# From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900

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The roots of the international legal order have often been traced to intertwining scholarly and political traditions dating back to the early seventeenth century, in particular to early writings in international law and the rise of the nation-state in Europe. Recent scholarship has attacked this narrative from many angles. One approach has been to reexamine early modern European politics and discourse, in particular questioning whether, for example, the publication of Grotius's writings, or the Peace of Westphalia, functioned as a foundational moment in the history of the interstate order.[1] A second, complementary approach has been to broaden the history of global order to encompass inter-imperial politics, including the legal relations of imperial powers and indigenous subjects.[2] The two projects

1. There is a growing literature on the misreadings of Westphalia. See, for example, Stephane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Brill, 2004). The best work on reinterpreting Grotius against a common reading by international relations theorists is Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).

2. A classic study along these lines is C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th Centuries)* (Oxford: Clarendon Press, 1967). See also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

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have been occasionally combined in efforts to trace the impact of imperial politics on trends in international law.[3] Yet the tendency here has been to emphasize perceptions in Europe of relations in empire. This perspective places colonial legal conflicts in the background, as elements of influence on European thought rather than phenomena with their own trajectories and institutional repercussions. It also leaves relatively unexamined an important link between imperial politics and international law: the actions and interpretations of imperial agents and colonial officials.[4]

This article considers the peculiar contributions of colonial officials to conceptualizations of "quasi-sovereignty" in the late nineteenth century. International lawyers used this term to refer to the status of sub-polities within empire-states that were said to retain some measure of authority over their internal legal affairs while holding only limited capacity to form international relations. The problems of refining the definition of quasi-sovereignty and fitting it within broader frameworks of law was taken up by both international lawyers and colonial officials—overlapping groups, as we shall see. Both sets of writers ultimately argued for the limits of applying international law to systems of quasi-sovereignty and at times imagined imperial power as trending irreversibly toward a unified system of sovereignty in which the law of empire represented a disaggregated variant of national law. Yet, even as they contributed to this emerging perspective, colonial officials faced immediate and complex legal challenges that simultaneously urged them to articulate a third position: the view that "imperial law" had distinctive qualities. Attention to the problem of "quasi-sovereignty" was instrumental in converting the business of imperial legal administration into a jurisprudence of imperial constitutional law.[5]

3. Keene, in *Beyond the Anarchical Society,* favors this approach without developing the legal politics of empire in detail. Several historians have made a more concerted effort to link the politics of trade in the East Indies with Grotius's writings. See, for example, Peter Borschberg, "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics, and the Origins of the Dutch-Johor Alliance (c. 1602–1616)," *Journal of Southeast Asian Studies* 33 (2002): 31–62; and, especially, Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615*) (Leiden: Brill, 2006).

4. Daniel Hulsebosch coins the term "imperial agents" and argues persuasively that in British North America these actors were key in elaborating the discourse on constitutionalism, rights, and sovereignty. Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2006). The study of imperial agents in the nineteenth century contributes to a trend, described and advocated by Duncan Bell, toward tracing British imperial discourse outside a small circle of unrepresentative canonical figures; see Duncan Bell, "Empire and International Relations in Victorian Political Thought," *The Historical Journal* 49 (2006): 281–98.

5. I am adapting here Hulsebosch's argument about the influence of imperial legal politics on the emergence of a new kind of jurisprudence in eighteenth-century New York (ibid.).

International lawyers' understanding of quasi-sovereignty in the second half of the nineteenth century was influenced by their emerging model of an international legal community composed of polities recognized as "civilized" by the societies already considered members of the international community. Efforts to fix a classification system encountered the problem of how to characterize a dependent imperial sub-polity that was "outside the scope of law and yet within it, lacking international capacity and yet necessarily possessing it."[6] Several solutions emerged. One was descriptive. States could be placed along a continuum stretching from, at one end, American federalism as a case in which "states" had retained significant jurisdictional prerogatives but could not engage in foreign policy, to, at the other end, states with some measure of control over external sovereignty such as the German states under the Holy Roman Empire; Tunis in relation to France; Zanzibar, under the protection of England; and the tributary polities of the Mughal and Chinese empires. Indian princely states fell somewhere in the middle of this continuum.[7] Another solution was to apply international law by analogy to systems of imperial sub-polities.[8] These states could be understood as relating to each other and at times to the imperial power in the same way as nation-states in the international order, with the difference that the imperial government possessed legal hegemony as the dominant political entity. In this sense, imperial administration represented a perfected international order, one without the Austinian problem of the absence of an overarching legal authority.[9] Neither of these solutions,

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For a discussion of global parallels to the scenario described in Hulsebosch, see Lauren Benton, "Constitutions and Empires," *Law & Social Inquiry* 31 (2006): 177–98.

6. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 81.

7. These examples are all provided by Westlake in *The Collected Papers of John Westlake,* ed. L. Oppenheim (Cambridge: Cambridge University Press, 1914), 88–89, 182, 198.

8. See, for example, Westlake's statement on international law by analogy (*The Collected Papers of John Westlake,* 232).

9. To a certain extent, this position also emerged out of the writings of imperial administrators. We see it foreshadowed in early nineteenth-century writings on the "subsidiary alliance" system in India. Wellesley, for example, noted in 1804 that British military power sustained by subsidiary forces in Indian states and supplemented by British political pressures enabled "the British power to control the causes of . . . internal warfare" and to guarantee to each state "the unmolested exercise of its separate authority within the limits of its established dominion, under the general protection of the British power." "Letter to the Secret Committee of the Court of Directors," extracted in S. V. Desika Char, ed., *The Constitutional History of India, 1757–1947* (Oxford and Delhi: Oxford University Press, 1983), 191–92. This view generalized the terms of treaties between the East India Company and the larger Indian states. The treaties took the form of agreements between independent states and emphasized the commitment of both sides to "mutual defence and protection against all enemies" while also committing the Indian ruler, "in the event of any differences arising," to accept "whatever adjustment" was decided upon by the "Company's Government" after

of course, truly disposed of the legal challenges posed by quasi-sovereignty. As Antony Anghie has observed, it was unclear how polities that possessed and yet did not possess sovereignty fit within a schema pairing degrees of civilization with graduated membership in international society.[10] And rendering empire as a kind of international system begged the question of when and where, and in the interests of whom and what, it was permissible to subvert treaties, suspend law, or otherwise ignore agreements between "states" in the imperial system.

These problems could to some extent be avoided by imagining empires as composite nation-states, in which variants of municipal law, rather than international law, applied. Rather than characterizing empires as objects for the application of international law, jurists represented them as peculiar variants of municipal law. Writing near the end of the nineteenth century, for example, John Westlake contended that quasi-sovereignty had ceased to be a problem. In considering the legal status of Indian princely states, Westlake observed that the effective power of the imperial government with regard to the princely states was growing irreversibly. He asserted that rule over Indian states had completed the shift "from an international to an imperial basis." Characterizing Indian princes as independent rulers or comparing the inhabitants of princely states to the subjects of sovereign nations had become merely "niceties of speech handed down from other days and now devoid of international significance."[11] Westlake recognized that the puzzles of sovereignty in native states had "at times perplexed the men who with high education and great practical ability have moulded that empire," but their attempts to delineate the legal puzzles of Indian states had probably been "needlessly intricate."[12] He drew on reports by British colonial officials to argue that it was a matter of settled law from 1857 in India that the subjects of Indian princely states were British subjects. Evidence in support of this view included a case in the Indian princely state of Baroda in which the British had asserted their right to "try" an Indian prince.[13]

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it weighed "matters in the scale of truth and justice." ("Treaty of general defensive alliance concluded by the Company with the Nizam of Hyderabad, 12 October 1800" in Char, ed., *The Constitutional History of India,* 189–92.) For similar treaties from this period, see C. U. Aitchison, ed., *A Collection of Treaties, Engagements, and Sunnuds Relating to India and Neighboring Countries* (Calcutta: Government Printing, 1865), vol. 9.

10. Anghie notes that the problem "was never satisfactorily denied or resolved." Anghie, *Imperialism, Sovereignty and the Making of International Law,* 81.

11. After all, whenever necessary, the imperial power could enact legislation—as it had in the case of control of the slave trade—that would apply across the empire. *The Collected Papers of John Westlake,* 220.

12. Ibid., 223, 232.

13. The British execution of the brother of the ruler of Manipur in 1891 for leading the revolt that placed his brother in power was also regarded by Westlake and others as confirmation

In analyzing the history of the "needlessly intricate" attempts of mid-level legal personnel to grapple with quasi-sovereignty in the late nineteenth century, this article shows that these officials could not so easily dismiss the legal challenges raised by colonial legal politics. Officials at times relied upon analogies to international law and at times appeared to be promoting a view of imperial rule as a less fully integrated version of the law of nation-states. Yet their efforts were also resulting in the elaboration of "imperial law" as a distinctive kind of law. Dubbed "political law" by British colonial officials, imperial law merged with constitutional law.[14] The problem of quasi-sovereignty in particular drew attention to two sets of constitutional problems: specifying precisely the elements of sovereignty possessed by sub-polities and clarifying the conditions under which the dominant power might subvert treaties or suspend law in order to intervene in states' internal affairs.

These two problems—defining the scope of subordinate jurisdictions and setting the conditions for the suspension of law—also existed within metropolitan law but became especially prominent as preoccupations for colonial administrators.[15] These officials were not only wrestling with the intellectual challenges of devising a coherent legal order out of disparate parts; they were also entangled with rulers in empire who were not passively conforming to the expectation that their polities would gradually and easily become enfolded into imperial administration. In examining the Baroda case and other legal disputes involving Indian princely states, this article shows that the principles described by international lawyers as settled—jurisdiction over British subjects, the reserved right to dictate and intervene in legal affairs of sub-polities, and the impulse toward consolidation of territory—were in fact subjects of ongoing conflicts and the catalysts of continual adjustments in imperial administration. Far from leading to legal integration, border disputes, jurisdictional tangles, and controversies about the application of imperial legislation were prompting the creation of new kinds of "anomalous legal zones" in empire, as colonial officials responded to conflicts by devising increasingly complex typologies of legal territories and elaborating ratio-

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that not just rulers but also the inhabitants of Indian princely states were British subjects. See ibid., 222–23; and William Lee-Warner, *The Protected Princes of India* (London: MacMillan and Co., 1894).

14. It is more common for historians to trace the connections between arrangements of quasi-sovereignty in India and the development of "indirect rule," a term that emphasized delegated authority rather than divided sovereignty. On the Indian residency system and indirect rule, see Michael Fisher, *Indirect Rule in India: Residents and the Residency System, 1764–1858* (Oxford: Oxford University Press, 1993).

15. Nasser Hussain has noted that imperial law made more frequent and systematic use of mechanisms for the suspension of law. Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

nales for intervening selectively in the internal affairs of quasi-sovereign states.[16] These processes created an institutional basis for continuing legal fragmentation and guaranteed that puzzles of quasi-sovereignty would not simply fade from view but would merge with broader controversies over the viability of imperial constitutions.[17]

Understanding quasi-sovereignty as a problem of imperial constitutional law allows us to connect debates in India to legal politics in other late nineteenth-century colonial (and national) settings. The last section of this article traces the very different results of legal politics regarding quasi-sovereignty in Basutoland in southern Africa and U.S. Indian law in the United States. The comparative context illuminates several dimensions of quasi-sovereignty as a constitutional problem. First, it calls attention to the global circulation of ideas about quasi-sovereignty. Phrases denoting a category in between "foreign" and "domestic" migrated across empires and regions. Second, the comparisons remind us of the open-endedness of the legal politics of quasi-sovereignty, with outcomes ranging from the establishment of rationales for broad legal intervention in U.S. Indian reservations to the creation in Basutoland of a formally independent nation-state. Third, juxtaposing the legal history of Indian princely states with the history of other dependent polities helps to show the spatial dimensions of quasi-sovereignty. The enclave pattern of semi-sovereign territories surrounded by areas of more direct colonial rule generated similar jurisdictional tensions that in turn prompted both periodic suspensions of law and the creation of new categories of legal distinction. Quasi-sovereign states came to be imagined everywhere as anomalous legal spaces, where imperial law applied differently—and sometimes not at all.

## The Sovereignty of Indian Princely States

The colonial project of defining the status of quasi-sovereign states was undertaken with special energy by a handful of British officials in the British Government of India, and especially the Foreign Office, between 1870 and the end of the century. The Foreign Office was responsible for the relations between the British Government of India with Afghanistan, the Persian Gulf states, and Burma, as well as with the numerous "Native States" of India.[18] The last were areas that had never come under the direct

16. I am adapting a term coined by Gerald Neuman, "Surveying Law and Borders: Anomalous Zones," *Stanford Law Review* 48 (1996): 1197–234.

17. For analysis of a discrete controversy about the viability of the imperial constitution, see R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford and New York: Oxford University Press, 2005).

18. For an overview of the changing composition and goals of the Foreign Department, see

control of the British government, and they numbered in the hundreds—various estimates over a fifty-year period placed the number of states at 693, 620, and 562, covering an area larger than one-third of the region and encompassing about a quarter of its population.[19] With very little coastal land, the territories of native states interrupted or partially surrounded districts claimed under direct British administration.

The problem of defining the sovereign status of these polities fell to Foreign Office officials, who sought to deduce from the mass of records of treaties, legal conflicts, and political crises a comprehensive doctrine that they labeled "political law," sometimes described as the foundations of a branch of Indian constitutionalism.[20] This effort has been treated somewhat peripherally by historians, in part because the princely states were quickly and clearly made subordinate to the British.[21] Many of the princes had been key allies of the British during the 1857 rebellion—as Lord Canning famously put it, they were the "breakwaters" of the wave of rebellion that swept the region—and post-1857 policy towards the states was influenced

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W. Murray Hogben, "The Foreign and Political Department of India, 1876–1919: A Study of Political Careers and Attitudes" (Ph.D. diss., University of Toronto, 1973), 1–28. On the Foreign Department at the time of the Baroda crisis, see I. F. S. Copland, "The Baroda Crisis of 1873–77: A Study in Government Rivalry," *Modern Asian Studies* 2 (1968): 97–123.

19. An estimate produced by a retired deputy surveyor-general in 1833 calculated that the area of native states with treaties of alliance with the British covered a little over 41 percent of the territory of the Raj (Barbara N. Ramusack, *The Indian Princes and Their States* [Cambridge: Cambridge University Press, 2004], 52–53). A report for the Government of India in 1875 estimated that the states covered over 590,000 square miles with nearly 56 million inhabitants. "Indian Native States Approximate Area, Population, Revenue, and Military Force," India Office Records, The British Library (hereafter IOR and BL) L/PS/18/D. In 1909, the *Imperial Gazetteer of India* counted 693 states (Ramusack, *The Indian Princes and Their States,* 2). By 1929, in part as a result of the consolidation of smaller states, a process that was approved by the larger states in order to secure their political influence and restrict membership in the Chamber of Princes, the estimated number was 562. (Directorate of the Chamber's Special Organisation, *The British Crown and the Indian States: An Outline Sketch Drawn up on Behalf of the Standing Committee of the Chamber of Princes* [London: P. S. King and Son, Ltd., 1929]).

20. Colonial officials did not always agree that they were engaging in debates about constitutional law. See Lee-Warner, *The Protected Princes of India,* 378–79.

21. Ramusack correctly notes the "muddled tedium" of most histories of the princely states (*The Indian Princes and Their States,* 2). She summarizes efforts of colonial officials to produce what she calls "bureaucratic codificiations" of relations with princely states (92–98). See also Fisher, *Indirect Rule in India.* Fisher's study ends before the period covered here but shows that British thinking about the doctrine of "paramountcy" was well developed before the mid-nineteenth century. On the careers of officials of the Foreign Office, see Hogben, *The Foreign and Political Department of India.* For an interesting legal case involving an Indian prince that reveals a certain reverence in popular culture in Bengal for petty princes in the early twentieth century, see Partha Chatterjee, *A Princely Imposter? The Strange and Universal History of the Kumar of Bhawal* (Princeton: Princeton University Press, 2002).

by the evident desire of both most princes and British officials to preserve a close political alliance. But the record of relations between the British and the native princes is hardly one of simple accommodation and collaboration. Nor was the project of systematizing the "political law" of empire an easy exercise. Most of the tensions surrounding the legal and political status of the princely states were never in fact resolved, and they emerged directly from conflicts and cases that often opposed princely and imperial authority. Further, the conflicts, and the debates they engendered, directly influenced broader definitions of British rule.[22]

An interesting window into the development of British legal policy toward princely states is provided by the writings of Sir Charles Lewis Tupper, an official in the British Punjab government from 1890 to 1899 and later a member of the Viceroy's Council. Tupper wrote both a general treatise on Indian "protectorates" and a four-volume report intended to serve as a manual on British law and policy toward the native states.[23] The report, published in 1895, built upon the work of two officials of the Foreign Office, H. M. Durand, who compiled a volume of "leading cases" involving the governance of princely states as a junior attaché before moving up the ranks and eventually becoming Foreign Secretary, and Sir Charles Aitchison, who served as Foreign Secretary between 1870 and 1877 and assembled multiple volumes of treaties, engagements, and *sanads* guiding relations of the Government of India and the Native States. Disagreements among these men and others within the Foreign Office were surprisingly minor. All participated in developing the argument that the relation between princely states and the British government should be regulated through "political law," the foundations of which were the doctrines of "divisible sovereignty" and "usage."[24]

For Tupper, "Indian political law" as positive law had its roots in a pre-British Indian past, and in "the hills and comparatively inaccessible tracts left aside by successive streams of invasion."[25] Tupper identified these re-

22. The legal politics of Indian princely states is part of a broader history of the politics of legal pluralism in India. The jurisdictional politics and contingencies of this history are outlined in Benton, *Law and Colonial Cultures,* chap. 4.

23. Sir Charles Lewis Tupper, *Our Indian Protectorate: An Introduction to the Study of the Relations between the British Government and Its Indian Feudatories* (London: Longmans, Green, and Co., 1893); and Sir Charles Lewis Tupper, *Indian Political Practice: A Collection of the Decisions of the Government of India in Political Cases,* 4 vols. (1895; Delhi: B. R. Pub. Corp. 1974).

24. Tupper's writings were published about the same time as another influential book on Indian "protected princes" by William Lee-Warner, also a prominent member of the Indian Civil Service. Lee-Warner took issue with Tupper's characterization of the legal and political order as "feudal" but agreed on the inapplicability of international law and, at the same time, the recognition of elements of "sovereignty" by native states. Lee-Warner, *The Protected Princes of India,* 376–82.

25. On the "Indian past," see Tupper, *Our Indian Protectorate,* 9, 132.

gions as comprising "the Punjab frontier, the Punjab hills, parts of Central and Southern India, and . . . nearly the whole of the country shown in the maps as belonging to native states."[26] The regions had preserved "a phase of sovereignty" that was "earlier than territorial sovereignty" and based on "tribal ownership of the soil."[27] Left to themselves, Tupper explained, the Indian rajas had historically shown a tendency "to range themselves, whether by compulsion or otherwise, under the hegemony of some paramount power."[28] In danger of imminent destruction by conquerors, the petty states were being rescued and preserved under British paramountcy.[29]

The "native" construction of paramountcy was seen to be congruent with European understandings of limited sovereignty. Rather than signifying an indivisible quality that a state either possessed or failed to retain, sovereignty could be held by degrees, with full sovereignty reserved for the imperial power. The notion of "divisible sovereignty" was articulated most clearly by Henry Sumner Maine. Maine's thought came to have more than a theoretical connection to imperial policy when he went to India in 1862—a year after the publication of his *Ancient Law*—to serve as Law Member of the Governor-General's Council. He wrote a series of Minutes in India that profoundly influenced officials in the Government of India formulating Indian "political law." Aspects of Tupper's approach to Indian sovereignty precisely imitated Maine's historical jurisprudence. Maine came to argue that the British had a responsibility to guide the speed of legal and political development in India so that it was neither too slow nor too fast. India operated in a wholly different time, so the British were obligated "to make their watches keep time in two longitudes at once."[30] Only exceptional leadership by jurists and lawyers would protect against "the capacity for law to become separated from the society it was supposed to reflect."[31]

26. Ibid., 131.
27. Ibid., 131, 167.
28. Ibid., 143.
29. Ibid., 151.
30. Quoted in R. C. J. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), 86.
31. This is Cocks's useful summation of Maine's central concern in *Ancient Law.* Ibid., 108. In *Ancient Law* (1861), Maine identified three processes within law that could produce change in order that the law would conform more closely to social conditions. These "instrumentalities" were legal fictions, equity, and legislation. Maine never succeeded in developing a coherent theory about how such mechanisms worked. He did become increasingly convinced that careful jurists could help to guide effective change, a belief that informed his strong support for codification later in his career. On the central place of the idea of legal evolution within British international law of the nineteenth century, see Casper Sylvest, "The Foundations of Victorian International Law," in *Victorian Visions of Global Order,* ed. Duncan Bell (Cambridge: Cambridge University Press, 2007), 47–66. On Maine's influence on imperial thinking about indirect rule, see Karuna Mantena, "'Law and Tradition': Henry

This perspective gave meaning to Maine's formulation of the notion of "divisible sovereignty" and provided the key to its application by British officials of the Foreign Office. The way to preserve earlier political and legal formations and to provide for their gradual change was to affirm the existence of quasi-sovereignty in these polities. Maine explained the argument clearly in his Minute of 1864 written in response to a question raised about the nature of sovereignty in Kathiawar. The region had been under the suzerainty of the Marathas, with tribute paid yearly to the ruler of Baroda (referred to as "the Gaekwar"). The British had the yearly exactions by the Gaekwar converted into fixed tribute, and, in 1820, administration of the region was ceded to the British, who guaranteed collection and payment of the tribute.[32] British officials regarded Kathiawar as a quintessential example of an anarchical region whose remote hills harbored multiple petty chieftainships in perpetual conflict. The British established a court of criminal justice in 1831 and another forum for adjudicating land cases, the Rajasthanik Court, in the same year. In the early 1860s, proposals to reassign some villages within the region, to enact measures against robberies across jurisdictions, and to regulate the district's mints raised questions among British officials about whether the region should be considered foreign or British territory and, if foreign, whether intervention in internal governance was permissible. The Governor of Bombay argued that the territory was part of British India because there was no evidence that the Kathiawar "chiefs" exercised sovereignty. Members of the Bombay Council agreed, citing earlier reports to argue that the polities of Kathiawar had long recognized sovereignty as residing in the suzerain power.[33] On this basis, the Bombay Government approved a plan by the Political Agent to consolidate and reorder the region's multiple petty jurisdictions.

But the Viceroy, in approving the plan for legal reorganization, reached a different conclusion about Kathiawar's status. Its residents, he argued, owed allegiance to the Crown but were not subject to British laws or administra-

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Maine and the Theoretical Origins of Indirect Rule," in *Law and History,* ed. Andrew Lewis and Michael Lobban (Oxford: Oxford University Press, 2005), 159–88.

32. Gujarat and Kathiawar had been divided between the Peshwa and the Gaekwar. Part of the region under the control of the Peshwa became British territory under the 1807–8 settlement agreement. In 1862, a proposal to cede this territory back to the Thákur of Bhaunagar was one of the issues that prompted the question of whether Kathiawar should be considered foreign or British territory. For more on Kathiawar, see John McLeod, *Sovereignty, Power, Control: Politics in the States of Western India, 1916–1947* (Leiden: Brill, 1999), 15–25.

33. They were citing Elphinstone's 1821 *Report on the Territories Conquered from the Paishwa,* reprinted in *Selections from the Minutes and other Official Writings of the honourable Mountstuart Elphinstone,* ed. G. W. Forrest (London: Richard Bendy and Son, 1844), 251–444. More broadly influential was James Tod's *Annals and Antiquities of Rathasthan* (1823; Delhi: Asian Educational Services, 2000).

tion. Although the British government retained the right to intervene "from time to time" when necessary to correct "evils and abuses," Kathiawar could not be considered British territory. Support for this "half-formed theory," as Tupper described the policy and its rationale, was drawn from international law writings on limited sovereignty.[34] But it was Maine who provided in his 1864 Minute the explicit theory of sovereignty that could compass a dependent state with quasi-sovereignty under British rule: "Sovereignty is a term which, in international law, indicates a well-ascertained assemblage of separate powers or privileges . . . A sovereign who possesses the whole of this aggregate of rights is called an *independent* sovereign; but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor, and some with another. Sovereignty has always been regarded as divisible." The Kathiawar States had "been permitted," Maine observed, to exercise some sovereign rights, but "by far the largest part of the sovereignty . . . resided in practice with the British Government, and among the rights which it has exercised appears to me to be an almost unlimited right of interference for the better order of the States." Maine added that the obligation to intervene was enhanced by "the fact . . . that our government of India has in a sense been the cause of this anarchy in Kathiawar" by preventing the states from engaging in the "natural process" of armed conflict among themselves. Maine concluded that Kathiawar must "be properly styled foreign territory."[35]

Tupper viewed the Kathiawar decision, and Maine's Minute in particular, as the foundation for Indian "political law." For Tupper, the recommendation that Kathiawar "be properly styled foreign territory" was not just legally but also historically correct; it translated an indigenous arrangement of petty states under a suzerain power into "Western phraseology" and signaled a distinction between the "primitive violence" of pre-British India and the "civilized rule" of the Raj.[36] There were other revealing, but still vague, parts of Maine's Minute that would take on more definite form as relations with princely states developed. Kathiawar, in Maine's words, had been "permitted" the exercise of sovereign rights. This phrasing implied, as subsequent policy debates would affirm, the view that sovereignty was held as an exclusive property of the imperial power and some of its attributes merely awarded, conditionally, to native states. Only "immunity

34. See Tupper's analysis of the Kathiawar issue in Tupper, *Our Indian Protectorate;* John McLeod, *Sovereignty, Power, Control,* 15–25; and Ian Copland, *The British Raj and the Indian Princes: Paramountcy in Western India, 1857–1930* (London: Sangam Books Limited, 1982), 98–122.

35. "Kattywar States; Sovereignty," Minutes by the Hon. Sir H. S. Maine, 22 March 1864, IOR V/27/100/3, 35–38.

36. Tupper, *Indian Political Practice,* 1:220.

from foreign laws" approached the nature of an inherent sovereign right, but this prerogative, too, might occasionally be swept away in the course of an act of "interference" by the British.[37] The only theoretical limit on intervention was that it be undertaken in the interest of restoring or promoting order and good governance.

Perhaps most striking about Maine's Minute of 1864 is not that it contained the outlines of British policy toward native territories for the next half century but that it left so many aspects of the relation undefined. It was impossible to deduce from the definition of a "foreign" and part-sovereign territory the arrangements that might pertain to jurisdiction. Not surprisingly, jurisdictional disputes—in turn intricately related to revenue questions—continued to dominate daily relations between the British Government of India and the Indian states. Further, the vagueness of the criteria for acts of intervention that violated states' sovereignty, while clearly serving the interests of the British government, was destined also to create uncertainty and controversy about the distinction between political and legal actions with regard to the states. Underlying this problem was the equivocation in Maine's Minute about the applicability of international law to the relation between the British government and the Indian states. Maine rested the rationale for intervention on principles of international law; the situation of Kathiawar, he wrote, exactly paralleled the hypothetical case of "a group of little independent States in the middle of Europe . . . hastening to utter anarchy." Their "theoretical independence" would never deter "the greater powers" from interfering to restore order. Yet, at the same time, Maine tried to distance the Indian situation from international law. The mere consideration of these questions seemed to enhance imperial authority. By defining native states' sovereignty, the British government had diminished it; by articulating a right to contain warfare, the British had removed inter-state relations from the realm of international relations.[38]

Perhaps anticipating the conflicts that would highlight these ambiguities, Maine's 1864 Minute held up "usage" as the only steady source for guidelines on British policy toward the Indian states: "The mode or degree in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, which has to be separately decided in each case, and to which no general rules apply." In other words, British policy itself formed guiding precedents, while the precise mix of sovereign rights in princely states would be deduced "from the

37. "Kattywar States; Sovereignty," IOR V/27/100/3, 35–38.

38. Ibid. This understanding was consistent with a parallel move by the colonial state to claim a prerogative to make the rules for the plural legal order and, in the process, set itself up as the dominant legal authority. See Benton, *Law and Colonial Cultures,* chap. 4.

*de facto* relations of these States with the British Government." Tupper generalized this principle as one establishing "usage" as the preeminent source of "political law."[39]

It is tempting to construe these principles as providing rationales for the exercise of unconstrained power. But this view would ignore several political and legal realities. First, British preoccupation with preserving the princes as allies after the events of 1857 created persistent pressure from within to accommodate their authority. Second, though they were sometimes labeled as collaborators, the rulers and subjects of native states repeatedly and routinely challenged British jurisdiction and extra-legal interventions. Third, British policy was riddled with contradictions. The tension between efforts to systematize relations with Indian states and insistence on the purely political nature of British intervention continued. Often it was minor colonial agents who demanded greater precision in law and higher British officials who saw legal guidelines as a potential constraint on power. Yet officials at both levels remained committed to the project of articulating the legal basis of differentiated rule. One result was an implied claim that the law itself generated the conditions for extra-legal action. Another was the creation of increasingly elaborate schemata for classifying different types of legal territories within both British India and the native states. These moves responded to a series of disputes and political crises clustered in just the first decade following the Kathiawar decision.

## Defining "bare sovereignty"

If British officials looked to debates about Kathiawar for definitions of sovereignty in princely states, they considered the Baroda case a reference point for subsequent interventions in native state administration. As it has come to be summarized, the case seems simple enough: Toward the end of 1874, the British Resident in Baroda, Colonel Robert Phayre, reported an attempt on his life. Someone had poisoned his morning sherbet, and suspicion fell almost immediately on household servants thought to be working for Baroda's ruler, the Gaekwar, Malhar Rao. The Viceroy appointed a commission composed of three British officials and three prominent Indians from other princely states to render an opinion on the charge of disloyalty. The panel was divided, with the British officials convinced of the Gaekwar's guilt and the Indian officials declaring that there was insufficient evidence of his involvement. The British government then ordered

39. "Kattywar States; Sovereignty," IOR V/27/100/3, 35–38.

the Gaekwar deposed, not on the basis of the attempt to poison the Resident but on the broader charge of "misrule," which was supported in part by reference to an earlier commission report detailing revenue irregularities and acts of oppression. Malhar Rao was sent into exile and an heir was chosen by the British government from among several minors proposed as candidates for succession. According to Tupper and other later observers, the actions simultaneously affirmed British control over succession in princely states and established the right to intervene to counter "misrule."[40] By refraining from annexing Baroda, the Government of India sought to reassure other native rulers that the pre-1857 policy of annexation would not be resumed, while also reinforcing the authority of Residents, who were officially empowered only to offer native rulers guidance and advice on internal affairs.

The crisis was more complex than this narrative suggests. Rather than resolving questions of British authority, the case pointed to the central and persistent legal puzzles of quasi-sovereignty. While the immediate catalyst was the apparent attempt to poison Colonel Phayre, the background to the accusation was a struggle between the Baroda ruler and the Resident centering on legal administration, especially jurisdictional arrangements. Baroda's geography helped to shape this legal politics. The state's territories were noncontiguous and mostly landlocked, surrounded by areas that were formally part of British India or other native states. Baroda contained both low plains, where cotton had recently become the main crop, and a diverse array of hill regions ranged along the state's non-contiguous borders. The legal administration of the hills was a subject of special conflict between Malhar Rao and the Bombay government, and the object of particular attention from Colonel Phayre. The British government's unwillingness to clarify jurisdictional rules or impose unpopular arrangements formed part of a more general, inchoate position on the limits of law in native states. The intractability of everyday legal politics helped to prepare the way for the British government's extra-legal actions late in the crisis.

The crisis also resulted in part from tensions between Phayre, who appealed to the government to sweep away the legal ambiguities of quasi-sovereignty, and higher officials who tried to perpetuate uncertainty as a matter of policy. Phayre had not been in Baroda for long. The Bombay government appointed him in 1873, over the objections of officials of the Government of

40. The Baroda case was routinely cited as a precedent-setting case that established "the principle that incorrigible misrule is a disqualification for sovereign power" (Tupper, *Indian Political Practice,* 1:49). The case was also said to affirm that rulers of Indian states owed allegiance to the Queen and the relation of the British monarch to the ruler was one "of sovereign to subject" (*The Collected Papers of John Westlake,* 221).

India in Calcutta.[41] Phayre's long and detailed letters to his superiors reveal a stubborn and officious figure.[42] He was strident in demanding more precise and aggressive rulings from Bombay to strengthen the authority of the Resident in Baroda, and he displayed little tact in his dealings with either British officials or Malhar Rao. Reading his correspondence, one begins to suspect that there were others besides his poisoners who would have taken pleasure in plotting against him. Certainly toward the end of the crisis, Bombay and Calcutta officials would agree on wanting him moved out of the way.

In summarizing Phayre's complaints, historians have emphasized tensions between Malhar Rao and local elites, particularly complaints about excessive taxation and, later, Phayre's open hostility toward the Baroda ruler's chosen *dewan.*[43] But a larger volume of Phayre's correspondence was taken up with legal matters. Phayre pressed continually for clearer rules about British jurisdiction and for an expanded imperial jurisdiction over crimes committed by Baroda subjects in neighboring British Indian territories or in British cantonments. He repeatedly proposed that the British seize criminal jurisdiction over all British subjects within Baroda.[44] Concerned about what he perceived to be infringements of British legal authority in the cantonment, Phayre wrote to Hyderabad for guidance about jurisdictional arrangements there. In most cantonments, the Government of India was characterizing the land as native territory that, for legal purposes, was to be treated as British territory, with princely states retaining only a symbolic attachment that one British official labeled as "bare sovereignty."[45] The ambiguity of such solutions seemed irksome to Phayre, who continued to press for greater precision in defining the scope of British legal authority.

The responses of Phayre's superiors were at first sympathetic, then cautionary, and ultimately adamant about non-interference.[46] Indeterminacy was being articulated as policy—even as a core principle of an imperial law based on divisible sovereignty. The position was consistent with warn-

41. Copland sees the case mainly as the byproduct of the political rivalry of the Bombay government and the Viceroy's Council in Calcutta. Copland, "The Baroda Crisis of 1873–77."

42. Phayre cuts a figure much like that of Captain Bligh in Greg Dening's telling: Bligh was not excessively harsh, but he was very bad at performing authority in a way that inspired loyalty in interlocutors or subordinates. Greg Dening, *Mr. Bligh's Bad Language* (Cambridge: Cambridge University Press, 2002).

43. This is Ian Copland's view in the most careful and comprehensive accounting of the crisis. Copland, "The Baroda Crisis of 1873–77."

44. IOR P/481, f. 122.

45. Quoted in Tupper, *Indian Political Practice,* 3:17–19.

46. Phayre was warned not to encourage Baroda subjects to bring complaints before him and to avoid "any language calculated to cause irritation" to the Baroda ruler. IOR P/481, f. 82.

ings by the Government of India about the dangers of specifying legal arrangements in treaties or other agreements with native states: "To do so would, in our opinion, reduce the right which we claim to exercise as the Paramount Power in India to a matter of negotiation between us and those over whom we assert the right." The position left open the possibility of action "when our interference is imperatively called for by the condition of the administration of justice in such States."[47] Even if the government wished for further precision, some legal advisors argued, the "infinite variety" of arrangements in native states, with different portions of sovereignty permitted to various native rules, made this goal impossible. Defining "in precise terms where in each case the ruling Prince merges into a British subject seems *beyond the power of language* in the present state of our relations and of our information."[48]

It is no wonder that his superiors found Phayre's insistence on precision in matters of jurisdiction so disruptive. In November 1874, when he was probably on the verge of being removed from office by Calcutta officials, Phayre raised the alarm about the attempt to poison him. Drawn into action, the British Government of India determined that any proceeding would have to be extra-judicial since the government did not hold criminal jurisdiction in Baroda. A commission was convened to consider the charges of poisoning and spying, but the Government of India insisted that it "was not constituted as, or intended to be, a judicial tribunal."[49] The decision to suspend the Gaekwar while the inquiry was underway was also "not based on considerations of law. It was an act of State, carried out by the Paramount Power."[50] In another extra-judicial move, the decision was taken not to press charges against the men who had confessed to involvement in the plot to poison Phayre; they were sent for indefinite terms of imprisonment to points ranging from Aden to Burma. Ultimately, the directive to depose the Gaekwar was issued because of irregularities of rule observed before the poisoning charge surfaced. The enclave location of the state helped to provide an argument for intervention because of "the manner in which the

47. IOR P/752, Government of India Foreign Department Proceedings, September, 1873, Judicial, No. 9, p. 14.

48. IOR L/PS/20/MEMO31/24, "Note for the Bhaonagan Case" by E. Perry, 11 December 1875. Emphasis added.

49. BL Mss Eur F/126/88, f. 5. In its charge to the commission, the Government of India stated that, if proved, the charge would be tantamount to treason. This statement, Westlake later argued, established that the Government's rationale for what Westlake incorrectly called a "trial" was that the Gaekwar was a subject of the Queen and owed allegiance to the Crown. See *The Collected Papers of John Westlake,* 222.

50. BL Mss Eur F/126/88, f. 4. The native members of the Commission were also accused of a form of jury nullification, that is, of basing their opinions more on "political feeling than on consideration of the evidence." IOR Mss Eur F/126/88, f. 9.

territories of the British Government and the Gaekwar are intermingled."[51] British officials expressed the fear that disorder would cross borders, and that Baroda would become a refuge for thieves and plunderers threatening British Indian territories.

The Baroda case did not make law so much as it pointed to the limits of law in regulating relations between the British government and the princely states. The same Foreign Office officials who prided themselves on systematizing legal relations with the states also developed and refined the notion that paramountcy resided mainly in the prerogative of the imperial power to decide where law ended and politics began. More precisely, the colonial state claimed the power not to decide—to remain silent on questions that were "beyond the power of language."

## Territorial Anomalies

Debates about how to deal with the legal ambiguities of native states influenced broader efforts to designate categories of colonial territory according to their different relationships to law. The "root of the difficulty" according to the Government of India was that its administrative powers had a larger scope than its legislative powers. Although British imperial laws might be in force in a given native state, they derived their standing as law not from legislative but from executive authority through the actions of the Governor-General in Council "executing powers delegated to him by a foreign ruler." The result was to form territories that were "*at once foreign to us and not foreign* . . . Such a state of things is very peculiar and anomalous, and must issue sooner or later in practical difficulty."[52] A case of legal confusion served as illustration of the anomalies. A subject of Jaipur was convicted in Rajputana and sent to an Agra jail, under British control. When a British official wanted to move the prisoner, he was asked for a warrant, but since the man was not a British subject, the official did not have authority to obtain one. Effectively, the man had been made into a legal non-person by transfer into custody in a British district.[53]

The uneven application of legislation in various territories was related to the broader uncertainty about whether imperial government regulations extended to "outlying districts" deemed to be unsuited for them. In 1870, Parliament established a process for local authorities to apply for "deregula-

51. The Viceroy's Minute of April 29, 1875, IOR F/126/88.

52. IOR P/752, Government of India Foreign Department Proceedings, July 1875, Judicial, No. 14, 9–10.

53. Memorandum by Mr. Stephen upon the issues disposed of by Despatch (Judicial) No. 55, dated 23 December 1875, IOR L/PS/18/D118.

tionising Acts" intended to remove "from the operation of the General Acts and Regulations certain districts which were too backward to benefit by them." Despite this and other attempts to fix a procedure and guidelines for determining when and where the general enactments were legally in force, there was considerable confusion about the standing of various districts. Judicial officials undertook a massive review of the record of past legislation, including deregulationising acts. The resulting Scheduled Districts Act, passed in 1874, listed those districts that would be exempted from legislation applicable to the rest of Indian territory. As Tupper summarized later, the legislation, together with existing practice and policy regarding native states, created five kinds of legal territory: three kinds of territory in British India and two kinds of territory in native states, depending on the statutes and agreements determining exemptions from British enactments and jurisdiction. Within British India, the exceptional territories making up the two minor categories were "wild, remote, or peculiar districts or provinces."[54] Within native states, "exceptional portions" operated under laws established through executive order of the Governor-General in Council.[55] The legislation of 1874 had been partly prompted by the legal anomalies of native states, but in practice it did little to address them while creating new categories of legal territory within British India.[56]

One need not have a very active imagination to guess that this schema did not put an end to questions about legal administration in the various territories, nor did it resolve controversies about the designation of some districts as British or native. The typology officially linked two kinds of legal backwardness, one of "remote" regions inside British India and another of native state territory that had not received British law. Exclusion from British jurisdiction and legislation was clearly tied to representations of wildness and disorder.[57] Hill regions, forests, and other remote regions within both British India and native states formed the quintessential examples of such imagined legal primitiveness.[58] Colonial officials' discourse

54. Tupper, *Indian Political Practice,* 1:230–52; quotes at 1:230, 241.

55. Maine had noted in 1864 that the British government had no authority to "extend" British laws into native territory; they could only be "applied."

56. In the same period, other legal policies were having a similar effect, most notably the Criminal Tribes Act of 1874, which created a legal category of exclusion for entire ethnic groups. See Anand Yang, "Dangerous Castes and Tribes: The Criminal Tribes Act and the Mahahiga Doms of Northeast India," in *Crime and Criminality in British India,* ed. Anand Yang (Tucson: University of Arizona Press, 1985), 108–27.

57. On the British discourse on "wildness," see Ajay Skaria, *Hybrid Histories: Forests, Frontiers and Wildness in Western India* (Oxford and New York: Oxford University Press, 1999).

58. A good example is the Dangs, an area that lay along the border of Baroda and the British district of Khandesh, whose main inhabitants, the Bhils, leased the lands for for-

about the legally archaic nature of these areas merged with attempts to define with greater precision the anomalies of rule in princely states. The result was an intricately variegated spatial legal order.[59]

## Comparative Puzzles

International lawyers embraced comparisons across a broad range of "protectorates" in the late nineteenth century, but they tended to turn away from comparisons between Indian native states and "uncivilized" colonial subpolities.[60] Westlake, for example, insisted on distinguishing between Indian princely states and protectorates in "uncivilized" regions. Yet his analysis of their qualities was not so very different; he viewed sovereignty in both kinds of places as effectively "in suspense"—in uncivilized regions, because they were supposedly stateless and would inevitably be subsumed by imperial governance; and in civilized regions, because recognition of autonomy was merely a political convenience and could be removed at any time.[61]

Even as international lawyers insisted on the differences between Indian princely states and "uncivilized" polities, colonial officials were free to propose parallels. Consider just one example, that of Basutoland, the region between Natal, the Orange Free State, and Griqualand east in southern Africa.[62] As part of a policy to contain and control Boer settlers in the interior, the British absorbed the territory, which was then under the suzerainty of the Basuto leader Moshoeshoe, into the Orange River Sovereignty in 1848. When the Sovereignty was abandoned in 1854, continued warfare between the Basuto and the Boers led Moshoeshoe to court the British as protec-

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estry to the British. In 1889, the Bombay government sought to declare the Dangs a part of British India. But the Government of India argued that the legal primitivism of the Bhils recommended instead the "personal rule of a British officer untrammeled by anything but executive orders from his own Government" (Tupper, *Indian Political Practice,* 1:245). See Skaria, *Hybrid Histories,* for a detailed history of British relations with the Bhils.

59. This legal territorial differentiation was occurring at the same time that various forces were giving rise to the political imaginary of a national territory. See Manu Goswami, *Producing India: From Colonial Economy to National Space* (Chicago and London: University of Chicago Press), 2004.

60. See Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Oxford University Press), 1984); and Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2004).

61. *The Collected Papers of John Westlake,* 183.

62. The mfekane had propelled a diverse set of polities into this region, and Boer and Griqua incursions also threatened to displace agricultural and pastoral settlements along the region's shifting borders.

tors. He declared himself a subject of the Queen and, in 1871, accepted annexation by the Cape Colony.

British and Cape officials used changes in legal administration to try to fashion a stable arrangement of quasi-sovereignty for Basutoland.[63] They were unsuccessful. Major struggles over such issues as the collection of the hut tax, the enforcement of marriage regulations, and Basuto disarmament in the rebellion that led to the eventual expulsion of Cape administrators were tied to ongoing, structural conflicts about shared legal authority. During the twelve years that Basutoland came under direct administration of the Cape, colonial officials sought to undermine chiefs' legal authority while carefully preserving elements of their legitimacy. Basuto leaders, for their part, often sought accommodations on matters of principle but violently opposed specific acts by Cape-appointed magistrates that threatened to undermine local legal prerogatives in settling disputes, imposing fines, and fixing punishments.[64] As in India, colonial officials held up Basuto political life as pure and admirable but also labeled it as the main source of instability in the region and a necessary object of gradual reform.[65] Sovereignty was seen as residing in the people, who expressed their views in community-wide meetings called *pitsos*, and law was held to derive not from the chief but from custom "from a period so remote that its origin was lost in the mist of antiquity."[66]

63. See Sandra Burman, *Chiefdom Politics and Alien Law: Basutoland under Cape Rule, 1871–1884* (London and Basingstoke: The MacMillan Press, 1981). The following account is based largely on Burman's narrative; see also S. B. Burman, ed., *The Justice of the Queen's Government: The Cape Administration of Basutoland, 1871–1884* (Leiden and Cambridge: African Studies Centre, 1976).

64. For example, in the explosion of raiding between Boers and Basuto after 1854, leaders of the Orange Free State routinely demanded restitution for Basuto cattle raids and the surrender of Basuto men accused of violent crimes for their trial by Orange Free State courts. The Basuto occasionally made some restitution for raids, but Moshoeshoe never gave in to the request for jurisdiction over border crimes. The Basuto leader eventually agreed to recognize a long-disputed boundary between the polities but refused the Boer demand that he accept a magistrate in Basuto territory to curb border infractions. Even in the War of the Guns that ended Cape sovereignty, the controversy over disarmament became a crisis only when the chiefs rejected the right of Cape-appointed magistrates to interfere in chiefs' actions to punish subjects who had refused orders not to give up their guns. Burman, *Chiefdom Politics and Alien Law.*

65. Also as in India, these views were influential throughout the middle decades of the nineteenth century but were most clearly articulated in the 1890s. George Theal, an official in the Native Affairs Department at the Cape, edited three volumes of documents on Basuto-European relations for which he wrote lengthy introductions tracing Basuto history and analyzing Basuto primitive sovereignty. The similarities to Tupper's perspective and position are unmistakable. J. W. Sauer and George Theal, eds., *Basutoland Records,* 3 vols. (Capetown: W. A. Richard & Sons, 1883).

66. Theal, "Introduction," in Sauer and Theal, eds., *Basutoland Records,* 3: xv.

The Basuto revolt against Cape authority in the 1880s prompted an attempt to introduce an arrangement modeled directly on British relations with Indian princely states. In the midst of the rebellion, the military commander at the Cape, Major-General Charles Gordon, proposed a system explicitly based on British Indian models in which Basuto internal affairs would be left alone and the British would assume control of the region's external sovereignty. Drawing from Indian examples, Gordon wanted to remove magistrates from Basutoland and replace them with a Resident and two Sub-Residents, charging these men mainly with overseeing Basuto relations with adjoining territories. Significantly, the proposal was rejected by Cape officials, who argued that the Basuto had no polity but were "simply a collection of jarring clans held together for the time by animosity against us."[67] Meanwhile, strong pressures to create an enclave status for Basutoland emanated from the continued raiding and legal indeterminacy along a border where Boers and Basutos intermingled, and from Basuto leaders' repeated insistence that Cape officials held only the barest form of sovereignty in the region. Basutoland returned to British indirect rule and eventually became Lesotho, an independent country subject to the economic and political constraints of its enclave geography within South Africa. This was an outcome hardly obvious to participants in the conflicts of the 1870s and 1880s. Differences in the political context might have produced an arrangement more like the quasi-sovereignty of Indian princely states or the status of Indian reservations in the United States.[68]

The comparison of Indians to Indians was one embraced, curiously, by nineteenth-century international lawyers and colonial officials. Apparently drawing on John Marshall's phrase defining American Indian nations within the United States as "domestic dependent nations," Twiss described Indian native states in his 1861 book *The Law of Nations* as "protected dependent states," and this formulation was later picked up and repeated by other writers.[69] The timing of this attention to Marshall's words is curious. By

67. Burman, *Chiefdom Politics and Alien Law,* 165.

68. The word "outcome" requires qualification. Conflicts over jurisdiction and shared sovereignty continued into the twentieth century, though the term "quasi-sovereignty" fell out of use and tensions over sovereignty took on new forms in the context of Indian nationalism. In the 1920s, the Chamber of Princes, composed of representatives of the larger princely states, asserted that the sovereign rights of the states were inherent rights rather than dependent upon the paramount power (or any subsequent government) for their creation. See K. M. Panikkar, *The Indian Princes in Council: A Record of the Chancellorship of his Highness the Maharaja of Patiala,1926–1931 and 1933–36* (London: Oxford University Press, 1936); and Ian Copland, *The Princes of India in the Endgame of Empire, 1917–1947* (Cambridge: Cambridge University Press, 2002).

69. Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace* (1884; Littleton, Colo.:

the time they were being invoked as part of a model for treating Indian princely states, Marshall's opinion had come to be largely overshadowed by a different approach to U.S. Indian law that proposed a theoretically nearly unlimited federal power to interfere with Indian jurisdiction and property. An important shift began with Congress's legislation in 1871 to ban further treaties with American Indian nations. The end of the treaty regime was followed by the decline of tribal governance and the effective transfer of power by the 1880s to officials of the Bureau of Indian Affairs. The reservation system, established through a series of forced agreements whereby Indians gave up large tracts of land in return for assurances of internal sovereignty, was then nearly dismantled as a result of the 1887 General Allotment Act, or Dawes Act, that created the mechanisms for the eventual transfer of some 86 million acres of land out of Indian hands. The result was a patchwork pattern of land ownership in which lands under Indian, non-Indian, and corporate control were interspersed, and "Indian country" came to be traversed by private railroads and state and federal highways. These trends exacerbated some jurisdictional tensions at the same time that they strengthened the hand of state and federal officials seeking rationales for further authority over disputes involving Indians and local resources.[70]

Historians have traced the shifts of federal Indian law, showing that the Supreme Court simultaneously established a system of "measured sovereignty" recognizing some scope for Indian internal sovereignty and moved toward an interventionist regime establishing wider federal jurisdiction over Indians.[71] Less attention has been devoted to the complex relation between federal and state legal politics. Any possibility for upholding Indian sovereignty depended upon claims to effective governance, which in turn were restricted to nations with formally bounded reservations, enclave territories now largely engulfed by state (and territorial) lands. Advocates of expanding federal jurisdiction cited the need to protect Indians from

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F. B. Rothman, 1985), 27. Twiss is cited approvingly by Tupper, *Our Indian Protectorate,* 4. Marshall's phrase is from *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831).

70. This account summarizes a complex history of Indian law and policy. For an overview, see Francis Paul Prucha, *The Great Father: The United States Government and the American Indians,* 2 vols. (Lincoln and London: University of Nebraska Press, 1984); and Charles Wilkinson, *American Indians, Time, and the Law* (New Haven and London: Yale University Press, 1988).

71. The phrase is from Wilkinson, *American Indians, Time, and the Law*. On the federal rulings from *Ex Parte Crow Dog,* 109 U.S. 556 (1883), to *Talton v. Mayes,* 163 U.S. 376 (1886), and to the Major Crimes Act of 1885, see Sidney Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994).

aggressive acts and property encroachments by the states and by white settlers ranged around the borders of Indian lands. Many of the legal problems that carried forward into the next century were related to this enclave geography and to "the dilemma of porous reservation boundaries": cases involving continued questions about jurisdiction; challenges to definitions of citizenship and tribal membership; and questions about the application of legislation in Indian territory.[72]

In contrast to "political law" in nineteenth-century India, American Indian law developed explicitly within a constitutional framework rather than ostensibly within a regime of international law. Yet, if we regard both histories as part of a developing imperial constitutional law, the similarities, including a systemic tendency toward territorial anomalies, are striking. The U.S. Constitution provided little guidance for the legal administration of newly acquired territories by an expanding empire at the end of the nineteenth century, and the result was a variegated legal landscape. Most newly acquired territories had been or would be converted into states. But even when statehood was the eventual outcome, administration of the territories posed resilient legal puzzles, including "constitutionally bizarre" arrangements such as the peacetime military administration of the territory of California in the two years before statehood and the definition of U.S. "sovereignty without sovereignty" in Panama and the Pacific guano islands.[73] Western territories settled by whites were not directly compared to Indian territories, but where the consequences of this comparison were less politically explosive, the parallel became a matter of law. Echoing Marshall in the Cherokee cases, Justice White wrote in his concurrence in *Downes v. Bidwell* (1901) that Puerto Rico should be considered "foreign to the United States in a domestic sense."[74] A formula for the constitutional recognition of legally anomalous enclaves surrounded by U.S. national

72. The phrase is from Brad Asher, *Beyond the Reservation: Indians, Settlers, and the Law in Washington Territory, 1853–1889* (Norman: University of Oklahoma Press, 1999), 195. Asher argues that Indian law beneath the federal level was "inherently unstable" (195). For a study showing the importance of state law in Indian legal history, see Deborah Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880* (Lincoln and London: University of Nebraska Press, 2007).

73. See Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven and London: Yale University Press, 2004), Part II; Christina Duffy Burnett, "The Edges of Empire and the Limits of Sovereignty: American Guano Islands," *American Quarterly* 57 (2005): 779–803; and Benton, "Constitutions and Empires."

74. *Downes v. Bidwell,* 182 U.S. 244 (1901). Christina Burnett argues that the "epochal significance" of the *Insular Cases* was not that they created a category of attenuated sovereignty for territorial acquisitions outside the United States but that in so doing they provided for the possibility of *de*annexation. Christina Duffy Burnett, "United States: American Expansion and Territorial Deannexation," *University of Chicago Law Review* 72 (2005): 797–879.

space was relied upon to describe the legal status of a colonial territory outside the country's borders.

In all these settings and in the same decades, legal officials struggled to devise a language for defining sub-polities as both "foreign" and "domestic." Arrangements for quasi-sovereignty were borrowed and transposed in the creation of other, still different examples of formally recognized legal anomaly. And during the same decades, imperial legal orders moved slowly, and sometimes suddenly after political acts framed by discourse about the limits of law, toward the constitution of legal regimes with explicit and intricate rules about intervention and exclusion.

## Conclusion

We have read that international lawyers in the second half of the nineteenth century observed the problems of imperial legal administration and sought to reconcile them with emerging understandings of the interstate order. We know that, by century's end, Westlake and other writers interpreted the unequal power of imperial governments and colonial sub-polities as signifying that the states had no international personality. These observations are useful as far as they go. But the important goal of analyzing "the constitutive effect of colonialism on sovereignty" cannot be achieved only by observing trends within European international law.[75] The politics of sovereignty within empires generated new legal practices, from ad hoc and quasi-legal arrangements such as the commission that "tried" Malhar Rao, to the application of legal fictions, such as the assumption of jurisdiction by imperial agents on the theory that it had been ceded to them by local rulers.

Such legal arrangements both generated new conflicts and stimulated an active discourse—a new jurisprudence—of imperial law. Intended to reconcile colonialism and international law, this legal project instead established new sets of constitutional issues at the center of what was being defined as a distinctive imperial legal order. Seeking to mark clearly the scope of autonomy for sub-polities produced an intricate typology of legal territories in empire. And as Indian princes and other indigenous elites held tenaciously to jurisdiction over internal affairs and even maneuvered for some marks of external sovereignty, colonial officials were driven to describe with greater precision the terms of intervention as a political act situated at the edges of law. No amount of wishful thinking on the part of international lawyers could make an imperial law dominated by these

75. Anghie, *Imperialism, Sovereignty and the Making of International Law,* 37.

preoccupations disappear. In fact, borrowings from international law served mainly to highlight the peculiarities of law in empire: a tendency toward more, not less, territorial irregularity and the probability that the terms of relations between imperial powers and colonial quasi-states would sometimes be defined as standing outside the law.

Tracing this development of "imperial law" suggests that we need to push still further in revising historical narratives of the international order. The history of quasi-sovereignty in the late nineteenth century reminds us that empires retained their international significance in an imagined world of territorially homogeneous and bounded states.[76] Comparisons show that within empires and also some nation-states, conflicts over sovereignty produced similar jurisdictional tensions, patterns of legal geography, and discourse about "dependent" polities. The usual statement that international law struggled to accommodate empire and eventually rendered it as obsolete might be turned around. That is, the "intricate" colonial efforts to parse sovereignty generated a robust constitutionalism that increasingly referenced international law for style, not substance. In the process, imperial jurisprudence pointed to the limitations of both international and municipal law as frameworks for global order.

76. On this point, see also Jane Burbank and Fred Cooper, *Empires and the Politics of Difference in World History* (Princeton: Princeton University Press, forthcoming).