



## **Who Is Sovereign? Evolution of the Concept of British Sovereignty in India, Seventeenth to the Early Nineteenth Century**

JEAN-PHILIPPE DEQUEN  
[JPDEQUEN@GMAIL.COM](mailto:JPDEQUEN@GMAIL.COM)

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### **Introduction**

This article seeks to briefly explore not so much the substance of English—and later British—legal transfers in India, but rather their procedural aspect, their *raison d'être*. The transplantation of English law—albeit modified to sometimes fit local realities within the Subcontinent—was indeed hardly a given, but on the contrary a heavily discussed topic; and irrespective of whether these transfers were championed or challenged, they always sought to be legally justified, be it on a theoretical, anthropological or historiographical level.

Robert Travers (2007) was among the first to comprehensively present the evolution of these ideological imperial legal discourses throughout the eighteenth century, while Nicholas Dirks (2008) pursued this venture within the 1800s. Similarly, much has been written on the colonial legal order and its link to the advent and spread of legal positivism worldwide throughout the nineteenth century, and how India and other colonies became a testing ground upon which the foundations of modern European legal orders were in fact constructed (see for instance Wilson 2008; Chaudhry 2016).



The existence of such heated debates as to how and whether legal transfers could or even should be conducted overseas has thus been well documented. Nonetheless they often have been portrayed under the paradigm of an experiment: that of trial and error, constant adaptations to new realities, differing and often competing orientalist and personal projections, and irremediably conclude to their apparent haphazard applications and results (Benton & Ford 2016).

However, as a matter of doctrine, the theory of legal transfers within the Common Law tradition has been surprisingly consistent since Edward Coke's opinion in the famous *Calvin's case* of 1608 (77 E. R. 377). Equally, the orientalist projections that underpinned the understanding of the Mughal monarchy, or indeed that of princely states in India, have also been fairly constant since François Bernier's travel log (1916) in the seventeenth century: that of a despotic monarch, allodial owner of the lands upon which the nobles were only granted conditional use, subject to expropriation and escheat. This begs the question as to why this impression of haphardness remains, if all the protocols and processes had been settled from a very early stage.

It is contented that the answer lies not in India, but rather in England. The evolution of legal transfers in India were imperial in scope but remained very provincial as to their justification, and could ultimately be traced back to Britain's own legal evolution as to the concept of sovereignty. The concept of sovereignty and the extent of sovereign power is indeed central to legal transplants' justification, and the necessary starting point upon which they can be processed. It is thus not mere coincidence that the utilitarians have made this question the cornerstone of their legal theory (Hart 1967), before embarking on a unprecedented string legal transfers in India in the second half of the nineteenth century (Stokes 1959). It is also unsurprising that they reserved their more scathing critiques to Common Law's conception of sovereignty—or lack thereof—and of its difficult localisation in the British legal and imperial contexts. Indeed, whether it sat with the King of England through its charters, the commercial companies to which they were granted, the British parliament or even the local Indian rulers, the localisation of sovereignty in the early modern period is hard to pinpoint.

Irrespective, it always remained a very English affair, where sovereignty was not theorised in conjunction to the formation of an abstract concept of the state, but rather as a linking mechanism between the King as allodial owner of the land, and parliament representing the "commonwealth" as the sole source of law within the said land. A linking mechanism, empirical and feudal in nature, which kept on swinging between crown and parliament to finally settle to the benefit of the latter



at the beginning of the nineteenth century. This conceptual ambiguity in the early modern period was not however an impediment to British colonial ventures, but on the contrary a blessing for the commercial companies, which quickly learned to benefit from it.

As such, this particular constitutional fluidity has had a direct impact on how the East India Company (here in after EIC or the Company) conceived its role in India. Indeed, the EIC did not so much seek *dominium* of the land, but rather *imperium* on it: how laws should both be administered, eventually changed and indeed transferred. It projected unto India the English constitutional debates and realities of the day, with and despite appearances, very little consideration for Indian ones. As such, it is advanced that the Company did not seek sovereignty in India, but rather to represent the Indian "commonwealth" by mirroring the evolution the latter gained in England during the same period, including the ability to ultimately choose which crown would suit its interests best.

### **The East India Company's legal standing in the seventeenth century**

#### *Sovereignty in Britain: a fluid legal concept*

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In order to understand the EIC's legal standing in India, one must first keep in mind the particular legal order of England—and then Britain—in the early modern period, and its radical distinction from its continental counterparts, especially in relation to the concept of property.

Whereas in France—as one of the most prominent counter-example—the state was formed by severing the ties it had with physical possession in the creation of an abstract concept of property, England founded its legal edifice by establishing possessory remedies through the King's courts and then the court of chancery. The emphasis on possession as the physical detention of the land entailing a right to property is deeply rooted in the Common Law tradition, but also in the differing political challenges faced by the King of England compared to his French counterpart. Whilst the latter wished to re-claim possession over territory he did not detain, the King of England wished to re-claim property rights over land he already owned.

Indeed, the original feudal system imported from Normandy had rapidly diverged from its continental model in numerous ways: first through the establishment of remedies which directly favoured possession as means to prove ownership, second on the survival of customs on manorial grounds which created a distinct class of tenure extraneous to the feudal scheme, and finally through the conveyance of use, which



ultimately led to by-pass most feudal incidents and led to the creation of equity (Buck 1990).

The individual's legal standing in England was one based on empirical realities of possession linked to "use", and not on the neo-Roman inspired abstract concept of property. In turn, this led to differing legal bases upon which political representation and thus sovereignty was established. Whereas in France sovereignty would progressively be theorised as an abstract legal notion embodied in the King (property leading to a right to possess), in England it is the "commonwealth" represented in parliament who will grant the King a right to sovereignty (possession leading to property rights).

In England, the division between the monarch's two bodies is almost absent until the sixteenth century.<sup>1</sup> It is the emergence of a legal capacity granted to individuals represented in parliament as "commonwealth" which will progressively shift the origin of the King's power from patrimonial allodial owner, to that of embodying the "crown" as a legal representative of the political body that is the "nation". Hence, whereas in France the King through the conceptualisation of the state embodies the "nation" as both "regime" and "commonwealth"; in England the "nation" will remain composed of two distinct entities, parliament as "commonwealth" and the King as the embodiment of its regime.<sup>2</sup>

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The legal historian Frederic Maitland (1900) will trace the origin of this distinction within Edward Coke's transposition of ecclesiastical law to the secular frame in his *Institutes* in the seventeenth century. Indeed, the two capacities—or bodies—of the King were incorporated within one single physical person (corporation sole), and not within an abstract legal personality (corporation aggregate), such as the continental concept of state encompassing both regime and commonwealth. If the former is inherently linked to the physical body of its holder and may be transferred upon his death, it still lacks the continuity attached to the fictitious legal personality of the latter. It is true that the "body politic" of the monarch will increasingly be referenced as an abstract "crown" throughout the eighteenth and nineteenth centuries, but as Maitland (1901: 136) remarks: 'We might have thought that the introduction of phrases which gave the king an immortal as well as a mortal body would have transformed this part of the law.<sup>3</sup> But no. The consequences of the old principle had to be picked off one after another by statute'.

The emergence of utilitarian thought at the turn of the nineteenth century alongside the advent of legal positivism, notably through the John Austin's command theory (Austin 1832), has nevertheless blurred the lines further, notably in its frontal attack on Blackstone's notion of the state within Common Law (see Bentham 2012). It was not however



able to achieve its goal in supplanting the traditional empirical notion of sovereignty with an abstract counterpart. Nevertheless, it did contribute to its re-localisation within the ambit of what came as close as a corporation aggregate. It is indeed the parliament which, through the Georgian era, will increasingly take over the attributes of government and regime within a contractualist perspective, incorporating the crown within its ambit and, as the nineteenth century unfolded, came to monopolise the use of term "sovereignty" up to this day.

*Sovereignty in British colonies: an appropriation of land, but not necessarily of law*

Irrespective, the continued dichotomy between crown and commonwealth in the legal conceptualisation of the English and then British state will endure, and will have lasting implications to the claims of sovereignty and that of legal transfers during Britain's colonial expansion.

The first consequence relates to the appropriation of land *per se* which, although falling into the dominium (hence the term "Dominion") of the crown, will not automatically fall under the English (as commonwealth) legal imperium. In other words, only the crown travels. Consequently, despite the merger of the Scottish and English crowns under James I, the King will never be able to legally unite both Kingdoms due to the parliaments' resistance in their conception of the monarch as having only a political capacity granted to him by the Common Law. Despite the attempts to change the myth underpinning law (whether by invoking the legendary lineage of King Fergus who "gave" law to barbarous Scots, or as being God's chosen leader), the English legal system would not depart from its practical and empirical roots and stray along the concept of an abstract state with a distinct legal personality, which would then be embodied by the King.

Subsequently, the laws that would apply in newly conquered territories, although inspired by the English legal system, could not (and in fact will not) simply be transplanted from England, but rather will take their source in the "commonwealth" of those territories, provided its inhabitants were deemed to have a legal personality of their own. In order to assess such legal personality, Coke is again the main reference, who through his opinion in *Calvin's case* will advance that a change in sovereignty over a land does not automatically entail the abrogation of pre-existing laws and the wholesale legal transplant of English statutes, provided the inhabitants were Christian. This solution will be followed by Lord Mansfield more than a hundred years later in *Campbell v. Hall* (1774, 98 E.R. 1045), while nonetheless dropping the requirement of



Christian affiliation which he deemed 'absurd [...] and in all probability arose from the mad enthousiasm of the Croisades' (ibid.: 1047f.).

Nonetheless, despite the increasing toleration of non-Christians within the fold of legal subjects, the main criteria to assess the legal capacity of an individual was still entrenched within seventeenth century legal thinking and most particularly that of John Locke who, through his 1690 *Second Treatise on Civil Government* (1986), will link the concept of legal personality with the "use" of the land, following an all but classical possessory notion of property, directly in line with the feudal English system (Schmitt 2003: 47). The agriculturalist theory that ensued will serve as the basis to deny the recognition of Native American law, first and foremost that of property (Armitage 2004), paving the way to English legal transfers in the Americas, but also in Australia and Sub-Saharan Africa.

#### *Relationship between the crown and the EIC*

However unlike in North America and other *res nullius* territories, India had struck the imagination of Europe as having proper—albeit imperfect—regime (Raiswell 2003). Similarly, and unlike American first nations, which were stripped of their legal personality for not "using" the land upon which they dwelled, Indians had been considered as a distinct "commonwealth", but most importantly still under the sovereignty of their local rulers, of which the EIC only sought extra-territorial rights for their own servants. At first, the English crown did not even seek dominium over Indian land, let alone imperium over it. Indeed, it was not its first goal at the turn of the seventeenth century. As Courtenay Ilbert (1915: 9) points out: 'the annexations of the sixteenth century were annexations not of territory, but of trading-grounds'.

It is thus unsurprising that the first charter granted to the EIC in 1600 did not refer to "untilled" or "not yet cultivated or planted" land, contrary to the ones given to the Lords Proprietor of Carolina in 1629 and 1663. Similarly, the Elizabethan charter only provided for the enactment of by-laws for the good governance of the EIC's own affairs. The limited jurisdiction and legislative powers the Company received were in fact from Indian rulers themselves, through treaties according to proto-international law. Hence, a letter from Jahangir (r. 1605-27) to James I (r. 1603-25), following the latter's demands through Thomas Roe's embassy will state:

I have given my general command to all my kingdoms and ports of my Dominions to receive all the merchants of the English nation as the subjects of my friend, that in what place so-ever they choose to lie they may have reception and residence to their own content



and safety [...] and in what City so-ever they shall have residence, I have commanded all my Governors and Captains to give them freedom answerable to their own desires.<sup>4</sup>

The promised settlement would later be confirmed through a *farman* (grant, edict) by the Gujarati *Nawwab*, relating to Surat:

The house of Cojah Hassen Allee in Surrat, with the garden, stable, and other conveniences thereunto belonging, shall be let them lease for the term of seven years immediately following the date hereof [...] 11. They shall quietly and freely exercise their own religion, wear arms for their defence and execute justice on their own people, though the offence bee done to a Mussellman.<sup>5</sup>

Other similar arrangements would follow suit through the establishment of factories in Madras (1639) and Calcutta (1690).

The situation however changed upon the transfer of Bombay to King Charles II as dowry for his marriage with Catherine of Braganza in 1661. For the first time, the EIC was now in a position to bypass Indian rulers, the English crown being not only in possession, but most importantly having property over an Indian territory. Coke's jurisprudence would here apply fully and is reflected in the 1661 Charter stating that justice would now be administered 'according the Laws of this Kingdom [England]', paving the way for wholesale legal transfers, with limited exceptions for the Christians present, namely Portuguese.

However the Company was well aware of the English legal framework and was determined not to be sidestepped in its claim to represent the Indian commonwealth. That the crown had dominium over Bombay was beyond dispute, but imperium was another affair. Projecting the debates within the English parliament following the restoration of Charles II (r. 1660-85) to the English throne and the increasing limitations of his sovereign powers, a subtle change of language was thus operated upon Bombay's lease to the EIC within the 1668 Charter for justice now to be administered 'as may be agreeable to the laws of this Kingdom', thus paving the way for the EIC to legislate on its own. The subsequent enactment of "Company laws" may have been qualified by Gerald Aungiers (president of Surat and governor of Bombay) as 'an excellent abridgement of the [laws of England]', they nevertheless were quite different (Fawcett 1934: 54). Aungiers himself, in the opening speech of the Bombay Court of Judicature in 1672, would emphasise the evasive concept of justice over the substantive law that would be administered to the King's new subjects, as well as of the conceptual dichotomy pertaining to English sovereignty in classifying these "subjects" as being both that of the King *and* of the Company.



The Inhabitants of this Island consist of several nations and Religions to wit -, English, Portuguese and other Christians, Moores [Muslims], and Jentues [Hindus], but you, when you sit in this seat of Justice and Judgement, must look upon them with one single eye as I do, without distinction of Nation or Religion, for they are all his Majesties and the Honourable Company's subjects as the English are, and have all an equal title and right to Justice and you must do them all Justice.<sup>6</sup>

The establishment of admiralty courts, made possible through the 1683 Charter followed the same logic: the recognition of the King's sovereignty alongside an insistence on the Company to represent and to legislate for the Indian commonwealth, mirroring the English evolving constitutional framework. The history of admiralty courts in seventeenth and eighteenth-century India have seldom been studied (with notably exceptions such as Das 1970; Crump 1980; Fawcett 1934), and moreover been branded as 'near universal failure' (Frass 2011: 43). However, if indeed admiralty courts have not had the success and longevity of the Mayor Court system established in 1726, they nonetheless do point to certain interesting features of English sovereignty in India.

A lot of focus has been put on the personal history of Dr. John St. John, the first professionally trained lawyer in civil law appointed to India in 1684, whose relations with the Company collapsed due to its self-appointment as Chief Justice of Bombay and his reliance on English statutes, as well as his personal enmities with EIC officials (Derrett 1980). His summary dismissal in 1687 and the Company later creating a Mayor Court in Madras under its own seal (1688)—and not that of the King's—should not however be interpreted as a defiance to the crown's sovereignty, but rather as a move to precisely prevent English law to be directly applied within the Subcontinent, as the EIC reminded its justices, first among which St. John:

We understand you have an antient Statute booke at Bombay; but you are under a great mistake, if you think our Statute booke be law in Bombay, none of our Statutes or Acts of Parliament as we have formerly told you, extending further then the Kingdome of England, the Dominion of Wales, and the Town of Barwick upon Tweed. [...] by his present Majesty's Charter, and the last Charter of our late Sovereign, you are to govern our people there, being subject to us under his Majesty by the Law Martiall and the Civill Law, which is only proper to India.<sup>7</sup>

A pattern then emerges as to the singular position of the EIC within—or rather outside—the English imperial system, that of representing a "commonwealth" of its own and the regime that it entails, as illustrated



in one of the Company's resolution in 1688 (cited in Ilbert 1915: 23, emphasis added):

The increase of our revenue is the subject of our care as much as our trade; 'tis that must maintain our force when twenty accidents may interrupt our trade; 'tis that must make us a *nation in India*; without that we are but a great number of interlopers, united by His Majesty's royal charter, fit only to trade where nobody of power thinks it their interest to prevent us; and upon this account it is that the wise Dutch, in all their general advices that we have seen, write ten paragraphs concerning their government, their civil and military policy, warfare, and the increase of their revenue, for one paragraph they write concerning trade.

In other words, the Company ventured to re-create the English constitutional legal framework in India, albeit under its own terms. The aim of the Company, of which one can see the origins within the establishment of mayor courts in the late seventeenth century, is not to replace the sovereign, but rather to be in the position to ensure the monopoly on the conception and administration of law within the Indian territories under its control.

### **The East India Company's standing in the eighteenth century**

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In this respect, the seventeenth century EIC did not have much to worry about Westminster's oversight, even during Oliver Cromwell's interlude at the head of the English Commonwealth. The Company on the contrary benefited from the absolutist tendencies of Charles I before him, and of Charles II's bitter fight with parliament following the restoration.

Indeed, the EIC's monopoly of trade in the East Indies depended solely on the King's charters, independent of the English parliament's purview, and the possession of Indian territory that had been achieved through the conclusion of multiple treaties as an agent of the crown, and not as agent of the English "commonwealth" represented in Westminster.

Losing such status however and becoming an agent of parliament would eventually impede its claim to administer and create law, for this time it would not be solely the crown that travelled but the entire British nation, and with it its laws. To avoid this fate, the EIC will thus try to establish alternative claims to sovereignty in order to keep its legislative power within the Subcontinent.



*The EIC losing its royal prerogatives and looking for alternatives*

The EIC's change of tactics followed closely the "Glorious Revolution" of 1688 and the subsequent empowerment of parliament to the detriment of the King, a tendency which dramatically increased at the beginning of the eighteenth century and the debates surrounding the succession of Queen Anne (r. 1702-14), of which Westminster tried (and arguably achieved) to control with the accession of George I (r. 1714-27), inaugurating an era leading up to parliamentary sovereignty.

In England, some traders were quick to latch on this evolving constitutional landscape and established a "new" Company, challenging the "old" one on the basis that a monopoly on trade was beyond royal prerogatives and could not be simply granted through a royal charter and necessitated an act of parliament. The bitter fight that ensued between both entities would finally be settled through their somewhat forced merger in 1708. However, the newly founded EIC was aware of the growing parliamentary control it would have to face, which was ultimately translated in the Charter of 1726, creating Mayor courts under the King's seal and most importantly enshrining the administration of English law within Presidency territories (namely Calcutta, Bombay and Madras) previously acquired by the "old" EIC in the name of the King. The Company thus started to look beyond the British King's agency, which had now been subdued by parliamentary control within those territories.

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It is with the aforementioned framework in mind that one can better understand Robert Clive's choice after the battle of Buxar (1764) to seek the *diwani* (administrative jurisdiction) of Bengal, Bihar and Odisha from the Mughal Emperor, with the added bonus of personally benefiting of the grant of tax free *jagir* (feudal land) within those territories. Indeed, only through a direct treaty between the EIC and the Mughal allodial owner (as he was then considered), could the former replicate the British constitutional framework, whilst by-passing the British parliament entirely.

The subsequent dual system—or diarchy—whereby English law would apply within the Presidencies through the King's courts and Islamic law within *mufassal* (also spelled *Mofussil*: provincial or rural district) territory through Company courts, installed the EIC as a *de facto* if not *de jure* Indian "parliament" within the Mofussil, controlling the administration of law but also its creation and reform under the nominal sovereignty of the Mughal monarch in lieu of the British King. A "parliament" which nonetheless only took the organisational features of a cabinet in the form of a Supreme Council, and within which no Indian were in fact represented.



This change of sovereignty spurred lively debates in the late eighteenth century, most notably between Warren Hastings, Governor General of Bengal (1773-85), and Philipp Francis, member of the Supreme Council. Indeed, Hastings defended the local Mughal institutions of justice, for which he devised a specific plan<sup>8</sup> with the aim of reforming them to suit the Company's needs, such as his plan to instate himself as the judge of last resort in criminal matters in lieu of the Mughal Nawwab (governor).<sup>9</sup> He also protected the predominance of Islamic law as the *lex loci* of India, justifying exceptions for the application of Hindu law within Islamic jurisprudence itself:

The Mahomedan government [...] has left their [the Hindus] privileges untouched [...]. I presume my lord, if this assertion can be proved, you will not deem it necessary that I should urge any argument in defence of their right to possess those benefits under a British and Christian administration which the bigotry of the Mahomedan government has never denied them.<sup>10</sup>

Francis on the other hand favoured another interpretation of the "Mughal Constitution", which on the contrary refuted the predominance of Islamic law and with it the "feudal fiction" of the Mughal Emperor's sovereignty as the allodial owner of the land. He favoured an empirical legal system, coined "country government", where laws stem, much like within the English manorial system, from the tradition of their local usage under the guise of the *zamindari* (manor, estate, lordship), which were in their great majority Hindu (Francis 1782: 72). As such, he considered that nothing impeded the British King to claim dominium over Bengal, albeit in a separate capacity from that of Britain and thus outside Westminster's purview, keeping in mind that such sovereignty would not lead to the imperium of English law, but quite the opposite.

Irrespective of the apparent differences between both conceptions, they both aimed at establishing a distinctive sovereign in India, separate from the British one, albeit incorporated within the same person for Francis. However, in doing so, they nonetheless continued to rely on the English framework distinguishing the sources of law from its administration; dominium from imperium; crown from commonwealth. In regard to the question of legal transfers from England to India, it could then be said they pursued, despite different avenues, the same continuous goal from the seventeenth century onwards: establishing the Company as the sole representative and legislator of the Indian "commonwealth".

As such, and far from inventing of a novel legal system, both men are at the core following the classical Common Law doctrine in relation to legal transfers, dating back from Coke and *Calvin's case*, extended to



the imperial context by Lord Mansfield in *Campbell v. Hall* and summarised for India by the orientalist (and 1783-94 judge at the Calcutta Supreme Court) William Jones, for whom 'the laws of the natives must be preserved inviolate; but the learning and vigilance of the *English* judge must be a check upon the native interpreters' (Cannon 1957: 188, emphasis in the original).

Following both Francis and Hasting's demise from Indian affairs, the *Cornwallis Code* of 1793<sup>11</sup> struck a balance between both these conceptions. Its main architect, John Shore, in a legal advice presented to the Supreme Council of Bengal, did not go as far as to question the Mughal Emperor's sovereignty. However, he did base the latter's existence on an empirical fact rather than on purely legal grounds, and further justified the reform of revenue collection on the observation that '[the] constitution of the Mughal Empire, despotic in its principle, arbitrary and irregular in its practice, renders it sometimes almost impossible to discriminate between power and principle, fact and right' and proposed a system that would be based on 'those usages which have subsisted for the greatest length of time, with the fewest variations and infringements'.<sup>12</sup> In conveying the notion of "use", Shore not only projects English legal history within the Indian context, but also hints at increasing the contractual nature of the EIC's conception of sovereignty.

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Indeed, in putting forward the idea of recognition of rights rather than their sole observation and ascertainment, the EIC was establishing itself—mirroring in that regard Britain's parliament—as sole decider over which it may confer them to. As Westminster acted through statutes in order to frame the King's prerogatives, the EIC used treaties and *sanad* (deed) to recognise the sovereignty of local rulers independently to that of the Mughal emperor. A political as well as a legal policy which would be championed most notably by Francis Rawdon-Hastings, Governor General of India between 1813 and 1823, who famously and continuously addressed the Mughal emperor as only the King of Delhi, and whose greatest achievement may have been to coronation of the Nawwab of Awadh as an independent monarch in 1819, declaring on that occasion that:

He (the King of Oude) now holds his dominions in independent sovereignty; as Nawaub he exercised only a delegated sway, which the British Government, as representing that of Delhi, had the right to resume at its own discretion. Names are sometimes as real as things, and the King of Oude is not for any purpose the same as the Nawaub Vizier. (in Hale 1857: 65)

The policy will endure, its framework leading to the concept of "paramountcy" which will ultimately rest within the British monarch post-



1858, albeit in a separate capacity than that of the British crown *per se*. Irrespective, the concept will follow that of its British roots as a "corporation sole" who would continue to be legally ill defined, its own theorists readily admitting as much (Lee-Warner 1910; Holdsworth 1930) and the Butler committee specifically formed to define it acknowledging in their report: 'We have endeavoured, as others before us have endeavoured, to find some formula which will cover the exercise of paramountcy, and we have failed, as others before have failed, to do so' (Butler 1929: 31).

The conceptual vagueness that surrounded the person of the sovereign in India was never however an impediment to the Company. What mattered the most was the "exercise" of sovereignty, which in Britain had shifted in the early nineteenth century to Westminster, and that the Company was seeking to reproduce independently within the Subcontinent. But in order to do so, it still relied on the aforementioned classical notions of Common Law, consisting of an independent legal standing as a "body politic" and the recognition of a pre-existing law to administer. However, already by the end of the eighteenth century, both of these aspects were under threat.

*The EIC's loss of "parliamentary" representation of the Indian "commonwealth"*

The Company—which had enjoyed a *sui generis* status since 1708—will first pass directly under the control of Parliament through the *Regulating Act 1773* (13 Geo 3 C 63). Although the latter's implications were not immediately foretold, they would however rapidly come to light through several decisions from the Supreme Court of Calcutta, which latched on the possibility to extend British jurisdiction within Mofussil territory. If the *Nandkumar case* of 1775 (1776) is best known for leading to the downfall of Warren Hastings, and the *Cossijurah case* of 1779 (Jain 1952: 107-11) for forcing Westminster to limit the powers of the Supreme Court outside Presidency territory through the *Amending Act 1781* (21 Geo 3 C 65), it was however the *Patna Case* in 1779 (1780) which will have the more lasting effects on the legal standing of the Company in regards to its claim of independent administration of the Mofussil.<sup>13</sup>

Whereas the Supreme Court's jurisdiction over diwani territory within this case would be invalidated by the *Amending Act 1781*, the argument put forward by Chief Justice Elijah Impey (in office 1774-83) will nevertheless have lasting consequences. The latter would indeed justify the court's jurisdiction precisely on the fact that the Company being since 1773 a delegate of parliament, it could not in turn delegate judicial



power to others through its Company courts (*delegatus non potest delegare*) to "native" (in this case Muslim) law officers. Although he would not go as far as to follow George Bogle (Commissioner of the Law Suits within the Company's Supreme Council) in his assessment that the grant of diwani was itself invalid, he nonetheless enshrined the conception that the Company could no longer be considered an agent of the British King nor that of the Mughal emperor, but a creation of Westminster, which ultimately was the one to represent the Indian "commonwealth", which would be confirmed years later through the *Charter Act 1833* (3 & 4 Will 4 C 85), notably in precluding the Company for creating legal institutions under its own seal.

The EIC could nevertheless still cling unto the long-standing doctrine precluding wholesale legal transfers from England to inhabited territories, which it was in a unique position to administer, be it as the agent of the British parliament. Indeed, even though Mughal sovereignty would be deemed having passed onto the British (as a matter of fact) by the Privy Council in its decision *Mayor of Lyons v. E. I. Company* (1836, 1 Moore P. C. Cases 175), the latter would still uphold the precedent that no substantive law had been transplanted following this transfer of sovereignty.

It was however to be settled following the *Lex Loci Report* (House of Commons 1842) by the first Indian Law Commission of 1840, which deemed that there were no *lex loci* in India (re-instating William Bolts (1772) critique of Clive's expansionism and invalidating the grant of diwani on the fact that the "Constitution of the Mogul Empire" simply did not exist). The commissioners followed in that regard the logical consequence of the 1773 Act, as interpreted in the *Patna case* precluding "native" law officers to be directly delegated the administration of justice by the Company. They indeed concluded that under such framework, Islamic law—which was still deemed to be the law of the land before the transfer of sovereignty (see for instance Galloway 1832: 12)—was inoperable as 'according to its own principles, [it] can only be administered by Mahomedan judges and Mahomedan arbitrators, upon the testimony of Mahomedan witness' and as such was 'not a system which can devolve *ipso jure*, and without express acceptance, upon a government and people of a different faith' (House of Commons 1842: 446).

The EIC would still administer India and its Mofussil territories for the next seventeen years until its dissolution following the Indian Rebellion of 1857, but its claim to legal imperium over its inhabitants has already vanished long before, paving the way for the string of codifications that will ensue following the establishment of the British Raj in 1858.



## Conclusion

A *longue durée* perspective has its inherent limitations. However, it does allow for patterns to emerge within a larger chronology which would otherwise be easily overshadowed by the detailed analysis of a particular event in time. In adopting such a perspective we have sought to put to light such a pattern: that the legal basis of British sovereignty in colonial India is both jurisprudentially consistent but also irrelevant in relation of the legal justification of legal transfers.

Consistent, in the fact that despite having been the subject of different localisations, or more precisely embodiments, sovereignty's legal foundation remained grounded within Common Law theory and the continuous division between the sovereign and the "commonwealth" granting the former its political legal capacity in the absence of an abstract state with a fictitious legal personality. Subsequently, the EIC was never—in the legal sense—sovereign in India. However, such continuum debunks the idea that British colonial expansion in India was made in 'a fit of absent-mindedness' as Lord Palmerston once put it.

Irrelevant, for the legal basis for legislation—and thus the possibility of substantive legal transfers—did not lie within the sovereign but with the "commonwealth" of the "nation" represented through parliament. It is this particular position within the English legal framework that the EIC ventured to transpose in India, but which would ultimately fail when taken over by the British parliament.

Further, the pattern that emerged offers insight into the early history of Anglo-Indian law. It tends to show—or rather confirm—that despite its claim to administer local laws, or invent an entirely novel legal system as the embodiment of the Indian "commonwealth", the EIC continued in fact to heavily rely and project English Common Law concepts, whose evolution where furthermore not based on its confrontation to Indian realities, but rather mimicked the changes occurring within the British Isles.

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## Endnotes

<sup>1</sup> This is mainly shown by the fact that the King could be legally seized to a "use" of another (1461 I Edw. 4 C. 1; S.R. ii, 380, at 386), acting as any other feudal lord at the time.

<sup>2</sup> The King 'has two capacities, for he has two bodies, the one whereof is a body natural, consisting of natural members as every other man has [...] the other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation' (*Willion v. Berkley* 1560, 75 E.R. 339, at 355).

<sup>3</sup> The author is referring to the demise of the crown, when all delegations granted from the monarch cease upon his death. Despite the advent of term 'crown' distinguishing more clearly the



political body of the King from his natural one, the fact that both are still incorporated within a physical person does not allow the 'immortality' or the continuity the abstract concept of the state conveys.

<sup>4</sup> *Letter from Great Mogul to King James*, 8th August 1618 (Foster 1899: 559). Roe whilst being on an official diplomatic mission will also receive payment for his services by the EIC, provided he offers information to the latter concerning his dealings at the Mughal Court (*The Company's agreement with Roe*, In *ibid*: 547-9), whilst the King himself enjoins Roe to 'use all the means you can to advance the Trade of the East India Company [...] which being the main scope of your employment' (*The King's instructions to Roe*, 29th December 1614, In *ibid*: 551-3).

<sup>5</sup> *The agreements concluded with the Surat authorities*, B., 1623 (Foster 1908: 309-12).

<sup>6</sup> Reported by George Wilcox (first President of the Court), In: Fawcett 1934: 54.

<sup>7</sup> *Letter to Bombay dated 28th Jul. 1686* (cited in Fawcett 1934: 132).

<sup>8</sup> *Plan for the administration of justice*, In: Monckton Jones 1918: 324-6.

<sup>9</sup> *Letter dated 6th January 1773*, In *ibid*: 327.

<sup>10</sup> *Warren Hastings to Lord Mansfield, 21 March 1774*, in: Berriedale Keith, 1922: vol. 1, 61.

<sup>11</sup> Being a series of Regulations adopted for the administration of justice under the governorship of Charles Cornwallis – a compendium of the latter have been reproduced In Colebrook 1807).

<sup>12</sup> *Minute of the rights of zemindars and talookdars, recorded on the proceedings of the Governement in the revenue department, 2nd April 1788*, In Harrington 1866: 4.

<sup>13</sup> The case revolved around an inheritance dispute between Nauderah Begum, the widow of a Company Servant living in Patna, and the latter's nephew, Behadar Beg. The case was first adjudicated by Muslim judges within a "Company Court" who, following Islamic succession law, decided in favour of the nephew, granting him three quarters of the estate of his uncle, whilst Nauderah Begum was only granted a quarter as a Quranic heir. Nauderah Begum, unhappy with the result, fled to Calcutta, where she brought up the case to the Supreme Court suing both Behadar Beg, but also the Muslim judges for lacking jurisdiction. While the latter were arrested, Nauderah Begum was granted the entire estate of her deceased husband under the justification of 'nature, justice and common sense'.

## References

### Primary sources

Bernier, F. 1916. *Travels in the Mogul empire, A. D. 1656-1668*. Edited by V. A. Smith. Transl. by A. Constable. London: Oxford University Press.

Berriedale Keith, A., ed. 1922. *Speeches and documents on Indian policy, 1750-1921*. London: Humphrey Milford.

Butler, H. 1929. *Report of the Indian States Committee 1928-1929*. London: Home Office.

Bolts, W. 1772. *Considerations on India affairs; particularly respecting the present state of Bengal dependencies*. London: J. Almon.

Colebrooke, J. E. 1807. *Supplement to the digest and laws enacted by the Governor General in Council for the Civil Government of the Territories under the Presidency of Bengal, containing a collection*



*of the regulations enacted anterior to the year.* Calcutta: s.n.

Foster, W., ed. 1899. *The embassy of Sir Thomas Roe to the court of the Great Mogul, 1615-1619.* London: Hakluyt Society.

Francis, P. 1782. *Original minutes of the Governor-General and the Council of Fort William on the settlement and collection of the revenues of Bengal.* London: J. Derrett.

Hale, W. P. 1857. *'The Oude Question', stated and considered with references to published official documents.* London: Smith and Co.

Harrington, J. H. 1866. *Extracts from Harrington's analysis of the Bengal Regulations.* Calcutta: Military Orphan Press.

House of Commons, ed. 1842. On the petitions of the East Indians and Armenians. In: *Copies of the special reports of the Indian law commissioners.* London: s.d., pp. 439-70.

s.n. 1780. *Narrative of the proceedings of the Provincial Council at Patna, in the Suit of Bahader Beg against Nadara Begun: and of the Supreme Court of Judicature at Calcutta, in the suit of Nadara Begum against Bahader Beg and others, and in the criminal prosecution instituted against Nadara Begum and her accomplices for forgery: forming together what is generally called in Bengal the Patna Cause.* London: s.n.

s.n. 1776. *The trial of Maha Rajah Nundocomar, Bahader, for forgery. Published by authority of the Supreme Court of judicature in Bengal.* London: T. Cadell.

### **Literature**

Armitage, David. 2004. John Locke, Carolina and the Two Treatises of Government. *Political Theory*, 32 (5), pp. 602-27.

Austin, John. 1832. *The province of jurisprudence determined.* London: John Murray.

Bentham, Jeremy. 2012. *A fragment of government.* Edited by R. Harrisson. Cambridge: Cambridge University Press.

Buck, A. R. 1990. The politics of land law in Tudor England, 1529-1540. *The Journal of Legal History*, 11 (2), pp. 200-17.

Cannon, Garland H. 1957. Sir William Jones and Edmund Burke. *Modern Philology*, 54 (3), pp. 165-86.



- Chaudhry, Faisal. 2017. Rethinking the nineteenth-century domestication of the shari'a: marriage and family in the imaginary of classical legal thought and the genealogy of (Muslim) personal law in late colonial India. *Law and History Review*, 35 (4), pp. 841-79.
- Crump, Helen. 1931. *Colonial admiralty jurisdiction in the seventeenth century*. London: Longmans, Green & Co.
- Das, H. 1970. The affairs of India and Siam (Cour of Admiralty Judge's Despatch to King James II). *Calcutta Review*, pp. 70-5.
- Derrett, John Duncan Martin. 1980. Dr. St. John, a civil lawyer in the Indies. *Tijdschrift Voor Rechtsgeschiedenes*, 48, pp. 243-57.
- Dirks, Nicholas B. 2008. *The scandal of empire, India and the creation of imperial Britain*. Cambridge, Mass.: Harvard University Press.
- Fawcett, Charles. 1934. *The first century of British justice in India*. Oxford: Clarendon Press.
- Foster, William. 1908. *The English factories in India, 1622-1623*. Oxford: Clarendon Press.
- Fraas, Arthur Mitchell. 2011. *"They Have Travailed Into a Wrong Latitude": the laws of England, Indian settlements and the British imperial constitution 1726-1773*. Durham: Duke University.
- Galloway, Archibald. 1832. *Observations on the law and constitution of India*. 2nd edn. London: Parbury, Allen & Co.
- Hart, H. L. A. 1967. Bentham on sovereignty. *Irish Jurist*, 2 (2), pp. 327-35.
- Holdsworth, William Searle. 1930. Indian states and India. *Law Quarterly Review*, 46 (4), pp. 407-46.
- Ilbert, Courtenay. 1915. *The government of India*. 3rd edn. Oxford: Clarendon Press.
- Jain, M. P. 1952. *Outline of Indian legal history*. Bombay: Tripathi.
- Lee-Warner, Willaim. 1910. *The native states of India*. London: MacMillan & Co.
- Locke, John. 1986. *The Second Treatise on Civil Government*. Amherst: Prometheus Books.
- Maitland, Frederic W. 1901. The crown as corporation. *Law Quarterly Review*, 17 (2), pp. 131-46.



\_\_\_\_\_. 1900. The corporation sole. *Law Quarterly Review*, 16, pp. 335-54.

Raiswell, R. 2003. *Before the company: English perceptions of India in the Sixteenth Century*. Toronto: University of Toronto Press.

Schmitt, Carl. 2003. *The nomos of the earth*. Transl. by G. L. Ulmen. New York: Telos Press.

Stokes, Eric. 1959. *The English utilitarians and India*. Oxford: Clarendon Press.

Travers, Robert. 2007. *Ideology and empire in Eighteenth-Century India*. Cambridge: Cambridge University Press.

Wilson, John. 2008. *The domination of strangers: modern governance in Eastern India, 1780-1835*. Basingstoke: Palgrave MacMillan.