terms of five years. They could be removed only by the King on the recommendation of the Court of Directors of the EIC. The Regulation Act of 1773 also authorised the Governor-General's Council to make and issue rules, ordinances and regulations for the good order and civil government of the Company in Calcutta. The Act expected the enactments to be just and reasonable, and not repugnant to the laws of England.

¹ This notes is based on Misra (1959), Misra (1970) and Stokes (1959). See these sources for details.

The Governor-General's Council was also given controlling authority over the Presidencies of Madras and Bombay. The Presidencies were prohibited from waging wars without the consent of the Governor-General and Council. Parliament gave itself a degree of control over the functioning of the East India Company. The Governor-General's Council was to keep the Court of Directors regularly informed through despatches and the directors were to submit to a Secretary of State for advice on matters related to civil, administrative and military affairs in India.

1.2. PITT'S ACT OF 1784

The administration was further modified through Pitt's Act of 1784. It provided for a hierarchy of political executives, beginning from the London Government through the Supreme Government in India to provincial or local governments. The Home Government in London consisted of a Parliamentary body of six 'Commissioners for the Affairs of India' known as the Board of Control. A Secretary of State was the President of the Board of Control. The Board of Control was the instrument for control, direction and supervision over civil, revenue and military administration in India.

To strengthen the hands of the Governor-General, Pitt's Act reduced the number of Councillors to three. An amendment in 1786 invested the Governor-General with the powers to override the decision of his Council under certain conditions. The appointments of Governor-General for the Supreme Government of India and Governors for Madras and Bombay Presidencies were made by the Court of Directors with the advice and approval of the Board of Control.

In the subsequent decades, several territories were acquired. Madras and Bombay Presidencies expanded. New local governments, for example, North-West Provinces, were created. The conquest and acquisition of territories raised serious financial and administrative problems. The recurring deficit in the Indian finances and the heavy public debt incurred to meet the acquisition of territories directed the necessity of

drastic reduction in the cost of administration. There were additional problems. The monopoly of the East India Company was abolished in 1833 under intense pressure from private traders. It was clear that the opening of Indian markets would lead to an influx of British subjects, requiring reform in law to regulate and control them.

1.3. CHARTER ACT OF 1833

The Charter Act of 1833 brought about these changes. It vested the administration of the whole of British India in the Governor-General in Council. The Council was authorised to supervise, direct and control the entire civil, revenue and military government of the whole British territories in India. The Council consisted of the Commander-in-Chief and four ordinary members. Three of the Ordinary members were to be appointed by the Company from among its servants of more than ten years' experience. The fourth member was called a Law member, appointed with the approbation of the Crown.

The Governor-General in Council had unlimited powers to make laws. The Act of 1833 provided that the Council could make laws for all persons, whether British or local, foreigners or others, and for all courts of justice. The only limitation was that the Council could not repeal or overrule law made by the British Parliament. The expansion of the legislative powers of the Governor-General in Council was at the expense of the Bombay and Madras Presidencies. The legislative power of these Presidencies were taken away. They could only propose drafts of laws and regulations for consideration by the Governor-General in Council. The centralisation of power extended to the financial arrangement also. All the revenue was appropriated by the Supreme Government. The Presidencies and local governments had to submit annual budgets for the approval of the Supreme Government. The Supreme Government disbursed finances to the subordinate governments according to the approved budget. This modality was devised to reduce the cost of administration of the Company.

1.4. POST-MUTINY CHANGES

Following the Mutiny of 1857-8, the administration of India was brought directly under the Crown. The powers of the Crown were exercised by a Secretary of State, a minister of Cabinet rank. The Secretary of State with a Council of 15 members formed the Council of India. The Secretary of State in Council took over the combined powers of the Court of Directors and the Board of Control.

The executive powers of the Governor-General in Council were strengthened. The Governor-General was authorised to appoint 6-12 additional members, half of them non-officials, including European and Indian, 'to be members of the Council for the purpose of making Laws and Regulations only'. They were not entitled to sit or vote in ordinary meetings. The legislative powers which the governments of Madras and Bombay enjoyed prior to 1833 were restored to them. The Governor-General in Council was empowered to devolve legislative powers to other local governments like Bengal, North-West Provinces or any other province placed under a Lieutenant Governor. These local councils (including Madras and Bombay) were not to legislate on subjects like public debt, public revenues, coinage, post and telegraph, the penal code, religion and usage of Indian subjects, armed forces, patents and copy rights, and relations with foreign governments and Indian states.

1.5 OFFICERS AND INTERNAL ARRANGEMENT

The administration of the Supreme Government and Presidencies and local Governments was done through several departments. In the early years of Company rule, there were departments like military, public and Revenue. As the activities of the administration expanded, the departments diversified. The new departments included education, agriculture, forests, railways and irrigation. A Secretary headed each department. In the portfolio system after 1833, different departments were assigned to members of the Council for supervision and control. The departments suggested measures and proposals for law making. These were then taken up by the

Law Department for consultation and drafting of law to be put up to the Governor-General in Council.

In the early Company period, the Directors of the East India Company appointed writers for the Company. Appointments to the Company were a matter of patronage dispensation. Increasingly, the patronage came under some control. In 1853, provision for open competition for appointment to a covenant position in the Company was made. With this, the powers of the Directors to nominate candidates ceased altogether. The service evolved to be called the Indian Civil Service. For provinces, it came to be called Provincial and Subordinate Civil Service. Earlier, only Europeans were employed, but from 1830s, Indians came to be employed in subordinate positions. The Company recognised that it was more efficient and economical to educate and employ Indians in subordinate positions than to get them from England. As the numbers of Indians in employment increased, their chances for acquiring senior positions became a contested issue.

2. REVENUE ADMINISTRATION

The principal source of revenue for the ruling power in India was agriculture. Thus, the settlement and collection of land revenue was important. This involved the decision of who, among the rival candidates, was to be accepted as entitled to settlement, and on what terms was this settlement to be made. The relations on land varied from region to region. Often, there were several layers of interest, starting from the cultivator of land to the ruling powers. Further, these arrangements were perpetually being reorganised. The peasant cultivators as tenants and rent payers constituted the base of the hierarchy of landed interests. They were generally the descendants of former dispossessed proprietors or they had been located by proprietors of their estates. On top of the hierarchy of landed interest in Bengal stood a class of persons known as *zamindars*. These persons were the descendants or representatives of ancient chiefs and nobles, military chiefs, and a considerable number of middlemen called assignees. In between the cultivating tenants and the

superior landholders, there existed a class of subordinates. Their relationships above with *zamindars* and with peasants below were complex and changing.

British rule, as it acquired territory, had to come to a decision on land tenure. What was the 'truth' of land tenures in India was a matter of much contention within the Company administration. The first province that came under the control of the Company was Bengal, Bihar and Orissa. Lord Cornwallis, the Governor-General in 1793, despite opposition within the administration, ordered that land settlement should be made in perpetuity with the *zamindars*. The British land policy was to create property in land through legislation and build a hierarchy of courts to enforce property rights. The system was called 'Permanent Settlement' because the revenue due from the *zamindar* was fixed forever. The system was introduced due to the difficulties experienced in the prior years. Earlier, the revenue collection was farmed out annually. This had led to decline of agriculture. By fixing revenue in perpetuity and creating property rights, it was hoped that the *zamindars* would improve agriculture. Further, the corruption of the Company officials was a problem. Fixing the revenue in perpetuity took away the discretionary powers of the Company officials and thus, reduced the opportunity for extortion.

The other territories that came under the Company control were in south India. The Permanent Land Settlement system was taken to parts of south India called the Northern Circars. There were pressures to introduce the Permanent Settlement as more territories came under British control in south India. However, officials of the Madras Presidency, mainly Thomas Munro, insisted that land tenure in south India was different from that in Bengal, Bihar and Orissa and thus, the Permanent Settlement was not suitable. He argued that it was *ryots* (peasant cultivators) with whom land was settled in the pre-British period. In this arrangement, the state became the owner of land and the *ryot* the perpetual lessee. The proposed system came to be called *ryotwari* settlement. In this arrangement, the state took the land revenue directly from the *ryots*. After a decade of debate within the Company administration and authorities in London, it was decided in the 1810s to introduce *ryotwari* settlement in southern India. There were factors that supported this. The

wars had escalated the cost of administration. It was recognised that under Permanent Land Settlement, the Company had forgone the discretion of increasing revenue. A crucial aspect of the land settlement was creating courts that could then enforce the property rights.

3. ADMINISTRATION OF JUSTICE

The need for institutions for administration of justice had arisen with the very first factory settlements in India. The factories had King's Courts. The jurisdiction of the Court extended over the English subjects residing in the factories. Later, Mayor's Courts were established in the Presidency towns of Calcutta, Madras and Bombay. These courts had civil and criminal jurisdiction over all persons residing within these towns. An appeal from these courts lay with the Governor in Council and from him to the King in Council (Privy Council).

The Regulation Act of 1773 abolished the Mayor's Court of Calcutta and established the Supreme Court of Judicature at Fort William. The Supreme Court of Judicature had a Chief Justice and three judges. Its jurisdiction extended to all persons in Calcutta and all British subjects in the province of Bengal, Bihar and Orissa. In administering personal law for the local people residing in Calcutta, the court followed Hindu and Mohammedan laws depending on the religion of the person. Similarly, in Madras and Bombay, the Mayor's courts were abolished in 1797 and Courts of Records were established.

With the control of the province of Bengal, Bihar and Orissa, the Company also acquired the responsibility of administering justice to persons. In the pre-British period, the local rulers and the state functionaries administered justice. The Company followed this system. The Collector of the district was responsible for revenue collection as well as judicial functions. In 1793, Lord Cornwallis introduced an entirely different system. He was interested in purging the corruption and extortion by the Company officials. The Permanent Land Settlement had taken away

some of the discretion of the Company officials. Divesting the executive of judicial functions was a further measure to clip the powers of the Company officials. Courts were created in the districts with jurisdiction over all criminal and civil matters. All local people came equally under its jurisdiction. Even government, when a party with its subjects in matters of property, was bound by the decree of these courts of justice. Cornwallis thus laid the foundation of an independent judiciary. This was also to secure the sanctity of private property conferred upon the landlords under the terms of the Permanent Land Settlement.

The Cornwallis Code provided for a three-tier structure. *Zilla* (district) and City courts were at the bottom, the Provincial Courts of Appeal in the middle, and the *Sadr Diwani* (civil) and *Nizamat Adalat* (criminal) on the top. These apex courts had a member of the Governor-General in Council as the Chief Judge and two covenant judges. The courts enforced laws derived from very different sources. The regulations of the government were one source of law. In suits and complaints regarding succession, inheritance, marriage, caste and all religious usage and institutions, Hindu or Mohammedan laws were followed. In other cases, the sense of justice, equity and good conscience was followed. In the early years, the courts employed *pandits* (learned in Hindu texts) and *maulvis* (learned in Islamic texts) to provide expert opinions from their religion on matters before the court. The judges, however, resented their dependence on these persons. Lord Cornwallis commissioned William Jones to prepare digests on local law from scriptural sources. With time, precedence developed and the administration of justice acquired a body of knowledge and continuity. The courts increasingly came to borrow many features of the English courts. This included use of stamp papers, presence of pleaders and lawyers, and adversarial modes of adjudication. The judiciary in Madras and Bombay Presidencies developed on similar lines.

The Courts followed local laws and customs which were unwritten and undefined. There were enormous variations and thus, uncertainties in judicial determinations. Further, law paid deference to antiquity of religion and caste, the basis of local custom. The necessity of a general code of law was recognised. As noticed earlier,

the Charter of 1833 created the position of Law Member in the Council of the Governor-General. In addition, a Law Commission was created to work on codification of law. The work of the Commission resulted in the enactment of several pieces of legislation including the Code of Civil Procedure, 1859, Limitation Act, 1859 and Code of Criminal Procedure, 1861. These codes did away with regional and local variations.

After the transfer of the administration to the Crown, the Indian High Courts Act, 1861, abolished the Supreme Judiciary, *Sadr Diwani* and *Nizamat Adalat*. In its place, High Courts were created in Calcutta, Madras and Bombay. In the post-Mutiny period, the codification of law and legal enactment became brisk. In conjunction with a new system of judiciary, the administration of justice developed a firmer foundation.

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Despatches from Governor in Council to the Court of Directors

STATE ARCHIVES TAMIL NADU, MADRAS

Proceedings of the Madras Board of Revenue

Malabar Diaries

NATIONAL ARCHIVES OF INDIA, NEW DELHI

The administration of forests was attached to several departments between 1862 to 1882. For this period, the proceedings of the following departments were relevant.

Public Works Department (Forests)
Revenue and Agriculture (Forest)

Revenue, Agriculture and Commerce (Forest)
Home, Revenue and Agriculture (Forest)

The other proceedings include,

Proceedings of the Legislative Department
Home Consultations
Correspondence between the Government of India and Secretary of
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