

THOMAS DUVE (ED.)

Entanglements in Legal History: Conceptual Approaches

Clara Kemme

The History of European International Law from a Global
Perspective: Entanglements in Eighteenth and Nineteenth
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The History of European International Law from a Global Perspective: Entanglements in Eighteenth and Nineteenth Century India

1. Introduction

At present, international relations are globally organized according to the principles of international law. The interaction between states is defined by this multilayered legal framework which is generally recognized by the international community as the main applicable system to regulate relations between states. However, it is only since the twentieth century that such a universal normative system has truly organized the relationships between states around the globe. During the nineteenth century international law as it was construed by European and American publicists, asserted that international law applied only to civilized sovereign states that composed the “Family of Nations.”¹ The appropriation of this normative order by non-Europeans led to its universalization at the beginning of the twentieth century.² Although international law theorists today reject nineteenth century positivism, basic conceptions of state, sovereignty and territorial exclusiveness still form the groundwork for the present international law system.³ Yet there are voices which propose a more pluralistic approach to international law which allows space for values which are derived from non-European traditions.⁴

The history of international law has predominantly focused on the history of European international law, leaving out of consideration normative

1 ANGHIE (2005) describes how in the nineteenth century the cultural differences between non-Europeans and Europeans were emphasized to create a closed international society.

2 See BECKER LORCA (2010) for a description of how non-European lawyers from, for example, Japan and Argentina appropriated European international law theory.

3 KOSKENNIEMI (2001) and KENNEDY (1996) describe the evolution of European international law during the nineteenth century.

4 See, for example, the work of Onuma, especially ONUMA (2000).

orders regulating the relations between polities outside Europe or the relations between European states and non-European entities.⁵ While at present international law is accepted as a universal order, the study of its history is often geographically limited to Europe and thus strongly regionalized. The history of international law is seldom studied from a global or transregional perspective, which in the end is in contradiction to its historical outcome. European states already before the twentieth century interacted intensively with non-European polities; however, the norms that dictated these interactions have not yet been sufficiently studied. Were these norms identical or similar to the norms that regulated the relations amongst European states? Were they part of another regional normative system or did these relations create a new kind of normative order? This article will discuss the relations between the British East India Company and Indian rulers from the mid-eighteenth century onward in order to answer these questions. It shows that a global perspective on the history of international law can be fruitful, contributing to a better understanding of the legal organization of international relations in the age of empire outside Europe and highlighting the particularities of nineteenth century European international law. It was the intensification of global relations that led to a regionalization of European international law. In a period when the European Law of Nations became more elaborate and institutionalized and at the same time the Europeans learned more about non-European customs, international lawyers began to emphasize the particularity of European international law. However, it was not uniquely the Europeans that had developed a system regulating inter-state relations. Other world views in different regions also laid down principles of inter-state conduct.⁶ When Europeans set sail to trade in other parts of the world they were confronted with new cultures and different normative orders. In order to be able to achieve their goals they had to find ways to on the one hand protect their own rights as they were accustomed to in their homelands and on the other hand to comply with the rules set by the host authorities. In the sixteenth and seventeenth century,

5 The opinion that international law was an European concept remained commonly accepted by authors like VERZIJL (1955), KUNZ (1955), and RÖLING (1960). More modern authors who do not consider colonialism of significant importance for the shaping of international law are BEDJAOU (1991) and BRIDGE/BULLEN (2005).

6 ANAND (2006).

unless agreements for extra-territoriality were convened, the Europeans participated in the various regional systems existing in Asia.⁷ However, European international law became increasingly entangled with these regional orders in the eighteenth century and more persistently in the nineteenth century, creating new dynamics and in the case of India a new system for regulating relations between states.

Indeed, in Asia, before European hegemony, the interactions between polities were regulated according to specific world views. The main normative orders which regulated Asian states in their interactions were the Islamic system of international law, the Hindu system of international law and the Chinese tributary system – also named the Confucian system of international law. While the Chinese tributary system was the dominating normative system in East Asia and parts of Southeast Asia, Hinduism and Islam influenced South- and Southeast Asia, sometimes intersecting with each other in the same regions.⁸ Scholars of the history of international relations in Asia have studied the interactions between states in East Asia, describing the central function of China in regional exchange. However, there is less extensive literature on the interactions between states in South and Southeast Asia outside the European colonial system. Although it is known that the Europeans, when they arrived in Asia, did not immediately impose their own legal systems on local societies, but initially participated in the existing regional systems, the process from a participation of Europeans in regional international orders to the imposition of European international (and, in part, municipal) law has not been sufficiently studied. This paper attempts to describe this process for the Indian sub-continent by analyzing how Britain extended its political and legal control over Indian states, and how little by little the Indian international system was rooted out and later substituted by a new regional system. Yet, the Indian system was not immediately substituted with the European Law of Nations. In a period of transition in which the East India Company gradually became the paramount power in India, new norms regulated the relations between Indian rulers and the British authorities in India, which might have been similar to the European Law of Nations but retained a distinct character. It was this system that gave the Europeans the tools to deprive the Indian states of their legal personality

7 ALEXANDROWICZ (1967).

8 FAIRBANK/TÊNG (1941).

in international law. However, the Indian states for a long period continued to regulate the relations amongst themselves according to the Indian international norms.⁹ European international law, finally, only fully applied to India again when it was recognized by the international community as an independent state in 1947.

This paper will hence begin with a brief outlay of the international political system which existed on the Indian sub-continent when the East India Company became a regional political power in India. It will then continue with a depiction of how Indian states were progressively deprived of their legal personality in international law in practice and how this was legitimized by the British government or Company employees on the one hand and the British international lawyers on the other. In this connection, I will take account of how the Indian political system adapted to the changing situation of international relations. Finally, the paper discusses the disadvantage of comparative history for understanding the position of European international law from a global perspective. Juxtaposing theories of various normative orders can be valuable for a history of ideas but less for a global legal history. Rather, in order to unveil how and why European international law became universal, it seems more suitable to trace the entanglements of plural normative orders in certain regions.

2. The Indian international system and the Mughal Empire

The international system which prevailed in India when the British East India Company became a territorial power was a polycentric system of diverse polities. The polities maintained a tributary relationship with each other. From the smallest units, estate holders (*zamindars*) who possessed many but not all attributes of what we would call sovereignty, to large states with a complex administrative system, from self-administering villages and nomadic tribes to a paramount empire, the hierarchy of the suzerain and the vassal trickled down the echelons to create an extremely complex international system. These polities differed significantly in size, population, leadership, administration, and ethnicity. It is difficult to categorize these states

9 My thesis herewith confirms Lauren Benton's argument that the concept of 'legal pluralism' can be an effective heuristical tool to identify "patterns of structuring multiple legal authorities" in colonial history. BENTON (2002).

without falling into arbitrary generalizations. For this reason, only the largest entities, which were indeed recognized to be states even by nineteenth century European criteria, will be looked at in this paper. Cases were chosen as to their degree of interaction as major states with the British. This makes the interpretation of the significant changes in the international system of India in the late eighteenth century and the first half of the nineteenth century more comprehensible.

In European international law the marks of an independent state were that the community constituting it was permanently established for a political end, that it possessed a defined territory, and that it was independent of external control.¹⁰ Also, the sovereign had to be competent to make peace and war and to enter into engagements.¹¹ In India there were several polities that fulfilled these criteria, that is why they will be referred to as Indian states in this article. However, it is the question whether these polities were indeed recognized as sovereign states in the scope of international law by European lawyers and policy makers. The answer will be discussed here.

From the sixteenth century until the British Crown's administrative assumption over India in 1857 the nominal suzerain of the Indian subcontinent was the Mughal Emperor. He was completely independent of any authority and held his title to his territories by conquest and later by right of descent, as his throne had become hereditary. The emperor not only directly ruled his own territories, but also received the allegiance and tribute of other dependent rulers. These vassals were Indian states which were independent to the extent that they could manage their internal affairs but had to give the Mughal Emperor military support in times of war. The emperor would grant revenue rights to a *mansabdar*, the rulers of the most powerful Indian states, thus giving them key positions in the imperial administration. The *mansab* was not hereditary and the emperor could take it away from his vassal. These vassals would then in turn assume the position of suzerain over the smaller states within their region, which were also to swear allegiance, collect taxes and pay tribute. The right to collect taxes was given by each suzerain to his ministers through land grants (*jhagirs*). The recipient of this grant became the *de facto* ruler of the territory and earned his income from its taxes. The

10 HALL (1924) 17.

11 WHEATON (1866) 49.

Mughal Emperor, according to Muslim law, had the right to collect one fifth of the revenues. This system had been introduced by the Muslim rulers in the thirteenth century and was continued by the British until they abolished it in 1851. Although the emperor was Islamic, he maintained the freedom of religion in his empire and he allowed his vassals to remain Hindu.¹²

The tributary relation between the suzerain and the vassal was the basic tether which bound the states to each other. However, the suzerain could also convoke his vassals to make war, to administer justice or to celebrate a festival. Yet, the interactions between the vassals seemed less intense. They had no obligatory habitual relations amongst themselves imposed by their common suzerain. This meant that each vassal state had its own jurisdiction and operated in relative isolation.¹³

By the beginning of the eighteenth century the Mughal Empire had drifted into decline. Torn by problems of succession, disintegration of the administration and invasions from the north it had to give large concessions to its vassals. In particular the Maratha rulers posed a serious threat to the authority of the Mughal Emperor and after multiple wars they essentially took over the administration of most parts of the empire in central and northern India. They received the right to collect taxes in return for protecting the north-western borders from invasion. By the mid-eighteenth century the Mughal territory was thus ruled through the Peshwa, the leader of the Marathas. The Mughal Emperor in Delhi was afraid the Peshwa wanted to replace him and called in help from the ruler of Afghanistan and from the governor of Oude (Awadh), the Nawab, to fight the Marathas. The confrontation resulted in one of the largest battles in history, the third battle of Panipat in 1761. The Marathas were defeated and expelled from northern India. The Afghan Emperor, Ahmad Shah Durrani, before departing, pronounced a royal *firman* (a decree issued by Islamic officials) which called upon the Indian rulers to recognize Shah Alam II as Emperor. It is notable that this *firman* was also sent to the British East India Company.¹⁴ The ruler of Afghanistan furthermore appointed a loyal regent to the Mughal court. However, he himself became preoccupied with rebellious Sikhs and was not able to continue protecting the emperor. It took the Marathas ten years to

12 TUPPER (1893) 130 ff.

13 TUPPER (1893) 238.

14 RAYCHAUDHURI/DATTA (1998).

regain their military strength and by 1771 they had re-conquered the Mughal territories and captured Delhi. The Mughal Emperor again had to accept their protection and thus became a puppet to the Marathas.¹⁵

In the meantime the East India Company had firmly established itself in the regions of Surat, Madras, Bombay and Calcutta for which it had received trading privileges from the Mughal emperors. However, the French had also gained a foothold in India and were determined to take over control in India. The two countries were already rivaling each other over their possessions in North America and the competition was extended to India during the Seven Years' War (1756–1763). British Company troops were able to defeat the French military in several direct confrontations, and Britain came out as the victor of the war. Nevertheless, rivalries in India continued and both countries pursued a policy of forming alliances with the rulers of Indian states, receiving concessions in return for protecting the Indian ruler against usurpers and rebels. French and British forces thus became engaged in local wars which made new confrontations inevitable.

The East India Company had received from Queen Elisabeth in 1600 the right to make peace or war with any Prince who was not Christian and the right of making treaties of peace and defensive alliances.¹⁶ The Company was hence granted sovereignty in specified non-European regions although it remained a trading company, not a sovereign personality. The Regulating Act of 1773 confirmed this right but required the consent and approbation of the Governor-General, who received complete legislative powers. The Governor-General, in turn, was placed under a general obligation to report all transactions relating to the Government to the Council of the Presidency of Fort William in Bengal.¹⁷ The act did not give any power to Parliament but as the financial problems of the Company grew, this changed. Pitt's India Act in 1784 provided for the joint governance of British India by both the Company and the Crown. It introduced a Board of Control which was constituted with two members of the British Cabinet and four of the Secret Committee (the Privy Council) and had control over all of the acts and operations relating to the civil and military matters as well as the Company's revenues. In 1793 the title of the Company to its territorial acquisitions

15 FÖRSTER (1992).

16 LEE-WARNER (1894) 44.

17 LEE-WARNER (1894) 44–45.

“without prejudice to the claims of the publick,” was confirmed. But it also restricted the powers of the supreme Government in India. It was enacted that, “without the express command and authority” of the Court of Directors or the Secret Committee, the Governor-General in Council should not declare war, or enter into any treaty of war or guarantee except in certain specified cases; and the local Governments were forbidden to conclude any treaty unless in pursuance of express orders from London or Calcutta.¹⁸ The sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the territorial acquisitions of the Company was confirmed in Statute 53 Geo. III. Cap. clv. in 1813.¹⁹ In 1833 the East India Company was declared to be “trustees for the Crown of the United Kingdom” and the treaties acquired formal recognition by the British Parliament.²⁰ Thus, until the Acts of 1784 and 1793 the East India Company retained far-reaching independence. After that, the British Government in India still retained its legislative powers and its power to wage war, make peace, and conclude treaties but the British Parliament was the highest authority to report to.

The first territories the British East India Company acquired in India were through support of certain factions in the struggles for the succession of the throne on the one hand in the Carnatic and on the other hand in the Deccan. When its pretenders were installed as Nawab and Nizam respectively after providing military support, the Company received several districts as gratitude for their service and as restitution of the debt accumulated with the Company by the pretenders during the war. The Mughal Emperor, whose position at that time had already been severely weakened, had no choice but to sanction the gift. He regulated it by granting a *firman* confirming the gift.²¹ However, the Company would soon firmly establish itself as the territorial power in India.

In 1756 the Nawab of Bengal died and was succeeded by his grandson Siraj-ud-daulah, who was very suspicious of the European presence in India. When the French and the British prepared for war against each other he

18 LEE-WARNER (1894) 45.

19 LEE-WARNER (1894) 45–46 and WESTLAKE (1914) 197.

20 WESTLAKE (1914) 197.

21 As the Shar'ia, the religious law of Islam, did not fully regulate every aspect of Ottoman social and political life, the Ottoman Sultan created *firman*s. These decrees were collected and applied as traditional bodies of law according to LAPIDUS (2002) 260–261.

ordered them not to strengthen their fortifications any further. The British refused to do so, hence, the young Nawab sent troops to surround the fort of Cossimbazar and besiege Calcutta. Company troops attacked the Nawab's forces, recaptured Calcutta and cornered the Nawab into signing a treaty, which provided for the restoration of the Company's factories as well as former privileges, and the permission to retain the fortification of Calcutta.²²

The commander of the British forces, Captain Robert Clive, decided to continue his campaign and to oust the French presence from Bengal. He attacked the French city of Chandernagar, which further fueled the Nawab's hatred against the British. At the same time however, the Nawab faced dissent at his own court. Siraj-ud-daulah was not popular with his ministers and the British prepared a conspiracy with the paymaster of his army, Mir Jafar. They proposed raising him to the throne of the Nawab in return for his support of the British in the field of battle and financial compensation for the attack on Calcutta. A resident working with the British named Omichund found out about the secret treaty with Mir Jafar and threatened to inform Siraj-ud-daulah unless he was promised 5% on all the treasure to be recovered. Clive thus suggested that two treaties be drawn – the real one on white paper, containing no reference to Omichund and the other on red paper, containing Omichund's desired stipulation, to deceive him. The Members of the Committee signed on both treaties, but Admiral Watson signed only the real one and his signature had to be counterfeited on the fictitious one. Mir Jafar signed both treaties on June 4, 1757.²³ In the nineteenth century the incidence became an example of misrule by the East India Company from critics of British policies in India, because it showed the kind of shaky legal and moral grounds upon which the Company was working, considering that according to European international law, fraud was a reason to declare a treaty *mala fide*.²⁴

The confrontation between the Nawab's troops and the East India Company took place at the infamous battle of Plessey. Due to Mir Jafar's

22 ORME (1861); MALLESON (1885); HARRINGTON (1994).

23 MARSHALL (1987).

24 HALL (1924) wrote that "Freedom of consent does not exist where the consent is determined by erroneous impressions produced through the fraud of the other party to the contract. When this occurs therefore; if, for example, in negotiations for a boundary treaty the consent of one of the parties to the adoption of a particular line is determined by the production of a forged map, the agreement is not obligatory upon the deceived party."

support the Nawab lost the war and Mir Jafar was made Nawab of Bengal according to the provisions of the white treaty. The Company acquired large tracts of land between Calcutta and the sea. Mir Jafar was not recognized by the Mughal Emperor who supported his son, Mir Quasim. The two formed a triple alliance together with the Nawab of Oude and attacked the British in the battle of Buxar in 1764. Due to division between the allies the Company troops vanquished the Indian armies. The Mughal Emperor agreed to sign a treaty with the Company that appointed it Dewan (chief revenue officer) of Bengal, Behar and Orissa, and in return his pre-war possessions were returned to him. He also was granted a pension from the Company and had to pay indemnity for the costs the Company had generated during the war. The Nawab of Bengal lost his function of revenue collector but retained the judiciary and police functions, which meant there was a double government in Bengal until 1793 when the Nawab was forced to transfer his rights to the Company. The Nawab of Oude had to pay indemnity, cede territory and accept a British resident at his court.

By these victories the East India Company had established a permanent foothold on the Indian sub-continent and become a territorial power in India. From this very brief account of the ascent of the Company in India we can conclude that its policy was based on treaty alliances, war and causing dissent at the Indian courts. It is furthermore notable that the Company seemed to acknowledge the suzerainty of the Mughal Empire. It participated in the Indian political system by becoming a feudatory of the emperor in Delhi, receiving *firman*s from him and functioning as his prime tax collector in the regions of Bombay, Orissa and Behar. According to Tupper the Nawab of Bengal had forfeited all claim to the title of governor by attacking the British settlements and inflicting torture upon them. Tupper came to the conclusion that during this period there was no law of territorial possession though there were many territorial powers. He reported stories of usurpation, rebellion and aggression and contended that it was not possible for the Company employees to entertain any distinctly conceived theory of public law as regulating the relations between the states with which they were brought in contact. Tupper thought that the English did precisely what the Indian rulers had done before them.²⁵ Notwithstanding, whilst the Com-

25 TUPPER (1893) 21–22 and 24.

pany officials might not have acted upon European international law, they did however act within the framework of the Indian international order.

3. British expansion and the Indian political system

During the eighteenth century the East India Company continued its policy of forming alliances with Indian princes and hence gaining territorial influence in a growing number of districts. When territory was not directly acquired by the Company through conquest or cession by treaty, they made alliances and established protectorates. It was finally the Company which became the biggest threat to the authority of the Mughal Empire. The emperor became a puppet of the British authorities, only nominally retaining absolute sovereignty over his territories. Initially the Company kept up the appearance of being a participant of the Indian system by recognizing the suzerainty of the Delhi emperor. However, as their influence over Indian territory increased both in size and intensity, the political system in India changed. The Company was no longer a trading company which had gained its political power by coincidence; the British officials actually started planning their visions for India. The Indian international system changed significantly when it became custom that the East India Company offered treaties which prevented the Indian treaty partner from having any connection or engagement with other chiefs or states. As a result, by 1858, when the British Crown took over the administration of India from the East India Company and the last Mughal Emperor was officially dethroned, the Indian political system as it had existed in the eighteenth century was now extinct.

The date when the British government became supreme in India and gained the position to actually be able to eliminate the Indian political system and build a new system based on subsidiary alliances had been a subject for discussion amongst nineteenth century British lawyers and colonial administrators. Lord Wellesley, who was Governor-General of India from 1798 to 1805, claimed that the defeat of Mysore in 1799 marked the beginning of British supremacy in India. C. U. Aitchison, who published an extensive collection of treaties with Indian states, thought the campaigns against the Marhatta chiefs in 1803 and Holkar in 1805 to be more significant, as they completely broke up the Mahrattan Confederacy. Sir George Barlow agreed that the Treaty of Bassein was “absolutely necessary for the defeat of these designs that no native state should be left to exist in India which is not under

its [the Company's] absolute control."²⁶ This chapter will reflect on these dates and show how the Indian system fell apart by the examples of the dissolution of the Maratha federation and the annexation of the state of Oudh.

But first we will turn our attention to the state of Mysore.²⁷ After the East India Company had permanently established itself as a territorial power in India it embarked on a policy of expansion. The largest obstacle to becoming the main power on the sub-continent was the state of Mysore. The two parties waged an indecisive war and in 1769 they signed a treaty of alliance and restored the status quo that had existed before the war. The ruler of Mysore however felt that the Company had not upheld the treaty, because it refused to support Mysore in its conflict with the ascending Marathas. Hence a second war occurred. Mysore won several decisive battles and after severe losses the British decided in 1784 to conclude a treaty with the new king, Tipu Sultan. The treaty of Mangalore is said to be the last agreement between an Indian ruler and the East India Company in which the Indian ruler dictated terms to the British. Tipu Sultan was able to claim victory and the British representatives were forced to travel to Mysore territory to sign the treaty of friendship. This treaty was set up according to European custom. Again, the status quo *ante bellum* was restored. Yet, the war had resulted in severe financial issues for the Company. As the British economy was in part dependent on the revenues of the Company, Parliament decided to increase its control over Indian affairs. Pitt's India Act created a Board of Control and directly connected the Supreme Government of India with the British Government.²⁸

Tipu Sultan continued to feel threatened by the British presence in India and in disregard of the treaty attacked a British ally, the state of Travancore, in 1789. The third Anglo-Mysore war ended with a victory for the East India Company and Tipu Sultan had to cede half of his kingdom to it. The Mysore King after that built up his army again and sought alliances with the Ottoman Empire and the French. When the British found out about this, they attacked Mysore again. Tipu Sultan died in battle and in 1799 Mysore

26 As quoted in TUPPER (1893) 32–33.

27 For an innovative account about the history of the kingdom of Mysore and the policies of Tipu Sultan see JASANOFFDAT (2005).

28 TUPPER (1893) 28.

lost its independence. Part of it was annexed by the Company and the remaining territory became a princely state where the British installed a new ruler on the throne, appointed a minister and a British resident to the court, exacted an annual tribute and sent a standing British army to remain on its territory.

Initially, the Governor-General Lord Cornwallis, had during this period executed a policy of non-intervention, abstaining from all interference in the internal concerns of other states in India in order to “regain the confidence and removing the suspicions of surrounding states.”²⁹ Lord Wellesley however promoted a different line. In a dispatch to the resident at Hyderabad on February 4, 1804 he pleaded for a policy of subsidiary alliances in order to preserve tranquility in the Indian peninsula and “to prevent the operation of that relentless spirit of ambition and violence which is the characteristic of every Asiatic government.” According to the general this object “can alone be accomplished by the operation of a general control over the principal states of India established in the hands of a superior power, and exercised with equity and moderation through the medium of alliances contracted with those states on the basis of the security and protection of their respective rights.”³⁰

Based on this policy many treaties with Indian states were concluded which established princely states similar to the princely state of Mysore. Some treaties were concluded following a war but others were signed voluntarily. The Nizam of Hyderabad, for example, ruler of one of the richest regions in India, saw that the East India Company was becoming a key player in Indian affairs and sought the protection of the British. In return for the protection of his borders and a personal annual rent, he permitted the Company to station troops on his territory and send a resident to his court. Hyderabad thus became a protected state. The protected states of India were termed the ‘native states’ by British colonial officers. The term represented “a political community, occupying a territory in India of defined boundaries, and subject to a common and responsible ruler, who has, as a matter of fact, enjoyed and exercised, with the sanction of the British Government, any of the functions and attributes of internal sovereignty.

29 TUPPER (1893) 41.

30 As quoted in TUPPER (1893) 40–41.

The indivisibility of sovereignty, on which Austin insists,³¹ does not belong to the Indian system of sovereign states.³² The ‘native states’ were excluded from the territories subject to the British constitutional laws. The largest states of India nonetheless usually became ‘native states’ after a display of military power by the East India Company. A very characteristic example of this were the wars with the Maratha states, although there are many other important examples like, for instance, the wars against the Sikh Empire or Burma. The events are quite similar for the wars had similar causes and effects. The defeat of the Maratha Confederacy was however significant because it made the East India Company the paramount power in India.

Submission of the Maratha Confederacy

The Maratha confederation existed of semi-autonomous states which were the vassals of the Peshwa. Their leaders were the Gaekwads of Baroda, the Holkars of Indore, the Scindias of Gwalior and the Bhonsales of Nagpur. The Peshwa, who resided in Poona, died in 1772 and the struggle for succession resulted divisions between the confederates. One contender for the throne sought support from the British and signed an agreement with the Government in Bombay in which he ceded some territories and part of the revenues from Surat and Bharuch districts in return for 2,500 soldiers. The Council in Calcutta did not recognize the treaty and ordered a new treaty to be made with the sitting Peshwa and the former treaty was annulled. The Peshwa

31 The divisibility of sovereignty was introduced by MOSER (1777) 26–31 and became a common principle in the nineteenth century. See, for example, PRADIER-FODÉRIÉ (1885) 176–198 or PHILLIMORE (1854) 100–155. The idea was that a state had international existence if it had the independent capacity to negotiate and to make peace or war with other states. States which did not stand this test were only mediately and in a subordinate degree considered as subjects of European international law and were commonly called semi-sovereign. This concept was used by international lawyers to describe protectorates. Edward Hall précised the concept by separating the internal sovereignty of a state from its external sovereignty. External sovereignty entailed the capacity to negotiate and to make peace or war with other states while internal sovereignty represented the rights and obligations between the sovereign and his people, HALL (1924) 150. Before the nineteenth century however, a state which was deprived of its capacity to negotiate and to make peace or war with other states, was not considered sovereign at all. The concept of semi-sovereignty did not exist then and even in the nineteenth century some lawyers, like John Austin, did not accept it, AUSTIN (1836).

32 LEE-WARNER (1894) 30–32.

however breached the new treaty by granting the French a port on the coast. The British sent a force to Poona and war was fought until 1782 when a peace treaty was signed recognizing the sitting Peshwa as the legitimate ruler. Amongst the Marathas however the throne was still contested. Holkar went to war against the Peshwa and Scindia and defeated them. The Peshwa fled and sought protection from the British who offered him a treaty in which the British promised to reinstall the Peshwa on the throne if he ceded his external sovereignty to the East India Company.³³

The treaty of Bassein, which was concluded on December 31, 1802, allowed British troops to be permanently stationed with the Peshwa. Any territorial districts yielding twenty-six lakh rupees or more were to be ceded to the East India Company. The Peshwa could not enter into any other treaty, declare war or conduct any foreign relations without first consulting the Company. Any territorial claims would be subject to the arbitration of the Company. The Peshwa thus, following Hall's definition, lost his external sovereignty.³⁴ The other Maratha rulers did not agree with the treaty and decided to fight the British. The Second Anglo-Maratha War (1803–1805) ended in the defeat of the Maratha states. Each of them signed a separate treaty of peace and friendship with the Company which was predominantly a treaty of cession. Each Maratha ruler for himself, his heirs and successors, entirely renounced all claim of every description on the territories ceded to the Company. They also agreed never to take and retain in their service any Frenchman, or the subject of any other European or American power (the Government of which may have been at war with the British Government) without the consent of the British Government. The Company engaged on its part, that it would not give aid or countenance to any discontented relations, Rajas, Zumindars, or other subjects of the ruler. Although the content of the treaties was more advantageous for the East India Company, the treaties did convey a certain kind of equality between the signatories. Both parties committed themselves to refrain from interfering with the other's allies or rivals and they agreed that accredited Ministers from each should reside at the Court of the other.³⁵ This kind of reciprocity would

33 BEVERIDGE (1862).

34 HALL (1924) 150.

35 Treaty of peace and friendship concluded with the Raja of Berar on December 17, 1803 and Treaty concluded with Jeswunt Rao Holkar, dated December 24, 1805, in: AITCHISON (1876).

end after the Third Anglo-Maratha War. The British officials however, held that the overlordship of the Peshwa had ended and the Company became the suzerain of the Maratha states after the Second Anglo-Maratha War, because the treaties contained an article in which the Maratha rulers renounced for himself, his heirs and successors, all adherence to the Maratha Confederacy.³⁶

It seems however that the Maratha states in practice still recognized the Peshwa as their suzerain. In the Third Anglo-Maratha War, they maintained a lively contact with the Peshwa, thus breaching the treaty agreements with the Company, which denied them any contact with states other than the British. Holkar and the ruler of Nagpore even decided to fight the British together with the Peshwa. Marquis de Hastings observed that they “displayed and professed obedience to the Peishwah’s summons” and that “the same Maratha tie was as powerful with the Raja of Nagpore.”³⁷ After the war, which ended in the annexation of most of the Peshwa’s territories by the East India Company, Hastings wrote to the Secret Committee that the annexation had been an “absolute moral necessity” because the other Maratha states would always remain loyal to the title of the Peshwa before any loyalty to the Company.³⁸

The Third Anglo-Maratha War started when a minister of the Gaekwar of Baroda was murdered allegedly by a minister of the state of Poona, a trustee of the Peshwa, Trimbuckjee Dainglia. The Gaekwar and the Peshwa had been negotiating the tax revenues of Baroda and the murdered minister had been part of the Gaekwar’s envoy. The British demanded that the Peshwa prosecute Trimbuckjee Dainglia but he was reluctant to arrest his trustee, emphasizing that it was not proven that he had committed the crime. At the same time, to the disliking of the Maratha chiefs, the East India Company had increased its military capacity in their states in order to fight the Pindaries, a large band of robbers who plundered Central India in short but devastating raids at the beginning of the nineteenth century. The Indian

36 AITCHISON (1876).

37 Marquis of Hastings to Court of Directors, February 8, 1818, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting’s Administration (1824) at 203 [British Library, W2290].

38 Marquis of Hastings to Secret Committee, August 21, 1820, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting’s Administration (1824) at 417 [British Library, W2290].

Government had planned to surround the Pindaries, which comprised about 25,000 members, but did not inform the Indian rulers of their plans for the Maratha territories.³⁹

The Peshwa responding to the increased amount of British forces on his territory, also mobilized his army. In these circumstances the British offered the Peshwa a treaty which he had no choice but to submit to. In November 1817 the Peshwa's troops nevertheless attacked the British residency at Poona which marked the beginning of the Third Anglo-Maratha War. The incineration of the residency was conceived by the British to be "contrary to the Law of Nations and the practice of India" and this stance was proclaimed repeatedly in official documents.⁴⁰ It seems that the attack on the residency was used as an excuse to officially wage war against the Peshwa. The Law of Nations in this case served as the legitimization for war, because it explicitly denounced attacks on legations and diplomatic representatives. It is interesting, however, that the attack was considered not only to be contrary to international law but also to the practice in India. The British officials in India hence explicitly separated European international law from the international system which prevailed on the Indian sub-continent.

While war ensued in Poona, the Maratha states of Nagpur and Holkar followed the call of the Peshwa and attacked the British in their territories. The ruler of Nagpur, Appa Saheb, had been solicited by the resident to explain the assemblage of troops which was taking place round Nagpur. Appa Saheb however did not show up and refused to reduce his troops. Hastings later declared that the ruler of Nagpore "with the basest deceit protested his inviolable amity, while he was equipping himself for a profligate outrage to the Law of Nations, in an attack on our accredited Minister at his court."⁴¹ So, here too, the Law of Nations was used to explain an Indian war, in this case with the doctrine of self-defense. Appa Saheb was defeated in 1818 and a treaty of friendship was signed leaving most of the Nagpur territories under British control and installing a puppet ruler on the throne.

39 Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 341 [British Library, W2290].

40 Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 117 [British Library, W2290].

41 Marquis of Hastings to Court of Directors, February 8, 1818, Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting's Administration (1824) at 203 [British Library, W2290].

Holkar was defeated in the same month as Nagpore and it also became a vassal of the East India Company by treaty. The British had tried to prevent hostilities by repeatedly offering to set up a treaty of friendship. Holkar however did not agree with the British offer and broke off the negotiations. After his defeat negotiations were again opened and his representatives attempted to alter the terms of the treaty which the British had offered him. The negotiators maintained that the war was provoked not by the Ministers of Holkar, but by a counsel of discontented military leaders, acting against their advice. They promised that Holkar would throw himself upon the protection of the British Government without any engagement, and trust to its bounty. This request was rejected so the Maharaja agreed to sign the treaty if the British would agree with three requests concerning the payment of tribute from the Rajpoot states and certain private territories which were to be ceded. None of these requests were accepted by the British representatives, even though the loss of the private possessions of the Maharaja was a great disgrace for the Holkar family. Only one final request was accepted by the British resident: that an article should be inserted in the treaty, declaring that “the Peishwah and his successors should not be permitted to exercise any sovereign rights or authority over Mulhar Rao Holkar or his heirs.”⁴² For the Company this had been one of the purposes of the treaty anyway, so the resident could easily agree to including such an article. But in the end this example shows that contrary to the treaty of Mangalore between the Sultan of Mysore and the East India Company, from the nineteenth century the Indian rulers were no longer in a position to negotiate treaties on their own terms. Holkar’s army had been completely reduced during the war and the Company’s officers were well aware that they could oblige his unqualified submission to any terms.⁴³

Military superiority thus forced the Maratha states to enter protective alliances with the East India Company. The same went for the Maratha state of Gwalior. Its ruler, Scindia, did not fight with the Peshwa although he by no means sympathized with the British. The large number of Company’s troops on his territory induced him to accept treaty obligations with the

42 Sir J. Malcom to John Adam Esq., Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting’s Administration (1824) at 189 [British Library, W2290].

43 As was noted by Hastings, Papers respecting the Pindarry and Maratha Wars. Marquis of Hasting’s Administration (1824) at 189–190 [British Library, W2290].

British. However, this time it was the Company that tried to get out of its treaty obligations with Scindia. To fight the Pindaries the Company needed support from the Rajput chiefs who were vassals to Scindia. Yet, in accordance with the eighth article of a treaty signed in 1805 the Company was bound not to hold any negotiations with those chiefs.⁴⁴ The British officers accused Scindia in order to exert hostile machinations against the Indian government and to support the Pindaries covertly, which was against treaty provisions. With those arguments they forced the ruler to subscribe to a treaty which abrogated the former preclusion. The ruler, being in a financial and militarily weak position, had no choice but to accept its terms.⁴⁵ The treaties with the Maratha states did not entail reciprocal provisions like they did after the Second Anglo-Maratha War. The Maratha rulers now had to accept a subsidiary force on their territory, partly disband their own army, allow a British resident at their court and they were deprived of the right to communicate or engage with other states.⁴⁶

When the Peshwa lost his allies he started to withdraw from Poona and the British troops followed him for months. Several battles took place but finally the Peshwa had to surrender. The British not only dethroned him but conquered his territories and founded a new sovereign for the Raja of Sattara, a Maratha chief that had been imprisoned by the Peshwa prior to the war and was thus willing to subjugate to the British. The annexed territories were incorporated with the Bombay Presidency and the territories won from the Pindaries became the Central provinces. A separate treaty was signed with each of the chiefs of the Rajput combining them into one league under the paramount authority of the Indian Government. The Peshwa was to receive an annual subsidy and was expelled from Poona. The defeat of the Peshwa was mourned all over the Maratha Empire as a national defeat.⁴⁷

44 Marquis of Hastings to the Court of Directors, May 19, 1818, Papers respecting the Pindary and Maratha Wars. Marquis of Hasting's Administration (1824) at 281 [British Library, W2290].

45 Papers respecting the Pindary and Maratha Wars. Marquis of Hasting's Administration (1824) at 205 [British Library, W2290].

46 Treaty with Mulhar Rao Holkar, dated January 6, 1818 and Treaty of Defensive Alliance with the Raja of Berar, dated the May 27, 1816, Provisional Treaty with the Raja of Nagpoor, dated January 6, 1818, in: AITCHISON (1876).

47 CHHABRA (2005).

The reluctance of the Maratha rulers to sign a treaty with the East India Company is evidence that the Indian rulers were not yet willing to accept British superiority and its accompanying normative order. When they, however, recognized that they could not defeat the British forces, they accepted the European system and tried to defend their cause through its mechanisms. Holkar as well as the Peshwa negotiated with the Company officials over the terms of the treaties and even proposed their own provisions but they were no longer in a position to impose their terms. Yet, the Indian system continued to regulate the relations between the Indian states and the Peshwa remained the suzerain over the other Maratha rulers. The British on the other hand from now on could impose their view of order on the Indian states. This order was not one of equal states as in Europe, but one of subsidiary alliances. The new Indian international system was defined by protected states acknowledging the suzerainty of the East India Company. The next example, that of the state of Oude, shows how the British used treaties as tools to compromise this Indian system.

The annexation of Oude

The first treaty which compromised Oude's full sovereignty was the treaty concluded after the battle of Buxar in 1764. During the war the East India Company had acquired the territories of Corah and Allahabad from the Mughal. These regions were sold to the Nawab of Oude in 1773 and a new treaty was set up for this purpose. It also appointed a resident to the court of Oude, restricted the number of men the Nawab could entertain in his army and introduced a monthly subsidy that he had to pay to the Company for the maintenance of its forces in his state. The Nawab had agreed to these far reaching provisions in order to secure his territories against future interference from the British. Exclusive to the sum which was to be paid for the cession of Corah and Allahabad, "no more should, on any account, be demanded of him." The treaty stipulated that: "He shall by no means and under no pretense, be liable to any obstructions in the aforesaid countries from the Company and the English chiefs; and, exclusive of the money now stipulated, no mention or requisition shall, by any means, be made to him for anything else on this account." As a matter of fact it was the Nawab himself who had sought an interview with Warren Hastings to discuss a

revision of existing treaties in order to secure his remaining rights as a sovereign.⁴⁸

The Nawabs retained their internal sovereignty as agreed upon in the treaties only for a relatively short period. When John Shore became Governor-General in 1793 demands were made to add to the former monthly subsidy the expense of one European and one native regiment of cavalry. The Nawab refused to pay more but after the arrest of his minister by the British authorities followed by a personal visit of the Governor-General, he was compelled to grant the additional subsidy. When the Nawab died the British Government in India did not want his faction to continue the rule of Oude and in 1798 it installed a contender, Saadat Allie Khan, on the throne who agreed to pay the increased subsidies.⁴⁹ In the same year Lord Wellesley became Governor-General in Calcutta and significantly changed the policy towards Oude. He pressed for the disbandment of the Nawab's regular army and the substitution of an increased number of the Company's regiments to be paid by the Nawab. It was Wellesley's object to "extinguish the Nawab's military power and to gain the exclusive authority, civil and military, over the dominions of Oude together with the full and entire right and title to the revenues thereof."⁵⁰

The two parties started negotiations, which on the British side were conducted by Lieutenant-Colonel William Scott on behalf of the Governor-General. Saadat Allie Khan requested Scott to send a letter from him to Lord Wellesley. In his elaborate letter, the Nawab explained in detail why the East India Company had breached the previous treaty with Oude which had been signed in 1798. First, he emphasized that the force designed for the defense of his dominions had been increased beyond what it had been in any former period and that he had agreed to defray the expense of the augmentation. He pointed out that "in no part of the said article is it written or hinted, that after the lapse of a certain number of years a further permanent augmentation should take place; and to deviate in any degree from the said treaty appears to me unnecessary." Thereafter, the Nawab referred to the second article of the treaty:

48 TAYLOR (1879) 13–17.

49 TAYLOR (1879) 33–35.

50 *Papers presented to the House of Commons relating to East India Affairs* (1806), 31 [British Library, W2998].

“From an inspection of the article we learn that, after the conclusion of the treaty in question, no further augmentation is to be made, excepting in case of necessity; and that the increase is to be proportioned to the emergency, and endure but as long as the necessity exists. An ‘augmentation’ of the troops without existing necessity, and making me answerable for the expense ‘attending the increase,’ is inconsistent with the treaty, and seems inexpedient.”⁵¹

And finally the Nawab addressed a direct plea to the Governor-General. The seventeenth article stipulated that the said Nawab would possess full authority over his household affairs, hereditary dominions, his troops, and his subjects. The British objective to take the management of the Nawab’s army from under his direction undermined his authority in this respect. He therefore asked that Wellesley, in conformity to the treaty, would leave him in possession of the full authority over all those areas mentioned above. He further requested that the Governor-General enjoined Lt.-Colonel Scott to advise and consult with him directly.⁵² The letter demonstrates that the Nawab was fully aware of the consequences the proposed treaty bore for his kingdom and that he used European international law to defend his rights and preserve his internal sovereignty.

Lord Wellesley declined to make any remarks on the letter on the ground that “besides indicating a levity unsuitable to the occasion, it is highly deficient in the respect due from His Excellency to the first British authority in India.” Instead he required Saadat Allie either to resign his princely authority altogether, and accept an annual stipend, or to cede one-half of his territorial possessions by way of indemnity for two bodies of troops previously dispatched to Oude. A draft of a treaty was at the same time forwarded, as well as the instructions to the resident authorizing him that, in the event of the Nawab not consenting to hand over the said provinces to the Company, to take forcible possession of the same. After months of negotiating the treaty was finally signed in 1801. The Nawab agreed to reform his administration and military and ceded the territory with the promise that it would henceforth be released from the subsidy. At the same time he received assurance that he would have an undisturbed authority over the territory left to him. Shortly after the conclusion of the treaty the Nawab

51 TAYLOR (1879) 44.

52 Translation of a memorial, presented on January 11, 1800 to Lieutenant-Colonel William Scott, Resident at Lucknow by H.E. the Nawab Vizier for the Governor-General in TAYLOR (1879) 41.

sent the Governor-General a memorandum which defined the tasks of the British resident compared to those of the ruler or Oude and clearly separated their authorities. Lord Wellesley officially accepted the definitions of the memorandum.⁵³ Part of the state of Oude thus became a vassal to the East India Company, though they continued to be part of the Mughal Empire in name until 1819.

The rulers of Oude continued serving the Company faithfully in the subsequent years, often lending it money which financed several major Indian wars. Many officers praised the Nawab's collaboration. Lord Dalhousie, for example, wrote that: "The rulers of Oude have ever been faithful and true in their adherence to the British power. No wavering friendship has ever been laid to their charge: they have aided us, as best they could, in the hour of our utmost need."⁵⁴ In recognition of their loyalty, Oude was raised to a kingdom in 1819 by the Indian Government. In 1814, when a new Nawab acceded the throne, a treaty was signed recognizing that the former treaties should "be observed and kept till the end of time" but also that the Nawab was to be treated in all public observances as an independent prince. The new Nawab in return wanted to pay tribute to his suzerain, the Governor-General; because he felt that his life and property were at his command. The Company however did not want to participate in an Indian system anymore and accepted the gift only in form of a loan.⁵⁵ The Company had clearly started to impose its own system on the rulers of India, although the tributary system continued to exist amongst the Indian states.

In 1837 the uncle of the Nawab succeeded the ruler following his death, with the support of the East India Company. One of his sons however forcibly took the sovereignty of the kingdom. The Indian Government sent in troops and confined the prince and his mother. The uncle had agreed to accept a treaty dictated by the Indian Government upon accession to the throne.⁵⁶ Together with the treaty of 1801, this treaty is essential for understanding the legal framework upon which the later annexation of Oude rested. In the treaty of 1801 Saadat Allie Khan had agreed to reform his administration and military but it did not stipulate any penalty or

53 TAYLOR (1879) 40.

54 Minute written by Lord Dalhousie on June 18, 1855 as quoted in *Oude Catechism* (1857).

55 WHITE (1838) 8.

56 TAYLOR (1879) 82.

remedy should he not do this. Thus, the treaty of 1837 modified some of the previous provisions. In article 6 of the treaty of 1801 the Nawab had promised that he would establish in his remaining territories such a system of administration, “to be carried into effect by his own officers,” as should be conducive to the prosperity of his own subjects, and be calculated to secure the lives and property of the inhabitants, and that he would always advise and act in conformity to the counsel of the officers of the Company. In 1837 article 7 provided express modification:

“(...) that the King of Oude shall immediately take into consideration, in concert with the British Resident, the best means of remedying the defects in the Police and in the Judicial and Revenue administrations of his dominions; and that if His Majesty should neglect to attend to the advice and counsel of the British Government, and if gross and systematic oppression, anarchy, and misrule should prevail within the Oude dominions, such as seriously to endanger the public tranquility, the British Government reserves to itself the right of appointing its own officers to the management of whatsoever portions of the Oude territory, either to a small or to a great extent, in which such misrule shall have occurred, for so long a period as it may deem necessary, the surplus receipts in such case, after defraying all charges, to be paid into the King’s territory, and a true and faithful account rendered to His Majesty of the receipts and expenditure.”⁵⁷

Article 8 of the treaty further provided “that in case the Governor-General of India, in Council, should be compelled to resort to the exercise of the authority vested in him by article 7 of this treaty, he will endeavor, as far as possible, to maintain (...) the native institutions and forms of administration within the assumed territories, so as to facilitate the restoration of those territories to the Sovereign of Oude when the proper period for such restoration shall arrive.”⁵⁸ And finally the Nawab was allowed to employ such a military establishment as he deemed necessary for the government of his dominions, which annulled the objective of the former treaty to disband his regular army. However, he was obliged to maintain a certain force at his own cost, which was not to be employed in the ordinary collection of revenue.

The treaties of 1801 and 1837 became the legal basis on which the state of Oude was annexed by the East India Company in 1856. But the accusations of misrule were not new. The state of Oude had been publicly discussed for decades in Britain. There was a general interest in the region, which was

⁵⁷ TAYLOR (1879) 194.

⁵⁸ TAYLOR (1879) 194.

considered to be very fertile and prosperous. Oude was described as “the garden, the granary, and the queen-province of India”⁵⁹ and spoke to the imagination of the people in Britain. John Shore, as Governor-General, had already early on accused the Nawab of Oude of gross misrule over his dominions in order to pressure him to cooperate with the Company. Thus, since the close of the eighteenth century reports had circulated about oppression and tyranny in Oude. Misrule in Oude became a publicly discussed subject. This triggered Lord William Bentick in 1831, when he was Governor-General of India, to threaten the Nawab to annex his territories should he not reform his administration.

Finally, in February 1856 the British Government in India decided to act and sent military forces to Oude, which, the King was told, was to serve as a corps of observation against Nepal. The troops however invaded Oude and took the King prisoner. He was offered a treaty which provided for the cession of his territory but the King declined and his dominions were annexed on February 7, 1856. It was said that Wajid Ali Shah refused to sign the treaty, exclaiming in a passionate burst of grief: “Treaties are necessary between equals only: who am I now, that the British Government should enter into treaties with?”⁶⁰ The Company officials issued a proclamation to the people of Oude which declared that the government of the territories of Oude was “henceforth vested, exclusively and forever, in the Honourable East India Company.”⁶¹ It further stated that:

“Fifty years of sad experience have proved that the Treaty of 1801 has wholly failed to secure the happiness and prosperity of Oude, and have conclusively shown that no effectual security can be had for the release of the people of that country from the grievous oppression they have long endured, unless the exclusive administration of the territories of Oude shall be permanently transferred to the British Government. To that end it has been declared, by the special authority and consent of the Honourable the Court of Directors, that the Treaty of 1801, disregarded and violated by each succeeding Sovereign of Oude, is henceforth wholly null and void. (...)”⁶²

The Company presented itself as a protector of the people of India against unjust Indian practices; a humanizing enterprise whose primary concern was civilizing India.⁶³

59 ARNOLD (1865) 329.

60 LUDLOW (1858) 11.

61 WHITE (1838) 9.

62 WHITE (1838) 8.

63 CARTER/HARLOW (2003) 404.

The annexation of Oude led to a public outcry in Britain as well as in India. Sympathizers felt that depriving a sovereign of his rights merely on the grounds of misrule was unjust. They sympathized with Wajid Ali Shah, the dethroned Nawab, because he and his predecessors were known to be polite rulers who had readily collaborated with the East India Company. But more importantly, he himself turned to the public to fight for his cause. Wajid Ali Shah intentioned to go to London himself to petition Queen Victoria, the British Parliament, and the Court of Directors of the India Company, to protest the annexation. When the British authorities blocked him from traveling to London, he dispatched a large delegation officially headed by his mother, the Queen Dowager, supported by his son and proclaimed heir and one of his younger brothers instead.⁶⁴ Wajid Ali Shah furthermore published a lengthy pamphlet in which he contested the accusations formulated by the Indian Government in a report which had been compiled over the years, and in which he argued that the annexation was against the Law of Nations. He described how his predecessors had supported the East India Company, which even bestowed the title of king on his family in recognition of their loyalty. The Company had corresponded with the Nawabs as if they were a sovereign power and Wajid Ali Shah reminded them that it was not lawful to set aside treaties between two nations according to the Law of Nations. He described how the Nawabs had ruled in compliance with the treaties and how they had continuously acted in accordance with the council of the Resident. He had, for example, on the advice of the Resident, reformed the tax system of Oude and introduced a border police, allowing more British forces on his territory than was provided for in the treaty of 1837. The Nawab presented letters from Governor-Generals which praised the rulers of Oude or specific ministers for their friendly collaboration. And finally, he uncovered outright lies put forward by British officials that demonstrated that crime in his state had decreased and was at a lower rate than in the neighboring British dominions.⁶⁵

Wajid Ali Shah ascertained that it was convened by treaty that the kingdom of Oude should be preserved in all its integrity to all the sovereigns and their heirs, whose rights and dignity should be respected and confirmed.

64 Mansra Haider (2008) www.egyankosh.ac.in/handle/123456789/26750.

65 Wajid Ali Shah, *Oude Papers* (1857), [British Library P/W 163–165].

Others pointed out that the treaty of 1837 distinctly set out the course to be taken in case there was misrule in Oude and that this course was not annexation. The treaty expressly gave the British Government in India the authority to appoint its own officers and to assume the management of whatever portions of the Oude territory in which misrule occurred. Hence the misrule which allegedly took place after 1837 happened under British auspice and although they had the tools to intervene, the Company's officers did not.⁶⁶ However, the real question debated was which treaty should be analyzed for the legitimization of annexation. The proclamation to the people of Oude referred to the treaty of 1801 and the treaty of 1837 was considered by some colonial officers to be void.

The Court of Directors had not agreed with the military provisions of the treaty of 1837 and had wholly disallowed it. In April 1838 the Secret Committee conveyed to the Governor-General their directions for the abrogation of the treaty, explicitly ordering him to secure good government to the people of Oude under the stipulation of the treaty of 1801. In July 1839, the King of Oude was informed that he was relieved from maintaining the auxiliary force, and that "certain provisions of the treaty" would not be carried into effect. Yet, he was never told that the whole treaty was entirely abrogated and considered the treaty to be binding. The case was submitted to Sir Travers Twiss, a renowned international lawyer who examined the papers submitted to him on behalf of Wajid Ali Shah.⁶⁷

The treaty was concluded in the name and on behalf of the Governor-General of India, by Lieutenant-Colonel James Low, the Resident at the court of Oude, and ratified by the Governor-General. It was formally referred to as a subsisting treaty in two separate communications from the Governor-General of India to the King of Oude, in the years 1839 and 1847 respectively. Based on these documents it appeared that the treaty of 1837 was a subsisting treaty, binding on the respective parties to it, and according to Twiss the Governor-General would be authorized, "by the law of Nations, under the state of circumstances contemplated by article 7, to take into his own hands the management of the territories of the King of Oude, as Curator, in behalf of the King, his heirs, and successors."⁶⁸ The treaty was

66 *Oude Catechism* (1857).

67 The opinion of Sir Travers Twiss is fully cited in TAYLOR (1879) 192–199.

68 TAYLOR (1879) 196.

also included in a volume of treaties published in 1845 by the authority of the Indian Government.

It appears, however, from a minute of Lord Dalhousie of June 18, 1855, that the Governor-General considered the treaty not to be binding on the British Government, because it had been abrogated by the Court of Directors. Twiss agreed that international law required for treaties to be ratified and if ratification was refused by the competent authority on one side, and the refusal notified to the other side, the act of the minister who concluded the treaty would become null and void. However, the Governor-General was the competent authority and he had ratified the treaty, therefore, Twiss judged that the full requirements of the Law of Nations had been satisfied. Although British municipal law contained in 33 George III., c. 52 limited the power of the Governor-General in declaring war and making treaties of peace and alliance, this did not apply in the case of the treaty of 1837. By the statute the Governor-General was forbidden, except in case of urgent necessity, to declare war or commence hostilities, or to enter into any treaty for making war against any of the Country Princes or States of India, or any treaty for guaranteeing the possession of any Country Prince or State without the command and authority of the Court of Directors, or the Secret Committee, by the authority of the Commissioners for India. The treaty of 1837, however, did not come under either class of treaties, which meant that the Governor-General indeed had possessed the authority to ratify it.⁶⁹

Finally, Twiss emphasized “that it is not competent to the Government of India to apply any other principles of law to establish the annulment of the treaty of 1837 than those which would be applicable to a treaty concluded with a Christian State. Thus, article 9 of the treaty of 1837, which provides ‘that all the other articles and conditions of former treaties between the British Government and the Oude State, which are not affected by the present convention, are to remain in full force and effect,’” was a purely formal article.⁷⁰ He stated that “it would be contrary to the received canons of interpretation to suppose that such article could have the legal effect of constituting an ancient treaty an integral part of a new treaty, or of engrafting on to a new treaty the specific political character which an earlier treaty has had impressed upon it by its own provisions, which remain,

69 LUDLOW (1858) 40.

70 TAYLOR (1879) 199.

proprio vigore, in force.”⁷¹ Thus, Twiss concluded that the Governor-General was not authorized by the Law of Nations to set aside the treaty of 1837 as inoperative, and to look exclusively to the treaty of 1801 as the instrument by which the mutual relations of the East India Company and the rulers of Oude were regulated.

The annexation of Oude was however not reversed and the effort made by Wajid Ali Shah to have his kingdom restored to himself was fruitless. He had to continue his life on a pension, living in exile in Calcutta. The Nawab did not try to alienate his people from the British either, in contrary, directly upon annexation he called upon them to cooperate with the new sovereign. However, the state soon became rebellious and the British had to fight a war to restore order. The rebellion did not directly have to do with the affairs in Oude but was a more general rebellion against British rule in India. It had started as a mutiny by the sepoys in the army but soon spread to other groups in society. Delhi was made the center of opposition but it extended to large parts of the sub-continent, among which also Oude. The upheaval in Oude, was not conducted in the name of any sovereign of Oude but the rebels fought their war in name of the Mughal Emperor, which seems to have been a last attempt to restore the Indian system on the sub-continent. Yet it had the adverse effect. After eight months of fighting the ‘Indian Mutiny’ of 1857 was put down and the Indian system drastically reformed.⁷²

The revolting parties in India had made the Mughal Emperor their symbol of resistance and proclaimed him the sovereign of India. In hindsight it might seem an act of desperation, as Muhammad Bahádur Shah was an old man with no nominal powers and the British political system had been firmly established during the nineteenth century. However, if we consider the states of India to be semi-autonomous states in which the Indian rulers retained internal sovereignty, we have to conclude that the Indian political system had not yet ceased to exist. As we have seen in this chapter, the two political systems continued to exist in parallel. Although the British no longer wished to participate in the Indian system and forced the Indian rulers to gradually accept their European customs and laws in their relations with the East India Company, the Indian tributary system continued to define relations amongst the protected Indian states. Further-

71 LUDLOW (1858) 49.

72 CHANDRA (2009) 140–157.

more, as the story of the Third Anglo-Maratha War proves, even though the suzerainty of Britain was officially recognized according to European international law by the treaties of “perpetual peace and friendship”, it did not automatically put an end to the feudal relations of the Indian states.

The last Mughal Emperor, Muhammad Bahádur Shah, was tried not under European international law but according to the Indian Penal Code, which derived from English criminal law and provided for the punishment of the offence of waging war against the Queen. The third count in the indictment against him was, “that he, being a subject of the British Government in India and not regarding the duty of his allegiance, did, at Delhi, on May 11, 1857, or thereabouts, as a false traitor against the state, proclaim and declare himself the reigning king and sovereign of India” and that he conspired with other traitors to raise, levy, and make insurrection, rebellion, and war against the state. The last remnants of his empire were incorporated into the British dominions. Other Indian rulers who had participated in the rebellion were also dethroned and/or their territory was confiscated. Some of them were even sentenced to death.⁷³

The rebellion led to the formal dissolution of the East India Company. In accordance with the Government of India Act its ruling powers were transferred to the British Crown in 1858. The Crown took on all responsibilities the East India Company had held and statute 21 and 22 Vic. Cap. Cvi., Para 67 enacted that “all treaties made by the said Company shall be binding on Her Majesty.”⁷⁴ The administration of India was reformed and the Indian political system was completely eradicated.

The Treaties

In this brief overview of how Britain became the paramount power in India we have focused on two examples in order to understand how the Indian political system interacted with the European political system. What becomes apparent is the importance of treaty making as a tool for the East India Company to legitimize its increasing control over Indian territories not only towards the British public but maybe even more importantly so, towards the Indian rulers. The way the content of treaties changed between

73 TUPPER (1893) 5–6.

74 LEE-WARNER (1894) 36.

the eighteenth century and the nineteenth century reflects how the Indian international system was gradually pushed to the margins.

In the first period, up to the dissolution of the Maratha Empire, the East India Company participated in the Indian political system as a vassal of the Mughal and assumed the role of a suzerain in a similar fashion as other dominant Indian states did. However, at the same time it introduced its own international system by organizing the majority of its relations with Indian rulers by treaty. The Indian states were treated as equal and independent states. The terms and the forms of negotiation were reciprocal and many treaties evidenced this with phrases of respect. Due attention was, for example, to be paid, in the vent of acquisition, “to the wishes and convenience of the parties”; a representative of each signatory was to reside in the army of the other; and “the representations of the contracting parties to each other shall be duly attended to.” If peace was judged expedient, “it shall be made by mutual consent.”⁷⁵

These general terms changed at the turn of the century. The Company had attained a leading position in India. In general this meant that it required its allies to surrender their rights of negotiation with foreign nations. The treaties usually provided for a subsidiary force to be installed in the Indian state under the Company’s control. The troops provided by the Company were paid for by the states for whose protection against foreign attack they were intended. Security for the payment of the troops was obtained by the cession to the Company of territory yielding the requisite means. Subjects of European powers were furthermore excluded from serving the Indian administration. The Company promised in return not to interfere with the internal affairs of the ally.⁷⁶

At the beginning of the nineteenth century the Indian rulers for a great part lost their external sovereignty but remained in charge of the internal affairs of their state. But over time the East India Company managed to install British Residents who functioned as political advisers at the courts of the Indian rulers. The Indian Government began to interfere increasingly in the internal affairs of Indian States, but interestingly, this was usually not done by treaty but by unilateral actions on behalf of the East India Company. The annexation of Oude is a shrewd example of this but many other Indian

75 As quoted in LEE-WARNER (1894) 85.

76 LEE-WARNER (1894) 86 and 88.

rulers were also deprived of their internal sovereignty over parts of their territory or their whole territory on the grounds of civilizational superiority. Sind and Punjab were annexed for the general interests of the empire and for the welfare of their people. Coorg was annexed to “secure the inhabitants of Coorg the blessing of a just and equitable government.”⁷⁷

Initially treaties represented agreements between equal states similar to how the British officials regarded treaties concluded in Europe. In a later stage however they became a tool to legitimize British interference in the internal affairs of Indian states. In a way the Company officers reemphasized the validity of the treaties concluded with Indian rulers according to the European Law of Nations in order to legitimize their interference towards the Indian ruler. For the colonial officers, treaties concluded in India thus needed to be recognized as existing within the scope of European international law. The opinion of Travers Twiss regarding the annexation of Oude and the validity of the treaty of 1837 confirms this view. The binding force between states was fully recognized by the British Government in India.

Nevertheless, on a more theoretical level, international lawyers diverged in their opinion as to whether treaties concluded with Indian states had the same value as treaties concluded in Europe. William Lee-Warner in his treatise on Indian princes quoted Wheaton to the effect that states are not only bound to each other through treaties but also through a natural law: “The acts of statesmen are no more exempt than humanity itself from the law of nature, which distributes change over the whole of creation. The treaties and engagements of native states cannot be fully understood either without reference to the relations of the parties at the time of their conclusion, or without reference to the relations since established between them.”⁷⁸ Tupper too emphasized that each case should be considered separately by fact and should the circumstances press for it, treaties could be abrogated. Westlake considered treaties concluded in India rather symbolic, because he stated that they were subordinate to other titles of acquisition of territory. Hall had had a similar stance, explaining that:

“(...) the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when

77 LEE-WARNER (1894) 127 and 135.

78 LEE-WARNER (1894) 40.

the interests of the subjects of the native princes are gravely affected. The treaties really amount to little more than statements of limitations which the Imperial Government except in very exceptional circumstances, places on its own action.”⁷⁹

Hall recognized that this was not the original intention of many of the treaties but like Westlake he emphasized the change the British rule in India had undergone which ultimately brought on the necessity of adapting the conditions.

Johann Caspar Bluntschli (1808–1881), a Swiss lawyer who was a founding member of the Institut du Droit International, did not reflect on the legal status of treaties concluded in India. He only defined in more general terms that even entities which were not a sovereign state could be treated as though they were one, and treaties could be signed with them within the scope of international law. Even nomadic tribes were to be persuaded to respect international law and to maintain treaty relations.⁸⁰ This implicitly contains a call upon the members of the international society of nations to apply international law onto other entities and at the same time persuade them to appropriate European international law. As long as the ‘non-civilized’ states acted upon the provisions of European international law, the treaties they signed would also be recognized as being part of that law.

Although Indian treaties were considered to be binding according to European international law by the colonial authorities this did not mean that they thought that the full body of international law applied to Indian states. It was thought that no ‘native state’ could quote the principles of international law against the British Government, because to do so would be to assert the position of equality, which all those principles presuppose.⁸¹ But the treaties which the Indian states had signed with the East India Company had deprived them of that equality. European international law should be treated as a useful guide, as an example of how relations *could* be organized, but it was not binding.

From 1858 onward international law definitively lost its application to the relations between Britain and the Indian states and the relations amongst the Indian states. Although, it seemed difficult to categorize the level of dependency of Indian states on the British as Lee-Warner laid out:

79 HALL (1924) 28.

80 BLUNTSCHLI (1872) 64.

81 TUPPER (1893) 7–8.

“Sir George Campell in his *Modern India* arrives to the conclusion that ‘Nepal alone retains any remains of independence.’ Sir Richard Temple, in his article on India, published in Chambers’s *Encyclopaedia*, observed that ‘some are practically independent sovereigns.’ But when he goes on to show that none of them can make war or alliances, and that the British Government ‘takes a paternal interest in the good government of the states,’ he materially detracts from the title conferred on them. Sir Travers Twiss allows them no shred of independence, and classifies them as ‘protected dependent states.’ Sir Tupper styles them Feudatory states, and cleverly, but, I venture to think, imperfectly, justifies his preference for that popular phrase. (...) Fresh ground is broken by *Élisée Reclus* in his *Géographie Universelle*. ‘Les princes vassaux’ are, in his opinion, destined to become ‘une grande aristocratie comme celle des lords anglais.’ Sir Henry Maine insists on the fact that sovereignty is divisible, and that the chiefs of India are semi-sovereign, (...) Parliament in 1861 and 1876 used the expression ‘princes and states in alliance with her Majesty’; but in 1889 they were described, by Statute 52 and 53 Vic. Cap. Lxiii, as “under the suzerainty of Her Majesty.”⁸²

It is evident that the Indian rulers had lost so much of their sovereign traits that their states could not be considered independent states and had lost their international legal personality.

As Lee-Warner put it: “No Native state in the interior of India enjoys the full attributes of complete external and internal sovereignty, since to none is left either the power of declaring war or peace, or the right of negotiating agreements with other states; but the sovereignty of Native states is shared between the British Government and the Chiefs in varying degrees.”⁸³

The case of Oude shows how the Indian rulers appropriated European international law in order to defend their position. It also shows that although in theory the British did not accept application of European international law on Indian states, they did fully recognize the validity of the treaties concluded with Indian rulers. They did so, because this enabled them to use the treaties as a tool for increasing their influence over Indian states. After 1858 international law definitely ceased to regulate the relations between states in India, because the Indian rulers had lost to many of the attributes of sovereignty to the British Government.

82 As discussed by LEE-WARNER (1894) in the Preface of his book.

83 LEE-WARNER (1894) 30–32.

4. Legitimization of territorial expansion

Although European territorial expansion was not a very important subject for European international lawyers until the close of the nineteenth century, European international law did provide a couple of doctrines for legitimization of the acquisition of territory. Yet these doctrines were extremely abstract, their vagueness leaving plenty of room for interpretation and the publicists elaborating on them would rarely use contemporary examples of the extension of sovereignty over foreign territories outside Europe.⁸⁴ Nevertheless, there were lawyers, mainly working for the European colonial offices, who attempted to find a legal sanction for the imperial facts of their respective home countries. In studying the correspondence between the colonial office and British representatives in India, we find that legal doctrines existed which were specific for the Indian sub-continent and did not come up in the treatises of the international lawyers.

According to European international law⁸⁵ sovereign states were allowed to occupy land which belonged to no one, also called *terra nullius*. Usually this was defined as uninhabited land, or land where humans did not live permanently and which was not cultivated. Nomads, for example, were not sedentary societies so their territories were considered *terra nullius*. In reality however, many regions of the world were permanently occupied by peoples. Yet they were deprived of the right of sovereignty over their land in European international law theory of the nineteenth century because they were not considered civilized by the Europeans. In their opinion land should be used in the most effective manner and the more civilized states had a better title to foreign lands because they knew how to put the land into effective use. At the same time international lawyers sought to bring order to the relations between the European powers, who had, markedly in the second half of the nineteenth century, gotten into fierce competition over non-European territories. Some were for decades, some even for centuries, nominally in possession of territories by the title of discovery but had not actually assumed control over the land. Rivaling European states could

84 With exception of WESTLAKE (1914), who devoted a whole chapter in his *Chapters on International Law* to India.

85 This description of the titles for the acquisition of territory in European international law is based on the following works: ANGHIE (2005); KOSKENNIEMI (2001); FISCH (1984); GONG (1984).

hence claim that they did not practice effective occupation and that they in turn did have the intention to take effective control. The European possessor of the foreign territory was allowed a certain period of time to assume effective occupation of the land and if no other state laid claim on the territory, the doctrine of acquiescence was recognized. Thus, the doctrine of effective occupation served two purposes: to legitimize the acquisition of territory by European states from non-European entities and to regulate the relations between the European states.

Another title for the acquisition of territory was conquest. European international law theory allowed for territorial acquisitions during wartime. The just war theory of the early modern period, which sanctioned war when it was fought for a just cause or a just reason, lost its relevance at the close of the nineteenth century when positivism had replaced religious morale. Waging war was considered a prerogative of the sovereign, and its initiation was scarcely limited. Positivist lawyers were more interested in making conduct in war more humane and protecting non-combatants than to actually prevent the occurrence of war.

Finally, next to discovery, occupation and conquest, territory could be acquired by cession. This meant that the sovereign of a state was allowed to give or sell a part or all of his territory to a successor state. Express permission was usually given in form of a treaty. Most European colonies were founded on the title of cession. However, it was not always territory which was ceded in treaties. It was also possible to cede parts of the rights inherent to a sovereign. International lawyers from the nineteenth century onward proposed that the sovereignty over a territory could be split into external and internal sovereignty. External sovereignty had to do with the relations between states and contained the right to wage war and make peace, to maintain peaceful relations with other states and to conclude treaties. Internal sovereignty was the right to rule the peoples within the territory of the state. This strict separation between internal and external sovereignty allowed for the establishment of protectorates. Protectorates constituted an agreement in which the protected state ceded its external rights in return for a military alliance.

When we apply these doctrines to the acquisition of sovereignty by the British in India, we see that some of them do not apply. First of all, the Indian sub-continent was relatively densely populated and possessed cities which were larger than their European counterparts. Many states had a high

level of organization and an effective administration based on tax collection. The territories acquired by the Company and the British Crown were thus by no means *terra nullius*. Effective occupation was also not a title which lawyers used to legitimize the European acquisitions in India, as vast regions in India were cultivated effectively and effectively ruled by a common sovereign. Conquest however did take place in India. The British waged many wars on the sub-continent which resulted in the acquisition of territory. The battles of Plessey and Buxar or the Maratha wars are examples of conquest. Nevertheless, cession was the most common manner of acquiring territories. Hundreds of treaties of perpetual peace and friendship were concluded with Indian rulers which brought them under British protection and/or provided for cession of territory.

Thus, some of the general doctrines about the acquisition of territory in European international law theory could be applied to the Indian territories. The British international lawyer John Westlake at the close of the nineteenth century summarized what he thought was the international title of the British *imperium* in India. He ruled out occupation because “India possessed a civilization placing her as far as Europe beyond the reach of any such title.”⁸⁶ He also ruled out cession, for not all princes had signed treaties with the British and “the imperial right is claimed as overriding the letter of the treaties which there are”. Finally, he also ruled out an ordinary case of conquest, because conquest precluded the suppression of the conquered state or if the defeated state was left in existence, cession. As he had already ruled out cession Westlake finally concluded that the “imperial right over the protected states appears to present a peculiar case of conquest, operating by assumption and acquiescence.”⁸⁷

Yet, lawyers who had served the British administration in India came up with supplemental titles for the acquisition of territory. Some of them would confirm European international law theory but others were very specific doctrines suitable for the Indian case. Primarily, they thought that with the imperial grants and the subsequent treaties which were concluded between

86 Bluntschli also explicitly recognized that the Indians had once possessed a high level of civilization: “Bei den civilisirten alten Voelkern Asiens, wie besonders bei den alten Indern mehren und entwickeln sich theilweise die Ansätze und Triebe zu voelkerrechtlicher Rechtsbildung.” BLUNTSCHLI (1872) 10.

87 WESTLAKE (1914) 214.

the Mughal and the East India Company, the Company had become the legal heirs of the Mughal Empire. They felt it gave it the right to rule the whole Indian subcontinent as the Mughals had done before. In a correspondence about the annexation of Oude in 1855, J. P. Grant, Officiating Secretary to the Government of India, placed the right of annexation on the succession of the Mughal Empire and the duty of terminating incorrigible misgovernment in his dominions. Governor-general Dalhousie in his response also claimed that the British government was the successor of the emperors of Delhi.⁸⁸

Second, the Indian states, according to an English colonial administrator, had a “restless spirit of ambition and violence which is characteristic of every Asiatic government” which “rendered the peninsula of India the scene of perpetual warfare, turbulence and disorder.”⁸⁹ According to the statesmen the British had to bring stability, peace and the rule of law to the region. Sir Charles Metcalfe, who was resident at the court of the Nizam and would later become Governor-General, advised his government to capture the city of Bhurtpure, which was followed up on in 1826, because:

“We have by degrees become the paramount state in India. In 1817 it became the established principle of our policy to maintain tranquility among the states of India; (...) and we cannot be indifferent spectators of anarchy therein without ultimately giving up India again to the pillage and confusion from which we then rescued her (...). We are bound, not by any positive engagement to the Bhurtpur state, but by our duty as supreme guardians of tranquility, law and right, to maintain the legal succession of Balwant Singh (...)”⁹⁰

The term ‘paramount power’ was commonly used amongst the colonial administrators and from this status they derived the title to interfere with native affairs and even to take upon themselves sovereign control over territories. They claimed it was their duty, being the paramount power in India, to bring order and tranquility to India, like order and tranquility existed in Europe. This even superseded the provisions of treaty engagements.

Nevertheless, as was discussed above, the East India Company had only become the ‘paramount power’ in India in the early nineteenth century.

88 WESTLAKE (1914) 204.

89 WESTLAKE (1914) 206.

90 TUPPER (1893) 55.

Before that, it had participated in the Indian international system generally according to its customs. Territorial expansion in the eighteenth century was rather legitimized to be self-defense, self-preservation and the participation in the Indian system was explained by a policy of the balance of power. In Europe international law was subordinated to the principle of the balance of power. The European system was to prevent single states from becoming so powerful that they overruled the other states on the continent. Because of the system for the balance of power small states were protected by international law but on the other hand large states had the right to act as a police force for the preservation of the system. In the eighteenth century British policymakers claimed to have introduced a similar system in India.

Lord Cornwallis explained his policy of alliances to be in accordance with the principle of the balance of power. He used the alliance of the East India Company with the Peshwa and the Nizam against Tippu Sultan in 1792 as an example of such a strategy.⁹¹ In the same manner, Lord Wellesley justified in a paper written by him on August 12, 1798, shortly before the war against Tippu Sultan began, his intentions by arguments drawn from international law and contended that “we were entitled by the Law of Nations to reduce the power of Tippoo as an effectual security against his designs.” He stated that it was still an object of the Indian Government to re-establish the balance of power in India as it had existed under the Mughal Emperor prior to his decline. However, the Mysore state was annihilated and became completely dependent on the British Government. Now that the East India Company had become the predominant power in India, the principle of the balance of power no longer applied.⁹²

Other territorial expansion was sanctioned under the title of self-preservation and self-defense. First, it was generally accepted that the East India Company had to be protected against the French. Lord Castlereagh wrote in 1804 that “it has not been a matter of choice but of necessity that our existence in India should pass from that of traders to sovereigns. If we had not, the French would long since have taken the lead in India to our exclusion.”⁹³ Sir George Barlow wrote in 1802 when he was Governor-General in India:

91 TUPPER (1893) 29.

92 TUPPER (1893) 33–34.

93 TUPPER (1893) 32–33.

“With respect to the French, supposing the present questions in Europe not to lead to an immediate rupture, we are now certain that the whole course of their policy has for its object the subversion of the British empire in India, and that at no distant period of time they will put their plans in execution. It is absolutely necessary for the defeat of those designs that no native state should be left to exist in India which is not upheld by the British power or the political conduct of which is not under its absolute control.”⁹⁴

Second, the existence of the Company was threatened by the increased powers of the Maratha Confederacy, which was regarded by the British to be ‘predatory’ and ‘warlike.’⁹⁵ A war against them seemed inevitable if the Company was to maintain its influence in the region. Many wars in India were excused by the British authorities as being wars of self-defense and they often reported on how the enemy had not accepted all the propositions short of war and continued to arm itself as if in preparation for war (like Nagpore during the Third Anglo-Maratha War). The first Burmese war for instance, was described by Sir Charles Metcalfe as “the clearest case of self-defense and violated territory.”⁹⁶

The expansion during the eighteenth century was explained to be rather coincidental, as if territorial expansion was forced upon the East India Company by local circumstances. Although at that time the Europeans already had a clear sense of civilizational superiority, depicting the Indian sovereigns as violent rulers not capable of maintaining order and tranquility amongst each other, civilization was not yet frequently used to sanction British expansion. The notion of progress however did increase in importance with the British officials in the nineteenth century. The example of the annexation of Oude based on the alleged misrule of its Indian ruler clearly demonstrates how they used their perceived civilizational superiority to sanction their interference in the internal affairs of Indian states.

“(…) In India there was, since the downfall of the Moghal empire, not one considerable government of any stability, the government of the Company itself alone excepted. There was no possibility of any lasting quasi international combination for pacific purposes framed on a common assent; and the governments of the several native states had not enough either of administrative and political strength or of public morality to act persistently and for any length of time up to what might be called international obligations. (...) Europe was saved by its civilization from the

94 WESTLAKE (1914) 205.

95 TUPPER (1893) 34.

96 As quoted in TUPPER (1893) 44.

domination of one power of the West; a more advanced civilization was the efficient cause which made one Western power supreme throughout India.”⁹⁷

The doctrines of self-preservation, self-defense and balance of power had legitimized the acquisition of territory by conquest, annexation and cession by the East India Company in the period of its assent. Once it had become the ‘paramount power,’ civilization became the term which sanctioned not only territorial acquisition but also the reduction of the internal sovereign rights of the Indian rulers.

Additionally, due to its paramountcy, the British Government in India was able to introduce the doctrine of lapse. In Hindu law the sovereign had the right to adopt a son in order to secure the succession to his throne. Adoption would either take place in case there was no heir by birth or if this heir was not considered adequate by the ruler to succeed him. The British generally disapproved of this practice. The British Government in India, in certain cases, did not recognize the adopted heir and after the death of the Indian ruler it assumed sovereignty over his territory on the pretext that in the absence of a legal heir, the paramount power held title to the territory. Nevertheless, in a series of dispatches dating from 1834 to 1846, the Court of Directors of the Company permitted adoption but emphasized that it should remain an exception and should never be granted but as a special mark of favor and approbation.⁹⁸ After the Indian Mutiny, from 1861 onward, the Indian Government started to issue *sanads* of adoption to loyal Indian rulers. These patents or grants allowed the sovereign to adopt his heirs.⁹⁹

Finally, a number of protectorates fell to the Indian Government on a voluntary basis. In 1803, for example, a few of the Káthiawár chiefs applied for British protection, and offered, on certain conditions, to cede their estates to the British Government. The offer was not accepted initially until it was deemed strategically necessary in 1807. The supreme authority in Káthiawár, however, was not vested in the British Government alone until the Peshwa’s rights to the Indian peninsula were terminated, and the Gaekwar in 1820 had engaged to send no troops to the province and to make no demands on it except through the British Government. In another example, the Cis-Sutlej chiefs were glad to receive protection from the British in 1809 when the

97 TUPPER (1893) 37.

98 TUPPER (1893) 44.

99 LEE-WARNER (1894) 37.

Mahraja Ranjit Singh claimed the right of sovereignty over the whole Sikh country.¹⁰⁰

European international theory thus stood above the legitimization colonial officers put forward for the expansion of British authority in India. Those titles were based on conquest and cession. But once the separate Indian cases are studied, many other titles were found, mainly relying on self-defense, self-preservation against the intentions of rivals like the French or the Marathas. But above all the higher level of civilization served as explanation for British expansion, especially in the nineteenth century after the Maratha states were defeated in 1818, when the British Government had become the paramount power.

5. Hindu Law, Islamic Law and European International Law

The above description reflects the functioning of the Indian international system in practice. However, this tributary system was embedded in a larger view of how life and the world should be organized. The largest normative orders which affected the Indian sub-continent before European settlement were the Islamic order and the Hindu order, because most Indian rulers adhered to either one of these confessions. In order to assess whether European international law was indeed unique in the way it regulated inter-state conduct – as it was perceived by the Europeans until well into the twentieth century – or whether its characteristics were similar to those of other normative orders (which might be an argument for the existence of a more natural law shared by all peoples) it is tempting to conduct a comparison of these world views. The discussion of the natural universality of international law, however, is a philosophical one and the description and comparison of ideological concepts does not bring us nearer to understanding the historical process of the universalization of European international law. As mentioned above, the Indian normative order was only gradually suppressed after a period of increased entanglement. It was a pragmatic process which was inherently tied to the realities of the balance of power in India and was more determined by politics than ideology. World views changed under the pressure of political reality, and in order to identify and understand these changes it is more useful to trace the entanglements of

100 TUPPER (1893) 49.

normative orders than to compare their theory as it was laid down in scriptures. Because, as we have seen before, even the theory of European international law was not applied in its entirety to ‘non-civilized’ states like the ‘native states’ of India; its norms were adapted for the colonial context. Similarly, Hindus and Muslims had to adapt their norms to the realities of a changing world and in confrontation with a different normative order.

A comparison of European international law to Hindu law or Islamic law is further complicated by linguistic differences. The Islamic world order as well as the Hindu world order had as their objective a peaceful international society which was embodied in a stable political order. What this international order looked like however, differed significantly. Both orders were not so much a body of laws like European international law, but catered more to the notion that there is an ideal way of life which can be reached by fulfilling certain duties. They encompassed not only legal rules but also moral, religious, social and political values. This means that the conduct of rulers or states encompassed only a small part of a larger body of norms. It can thus be difficult for Europeans to interpret and understand these normative orders without pressing onto it a European framework of analysis. Nevertheless, colonial policies were often based on such misinterpretations. The British conducted many translations of Islamic and Hindu texts in order to uncover the plural legal systems existing in India. In a way they admired these legal traditions as examples of written law, in contrast to the oral traditions they had encountered elsewhere. “But in translating Hindu texts and using them as legal codes, the British were distorting Hindu legal judgments.”¹⁰¹ The historian must be careful not to make the same mistakes.

Nevertheless, it remains interesting to see what ideological framework the Indian tributary system was embedded in, in order to better understand its context but also in order to place the history of European international law in a global historical context. Yet, such a comparison can only be a superficial one, as the written sources of the three world views stem from very different eras and thus functioned in different historical contexts. Furthermore, even though a large part of India came to be ruled by Muslim rulers, its Hindu customs were not completely given up. Rather, the rulers integrated into Indian culture and did not fully apply Islamic rules of

101 BENTON (2002) 139.

inter-state conduct to India but preferably adopted the Indian customary rules.¹⁰² It was only Aurangzeb (1618–1707), the last successful Mughal Emperor, who adopted a more orthodox Islamic policy.¹⁰³ Thus, in India the Islamic world view and the Hindu world view merged and became a hybrid form of both ideologies.

Islamic law theory derived from the Qur'an and the *sunna*, which conveyed the exemplary practice of the Prophet Muhammad. From these sources stemmed the norms compiled in the *sharia*, which regulated the behavior of Muslims in their domestic and foreign affairs. Islam divided the world into two parts, namely that of the believers and that of the unbelievers. The territory under Muslim rule was called *dar al-Islam* (abode of Islam) and the territory under the rule of unbelievers was named *daral-harab* (abode of the war). Muslims had the constant duty to convert the *daral-harab* to Islam even if it involved forceful means. This duty was called the *jihad*.¹⁰⁴ Yet, in practice it was not viable to constantly wage war. In order to maintain peaceful relations with unbelievers and to facilitate trade for example, later jurists came with the explanation of the *sulh* which consisted of ways to suspend the *jihad* for a certain period. Muslims were thus allowed to engage in economic and cultural activities in the *dar al-harab* and the people of the book, such as Christian and Jewish people, were allowed to do the same in the *dar al-Islam*. Their life, security and property were protected by the authority of the Muslim ruler. Foreigners rights were sanctioned by the unilateral *ahdname* conferred only by the Muslim ruler, and could be unilaterally revoked whenever the pledge of friendship was construed to be violated.¹⁰⁵

In keeping with Islamic law theory, the ruler of the faithful should be elected by the congregation, and should govern according to the precepts of the Koran. So there was no fixed rule of succession, which led to many problems of succession in the Mughal Empire. The Islamic emperors, like the rajas, were regarded as a sort of ultimate court of appeal all in cases, judicial and others.¹⁰⁶ The *dar al-Islam* was ruled by one highest authority:

102 ANAND (2006) 9.

103 HARMATTA (1994) 318.

104 ONUMA (2000) 18–19.

105 ONUMA (2000) 20.

106 TUPPER (1893) 185.

the Caliph, who did not recognize any superior except the Divine. His governors in the provinces commanded armies, collected taxes, and generally carried out the duties of statecraft. The Caliph's duty was to maintain the unity of the territory of Islam by authorizing such governors to rule as agents of the court.¹⁰⁷

The king also played a central role in the Hindu world view. The term 'Hindu law' is used to denote the moral duties which were described in ancient Sanskrit texts. However, this is a modern term which actually does not fit with a concept that embraces all of life and is synonymous with virtue. As in English the concept of *dharmā*, a religious and legal duty, does not exist, we translate it into law. Dharma is derived from assumed divine revelations (śruti) which were recorded in the Vedas between 1500 and 800 B.C. Authors writing between 600 and 100 B.C. in aphorisms (sutras), and writing books of 'things remembered' (smritis) later interpreted the revelations and molded them into a legal science of dharma (dharmaśāstra). A vast Sanskrit literature of 'things remembered,' commentaries, treatises and digests subsequently "developed a complex system of legal rules building on the foregoing fundamental jurisprudential premises."¹⁰⁸

The Hindu legal system was to be administered by the kings of separate kingdoms who were to be advised by priests. It was the duty of the king to maintain order; he was not considered to be the source of law or the repository of law. He too was subject to the law and fulfilled the role of a judge.¹⁰⁹ The Hindu international system was similar to a *mandala*. Each king saw his kingdom at the center of the circle. The neighbors were all potential enemies and the states bordering those neighbors were all potential friends. This international system of embedded circles of states could be expanded infinitively over all states in the world. The only way to pacify it would be to establish a single sovereign over all. One king would expand his empire by conquering territories and meanwhile spread out the realm within which the law was faithfully observed. Other kings would continue to exist in this system as subsidiary or feudal states, or as members of a sort of confederation.¹¹⁰ The world sovereign had to balance the centrifugal forces

107 KELSAY (2010) 130.

108 FUNK (1996) 172.

109 FUNK (1996) 85.

110 GRAFF (2010) 183.

of the mandala system. If he was able to stabilize the system by creating friendly dependencies and subordinate chiefs then peace would prevail and his kingdom would become prosperous. The peace would be cemented by the exchange of gifts, thus establishing tributary relations. Like in Europe the notion of the balance of power existed. Kautilya, for example, called for states to intervene if another state should grow disproportionately strong in order to uphold the balance in the circular system.¹¹¹

It was the duty of the king to maintain order. Like in the caste system, where every individual was supposed to know his or her place in the system and to carry out the duties that the position required, it was the king's responsibility to correctly identify his state's relative position in international society and act accordingly, pursuing policies of expansion, conciliation or strategic retreat as necessary. It was the task of the king to uphold order in the domestic as well as in the international system.¹¹² Thus, a separation of sovereign rights into internal and external sovereignty like in European international law theory was not possible in the Hindu system. Every king, even though he was a vassal to another king, had the responsibility to pursue the balanced international order as represented by the *mandala*.

The use of force was deemed imperative for the maintenance of order. It was said to prevent the deterioration of order and in some contexts even to be a positive good. To prevent the social order from devolving into a state of nature, the king was obliged to enforce punishments. Force could even create the stable conditions for social and economic growth. In the international context this meant that war was a duty for the princely caste (*ksatriyas*). War became a religious ritual and when the king died in battle he was guaranteed heaven. The preservation of good order was preferable to an increase of prosperity, because without order prosperity was not possible.¹¹³ The use of force was also a necessity in Islamic law and war or *jihad* were indispensable in order to reach a world which was fully under *dar al-Islam*.

However, chivalric codes and complex legal principles similar to European international law governed war in the Hindu order as well as the Islamic order. They all committed to protect civilians from the causes of war. Yet, Hindu and Islamic law did not elaborate as much on measures short of

111 GRAFF (2010) 183.

112 GRAFF (2010) 170.

113 GRAFF (2010) 170–172.

war as European international law theory, because in these normative orders war was a necessity. Nevertheless, the notion that war was a last resort did exist in both orders, and when victory was doubtful, peace should be concluded.¹¹⁴ In Hinduism peace had to be sought by means of conciliation, gifts, or bribery, or by causing dissension among the enemy. If these expedients could not be used, the king should be prepared to fight in such a way as to conquer his enemies. Similarly to European standards, war ought to be declared openly.¹¹⁵

We have seen in the previous chapter how the acquisition of territory was treated in European international law. Hindu law allowed for belligerents to conquer territory from the enemy in the same manner as European international law permitted it. The execution seemed however to be different. In Hindu law the conqueror had special duties towards conquered territories. He was not allowed to conduct vengeance or to destroy the land he had occupied. On the contrary, the victor had the duty to protect the newly conquered land from acts of aggression. He even had to prevent his troops from pursuing the defeated enemy too much. Disposed kings should be treated with honor and all attempts should be made to win over the hearts of the locals, using a mixture of bribery and good governance. The victorious king:

“(...) should give rewards, as promised, to those who deserted the enemy for his cause; he should also offer rewards to them as often as they render help to him (...). He should adopt the same mode of life, the same dress, language, and customs as those of the people. He should follow the people in their faith with which they celebrate their national, religious and congregational festivals or amusements. He should please them by giving gifts, remitting taxes, and providing for their security. He should always hold religious life in high esteem. (...)”¹¹⁶

Thus, unlike European international law Hindu law prescribed the conqueror to integrate into the conquered society and adapt his policy to its customs. He was to restore the status quo which prevailed before the war. The conqueror was not to establish absolute sovereignty or dominion over the newly acquired territory but to bring it under his oversight, restoring order in a manner similar to a federation.¹¹⁷

114 KELSAY (2010) 124.

115 GRAFF (2010) 175–176.

116 As quoted in GRAFF (2010) 180–181.

117 SENGUPTA (1925) 12.

Defeated kings could be restored as feudal lords to the throne. Graff suggests that a treaty could be made with the original rulers if that was the preference of the inhabitants. Medhatithi, a tenth century commentator on Manu, stated that the defeated ruler and the victorious ruler shared their profits and inconveniences: “You must give me an equal share in your treasury, (...) and you must take an equal share in my fortune and misfortune (...) in activity or inactivity, at the proper time, you must personally adhere to me, both with your forces and treasury.”¹¹⁸ These words reflect the relationship between a suzerain and a vassal.

In Islamic law all territories not under Muslim rule were viable for conquest. The conqueror was to levy a special tax on the conquered people called the *fiqb*.¹¹⁹ Indeed, Aurazeb did introduce this tax in India. Additionally, the ruler could establish tributary relationships with the conquered state.¹²⁰

This very brief and superficial overview of the Hindu and Islamic norms for inter-state conduct demonstrates that describing the ideology behind the Indian tributary system is not explanatory for the existence of that same system. Also, it does not reflect the confrontation with the European normative order, because it predates this historical process. In this case it is preferable to trace entanglements in normative orders in order to understand why European international law competed with local norms and subdued them. What we can however derive from this overview is that there was no title in the theory of Hindu law or Islamic law for the acquisition of territory except conquest. Relations between states were mainly defined by war and in time of peace states in theory ruled in isolation or in a tributary relation between suzerains and vassals. Conquered states received a large amount of independence when they accepted the protection of the conqueror. Thus, in theory protectorates like in European international law existed in Hindu and Islamic law, yet they were not so much sanctioned by treaties as by gifts.

118 GRAFF (2010) 182.

119 KELSAY (2010) 128.

120 KELSAY (2010) 122–123.

6. Conclusion

The universalization of European international law was a long process and the Law of Nations was not at once accepted by non-European states. The history of the colonization of India confirms this. It is possible to define several stages in which different systems regulated the relations between states on the Indian sub-continent. In the first stage, at the time when the East India Company was still becoming a territorial power, European international law did not have any application to India. This by no means meant there was no international order on the sub-continent. On the contrary, Hinduism and Islam provided for very clear ideas of the role of sovereigns and how they should interact with each other. From these world views derived a complex network in India which was based on tributary relations. At the head of this network was the Mughal Emperor. He was the one who distributed offices and held the system together. The British East India Company initially participated in the Indian international system. It received *firmans* from the Mughal Emperor and became the empire's tax collector. The relations between the Company and the Indian states were those of equal sovereign states and this permitted the Company to pursue its policy of treaty alliances. The concept of protected states already existed in the Indian international system; the Company only added to it the standard of written treaties.

By the beginning of the nineteenth century, the East India Company became the paramount power in India. This allowed the Company to start imposing its own order on the Indian states. The new policy consisted of subsidiary alliances in which the Indian rulers received protection against their rivals if they in return allowed a British resident at their court and a subsidiary force to be maintained at their own cost within their territory. The force could either be paid with money or by cession of territory. The East India Company promised not to interfere with the internal affairs of the Indian state. The internal sovereignty of the ruler was thus protected.

The Indian rulers accepted the unequal treaties because it provided them protection against further interference of the British. They were fully aware of what the treaty relations entailed and although the treaties were first drafted by British officials and presented by them to the Indian ruler, the Indian rulers did try to negotiate on the terms of the treaty. Notwithstanding the fact that European international law seemed to increasingly regulate the

relations between the East India Company and the Indian rulers, the Indian international system continued to regulate the relations amongst the Indian sovereigns. They also tried to uphold it towards the East India Company, as the wish of the Nawab of Oude to pay tribute to his suzerain, the Governor-General, in 1814 proves, but the Company wished to put an end to these native customs. In this period the British officials did recognize the existence of an Indian legal system and only applied their own legal system where they deemed it necessary. The full body of European international law thus did not apply to Indian states, only those provisions which were convenient for the European hegemony. The Law of Nations did serve as a legitimization for territorial expansion of the East India Company. The treaties concluded with Indian states were recognized as valid treaties in the scope of European international law because they served as tools to sanction interference in Indian affairs, especially towards the Indian rulers.

In the nineteenth century the colonial officials started to use their perceived civilizational superiority more frequently to legitimize the interference in internal affairs of Indian states. This right stood above all other titles and permitted even the breach of treaties. An increased number of states was annexed on civilizational grounds. By that time the Indian rulers had appropriated the new international system and tried to claim their rights through its machinery. The remonstrations of Wajid Ali Shah in connection with the annexation of Oude are evidence of Indian appropriation of European international law.

From 1858 international law no longer had application to Indian states. The rulers had not only lost their right to wage war, make peace and enter into alliances but were also bound to follow up on the advice of the British resident, which compromised the internal sovereignty of the rulers. It was now the laws of the British Government they had to obey. The key symbol of the Indian international system too had disappeared when the last Mughal Emperor was tried in 1858. The treaties had effectively deprived the Indian states of their sovereign rights which were a prerequisite to be recognized as an equal state under European international law.

European international law served as legitimization of British colonial expansion; hence there were multiple titles for the acquisition of territory. The acquisition of territory in India was sanctioned by doctrines of civilizational superiority, conquest and cession. British colonial actors introduced additional titles for the legitimization of the acquisition of territory, the most

important one identifying the British government in India as the legal successor of the Mughal Emperor. International legal treatises looked more at legal practice within Europe than at developments overseas, so their provisions remained very generic.

A normative order is based on an ideology and does not necessarily reflect which ideas are put in practice. The theories for inter-state conduct derived from Islamic and Hindu scriptures predate the hybridization of both in India and the confrontation with the European Law of Nations. Also, it is difficult to identify the Indian international system which regulated tributary relations in India in the seventeenth and eighteenth century in an analysis of the ideology. Not so much a comparison of normative orders will help us to put the history of European international law in global historical perspective, rather the tracing of entanglements will provide more adequate tools to do so. The study of the historical practice is as much suitable for finding similarities and differences in various normative orders as comparative history. Entanglements, however, not only allow for legal pluralism but also provide the means for analyzing the tangible relationships amongst these plural legal systems.

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Contents

Introduction

- 3 | **Thomas Duve**
Entanglements in Legal History. Introductory Remarks

Traditions of Transnational Legal History

- 29 | **Thomas Duve**
European Legal History – Concepts, Methods, Challenges
- 67 | **Inge Kroppenber, Nikolaus Linder**
Coding the Nation. Codification History from a (Post-)Global Perspective
- 101 | **Geetanjali Srikantan**
Towards New Conceptual Approaches in Legal History: Rethinking “Hindu Law” through Weber’s Sociology of Religion
- 129 | **George Rodrigo Bandeira Galindo**
Legal Transplants between Time and Space

Empires and Law

- 151 | **Emiliano J. Buis**
Ancient Entanglements: The Influence of Greek Treaties in Roman ‘International Law’ under the Framework of Narrative Transculturation

- 187 | **Ana Belem Fernández Castro**
A Transnational Empire Built on Law: The Case of the Commercial Jurisprudence of the House of Trade of Seville (1583–1598)
- 213 | **Seán Patrick Donlan**
Entangled up in Red, White, and Blue: Spanish West Florida and the American Territory of Orleans, 1803–1810
- 253 | **Jakob Zollmann**
German Colonial Law and Comparative Law, 1884–1919
- Analyzing Transnational Law and Legal Scholarship
in the 19th and early 20th Century**
- 297 | **Francisco J. Andrés Santos**
Napoleon in America?
Reflections on the Concept of ‘Legal Reception’ in the Light of the Civil Law Codification in Latin America
- 315 | **Agustín Parise**
Libraries of Civil Codes as Mirrors of Normative Transfers from Europe to the Americas: The Experiences of Lorimier in Quebec (1871–1890) and Varela in Argentina (1873–1875)
- 385 | **Eduardo Zimmermann**
Translations of the “American Model” in Nineteenth Century Argentina: Constitutional Culture as a Global Legal Entanglement
- 427 | **Bram Delbecke**
Modern Constitutionalism and Legal Transfer: The Political Offence in the French Charte Constitutionnelle (1830) and the Belgian Constitution (1831)
- 461 | **Lea Heimbeck**
Discovering Legal Silence: Global Legal History and the Liquidation of State Bankruptcies (1854–1907)

- 489 | **Clara Kemme**
The History of European International Law from a
Global Perspective: Entanglements in Eighteenth and
Nineteenth Century India
- 543 | **Michele Pifferi**
Global Criminology and National Tradition: The Impact of
Reform Movements on Criminal Systems at the Beginning of
the 20th Century
- 565 | **Contributors**