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The Geography of Quasi-Sovereignty:
Westlake, Maine, and the Legal Politics of
Colonial Enclaves

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ABSTRACT

The Geography of Quasi-Sovereignty: Westlake, Maine, and the Legal Politics of Colonial Enclaves

by Lauren Benton

This paper traces the connections between routine legal conflicts in colonial enclaves and shifting ideas about quasi-sovereignty in international legal circles, with particular attention to representations of hill regions as sites of “archaic law” and to the legal politics of Indian princely states. Definitions of quasi-sovereignty were deeply influenced by colonial legal conflicts, as Maine, Westlake, and others drew directly on material compiled by British colonial legal administrators. These officials were responding to protracted jurisdictional conflicts with Indian elites and were especially concerned about the uncertain legal status of remote hill regions. The paper illustrates these processes by analyzing the Baroda crisis of the 1870s, in which colonial officials ultimately abandoned attempts to systematize legal policy, while also insisting that the suspension or partial application of law in certain territories was a routine product of imperial legal authority. In the same decades that international lawyers were emphasizing territorial sovereignty as a property of all states in the international order, they were forced to recognize that imperial sovereignty implied a highly variegated legal geography.

The Geography of Quasi-Sovereignty:

Westlake, Maine, and the Legal Politics of Colonial Enclaves

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“Mountains Come First”

To gaze at the mountains from the plains in the sixteenth-century Mediterranean world was to look back in time, according to Braudel.¹ Mountains were both geologically old and socially primeval: they bore evidence of prehistoric folding and ancient, inland seas, as well as the marks of settlement from eras before the coastal plains were made safe from disease and enemies. Rome’s impact was muted, and religious conversion – both Christianization and Islamization – developed more slowly than on the plains. These Mediterranean “hilltop worlds” were worlds apart, “semi-deserted” and “half-wild” zones of refuge for religious sects and “aberrant cults.”² Yet, despite their reputation for slow change and inhabitants’ “primitive credulity,” mountainous regions could also experience rapid and violent shifts as the result of conquest and reconquest by plains polities, most of which established only tenuous control over the highlands.³

¹ “Mountains Come First” is Braudel’s heading for the section on mountain geography referred to in this paragraph. Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II, Vol. I* (New York: Harper and Row, 1976), p. 25.

² *Ibid.*, pp. 34, 29, 37.

³ *Ibid.*, p. 37. Note that Braudel distinguishes between mountain and hill regions, but not consistently.

For Braudel, the hills were places of legal primitivism. The vendetta in Corsica and other hilly enclaves thrived because feudal justice had not penetrated there. The legal system of the hills and mountains was as undeveloped as the aristocracy, so that such regions became zones “of liberty, democracy, and peasant ‘republics’”.⁴ The story was the same across the Mediterranean: In the hill-villages of Greece, Albania, and Lebanon, “Turkish despotism” fared poorly.⁵ Even as trade, transhumanism, and the seasonal labor migrations of mountain dwellers connected highland and lowland regions, perceptions of deep cultural and institutional differences persisted. In some places, rhetoric about the backwardness of the mountains sharpened over time.

Braudel’s portrait of mountain and hill regions as sheltered, relatively self-sufficient reserves for ancient practices was intended in part to report the views of sixteenth-century lowlanders. But the account also bore the marks of the historian’s own time. The contrast between the civilized plains and the primitive mountains belonged to an intellectual tradition with classical roots, an early modern lineage, an Enlightenment reprise, and – especially influencing Braudel – a nineteenth-century evolutionary twist. The mountains were “magic” because their geography suspended time. The imperfect penetration of civilization from below produced not just cultural difference, but backwardness. Change occurred only as a result of disruptions from the outside, usually in the form of attempts at conquest from below. Unlike sixteenth-century lowlanders, Braudel did not engage in cruel caricature of highlanders, but the notion that mountain

⁴ Ibid., p. 40.

⁵ Ibid., p. 40.

regions preserved earlier forms of political and legal culture was a caricature nonetheless.⁶

Since Braudel, some historians have tried to disentangle lowlanders' perceptions from the lived conditions of mountain regions.⁷ Certainly historians are now more careful to separate assumptions about different stages of legal development from observations of cultural divergence. But whatever the subsequent revisions, the confusion of historical description and evolutionary categorization of hill regions remains relatively unexamined. While Braudel was writing about mountains in one world region, the discourse about the primitive law of the hills has influenced representations of space and time in other places, especially European empires.

Colonial historians have contrasted representations of static and primitive non-Western societies with the contrived dynamism of the West but have left legal geography largely to one side. Investigations of the typologies of colonial topologies have emphasized the place of hills within a discourse on medicine and health. Historians of nineteenth century India, for example, have shown that the British portrayed the mountains as a healthful refuge from the degenerating environment of the hot plains, where European constitutions were endangered.⁸ Other kinds of constitutions, also at

⁶ Ibid., p. 46.

⁷ For a study of the differences and convergences of the views of highlanders and lowlanders about the political status of mountain regions, see Peter Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees* (University of California Press, 1991). For an analysis of representations of a mountain region in a national discourse on enlightenment, see Karen Wigen, "Discovering the Japanese Alps: Meiji Mountaineering and the Quest for Geographical Enlightenment" *The Journal of Japanese Studies* 31.1 (2005) 1-26.

⁸ Dane Kennedy, *The Magic Mountains: Hill Stations and the British Raj* (University of California Press, 1996); David Arnold, *Colonizing the Body: State Medicine and Epidemic Disease in Nineteenth-Century India* (University of California Press, 1993);

stake, have received less attention. Yet the notion of an archaic law of the hills informed ideas about sovereignty in play within a broader politics about territorialization in the nineteenth century. The connection was especially clear in debates about the status of enclave territories, discrete zones embedded within areas of more direct colonial rule. Represented as metaphorical high ground stranded above “the rising tide of...civilization,” enclave territories became the focus of elaborate efforts in the late-nineteenth century to characterize systems of quasi-sovereignty and their place within international law.⁹

Viewed as primitive areas with the potential to become increasingly, but never fully, modern, hill regions were seen as zones in perpetual transition. They might attain, and would be rewarded with, only the kind and amount of law that matched their level of development. Imperial governance therefore *required* colonizers to hold legal prerogatives in reserve. The notion that sovereign functions could be parceled out and assigned to territories as they developed was related, in turn, to an understanding of sovereignty as divisible, made up of a bundle of separable traits.¹⁰ The thin air of

Mark Harrison, *Climates and Constitutions : Health, Race, Environment and British Imperialism in India 1600-1850* (Oxford University Press, 2003).

⁹ Wilkinson uses this phrase to describe U.S. officials’ perceptions of Indian enclaves within Western states. Charles Wilkinson, *American Indians, Time, and the Law* (New Haven and London: Yale University Press, 1987). Lee-Warner used the same metaphor in writing of the Indian princely states as comprising “vast tracts of territory left above the tide of British conquest as it rose and submerged” the rest of India. William Lee-Warner, *The Protected Princes of India* (London: MacMillan and Co, 1894).

¹⁰ This view of sovereignty was emphasized by Maine and Westlake but has been traced back to Grotius (Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge, 2002). Keene argues that it is now treated as antithetical to the system of sovereign states as defined in international relations. But aspects of the approach are still influential. See for example Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999). Though Krasner also defines sovereignty as divisible, his approach is different from the one outlined here for the late-nineteenth century in part because a territorial element is explicit in all the

mountain regions could support only a thin collection of sovereign attributes, while lowland colonial territories, or even highland polities that attempted to consolidate naturally occurring petty states, sustained a mix of sovereign rights producing petty despotism. This supposed tendency toward despotism paradoxically affirmed the greater purity of forms of sovereignty in the hills and at times suggested that they were deserving of more autonomy.

If full sovereignty was a property of imperial power to be parceled out in pieces and as conditions dictated, the problem of ruling enclave territories was one of legal administration, of finding the right jurisdictional arrangement and displaying the right mix of deference to, and authority over, local rulers. Legal administration, even imperial legal administration, belonged to the realm of municipal law. Yet, at the same time, ideas about pure forms of primitive sovereignty in the hills suggested that “native” territories should be left alone. Hill polities could advance only by fighting with one another, with the disruptive effects of such conflicts contained by imperial authorities’ arbitrating in disputes and setting norms for petty state interrelations. These functions implied a close connection, or at least an analogy, of imperial law to international law. Principles of international law might be drawn upon to order relations among dependent polities, even as these states were at the same time deprived of the very capacity that was the basis for international law, the authority to enter into inter-state agreements.

variants of sovereignty he defines. While territoriality was an element of many nineteenth-century definitions of sovereignty, I would argue against the notion, sometimes implicit in histories of international law (though not in Krasner’s account) that territoriality was widely accepted as the central aspect of sovereignty after Westphalia. On misreadings of Westphalia, see Stephane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Brill, 2004).

Questions about the proper role for imperial law were especially salient in debates about the legal status of princely states in India in the nineteenth century. International lawyers viewed Indian native states as a prominent variant of a more general pattern of quasi-sovereignty in empire, and observers offered wide-ranging cross-regional and inter-imperial comparisons.¹¹ Westlake, for example, placed American federalism at one end of a continuum as a setting in which “states” had retained significant jurisdictional prerogatives but could not engage in foreign policy; that is, they had no international identity.¹² At the other end of the continuum Westlake assigned such cases 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.¹³ The international community gave some recognition to such “protected” states as having international personality – or control over external sovereignty – even though they clearly had only limited capacity to form international relations.¹⁴

The Indian princely states appeared to occupy an intermediate position. They retained significant control over internal affairs while being stripped of rights to engage

¹¹ “Quasi-sovereignty” is chosen here to encompass a number of terms used to describe arrangements of shared or limited sovereignty, including “semi-sovereignty,” “paramountcy,” “protectorates,” and indirect rule. International lawyers developed some distinctions between these terms, so it seems preferable to choose a term not commonly used by them to refer to the class of arrangements of divided rule.

¹² For example, John Westlake, “The Equality and Independence of States” pp. 86-110 in Oppenheim (ed.), *The Collected Papers of John Westlake*, pp. 88-89.

¹³ Again, these examples are all provided by Westlake, in Oppenheim, *The Collected Papers of John Westlake*, pp. 88-89, 182, 198.

¹⁴ Another point of comparison was extraterritoriality, specifically claims to jurisdiction over Europeans resident in foreign nations. Extraterritorial claims by Europeans in the Ottoman Empire, China, and elsewhere in the long nineteenth century influenced thinking about quasi-sovereignty, but the parallel was not perfect. In most such cases, territorial enclaves were defined as having European or mixed jurisdiction; they were not “native” territories of quasi-sovereign status within areas of direct colonial rule. On

in foreign relations. Their regulation seemed to belong to the realm of imperial administration rather than international law. Yet, even for Westlake, who asserted that by the 1890s the basis of rule over Indian states had completed the shift “from an international to an imperial basis,” international law continued to have the power of analogy.¹⁵ Arguing that the imperial power only *appeared* to share sovereignty with the princely states but also trying to account for the continued deference to aspects of Indian state sovereignty, Westlake resorted to characterizing claims about the quasi-sovereignty of Indian princely states as mainly, but not purely, a rhetorical strategy:

That their dominions are contrasted with the dominions of the queen, and that their subjects are contrasted with the subjects of the queen, are *niceties of speech* handed down from other days and now devoid of international significance, though their preservation may be convenient for purposes internal to the empire, in other words for constitutional purposes.¹⁶

Westlake drew support for his position from British colonial officials’ accounts of legal relations with the Indian states, but he drew very selectively on this record. He suggested, for example, that it was a matter of settled law from 1857 on that the subjects of Indian princely states were British subjects.¹⁷ Westlake argued, too, that although the power of the executive and the application of imperial legislation were constrained inside

extraterritoriality, see Chapter 6, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press, 2002).

¹⁵ *Ibid.* p. 232.

¹⁶ *Ibid.* p. 220. Emphasis added.

¹⁷ More precisely, Westlake thought that this principle had been proved by the Baroda case discussed in this paper because the British had asserted their right to “try” an Indian prince. The British execution of the brother of the ruler of Manipur in 1891 for leading the revolt that placed his brother in power was regarded by Westlake as confirmation that not just rulers but also the inhabitants of Indian princely states were British subjects. See Westlake, “The Indian Empire,” pp. 222-223.

native states, they were in theory unlimited. 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. Westlake acknowledged that the intricacies of sovereignty in native states had “at times perplexed the men who with high education and great practical ability have moulded that empire,” but he also thought that the attempts to delineate the legal puzzles of Indian states had probably been “needlessly intricate.”¹⁸ There was nothing especially complex about a growing and, he thought, irreversible, imperial power.

The progression of British power in India seemed to Westlake to parallel territorial consolidation. Imperial authority had spread to the interior of India from coastal enclaves at Bombay, Madras, and Calcutta, gradually to overtake the plains and then, finally, the mountain regions.¹⁹ This progression was emblematic of a general process of naturally expansive imperial influence that could be measured by the imposition of jurisdiction: “It is true that in inland places there may be a greater difficulty of maintaining effective jurisdiction than on the coast,” Westlake wrote, but as communications and settlement advanced, “the means of government will advance with parallel steps.”²⁰ The shifting of law in India “from an international to an imperial basis” depended upon the gradual formation of a single legal framework for territory.

¹⁸ Ibid, pp. 223, 232.

¹⁹ Ibid, p. 215.

²⁰ John Westlake, “Territorial Sovereignty, Especially with Relation to Uncivilized Regions,” pp. 131-193 in Oppenheim (ed.), *The Collected Papers of John Westlake*, p. 186. In relying heavily on Lee-Warner’s account of the history of British relations with Indian princely states, Westlake would have also been influenced by Lee-Warner’s representation of the princely states as islands of territory left over from an imperial push from the coasts. The “ring-fence” policy of the early Raj had promoted the autonomy of Indian states as buffer zones responsible for their own protection on the edges of British-

Westlake's account shows a set of wider assumptions at work about the linked processes of expanding imperial legal authority and the formation of Indian national space. As Goswami has shown, at the same time that the political imagination of a national territory was forming out of a complex array of transnational processes, uneven capitalist change continued to create territorial unevenness.²¹ Other territorial anomalies were meanwhile being produced by imperial legal politics. The Indian national imaginary did not immediately occlude what Cooper has called "the imperatives of thinking like an empire."²² The impulse to claim territorial sovereignty over "nationally" bounded space occurred alongside the imperial project of devising a system of territorial differentiation recognizing degrees of territorial sovereignty for colonial enclaves. Quasi-sovereignty came to be defined as a coherent system at precisely the same time that imperial legal politics revealed it to be unworkable. Driving this contradiction were repeating legal conflicts blurring the boundaries between internal and external sovereignty in colonial enclaves: border disputes, jurisdictional tangles, and controversies about the application of imperial legislation. In critical moments when the messy legal politics defied administrative ordering and confused categories of sovereignty, political interventions trumped legal rules. The result was more than a gap between theory and practice. One of the core characteristics of systems of divided sovereignty came to be the occasional outright suspension of law.

controlled districts. As British influence advanced from the coasts, Indian state territories were encircled. See Lee-Warner, *The Protected States of India*.

²¹ Manu Goswami, *Producing India: From Colonial Economy to National Space* (Chicago and London, University of Chicago Press, 2004).

²² Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley: University of California Press, 2005).

Divisible Sovereignty

British musings about the distinctive qualities of the hill regions in India had many variants. Hill regions had no cultural uniformity and spread from the foothills of the Himalayas to the interior of southern India. British observers insisted on cataloguing similarities arising from the contrast of these regions with the plains. Writings about the hills were infused with “nostalgic intent” and evoked images of an English past of simpler village life. The hills were also seen as an antidote to the politically and physically degraded environment of the plains.²³

These associations were partly the basis for James Tod’s identification of the Rajput polities as examples of European feudalism in an influential report for the East India Company published as *Annals and Antiquities of Rathast’han* in 1823. The “feudal” label would prove somewhat controversial among British officials, but the idea matched a more general discourse about the hills as places relatively protected from the influences of sequential invaders, both Mughal and Maratha. Elphinstone’s 1821 *Report on the Territories Conquered from the Paishwa*, for example, describes the “grand geographical feature” of Western India as the “chain of ghauts” transecting the region from north to south. Offering the Bhils as an example, Elphinstone contrasted the unruly inhabitants of the hills with the “sober, frugal, industrial” peasants of the plain who were more vulnerable to the oppression by “coarse, ignorant, rapacious and oppressive” Maratha rulers. Yet Elphinstone did not condemn Maratha rule, mainly because the government’s corruption left subjects “the means of procuring [justice] for themselves.” Hill regions especially benefited from being left alone. A British policy of imitating “the

Native system” and acting only to remove obvious sources of corruption would, he argued, allow legal change to continue to occur slowly, permitting the development of society “to keep pace with that of the laws.” This account, and others like it, combined an image of remote regions as pristine and primitive with the view that the British should emulate Indian political models and encourage – through contained conflict – a natural progression toward a more advanced legal order. The hills were both naturally chaotic because of their division into petty states and peculiarly suited to imperial government because conflict, together with the simpler political goals consistent with primitive forms of sovereignty, made the states amenable to the rule of a paramount power.

This pairing of legal evolution and legal geography received careful elaboration by a handful of officials in the Foreign Office within the British Government of India, a colonial project energetically pursued between 1870 and the end of the century.²⁴ 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.²⁵ The latter were areas that had never come under the direct 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

²³ Dane, *The Magic Mountains*.

²⁴ Throughout this paper, when I use the title “Government of India,” I will be referring to the British Government of India, the highest administrative authority of the British in India.

²⁵ There was a concerted effort to centralize “foreign affairs” in the hands of the Government of India in Calcutta under the Sir Charles Aitchison, Foreign Secretary between 1870 and 1877. He succeeded in placing Zanzibar and the Persian Gulf under the Foreign Office, while the government of Bombay retained oversight of Sind, Upper Sind, Baluchistan and Khelat. See I.F.S. Copland, “The Baroda Crisis of 1873-77: A Study in Government Rivalry,” *Modern Asian Studies*, Vol. 2, No. 2 (1968), 97-123.

larger than one-third of the region and encompassing about a quarter of its population.²⁶ 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 of what was labeled “political law” and the foundations of a branch of Indian constitutionalism. This effort has been treated somewhat peripherally by historians, in part because the princely states were quickly and clearly made subordinate to the British.²⁷ Many of the princes were key allies of the British during the

²⁶ 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 New Cambridge History of India III (6): The Indian Princes and Their States*; Cambridge University Press, 2001, pp. 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 (Political and Secret Department, “Indian Native States Approximate Area, Population, Revenue, and Military Force,” May, 1875; IOR L/PS/18/D). In 1909, the *Imperial Gazetteer of India* counted 693 states (Ramusack, p. 2). By 1929, in part as a result of the consolidation of smaller states, a process 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, Limited, 1929).

²⁷ The best comprehensive history of the Indian princely states is by Ramusack (*The Indian Princes and Their States*), who correctly notes the “muddled tedium” of most histories of the princely states (p. 2). Ramusack provides a brief overview of efforts of colonial officials to produce what she calls “bureaucratic codifications” of relations with princely states (pp. 92-98). Another valuable study of indirect rule and the residency system is Michael Fisher, *Indirect Rule in India: Residents and the Residency System 1764-1858* (Oxford University Press, 1993). Fisher’s study ends before the period covered here but shows that British thinking about paramountcy was well developed before the mid-nineteenth century and also featured earlier the idea of preserving domestic sovereignty while removing sovereignty beyond the borders of dependent polities. Yet before 1858, Fisher observes, wide divisions of opinion about indirect rule were evident, and there was “inconsistent development of official British policy with respect to sovereignty” (p. 13). On the careers of officials of the Foreign Office, see W. Murray Hogben, *The Foreign and Political Department of India 1876-1919: A Study of*

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 by the evident desire by 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 Indian rule. In particular, the anomalous legal situation of princely territories informed distinctions among other British Indian territories. Beyond British-Indian relations, the conflicts connected to debates about the relation between imperial and international law, and the nature of indirect rule.

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.²⁸ The report, published in 1895, built upon the work of two officials of the

Political Careers and Attitudes (Ph.D. thesis, University of Toronto). 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 University Press, 2002).

²⁸ 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 Cop, 1893); and Sir Charles Lewis Tupper, *Indian Political*

Foreign Office, H. Mortimer Durand, the author of a volume of “leading cases” involving the governance of princely states, and Sir Charles Aitchison, who served as Foreign Secretary between 1870 and 1877 and compiled 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 endorsed the view that the relation between princely states and the British government should not be regulated according to international law or municipal law, but through something that Tupper called “political law,” the foundations of which were the doctrine of “divisible sovereignty” and “usage.”²⁹

For Tupper, drawing on Elphinstone’s report, Sir Alfred Lyall’s writings on Rajputana, and works by other British officials, including Henry Sumner Maine, renderings of both sovereignty and usage depended upon understanding the history of hill regions. “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.”³⁰ Tupper identified these regions 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.”³¹ The regions had preserved “a phase of sovereignty” that was “earlier than territorial sovereignty” and based on “tribal

Practice: A Collection of the Decisions of the Government of India in Political Cases (Delhi: B.R. Pub. Corp. 1974 [1895]).

²⁹ The term “political” was to distinguish the action of officials with regard to native states from diplomacy, the term for dealings between sovereign states (Tupper, 1893, p. 6). Tupper also rejects the term “international law.” The phrase “political law” is thus designed specifically to reflect the British control over the assignment of the attributes of sovereignty.

³⁰ On the “Indian past,” see Tupper, *Our Indian Protectorate*, pp. 9, 132.

³¹ *Ibid.* p. 131.

ownership of the soil.”³² 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.”³³ In danger of imminent destruction by conquerors, the petty states were being rescued and preserved under British paramountcy.³⁴

While emphasizing their basic similarities, Tupper also distinguished among different forms of primitive sovereignty in various hill regions. The states of Rajputana, for example, displayed a form of sovereignty defined as “midway between tribal chiefship and territorial chiefship,” with those states closer to the plains and therefore more exposed to the Mughal and Maratha influences tending toward feudalism. In contrast, the highest regions of the Punjab Hills represented “an earlier formation” of tribal suzerainties.³⁵ Yet none of the regions, even the cases approaching territorial sovereignty, could claim *national* territorial sovereignty, defined as a purely European construct distinguishing British from Indian conceptions of political community.

This understanding of sovereignty in hill regions fortified the argument that British rule was based on a political arrangement – paramountcy – which was in turn founded on prior, indigenous political forms. As Tupper put it, “our present conception of an empire comprising districts under direct administration and dependent states held

³² Ibid. pp. 131, 167.

³³ Ibid. p. 143.

³⁴ Ibid. p. 151.

³⁵ Ibid. pp. 147-148. Tupper is basing these observations on the work of Sir Alfred Lyall (*Asiatic Studies Religious and Social*; London, John Murray, 1882). He quotes Lyall’s characterization of the eastern portion of Rajputana as “rapidly sliding into the normal type of ordinary Oriental government, irresponsible personal despotism.” (Tupper, *Our Indian Protectorate*, p. 148)

by subordinate or tributary chieftains is really indigenous.”³⁶ This “native” construction of paramountcy was seen to be congruent with European understandings of limited sovereignty. Rather than signifying a quality that a state either possessed or failed to retain, sovereignty could be held by degrees, with full sovereignty reserved for the imperial power.³⁷

The notion of “divisible sovereignty” was articulated most clearly by Henry Sumner Maine, who proposed the idea in opposition to John Austin’s definition of sovereignty as an attribute only of nation-states. It is helpful to understand this concept in the context of Maine’s quasi-evolutionary understanding of legal development presented in *Ancient Law*, “the only legal best seller” of the century.³⁸ The best known element of this work is Maine’s thesis that law in society progressed “from status to contract,” but the mechanisms for historical changes in law described by Maine were both more complex and vaguer than this phrase implies.³⁹ In Maine’s view, legal

³⁶ Ibid. p. 153.

³⁷ In 1930, the rulers of native states turned this argument on its head, arguing that because sovereignty was divisible the princely states retained any trait of sovereignty that had not been formally ceded to the British. Similarly, members of the Chamber of Princes resolved that because a particular right of a state was confirmed in a *sanad* issued by the Government of India, this did not mean that the Paramount Power had created that right, only that it had recognized an existing right. K. Pannikar, *The Indian Princes in Council: A Record of the Chancellorship of His Highness the Maharaja of Patiala 1926-1931 and 1933-1936* (London: Oxford University Press, 1936). On Indian states’ argument that they retained any right of sovereignty that had not been transferred, see K.R.R. Sastry, *Indian States and Responsible Government* (Allahabad: The Allahabad Law Journal, 1939).

³⁸ The phrase is from W.B. Simpson, quoted in R.C.J. Cocks, *Sir Henry Maine, A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), p. 1.

³⁹ Maine identified three main 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.

evolution occurred in response to, and in harmony with, changing social conditions, but the speed and direction of change were not inevitable. Jurists had a special responsibility to adjust law in ways that would encourage gradual change, a task possible only through appreciation of the historical basis for existing law. 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 *Ancient Law* – to serve as a Law Member of the Governor-General's Council. He wrote a series of Minutes in India that profoundly influenced officials in the Foreign Office 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. Like Braudel's “magic mountains,” Maine's India operated in a wholly different time so that the British were obligated “to make their watches keep time in two longitudes at once.”⁴⁰ 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.”⁴¹

It was this context that 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 Gaekwar, the ruler of

⁴⁰ Quoted in *Ibid*, p. 86.

Baroda. 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.⁴² 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, as the rulers of the petty states of Kathiawar were called by the British, exercised sovereignty. Members of the Bombay Council agreed, citing Elphinstone's report to argue that the polities of Kathiawar had long recognized sovereignty as residing in the suzerain power. 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 administration. Although the British

⁴¹ This is Cocks's useful summation of Maine's central concern in *Ancient Law*. Ibid, p. 108.

⁴² 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 1807-08 settlement agreement. In 1862, a proposal to cede this territory back to the Thákur of

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 Wheaton’s writings on limited sovereignty.⁴³ 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.⁴⁴

Kathiawar, Maine indicated, exercised some rights of sovereignty, but not full sovereignty:

The Kathiawar States have been permitted to enjoy several sovereign rights of which the principal – and it is a well-known right of sovereignty – is immunity from foreign laws...But by far the largest part of the sovereignty has obviously 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.⁴⁵

Bhaunagar was one of the issues that prompted the question of whether Kathiawar should be considered foreign or British territory.

⁴³ Tupper, *Our Indian Protectorate*.

⁴⁴ Political Proceedings A, April 1864, No. 17.

⁴⁵ *Ibid.*

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” because it had prevented the states from engaging in the “natural process” of armed conflict among themselves. Maine concluded that Kathiawar must “be properly styled foreign territory.”⁴⁶

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.⁴⁷ 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 were merely awarded, conditionally, to native states. Only “immunity 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. The only theoretical limit on intervention was that it be undertaken in the interest of restoring or promoting order and good governance.

What is 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

⁴⁶ Ibid.

⁴⁷ Tupper, *Indian Political Practice, Vol. I*, p. 220.

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 specific 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. A political Heisenberg principle seemed to be at work: by defining native states’ sovereignty, the British government had altered it; by articulating a right to contain warfare, the British had removed inter-state relations from the realm of international relations.

Perhaps Maine anticipated the multiplicity of conflicts that would highlight these ambiguities. The 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, and the actual mix of sovereign rights in princely states could only be deduced “from the *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.”

It is tempting to construe this formulation as a simple rationale for 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 – in effect to set them up as a variant of constitutional law – and insistence on the purely political nature of British intervention continued. Often it was minor agents who demanded greater precision in law and higher British officials who saw legal guidelines as a potential constraint on power. Yet the latter also 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.

“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 charges, and 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 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 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.”⁴⁸

⁴⁸ The Baroda case was routinely cited as a precedent-setting case for intervention on the basis of charges of misgovernment. Tupper framed the case in this way, characterizing it as “pre-eminently a leading case” that established “the principle that incorrigible misrule is a disqualification for sovereign power.” (Tupper, *Indian Political Practice, Vol. I*, p. 49). Westlake defined the precedent somewhat differently, emphasizing that the investigation of the Gaekwar for the alleged poisoning was founded on an understanding 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.” (John Westlake, “The Empire of

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 Gaekwar and the Resident centering on legal administration, especially jurisdictional arrangements. Baroda's geography helped to shape this legal politics. The Gaekwar'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 the Gaekwar 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

India," pp. 194-236 in L. Oppenheim, ed. *The Collected Papers of John Westlake*; Cambridge: Cambridge University Press, 1914, p. 221). For more on this argument in

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 India in Calcutta.⁴⁹ In long and detailed letters to his superiors, Phayre cuts the figure of a landlubbing Captain Bligh. 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 the Gaekwar. Reading his correspondence, one begins to suspect that there were others besides the Baroda ruler who took pleasure in imagining him dead. Certainly toward the end of the crisis, Bombay and Calcutta officials would agree on wanting him moved out of the way.

One of Phayre's first communications as Resident to the Bombay government echoed his predecessor's praise for the Gaekwar as someone who was "very intelligent and ready to hear about what I have to urge upon questions of importance."⁵⁰ Only a month later, Phayre's tone had changed, and he was warning that if the government did not address festering problems in Baroda, the situation would "culminate in a general outbreak of some sort or other."⁵¹ In summarizing Phayre's complaints, historians have emphasized tensions between the Gaekwar and local elites, particularly complaints about

relation to the "trial" of the Gaekwar, see note 77 below.

⁴⁹ 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."

⁵⁰ IOR R/2/481/55 f. 29. After the attempted poisoning, Phayre claimed that the Gaekwar had made overtures to bribe him soon after he arrived in Baroda. When that effort failed, the Gaekwar began a campaign of "sorcery" involving a servant "going about Baroda with a middle sized magic bottle" with Phayre's name inscribed in English and Persian. This display was followed by "persecution and insult" and, after the British government, at Phayre's urging, issued a statement calling for administrative reform, "an active system of retaliation." (IOR R/2/474/2, ff. 25-26).

⁵¹ *Ibid.*, f. 37.

excessive taxation and, later, Phayre's open hostility toward the Gaekwar's chosen *dewan*.⁵² But a larger volume of Phayre's correspondence was taken up with legal matters. The Gaekwar's hill territories bordering British Indian districts were a particular source of trouble. Baroda subjects were moving into British territory, some conducting raids and robberies along the border and taking refuge in the Gaekwar's dominions. The British had no clear legal basis for arresting or prosecuting suspects in such cases.⁵³ Nor could the Resident act against British subjects or the subjects of other native states who were entering Baroda territory to commit crimes; the Gaekwar had sole criminal jurisdiction in his territory, except with regard to European British subjects. Phayre complained that the Gaekwar's courts could not be trusted. British subjects' rights were "systematically disregarded," criminal proceedings were especially lax, and Phayre claimed that rumors were rampant about the use of torture and the forgery of evidence.⁵⁴ By July, 1873 – just four months into his tenure as Resident – Phayre was urging the Bombay government to award him sole authority to determine whether individual cases should be tried in British or Baroda courts. If the Gaekwar resisted the Resident's authority, Phayre proposed, the government should seize from him all criminal jurisdiction with regard to British subjects.⁵⁵

British officials sent back mixed messages. They took Phayre's complaints seriously enough to appoint a commission to assess the state of governance in Baroda.

⁵² This is Ian Copland's view in the most careful and comprehensive accounting of the crisis. Copland, "The Baroda Crisis of 1873-77."

⁵³ The Chief Constable from an adjacent British territory wrote: "Supposing a robbery has taken place and the perpetrators escape into the Guikwar territory, and if any one was suspected of having committed it, yet neither our police nor the complainant can according to law touch him." [IOR]

⁵⁴ *Ibid.*, f. 212.

⁵⁵ IOR P/481, f. 122.

But action in response to Phayre's repeated requests for the expansion of his legal authority, and even for clarification of the Resident's role, was slow in coming. Phayre was instead instructed not to encourage the Gaekwar's subjects to lodge complaints with Phayre because he had "no legal authority to grant them redress." The Resident was also warned to avoid "any language calculated to cause irritation" to the Baroda ruler.⁵⁶

Undeterred, Phayre was in full campaign against the Gaekwar by early 1874.⁵⁷ He pressed the government to create a British Criminal Court at Baroda for trying British subjects and hectored Bombay officials to enhance his jurisdiction to try the suspects in a number of dacoity cases, eliciting the support of anti-dacoity officials.⁵⁸ The peculiar jurisdictional tangles in Baroda were illustrated by "a case of dacoity upon the property of a British subject residing at [the British district of] Ahmedabad, which had meanwhile been committed in Gaekwar territory by a gang of robbers from Rajpootana."⁵⁹ Phayre was adamant in stating that mere negotiation with the Gaekwar to sort out legal responsibilities in such cases would fail; the Baroda ruler jealously guarded his legal authority and was resisting the Resident's advice about the disposition of cases involving British subjects or border raids.⁶⁰ The response from Bombay continued to be anything

⁵⁶ *Ibid.*, f. 82.

⁵⁷ He penned a detailed reprise of Mulhar Rao's "course of treason, murder, and every conceivable act of lawlessness, for the last 16 years." Phayre accused the Gaekwar of having participated in the rebellion of 1857 by participating in a conspiracy against the British spreading across Baroda's borders to neighboring British districts. He also cited evidence that Malhar Rao had taken a leading role, never proved, in the conspiracy to kill his brother, then the Gaekwar, and replace him on the throne in 1863. [IOR] f. 88.

⁵⁸ An official of the Operation for the Suppression of Thuggee and Dacoity echoed Phayre's concerns and pointed out that in some other native states British involvement in prosecuting highway robbers was routine. IOR

⁵⁹ IOR P/752 No. 69.

⁶⁰ Phayre wrote that "it appears to me to be vain to expect that, put the case how we may, the Durbar will voluntarily consent to surrender what they wrongly conceive it is for their dignity and honor to retain." The Gaekwar bristled at the existing requirement that he

but encouraging. In May, 1874, the government resolved that it was “not expedient to press the Gaekwar to give the Resident jurisdiction.”⁶¹ A few months later, Bombay officials were more explicit and instructed Phayre to give up his campaign; British subjects apprehended in British territory for crimes committed in Baroda were to be surrendered to Baroda authorities.⁶²

One of the issues pressed by Phayre was the nature of criminal jurisdiction in the cantonment and Residency bazaar. The question had come up nearly twenty years before, when officials worried about the lack of clear provisions about whether the British or the Gaekwar held jurisdiction on a site that was “situated in the territories of a foreign state.”⁶³ In 1867, the Bombay government declared that the British held only military jurisdiction inside the cantonment but could exercise a wider jurisdiction if the Gaekwar consented. Officials assumed that he would cooperate, but he turned out to be “very tenacious” in asserting his judicial authority in both criminal and civil cases.⁶⁴ Though Malhar Rao eventually agreed that a British magistrate might operate under his jurisdiction, Phayre was complaining in 1874 about irregularities in procedure and continued uncertainties about the exercise of criminal jurisdiction. He wrote to Hyderabad seeking information on jurisdictional arrangements in the cantonment there, and he appealed to Bombay for guidance in a case of camp followers arrested for murder outside the cantonment; he thought they should be returned to the British for trial.⁶⁵

produce witnesses before the Resident to establish a *prima facie* case against any British subject before proceeding to trial in one of his courts. IOR P/752.

⁶¹ *Ibid.*, 11 May 1874.

⁶² IOR P/481, f. 122.

⁶³ IOR R/2/487/71 f. 3.

⁶⁴ *Ibid.* f. 17(a).

⁶⁵ 1875, Phayre complained that an arrangement dating from 1853, whereby the British agreed to hand over to the Gaekwar any of his subjects arrested for crimes committed in

Phayre was calling attention to questions that were being raised, usually in less strident tones, by British officials in other native states. The problem of cantonment jurisdiction, for example, had recently gained the attention of the government because of an appeal brought in 1872 from the cantonment of Secunderabad, in Hyderabad. A woman whose cantonment house had been attached in a civil suit sought to delay action in the case by appealing to the Privy Council. The Hyderabad Resident inquired whether the appeal was proper since his jurisdiction in the case was merely delegated by the Nizam and the majority of residents inside the cantonment were the Nizam's subjects. The Government of India ruled that jurisdiction flowed from the occupation of the cantonment by British troops and was "*a matter of fact.*" The petitioner had no right to appeal to the Privy Council, but the Council of the Government of India might decide to hear an appeal and might issue "any injunctions they think fit."⁶⁶ In a subsequent case in Deesa, the Government affirmed British jurisdiction in the cantonment, which was described as native territory that for legal purposes was to be treated as British territory. Such cases seemed to establish the principle that native states had no jurisdiction in cantonments, while they retained a property labeled by one official as "bare sovereignty."⁶⁷ Even this erasure of effective sovereignty did not clear away conflict over the actual exercise of jurisdiction, as relations in Baroda clearly showed.

The issue of jurisdiction over British subjects was also prevalent in other native states, and guiding principles also left considerable room for interpretation and maneuver. The British government distinguished between European British subjects and Indian

the cantonment and the Gaekwar was to transfer camp followers suspected in crimes committed outside the camp, was breaking down.

⁶⁶ The case is covered in Tupper, *Indian Political Practice Vol. III*, pp. 17-19.

⁶⁷ Quoted in *Ibid*, p. 20.

British subjects in a ruling in 1871 directing that no native state would be permitted “to try a European British subject according to its own forms of Procedure and punish him according to its own laws.”⁶⁸ In 1873, the native states of Travancore and Cochin announced an extradition agreement, prompting a debate among British officials about whether to insist on inserting a clause excepting European subjects from transfer for prosecution in either state. Travancore had earlier tried a European British subject, Liddell, for misappropriating state funds, and the Government of India had decided not to intervene. Now the Governor-General instructed the Foreign Office not to alter the Travancore-Cochin agreement; despite imperial legislation prohibiting native states’ jurisdiction over European subjects, imperial officials insisted that the question should be treated “as one of many undefined matters” subject to ad hoc regulation.⁶⁹

It was possible, the Viceroy asserted, to imagine other cases in which a European offender should be left to be tried in native courts, and the best policy was not to form a firm rule – and certainly to avoid recognizing that treaties with or between native states were authoritative sources for such a rule.

If the seemingly fixed legal status of European British subjects was open-ended, that of Indian British subjects was even more uncertain. At the same time that Phayre was worrying about the vagaries of jurisdiction over British subjects in Baroda, the issue was being raised by the Political Agent of Hill Tipperah, a native state bordering British India territory in Bengal. As in Baroda, the question of order in the hills, and on the border, was prompting the Political Agent to call for British jurisdiction. British subjects were said to be committing crimes and escaping into Hill Tipperah, where there were

⁶⁸ IOR P/752 No. 158J

“great facilities for evading justice.”⁷⁰ Here, as in Baroda, the government instructed that assuming jurisdiction would be “inexpedient” and that nothing should be done.⁷¹

Indeterminacy was being articulated as policy – even as a core principle of an imperial law based on divisible sovereignty. Commenting on the Liddell case, the Government of India insisted on the importance of not 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 administration of justice in such States.”⁷² 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.”⁷³

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 and insisted there was “no reasonable hope” for a fair

⁶⁹ Letter from Secretary, Government of India, Foreign Department to Chief Secretary to Government, Fort St. George, 29 Aug 1873, IOR P/752.

⁷⁰ IOR P/752 No. 60.

⁷¹ IOR P/752 No. 61.

⁷² Letter From the Government of India, to Secretary of State for India, Simla, 1 September 1873, IOR P/752 ..

⁷³ IOR L/PS/D/64, “Note for the Bhaonagan Case” by E. Perry, 11 December 1875. Emphasis added.

investigation with the Gaekwar in power. The Viceroy sent Sir Lewis Pelly to Baroda in December to head up a special commission; Phayre was sacked.⁷⁴ Although Pelly's appointment marked a turning point in the power struggle between Bombay and Calcutta, it was not at all certain that the result would be direct intervention in Baroda governance. Pelly's early reports stated that the main problems in the state flowed from the recent collapse of cotton prices – a condition with global causes – and the resulting attempt by the state to shore up its financing through increased taxation.⁷⁵ Financial reforms, together with some greater clarity and stability in the government's policies towards Baroda, were perhaps all that were needed. But it was no longer possible to ignore the poisoning charge when Pelly's investigation produced the confession of a servant who said he had tried to poison Phayre at the behest of the Gaekwar. This confession was followed by admissions of guilt by three others. Now Calcutta officials had to act.

The government had, however, no formal criminal jurisdiction over the Gaekwar or his subjects. Any proceeding would have to be extra-judicial. Summarizing British actions later, the Viceroy allowed that the commission convened to consider the charges of poisoning and spying “was not constituted as, or intended to be, a judicial tribunal.”⁷⁶

⁷⁴ Pelly's appointment by the Government of India was an affront to the Bombay government. See Copland, “The Baroda Crisis of 1873-77.”

⁷⁵ “The main origin of the present revenue difficulties is, in my opinion, to be found among the consequences of the rebellion in the United States,” Pelly reported (Mss Eur F/126/83, f. 3). As the price of cotton had gone up, more land was reserved for its cultivation and less to food production. Though cotton prices had recently fallen, Pelly found, rents were still high and cultivators were unable to pay. Pelly wondered, too, whether some agriculturalists might have been encouraged by the British in their opposition to the Gaekwar.

⁷⁶ IOR Mss Eur F/126/88, f. 5. In its charge to the commission, the Government of India stated that if the charge were proved, it 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

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.”⁷⁷ In another extra-judicial move, it was decided not to press charges against the men who had confessed to involvement; they were sent for indefinite terms of imprisonment to points ranging from Aden to Burma. When the commission returned its opinion, perfectly divided along British and Indian lines, the government could not rest the decision to depose the Baroda leader on the poisoning charges. But the charge of “misrule” also appeared flawed, since neither the first commission’s findings in 1874, nor the Government of Bombay, nor even Pelly, had recommended that the Gaekwar be permanently deposed for the irregularities of rule observed before the poisoning charge surfaced. It was left for the Viceroy to argue that the action was taken “on general grounds” that included some very recent missteps by the Gaekwar and factored in lingering suspicions, though not proven charges, in the poisoning case.⁷⁸ The enclave location of the state also provided an argument for intervention. Conditions in Baroda under the Gaekwar

contained the elements of serious disturbance, which, owing to the manner in which the territories of the British Government and the Gaekwar are intermingled, might have been greatly prejudicial to the interest of British subjects and to the peace and order of Her Majesty’s dominions.⁷⁹

allegiance to the crown. See Westlake, “The Empire of India,” p. 222, and note 92 below.

⁷⁷ Ibid., f. 4. The native members of the Commission were also accused of a form of jury nullification, of basing their opinions more on “political feeling than on consideration of the evidence.” Ibid., f. 9.

⁷⁸ Ibid., f. 9.

⁷⁹ The Viceroy’s Minute of April 29, 1875, IOR F/126/88.

The ultimate rationale for extra-judicial action was the appeal to order. Phayre and other officials had certainly understood this logic when they had portrayed Baroda as a refuge for plunderers and a threat to the peace of adjoining districts.

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 native states. These limits existed not just in the case for deposition because of misrule but in the more routine management of legal matters arising from minor cases and unsolved jurisdictional questions. The same Foreign Office officials who prided themselves on systematizing legal relations with the native 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

The political fallout from Malhar Rao’s deposition was less than some officials had feared, and also less than others had hoped. Calcutta officials who saw the Baroda case as an opening for asserting stronger authority over the Bombay Presidency were mainly disappointed. A number of ambitious schemes for political reorganization were scuttled, and the principal gain for Calcutta was control over the Baroda Residency. One of the schemes for reorganization was interesting for the way it called upon a familiar, romanticized notion of simpler governance in the hills. Pelly and Meade, the heads of the two Baroda commissions, came to champion the idea of consolidating Baroda and the Kathiawar states into a consortium of Gujarat-Maratha states. The idea was prefigured

in a postscript to one of Pelly's letters to the Viceroy in the midst of the crisis. Pelly had been stationed in Rajputana before coming to Baroda, and he suggested that if Baroda had been structured as "a congeries of States," the crisis would never have occurred because order would have been attained through "force of routine and system" guided by the Foreign Office.⁸⁰ The comment was in part intended to reinforce the claims of the Supreme Government to intervene in Baroda, but it also called upon the widely circulating notion that a multiplicity of Indian states in tension with one another formed a purer political system, one that was more amenable to imperial rule. The same phenomenon, of course, could perpetuate disorder and delay progress. By design, the idea that the outcome was contingent on the methods of careful rule – dependent, in other words, precisely on the qualities that Phayre had lacked but men like Pelly and Aitcheson claimed to possess – implied that imperial governance was both science and art, and that the men of the Foreign Office were its most gifted players.

For a brief time, at least, their efforts were in fact central to shaping imperial space. 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. A reflection on jurisdictional problems in native states made the connection explicitly, noting that "the root of the difficulty" appeared to be that the Government of India's administrative powers had a larger scope than its legislative powers. The administrative power of the government in native states was vast and allowed for "growth and extension"; the government's legislative capacity – its authority to extend laws passed by the Legislative Council to the territories of native states – was "very definitely marked off." Although British laws might be in force in a given native

⁸⁰ Mss F 126/83, f. 10.

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.”⁸¹ By way of illustration of the anomalies, the letter called attention to two cases of legal confusion. In one, 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, he 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.⁸²

This problem was related to the broader uncertainty about the application of imperial government regulations and laws in “outlying districts” deemed to be unsuited for them. In 1870, Parliament established a process for local authorities to apply to the Council for “deregulationising Acts” intended “to remove those districts from beyond the pale of the law.” Despite this and other attempts to fix a procedure and guidelines for

⁸¹ Letter from the Government of India to the Secretary of State for India, 28 June, 1875, IOR P/752, No. 2.

⁸² In a memorandum about these issues, Stephen disagreed that the legal problems were intractable. Any “persons brought into the country by force” were subject to British law as soon as they entered British territory. Stephen asserted that the only constraint on making laws investing British Courts with the power to try subjects of Native States even if they committed crimes there was political. And there could be no objection to carrying out a sentence passed in a native court: “A man commits an offence on the Holkar State Railway. He is brought before a Nimar Magistrate sitting in British territory under the executive authority of the Viceroy, and sentenced to imprisonment. It is surely incorrect to say that such a man is punished by British law for an offence committed in Native territory. He is punished by Native law for an offence committed in Native territory by a Native Court which, by the permission of the British Government, sits in British territory, and the sentence of which is executed by British officials.” Memorandum by Mr. Stephen upon the issues disposed of by Despatch (Judicial) No. 55, dated 23 December, 1875, IOR L/PS/D118.

determining when and where the general enactments were legally in force, there was considerable confusion about the standing of various districts. Beginning in 1870, judicial officials undertook a massive review of the record of legislation, including deregulationising acts. Because the standing of a number of native territories was in question – some areas were still technically quasi-sovereign but operated legally as if integral to British India – any territory whose status was uncertain was excepted from the resulting schedule. The resulting Scheduled Districts Act, passed in 1874, listed those districts that would be “excluded from the acts we pass for the rest of the country.” These territories comprised “remote or backward tracts or provinces of British India” in which legislation and ordinary jurisdiction had never been in operation, or had been removed. Some territories, including some Scheduled Districts, remained subject to 1870 decisions on their status.

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.”⁸³ Within native states, “exceptional portions” operated under laws established through executive order of the Governor-General in Council.⁸⁴ The legislation of 1875 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 exception within British India.

⁸³ Tupper, *Indian Political Practice* Vol. 1, p. 241.

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, even, resolve controversies about the designation of some districts as British or native. But the legal typology created and 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 remoteness, wildness, and disorder.⁸⁵ Hill regions, within both British India and native states, continued to form the quintessential examples of such legal primitiveness.

A last example will help to illustrate this point. The Dangs, an area that lay along the border of Baroda and the British district of Khandesh, was characterized by the British as a composite of chiefdoms, whose main inhabitants, the Bhils, repeatedly leased the lands for forestry to the British.⁸⁶ In 1889, the Bombay government sought to declare the Dangs a part of British India. The arguments both in favor and against this proposal relied on representations of the Bhils as culturally and legally backward. If the Bhils were incapable of exercising civil or criminal jurisdiction, then by default legal administration should fall to the British.⁸⁷ But the Bhils’ legal primitivism also suggested that they were not ready for direct rule: “In this wild country the introduction of laws and regulations seems likely to lead to embarrassment and difficulty. The Government of

⁸⁴ As Maine had noted in 1864, the British government had no authority to “extend” British laws into native territory; they could only be “applied.”

⁸⁵ 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).

⁸⁶ Skaria (Ibid.) provides a detailed history of British relations with the Bhils. The forest leases were in 1832 and 1862. The Baroda Gaekwar had unsuccessfully presented claims to sovereignty over part of the region beginning in the 1860s.

India are disposed to think that, for a backward community like the Dáng Bhíls, the strongest and most effective form of control is the personal rule of a British officer untrammelled by anything but executive orders from his own Government.”⁸⁸ As in Baroda, part of the issue was inter-governmental rivalry and a desire on the part of the central government to block Bombay’s control; but, as with Pelly’s comments comparing Baroda to Rajputana, the government’s response also rested on understandings of the natural fit between legally primitive petty states and the less complicated oversight of an imperial executive with unspecified power. Here, as elsewhere, the uncertainty of the Bhíls’ status urged a political solution with a spatial referent – undefined executive authority over a legally anomalous zone.⁸⁹

Comparative puzzles

International lawyers in the second half of the nineteenth century came to define membership in international society as restricted to those polities recognized as “civilized” by the societies already considered members of the international community. As Anghie has shown, efforts to fix a classification system pairing degrees of civilization with graduated membership in international society produced inconsistency and confusion: “The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking international capacity and yet necessarily possessing it...was

⁸⁷ British power had “not been questioned though never defined.” Letter from W. Lee-Warner, Esq. Secretary to Government, to Secretary to the Government of India, 22 February 1889, Bombay Castle, Political Department. IOR R/3505 No. 350.

⁸⁸ Tupper, *Indian Political Practice* Vol. I, p. 245.

⁸⁹ I borrow the phrase from Gerald Neuman, “Surveying Law and Borders: Anomalous Zones,” 48 *Stanford Law Review* (1996) 1197

never satisfactorily denied or resolved.”⁹⁰ Anghie views the efforts to grapple with quasi-sovereignty as a result of the contradiction posed by expansive imperial claims and the continued recognition of the capacity of non-European polities to enter into treaties.

This observation is useful as far as it goes. In India, British officials did assert the right to disregard treaties and other agreements with princely states, and this move, seen as voiding any claims of the states’ international personality, drove the effort to find another way of defining their status in international law. But Anghie’s important goal of analyzing “the constitutive effect of colonialism on sovereignty” cannot be achieved only by observing trends within European international law.⁹¹ Quasi-sovereignty was a construct also shaped by repeating problems of legal administration in empire. Intellectual and political-legal currents cannot be separated. To begin with, much of the intellectual work of defining quasi-sovereignty was not being done in Europe and the United States but in empire. The material for Westlake, and for other international lawyers writing about Indian princely states, was supplied by colonial officials, whose elaborate legal typologies were being constructed not to resolve intellectual puzzles so much as to respond to ongoing legal conflicts and provide a guide for colonial administrators in an imperial future they saw as extending indefinitely. Maine, and at a lower profile, Tupper and Lee-Warner, straddled the worlds of imperial officials and metropolitan intellectuals. They were acutely aware of the forces ranged against the easy incorporation of enclave colonial territories into the legal order of empire. Local rulers insisted on retaining jurisdiction, and they advanced arguments about territorial sovereignty that invoked both international law arguments and a discourse about the

⁹⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), p. 81.

virtues of customary law.⁹² Colonial officials' efforts to systematize rule meanwhile resulted in further territorial classifications as they distinguished different kinds of anomalous legal zones and applied confusing and contradictory legal policies. Conflicts like those in Baroda about control at borders, ambiguities of subjecthood, and the vagaries of applying imperial legislation were repeated in other Indian princely states and elsewhere, with variations.

One of the more interesting comparative references of the nineteenth century was the sometimes explicit, sometimes implicit invoking of the status of American Indian nations as a model for the quasi-sovereignty of princely states in India. 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

⁹¹ Ibid., p. 37.

⁹² For example, in the debate about the treaty of extradition negotiated by Travancore and Cochin in 1873, British officials ultimately approved the treaty but explicitly denied the arguments of the *dewan* of Travancore based on international law in defending the states' rights to form the agreement. It is important to note that the *dewan*, Madava Row, was not taking a particularly radical stance, suggesting at one point that the agreement could incorporate a statement requiring approval of the Resident for any extradition of a European British subject. ("Note from Madava Row, Diwan of Travancore, to the Resident of T and C, 24th April 1872," IOR P/752) The responses of British officials to this case prompted one of the clearest statements of the perceived tight connection between paramountcy and indeterminacy in the imperial government's posture toward the native states: "The Dewan of Travancore appeals to the maxims of international law, which regulate the relations of independent and co-equal European States. I do not concur in the line of argument, though I do not blame the Minister for advocating the rights of his sovereign with dignity and spirit. There *is* a paramount power in the British Crown, of which the extent is wisely left undefined. There *is* a subordination in the Native States which is understood, but not explained. I may affirm, however, with safety, that the Paramount Power intervenes only on grounds of general policy where the interests of the Indian people, or the safety of the British power, are at stake. Irrespective of those features of sovereign right which Native States have, for the most part, ceded or circumscribed by Treaty, there are certainly some of which they have been silently, but effectually, deprived." (Minute of Lord Napier of Merchistoun, quoted in "Letter From Government of India, to Secretary of State for India, Simla, 1 September 1873," IOR P/752; emphases in original). And see discussion of the Lidell case above.

book *The Law of Nations* as “protected dependent states,” and this formulation was later picked up and repeated by other writers.⁹³ The irony of drawing on Marshall’s formulation of American Indian sovereignty would have been made apparent by even a cursory look at contemporary legal trends in American Indian law. Even at the time they were issued, the Supreme Court’s decisions in the Cherokee cases did little to protect Indians from white incursions on their land and from a policy of removal to the west of the Mississippi. By the time Marshall’s words were being repeated as a model for thinking about Indian princely states, his views had come to be largely overshadowed by a different approach to 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, 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

⁹³ Sir Travers Twiss, *The law of nations considered as independent political communities: on the rights and duties of nations in time of peace* (Littleton, Colo. : F.B. Rothman, 1985), p. 27. Twiss is cited approvingly by Tupper, *Our Indian Protectorate*, p. 4. Marshall’s phrase is from *Cherokee Nation v. Georgia* (1831).

exacerbated some jurisdictional issues at the same time that they strengthened the hand of state and federal officials seeking rationales for intervention in Indian affairs.⁹⁴

The precedent set by the Supreme Court in favor of a system of “measured sovereignty” did, in its broadest outlines, resemble the theoretical outlines of British paramountcy in India, and this line of legal thinking and policy was not a complete dead-letter.⁹⁵ In *ex parte Crow Dog*, in 1883, the Court upheld the right of the Brulé Sioux Indians to judge and punish an Indian for the murder of another Indian and held that Congress had never established federal jurisdiction over Indian subjects committing crimes on Indian land. In *Talton v. Mayes*, decided in 1886, the Court went on to exempt Indian tribes from the requirement of conducting a grand jury proceeding under the Fifth Amendment because tribal law predated the writing of the Constitution. These decisions kept alive a line of legal reasoning and a tradition in policy based on the assumption of effective Indian internal sovereignty.⁹⁶ But they also elicited a backlash. In part prompted by the *Crow Dog* decision, Congress passed the Major Crimes Act in 1885 to establish federal jurisdiction over Indians anywhere who were charged with crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. The law was upheld in *United States v. Kagama* the next year, in a ruling that seemed to establish definitively the power of the federal government to determine unilaterally the kind and amount of autonomy that would be awarded to Indians, including those with organized governments in clearly bounded territories.

⁹⁴ 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 Vols I and II* (Lincoln and London: University of Nebraska Press, 1984); and Wilkinson, *American Indians, Time, and the Law*.

⁹⁵ The phrase is from Wilkinson, *American Indians, Time, and the Law*.

Uniting both strands of Indian jurisprudence was an effort to distinguish federal from state prerogatives to intercede in Indian affairs. Any possibility for upholding Indian sovereignty depended upon claims to effective governance, which in turn was restricted to nations with formally bounded reservations, enclave territories now largely engulfed by state lands. Advocates of expanding federal jurisdiction cited the need to protect Indians from 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: cases involving continued questions about jurisdiction along reservation borders; challenging definitions of citizenship and tribal membership; and determining the application of federal legislation in Indian territory. Treaty provisions and case law together tell only part of many tribe-centered legal stories involving series of small struggles over Indian lands and jurisdiction.

In contrast to nineteenth century India, there was less debate about whether American Indian law developed within a constitutional framework rather than within a regime of international law. Yet we still observe a systemic tendency toward territorial anomalies, and the legal administration of American Indian lands formed only one part of a wider pattern. The administration of newly acquired territories by the United States created 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

⁹⁶ See Sidney Haring, *Crow Dog's Case : American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge University Press, 1994).

California in the two years before statehood, and the definition of U.S. “sovereignty without sovereignty” in Panama and the Pacific guano islands.⁹⁷ 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.”⁹⁸ A formula for the constitutional recognition of legally anomalous enclaves surrounded by U.S. national space was relied upon to describe the legal status of a colonial territory outside the country’s borders.

I do not want to follow nineteenth century writings in insisting on strained comparisons of Indians to Indians. These histories, and the geographies they produced, are very different. In both settings, though, legally exceptional enclave territories played a symbolically important role in wider processes of incorporating territory into nation-empires. And during the same decades of the nineteenth century, legal schemata promoting a vision of semi-autonomous sub-polities – a form of quasi-sovereignty – gave way slowly, through political acts framed by discourse about the limits of law, to a regime of intervention. Both national and imperial constitutionalism promoted uncertainty and, at the same time, the transposition of arrangements for enclave rule to other legally anomalous territories.

⁹⁷ 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; and Neuman, “Surveying Law and Borders: Anomalous Zones.”

⁹⁸ *Downes*, 182 (White concurring). Christina Duffy makes the interesting argument that the standard view of the *Insular Cases* must be modified. Their “epochal significant” was not that they created a category of attenuated sovereignty for territorial acquisitions outside the United States but that provided for the possibility of *deannexation*. Christina

While nineteenth-century jurists embraced comparisons across a broad range of “protectorates,” they turned away from comparisons between Indian native states and “uncivilized” colonial enclaves.⁹⁹ Westlake, for example, insisted on distinguishing between Indian princely states and protectorates in “uncivilized” regions. Yet his analysis of their qualities were not so very different; he viewed sovereignty in both kinds of places as effectively “in suspense” – in uncivilized regions, because they were 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.¹⁰⁰ Westlake did not see parallels in the legal politics of enclave territories in Africa and Asia because he did not look. Consider just one example, that of Basutoland, the region of hills, mountains, and high plateaus between Natal, the Orange Free State, and Griqualand east in southern Africa. The region fit the image of a refuge from successive upheavals emanating from conflicts nearer to the coast.¹⁰¹ As part of a policy to contain and control Boer settlers in the interior, the British absorbed the territory, 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 protectors. He declared himself a subject of the Queen and, in 1871, accepted annexation

Duffy Burnett, “*United States: American Expansion and Territorial Deannexation.*” *University of Chicago Law Review* 72 (3) 2005: 797-879.

⁹⁹ See Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford University Press, 1984); and see also Martti Koskenniemi, *The Gentle Civilizer of Nations : The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2004).

¹⁰⁰ Westlake, “Territorial Sovereignty,” p. 183.

¹⁰¹ The mfekane had propelled a diverse set of polities into the high tablelands, and Boer and Griqua incursions also threatened to displace agricultural and pastoral settlements along the region’s shifting borders, pushing various groups to higher ground.

by the Cape Colony. Direct administration under the Cape led to rebellion and the end of Cape administration in 1884. The region returned to British indirect rule and eventually became Lesotho, an independent country subject to the economic and political constraints of its enclave geography within the territory of South Africa.

The centrality of legal politics in the creation and re-creation of Basuto as a territorial enclave is striking.¹⁰² While major struggles focused on such issues as the collection of the hut tax, the enforcement of marriage regulations, and Basuto disarmament in the rebellion that led to the end of Cape administration, conflicts over the structure of shared legal authority were both routine and occasionally explosive. 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.¹⁰³ As in India, colonial officials simultaneously held up Basuto

¹⁰² See Sandra Burman, *Chieftdom 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).

¹⁰³ 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, *Chieftdom Politics and Alien Law*.

political life as pure and admirable, and viewed it as the main source of instability in the region and a necessary object of gradual reform.¹⁰⁴ 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.”¹⁰⁵

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

¹⁰⁴ 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 Vols. I-III* (Capetown: W.A. Richard & Sons, 1883).

¹⁰⁵ Theal, “Introduction” in Sauer and Theal (eds.) *Basutoland Records Vol. III*, p. xv. Yet despite its emphasis on “perfect freedom of speech” for every individual and on “always deciding cases according to precedent,” Basuto common law was, colonial officials cautioned, not to be confused with the common law of England; it was “adapted to people in a rude state of society,” and it generated a legal order that tolerated cruelty, protected chiefs’ privileges, and treated many serious crimes as mere civil offenses (pp. xv-xvi). The system was also, if left in isolation, frozen in time: “The traditional laws meeting all the circumstances of barbarian life, it was only when something abnormal occurred through contact with civilization that new ones were needed.” (p. xvi).

animosity against us.”¹⁰⁶ As with the Bhils, such ideas could be placed in the service of opposite solutions. The pressures toward creating an enclave status for Basutoland emanated not so much from these debates as 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 equivalent of “bare sovereignty.”

These examples help to remind us of the variety of settings in which enclave territories developed because and in spite of imperial legal policies. In the United States, a constitutional formula for the protection of quasi-sovereignty gave way rather quickly to a legal regime of intervention in the nineteenth century combined with continued recognition of territorial anomalies. In Basutoland, an apparent trend toward legal integration led unexpectedly to the creation of a permanent enclave state. Events in Baroda illustrate the close connections, apparent in all these cases, between routine legal tensions and the rationale for exceptional political intervention. Visions of the hardness of primitive law blended with projections of its inevitable demise, while designs on territorial absorption also recognized repeated territorial exceptions. Everywhere, seemingly small legal disputes rose quickly to the level of constitutional challenges or political crises. In enclave territories surrounded or partially engulfed by territories of direct rule, jurisdictional conflicts at the borders and controversies about subjecthood or citizenship blurred distinctions between internal and external sovereignty. Fumbling to define situations that had no clear place within municipal or international law, officials both approved the repeated suspension of law and sought to define its necessity in legal terms.

¹⁰⁶ Burman, *Chieftom Politics and Alien Law* p. 165.

This last phenomenon appears to be part of a wider pattern connecting colonial and imperial law to states of emergency. Nasser Hussain has argued that imperial law contained within it the rationale and mechanisms for the suspension of law.¹⁰⁷ He examines two legal acts that were taken from European law but given greater political significance in colonies: the declaration of martial law and the suspension of habeas corpus. Both kinds of legal action took a temporary state of legal suspension and made it systemic, with martial law often invoked as a fictional starting point for new imperial regimes and the suspension of habeas corpus seen as a discrete, repeatable act of imperial fine tuning. Both legal actions responded to a broader representation of the doctrine of necessity as especially relevant to colonial law. The tendency toward the suspension of law in the rule of quasi-sovereign territorial enclaves poses some similarities to these patterns. Repeated conflicts over border control, jurisdiction, and the application of imperial legislation created an environment in which routine legal disputes could quickly generate political crises – creating the institutionalization of intervention “by necessity.” The distinguishing characteristic is that the limits of law in these cases both originated in and helped to create spatial irregularities in empire. The acts of intervention would have been politically unremarkable if applied to territories of direct rule but took on the quality of “exceptional” acts when applied to colonial enclaves, engendering an association between holes in the imperial map and silences in the law.

The discourse about archaic law in the hills – quintessential settings for zones of quasi-sovereignty – both contributed to the impulse to create separate legal spaces and helped to make this spatial and legal exceptionalism appear natural. The legal

¹⁰⁷ Nasser Hussain, *The Jurisprudence of Emergency : Colonialism and the Rule of Law* (Ann Arbor, MI: University of Michigan Press, 2003).

primitivism associated with the hills was transposed onto other landscapes, and it offered a useful explanation for the anomalies of places not easily integrated into the imperial legal order, even while it affirmed the expectation of their eventual absorption. Like the trope of the “tropics,” the image of timeless colonial hills was related to a broader Orientalism, to be sure, but it also reflected a legal politics creating differentiated colonial territories rather than consolidated zones of homogeneous and subordinated “others.” The very notion of divided sovereignty seemed linked to the “natural” political and cultural fissures of enclave regions. Their singularity signaled the spatial and temporal limits of law.