

**The 1858 Trial of the Mughal Emperor  
Bahadur Shah II 'Zafar'  
for 'Crimes Against the State'**

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## ABSTRACT

In 1857, hostilities broke out against the 'rule' of the East India Company (EIC) in northern India. Measures to suppress the hostilities, known as the 'Mutiny', 'Rebellion' or 'War' of 1857', included legislation enacted by the EIC's Government of India criminalising 'rebellion' and 'waging war' and establishing temporary civil and military commissions. From 1857 to 1859, the Government of India tried soldiers and civilians, including the last Mughal Emperor, the King of Delhi Bahadur Shah II, for their conduct during the hostilities. The law and trials have not previously been the subject of study.

This thesis assesses the validity, according to the international law of the time, of the trial by military commission of the King of Delhi in 1858. The research and writing of this study is original for no review of the trial according to international law has previously been attempted.

The central hypothesis is that the trial was in breach of the international law of the time.

The thesis demonstrates that the King of Delhi was a Sovereign recognised by Britain and under its protection until he was deposed three months before the trial. The thesis contends that his status as a recognised Sovereign, which according to the long-established rule of sovereign immunity precluded prosecution in the courts of another State, should have been considered sufficient to entitle him to immunity from prosecution. The criminal trial of a recognised Sovereign was without precedent.

The thesis also contends that the apparent basis for the assertion of jurisdiction over the King of Delhi, that he became a British national through the extension of protection to the Kingdom of Delhi in 1803, was untenable in law. According to State practice of the time, protection of one State by another neither deprived the protected State of sovereignty nor effected a change in nationality.

The thesis suggests that sovereign immunity was deliberately overridden on the grounds of his status as a protected king, the gravity of his crimes or on both grounds. Unprecedented in 1858, these grounds formed the basis for later challenges to the doctrine of sovereign immunity by plaintiffs in Britain. While neither ground found support in the law of the time, they signalled a new appetite to pierce the shield of sovereign immunity.

The thesis concludes that the trial of the deposed and protected King of Delhi, Bahadur Shah, by a British court-martial in 1858, was both invalid according to the international law of the time and heralded an emerging international trend in favour of Head of State accountability.

**DECLARATION**

This is to certify that:

- (i) the thesis comprises only my original work towards the PhD;
- (ii) due acknowledgment has been made in the text to all other material used;
- (iii) the thesis is less than 100 000 words in length, exclusive of tables, maps, bibliographies and appendices.

Signed: QuandaBela

Dated: 11 July 2005

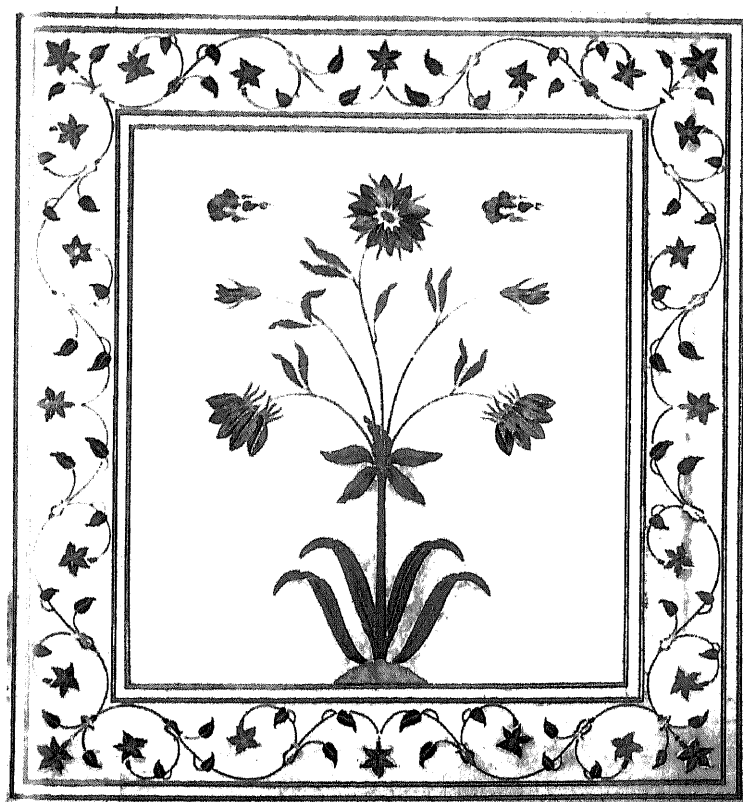
## ACKNOWLEDGMENTS

First and foremost, I thank Eleanor and Max for allowing me time and space, over six long years of their childhood, in my quest to solve the riddle of the shadow king, the King of Delhi, Bahadur Shah. I owe my father, H H Bell, a huge debt. Always ready to discuss arcane and occasionally enigmatic pronouncements of the Judicial Committee of the Privy Council or to read, yet again, the latest draft of this thesis. I thank Hervé Schmitt for his insights, gentle encouragement, and life-sustaining Bocuf Bourguignon, over recent months.

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Finally, I thank the Commonwealth Department of Foreign Affairs and Trade, and the Department of the Prime Minister and Cabinet, for enabling me to undertake a research project of this magnitude whilst serving in both departments.

**Figure I** Detail of panel of the *diwan-i-khas*, Delhi.



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## A NOTE ON THE TRIAL PROCEEDINGS

This thesis relies on the trial proceedings tabled as a parliamentary paper in the House of Commons in 1859, hereinafter referred to as ‘the *Proceedings*’.<sup>1</sup>

The *Proceedings* chronologically records the English translations of documents, questions from the Prosecutor, the Court and the Prisoner, testimony of witnesses, the Opening and Closing Addresses of the Prosecutor, and includes a statement labelled “Written Defence put in by Bahadur Shah, ex-King of Delhi”.<sup>2</sup>

The *Proceedings* was published seven times between 1870 and 1980. The British Government published the *Proceedings* in 1870,<sup>3</sup> 1895<sup>4</sup> and in 1932.<sup>5</sup> In 1946 two abridged editions of the *Proceedings* were published in India,<sup>6</sup> both omitting the documentary and oral evidence. In 1972 an abridged edition was published in Pakistan.<sup>7</sup> A further edition, based on the *Proceedings*, was published in India in 1980.<sup>8</sup>

The existence and location of the original trial documents is unknown. Some Persian and Urdu documents tabled before the Court - and reproduced in the *Proceedings* - are reportedly held by the National Archives of India and the Delhi State Archives.<sup>9</sup>

No record of the trial, in Persian or in Urdu in the original or in translation, has been cited by any scholar. A book by Nadir Ali Khan on Urdu journalism,<sup>10</sup> itself a translation from Urdu to English, excerpts testimony from the trial which would originally have been given in Urdu. Khan cites, without details, a text with a Persian title: *Muqaddamah -e-Bahadur*

<sup>1</sup> House of Commons, *Parliamentary Papers*, 1859, Session I, XVIII. [Hereinafter, “the *Proceedings*”].

<sup>2</sup> *ibid* 131.

<sup>3</sup> *Trial of Muhammad Bahadur Shah, Titular King of Delhi, and of Mogul Beg and Hajee, all of Delhi, for rebellion against the British Government, and Murder of Europeans during 1857* (1870); also cited as *Selections from the Records of the Government of the Punjab and its Dependencies*, New Series, No. VII, *Trial of Muhammad Bahadur Shah*.

<sup>4</sup> *Proceedings of the Trial of Muhammad Bahadur Shah II, Titular King of Delhi, before a Military Commission on Trial of Rebellion in 1858* (1895).

<sup>5</sup> *The Trial of Muhammed Bahadur Shah, ex. King of Delhi*, (ed) H L O Garratt (1932).

<sup>6</sup> Moti Ram, (ed), *Two Historic Trials in Red Fort An Authentic Account of the Trial by a General Court Martial of Cpt Shah Nawaz Khan, Cpt. P. K. Sahgal and Lt. G. S. Dhillia and the Trial by a European Military Commission of Emperor Bahadur Shah*, n. d. [1946?] and K L Gauba, *Famous and Historic Trials* (1946).

<sup>7</sup> I H Qureshi (ed), *Trial of Muhammad Bahadur Shah* (1972).

<sup>8</sup> K C Yadav (ed), *Delhi in 1857; The Trial of Bahadur Shah* (1980).

<sup>9</sup> Henry Scholberg, *The Indian Literature of the Great Rebellion* (1993), 85.

<sup>10</sup> Nadir Ali Khan, *A History of Urdu Journalism (1822-1857)*, (1991).

*Shah Zafar* (“The Trial of Bahadur Shah Zafar”). It is not clear if this text is based on the original transcript. Accordingly, the existence of a record of the trial in Urdu or Persian remains doubtful.

The most detailed first-hand account of the trial is in Montgomery Martin’s *The Indian Empire* (hereinafter referred to as ‘the Martin account’).<sup>11</sup> Two shorter accounts paraphrasing the Martin account are contained in Ball’s *The History of the Indian Mutiny*<sup>12</sup> and in *Chambers’ History of the Revolt in India*.<sup>13</sup> No sources are cited in any of these texts.

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<sup>11</sup> Montgomery Martin, *The Indian Empire*, III, n.d. [1858?].

<sup>12</sup> Charles Ball, *The History of the Indian Mutiny* (1981 [n.d. 1859?]).

<sup>13</sup> *Chambers’ History of the Revolt in India and the expedition to Persian, China and Japan 1856-7-8* (1859).

### A NOTE ON TRANSLITERATION

Urdu and Hindustani words that are accepted usage in the *Macquarie Dictionary* are spelled as in that dictionary. Other Urdu and Hindustani words have been transliterated as in Wilson's *Dictionary of Judicial Revenue* and *Platts Dictionary of Urdu, Classical Hindi and English*. In quotations, all words are left as in the original.

The *Proceedings* does not give the full title to the witnesses from the Mughal Court nor does it give the first names of the British and Anglo-Indian witnesses. In this thesis, all personal names are given as in the *Proceedings*.

The thesis uses traditional spelling of place names, for example 'Delhi' instead of 'Dehli', and 'Cawnpore' instead of Kanpur.

## A NOTE ON TERMINOLOGY

The events of 1857 have been known by various names. The terms used at the time include 'revolt', 'rebellion', 'outbreak', 'insurrection,' and 'mutiny'.

Some of the terms used by historians bring out the military element of the events, for example, "the Mutiny of 1857", "the Sepoy Revolt", "the Sepoy Rebellion". Other terms highlight the significance of the event in the history of the British Empire, events which were assumed to be known, like "the Great War" to denote World War I, hence 'The Great Mutiny'.

The practice of some contemporary scholars is to underscore the extent of civilian support by substituting 'rebellion' for 'mutiny' or to emphasise the political aims of the event, for example by use of the term "The First War of Independence". Other scholars have sought to de-politicise the term, viz. "The Indian Uprising" and, simply, "1857."

As this thesis considers the events of 1857-58 from the perspective of international law, the term 'the hostilities' would better indicate the existence of conflict without pre-judging it as 'foreign' or 'domestic'. However, to avoid confusion, this thesis uses the term 'Rebellion' to denote the events of 1857-59.

## Introduction

On Sunday May 10 1857, sepoys in the East India Company's Bengal Army rose against their British officers in the town of Meerut and rode to Delhi, some forty miles away. Entering the walled city of Delhi, the sepoys gathered on the *zir jharoka*, the dry river bed beneath the *khas mahal*, the private apartments of the King of Delhi in his palace in the Lal Qila (Red Fort), and sought an audience with the King. Reports of the arrival of the mutinous sepoys and subsequent massacre of the British and Christian population of Delhi heralded the start of a bloody war for the possession of the imperial Mughal city of Delhi. The events precipitated by the arrival of the sepoys would culminate four months later in the capture of the King by a British officer of the Bengal Army and the King's subsequent trial for 'crimes against the State', which is the subject of this thesis.

Within a week of the outbreak of mutiny, criminal and civil laws were suspended and martial law proclaimed. Within a month, legislation giving enormous judicial powers to civilians and military officers was enacted and nooses swung across northern India. Within a year, the rule in India of both the King of Delhi Abul Muzaffar Siraj-uddin Mohammad Bahadur Shah 'Zafar' ('Bahadur Shah') and the Honourable East India Company<sup>1</sup> ('the EIC') would come to an end.

Bahadur Shah was the heir of the great sixteenth and seventeenth century Mughal Emperors of the House of Timor, and the final Mughal to bear the title *Sultan-i-Delhi*, the King of Delhi.<sup>2</sup> He was a king who reigned over a small kingdom, had no army and only limited revenue, and was by no means politically independent. He was tried by a British court-martial in January 1858 and exiled to Rangoon in October 1858. Five months later, the British Parliament passed the *Government of India Act 1858 (UK)*<sup>3</sup> vesting in the Crown all territories in the possession or under the government of the EIC and the powers

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<sup>1</sup>The company was incorporated by Queen Elizabeth I by letters patent, dated 31 December 1600, as "The Governor and Merchants of London Trading into the East Indies". In 1709 the company merged with a rival trading body, "The English Company Trading to the East Indies" which had been granted a charter by act of parliament in 1698. The name of the merged company from 1709 was "The United Company of Merchants of England Trading to the East Indies". The shorter title, "The East India Company", was for the first time styled officially in the *1833 Charter Act* (3 and 4 Will. iv, c85).

<sup>2</sup> A Genealogical Chart of the Mughal Emperors is at *Appendix 4*.

of the Company over these territories. Bahadur Shah died in Rangoon in 1862, while the EIC was divested of its sovereign powers in 1858 and dissolved in 1874.<sup>4</sup>

Many civilians and sepoys are officially recorded as having been executed after trial by British civil and military commissions between 1857 and 1859. Records of proceedings were rarely kept, but records of numbers acquitted, executed, flogged or transported were regularly updated.<sup>5</sup> The Governor-General, the Earl Canning, himself noted that under the legislation passed by his Legislative Council in 1857

capital punishment was inflicted for trivial offences committed during a period of anarchy, and on evidence which, under ordinary circumstances, would not have been received, and [that] in some quarters the fact of a man being a sepoy was enough, in the state of excited feeling which then prevailed, to ensure his apprehension and immediate execution as a deserter.<sup>6</sup>

Bahadur Shah was captured in September 1857 and promised his life by a British military officer, Captain William Hodson.<sup>7</sup> He was tried, while hostilities were still afoot,<sup>8</sup> in January 1858 by a British military commission established under the legislation enacted by the Government of India immediately after the commencement of the Rebellion. This legislation, *inter alia*, criminalised ‘rebellion’ and ‘waging war’ and authorised the convening of temporary civil and military commissions.<sup>9</sup> Bahadur Shah was tried on the charges of encouragement of mutiny, rebellion, proclaiming himself the reigning king and sovereign of India, and accessory to murder.<sup>10</sup> He was found guilty of all charges in March 1858. No right of appeal was allowed under the Rebellion laws but, following British

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<sup>3</sup> 21 and 22 Vict., c. 106., sections 1 and 2. The Act came into effect on 2 September 1858.

<sup>4</sup> Section XII of the *Charter Act 1833* guaranteed an annuity to EIC shareholders for a minimum period of forty years. The EIC was dissolved under s36 of *The East India Stock Dividend Redemption Act* (36 Vict. c.17) 1873 (UK), effective as of 1 June 1874.

<sup>5</sup> See for example House of Commons, *Parliamentary Papers*, 1857-58, XII and Edward Thompson, *The Other Side of the Medal* (1926).

<sup>6</sup> Letter of the Governor-General of India in Council to the Court of Directors of the East India Company, 11 December 1857, No 144 (Public), House of Commons, *Parliamentary Papers*, XLIV, I, 1857-58, 5.

<sup>7</sup> See **Chapter 7 The Imprisonment of the King of Delhi in 1857**, below.

<sup>8</sup> Military control of the areas affected by rebellion was not re-established until 1859. Restoration of Peace was formally proclaimed on 8 July 1859: J J Higgenbotham, *Men Whom India has Known: biographies of eminent Indian characters* (1874), 54.

<sup>9</sup> See **Chapter 9 The Rebellion Laws**, below.

<sup>10</sup> The charges are set out in *Appendix I*.



military custom, the finding of the Court<sup>11</sup> was confirmed by Major-General Nicholas Penny. The finding was approved by the British Government in June 1859.<sup>12</sup>

Of all the trials conducted during the Rebellion, the trial of Bahadur Shah stands out. No mere nobleman, he was the King of Delhi, the last of the Mughals, an Indian Sovereign.

Yet there has been little substantial study of the trial.

The international lawyer John Westlake considered the trial only in passing in his 1914 review of the international and constitutional position of the kingdoms of the sub-continent.<sup>13</sup> He suggested that “[W]hen the emperor of Delhi was tried and sentenced for joining the mutineers in 1857, it might have been pleaded, at least in mitigation, that only some fifteen years before his dynasty had been still led to believe that England was its tributary”.<sup>14</sup>

In 1922, an influential article by Francis William Buckler, echoing Westlake’s musings, argued that the EIC was the “vassal” of the Mughal Emperor until 1857 and that, far from Bahadur Shah having rebelled against the rule of the EIC, the company had rebelled against the rule of the Mughal Emperor.<sup>15</sup> Buckler argued that the delegation in 1765 to the EIC of a right under Mughal administration to collect revenue and administer civil justice, known as the *diwani*, had made the Mughal Emperor the “suzerain *de jure*” of the EIC and the EIC his “vassal”.<sup>16</sup> Evidence of the relationship, he said, could be seen in the EIC’s observance of Mughal customs of kingship, such as the company’s payment of a subordinate’s tribute, known as *nazar* and acceptance by EIC officials of ceremonial robes, known as *khilat*, conferred by the Emperor.<sup>17</sup> Buckler suggested that an extension of “protection” in 1803 by the EIC to the Kings of Delhi<sup>18</sup> was seen by the Mughal Emperors

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<sup>11</sup> This thesis follows the convention of British military law in using the term ‘the Court’ to denote the General Court-Martial established to try Bahadur Shah.

<sup>12</sup> See s2.11 **The Finding in Chapter 2 Overview of the Trial**, below.

<sup>13</sup> John Westlake, “The Empire of India”, in L. Oppenheim (ed), *The Collected Papers of John Westlake on Public International Law* (1914), 194. See further below, **Methodology**.

<sup>14</sup> *ibid* 201, Note 2.

<sup>15</sup> F W Buckler, “The Political Theory of the Indian Mutiny” (1922), in M N Pearson, *Legitimacy and Symbols, The South Asian Writings of F W Buckler* (1985).

<sup>16</sup> *ibid* 45. On the grant of the *diwani*, see further **Chapter 3 The ‘Titular’ King of Delhi**, below.

<sup>17</sup> *ibid* 49-50.

<sup>18</sup> See also s3.3.1 **The Extension of Protection to the Mughal Emperor in 1803** in **Chapter 3 The ‘Titular’ King of Delhi** and s10.2 **The Argument of the Prosecutor: A British National** in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

as the protection of a vassal, in the “loyal execution of its duties as the *Diwan*”.<sup>19</sup>

Accordingly, Bahadur Shah was not a “subject of the British Government in India” and the Court in his trial was “ignorant as to his real status”.<sup>20</sup>

Buckler’s theory, based on analysis of Mughal and British documents of the period, and on his study of Mughal customs of kingship, is consistent with references in records of the Government of India to persistent attempts by the three last Mughal Emperors, Shah Alam II, Akbar Shah II and Bahadur Shah II, to assert a royal superiority over the EIC Government, and the concomitant efforts by government officials to shake off any suggestion that the EIC was subordinate to the Emperor.<sup>21</sup> However, at the time of publication, Buckler’s theory

aroused considerable protest from the ‘establishment’ British historians of India, for it seemed to denigrate or even threaten the position of the British in nineteenth and twentieth century India.<sup>22</sup>

After initial challenges from these “establishment” historians,<sup>23</sup> Buckler’s theory became a popular modern view of the trial.<sup>24</sup> Spear’s *Twilight of the Mughals*, published in 1951, containing the most detailed analysis of Bahadur Shah’s trial since the debate in the 1920s, devoting four pages to the trial, picked up Buckler’s argument and concluded that from “an Indian juridical” point of view, Bahadur Shah was no subject of the British and could have raised “subsisting imperial Mughal rights” in his defence.<sup>25</sup>

Buckler’s theory was not based on analysis of British or international law. Rather, he spoke of Mughal conceptions of sovereignty (for example, the significance of the *diwani*, ie. the delegation of revenue collection rights) and Mughal forms of recognition of

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<sup>19</sup> Buckler, above n 14, 57-59.

<sup>20</sup> *ibid* 46.

<sup>21</sup> See for example Jatindra Kumar Majumdar, *Raja Rammohun Roy and the Last Moghuls, A Selection from Official Records (1803-1859)* (1939).

<sup>22</sup> Pearson, above n 14, 8.

<sup>23</sup> For example, D Dewar, “A Reply to F Buckler’s ‘Political Theory of the Indian Mutiny’ (1923) and S M Edwards “A Few Reflections on Buckler’s Political Theory of the Indian Mutiny”, in Pearson, above n 14.

<sup>24</sup> For example: A B Keith, *A Constitutional History of India 1600-1935* (2<sup>nd</sup> ed, 1937), 125; Michael Edwardes, *Red Year: The Indian Rebellion of 1857* (1975 [1973]) 143-144; Bernard Cohn, “Representing Authority in Victorian India”, in E J Hobsbawm and T Ranger (eds); *The Invention of Tradition* (1983), 178; C A Bayley (ed), Eric Stokes, *The Peasant Armed: The Indian Rebellion of 1857* (1992), 238-239; Thomas R Metcalf, *Ideologies of the Raj* (1995), 50-51, 237; F W Pritchett, *Nets of Awareness, Urdu Poetry and its Critics* (1994), 18; S K Sinha, “Indian Army Before and After Independence and its Role in Nation Building”, *Journal of the United Service Institution of India*, CXXXVI (1996), 452.

<sup>25</sup> Percival Spear, *Twilight of the Mughals, Studies in late Mughal Delhi* 1991 [1951], 223, 226.

sovereignty (for example, the conferral and acceptance of *khilat*,<sup>26</sup> payment and receipt of *nazar*).<sup>27</sup> Although Buckler used the terms ‘vassal’ and ‘suzerain’, he was dealing with Mughal concepts of subordinate alliances.

No review of the trial of Bahadur Shah has previously been undertaken on the basis of analysis of international law.

### Thesis

The question addressed in this thesis is whether the prosecution of the King of Delhi by the Government of India was validly held under international law: was the exercise of jurisdiction sustainable under international law of the time?

This question is addressed in this thesis in three ways.<sup>28</sup>

The thesis reviews the legal basis upon which the Court purported to exercise jurisdiction over Bahadur Shah against international law. While the political value to be derived from a prosecution was explicit in pre-trial official correspondence, officials were silent on the legal authority for exercising jurisdiction. The basis for exercising jurisdiction was put forth by the Prosecutor in establishing liability for rebellion crimes under the Rebellion laws, for he argued in the trial that Bahadur Shah was born “a subject of the British Government in India” and that the Kings of Delhi had become subjects through an extension of “protection” by the EIC in 1803. The thesis assesses whether this protection effected a change in nationality of the Kings of Delhi under international law.

The thesis also considers whether Bahadur Shah was entitled to sovereign immunity. Bahadur Shah was variously styled at his trial “the King of Delhi,” the “ex-King of Delhi” and the “Titular King of Delhi.” The trial of a recognised Sovereign by another State was unprecedented. Well-established rules of international law precluded the exercise of jurisdiction of the courts of one State over the Head of State of another. The trial of a recognised Sovereign would *prima facie* constitute a contravention of those rules. The thesis determines Bahadur Shah’s standing in international law and any immunities flowing from that status.

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<sup>26</sup> *Khilat*: ceremonial robe.

<sup>27</sup> *Nazar*: tribute.

Finally, the thesis questions whether sovereign immunity was deliberately overridden by the Government of India. Close review of the *Proceedings* suggests a view that the gravity of Bahadur Shah's crimes outweighed any immunity to which he might otherwise be entitled and that the form of sovereignty possessed by Bahadur Shah, namely 'titular' sovereignty, did not entitle him to the privileges and immunities of international law. The thesis assesses the overriding of immunity against the international law of the time.

### **Inter-temporal Law**

Bahadur Shah did not have the benefit of a Defence Counsel trained in British or international law. One purpose of this thesis is to stand in the place of a Defence Counsel and to question the basis in law for the assertion of jurisdiction over the King of Delhi. The aim is to assess the exercise of jurisdiction in January 1858 against the law of the time, and not to assess it retrospectively against twenty-first century standards. Only an analysis of the law prevailing at the time of the trial, and not at the time of analysis, would have credibility as to the question of its validity. The question is, simply, did the trial go forward in violation of the prevailing law?

This notion that the application of modern law will not answer a legal question of the past finds expression in the doctrine of inter-temporal law. As Max Huber famously stated in the *Island of Palmas* arbitration in 1928:

A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.<sup>29</sup>

By 1953, Sir Gerald Fitzmaurice would say that it was "an established principle of international law" that

it is not permissible to import into the legal evaluation of a previously existing situation...doctrines of modern law that did not exist or were not accepted at the time, and only resulted from the subsequent development or evolution of international law.<sup>30</sup>

Unobjectionable if seen as "merely an aspect of the rule against retroactive laws",<sup>31</sup> the doctrine has not been without its critics. One difficulty lies in its application to treaties, in

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<sup>28</sup> The organisation of the thesis is outlined below in **Structure**.

<sup>29</sup> Max Huber, Arbitrator, in *The Island of Palmas Arbitration* (1928) 2 RIAA 831, 845.

<sup>30</sup> Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", (1953) *British Year Book of International Law* 30, 5.

particular those containing human rights obligations.<sup>32</sup> Another difficulty is the application of a so-called ‘second limb’, for Huber also suggested that “the continued manifestation” of a right followed “the conditions required by the evolution of law”.<sup>33</sup> This is said to mean that “[I]n certain cases rights may cease to be effective as the result of the development of new rules of law attaching conditions of the continued validity of these rights”.<sup>34</sup> Thus rights once lawful can be lost by the evolution of law, reflecting the progressive development of international law, adjusting “old legal rules... to meet new societal conditions and values”.<sup>35</sup> However, applied to claims of territorial sovereignty, it arguably precludes “title insurance”. For example, Jessup suggested in 1928 that a logical corollary of the doctrine, with chaotic effect, would be that land titles valid under pre-existing national laws could be “wholly disregarded” if “a new system of land tenures is instituted by the state”.<sup>36</sup> Despite some criticism, the first limb of the doctrine has since been widely accepted in international law, and, in practice, Jessup’s warning of chaos has not born fruit, with the potential effect mitigated by the application of other principles of interpretation.<sup>37</sup>

The time dimension of international law is also pertinent to appreciating the standing in international law of the kingdoms of the sub-continent.<sup>38</sup> Until 1858, British Courts treated the kingdoms as having an international status. From 1890, extant kingdoms were said by the Government of India not to have any international status, and in 1928, a Government committee said that they had never held an international status. Apart from questions of the correctness in law of such statements, should this thesis assess the standing of the Kingdom of Delhi in light of statements uttered seventy years after it was extinguished? Or in light of international law as it has developed one hundred and fifty years after the trial?

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<sup>31</sup> R Y Jennings, *The Acquisition of Territory in International Law* (1963), 28.

<sup>32</sup> Rosalyn Higgins, “Time and the Law: International Perspectives on an Old Problem”, 46 *International & Comparative Law Quarterly* (1997) 501, 516-517.

<sup>33</sup> *Island of Palmas Arbitration*, above n 39, 845.

<sup>34</sup> H Lauterpacht, *The Function of Law in the International Community* (1966), 283.

<sup>35</sup> Edward McWhinney, “The Time Dimension in International Law, Historical Relativism and Intertemporal Law”, in Jerzy Makarezyk, *Essays in International Law in honour of Judge Manfred Lachs* (1984) 198.

<sup>36</sup> Philip C Jessup, “The Palmas Island Arbitration” 22 *American Journal of International Law* 735 (1928), 740.

<sup>37</sup> T O Elias, “The Doctrine of Intertemporal Law”, 74 *American Journal of International Law* 285 (1980), 286.

<sup>38</sup> See s1.2 **The Application of International Law Outside Europe** in **Chapter 1 International Law and the Kingdom of Delhi**, below.

This thesis contends that assessing the validity of the trial against later notions of law would not answer the question of its legality. Accordingly, this thesis assesses jurisdiction over Bahadur Shah, including his standing in international law, against the law prevailing at the time of his trial, insofar as it can be ascertained in the writers of international law (also known at that time as ‘the Law of Nations’), State practice and judicial decisions.

### Methodology

The key object of research was to identify the legal status of the King of Delhi in 1857, for this would determine the lawfulness of jurisdiction. Was he a British national? Was he a recognised Sovereign? Did he hold the same standing in nineteenth century international law as a Sovereign in Europe?

The thesis draws on legal and historical materials in addressing those questions.

The scope and application of the principles and rules of international law of the mid-nineteenth century are discussed in **Chapter 1 International Law and the Kingdom of Delhi**. The thesis attempts a strictly legal analysis of jurisdiction and does not assess the use of law as a tool of British territorial expansion.

The principle research challenge was the scarcity of sources on the trial of Bahadur Shah and on the status in law of the Kingdom of Delhi in the nineteenth century. Studies of the Mughal Emperors in the nineteenth century are relatively few. Spear’s *Twilight at Delhi*, published in 1951 and two biographies of Bahadur Shah, published in 1987 and 1995 respectively, address the trial in passing.<sup>39</sup> There were only scattered references to the legal extinction of the Kingdom. For example, in 1914, Westlake noted that “in no public act did the British Government claim any political power as deduced to it from the pageant dynasty which it maintained at Delhi”,<sup>40</sup> and commented that the trial marked the completion of “the transition from an international to an imperial system in India”, but did

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<sup>39</sup> Spear, above n 25, Mahdi Husain, *Bahadur Shah II and the War of 1857 in Delhi with its Unforgettable Scenes* (1987) and S M Burke and S Quraishi, *Bahadur Shah: The Last Moghul Emperor of India* (1995). A biography of Bahadur Shah by William Dalrymple is forthcoming.

<sup>40</sup> Westlake, *Collected Papers*, above n 13, 204. He commented that a statement (date not specified) by Governor-General Lord Dalhousie (in office from 1848-1856) that the British Government “was the successor of the emperors at Delhi” was merely the reasoning of an individual statesman.

not address the manner of extinction of the Kingdom of Delhi.<sup>41</sup> Arthur Keith made an intriguing statement in his 1937 text *A Constitutional History of India* on the importance of the deposition of the King of Delhi in 1858 but did not discuss how or precisely when this occurred.<sup>42</sup> In a 1991 history of India, the historian C A Bayly stated that sovereignty was held by the Mughal Emperor until 1858, “however degraded his real power”.<sup>43</sup>

Could the institution of criminal proceedings against the King of Delhi in 1858 of itself constitute a deposition of the King of Delhi? Was there a proclamation of annexation by Britain in 1858? Was there a treaty of peace? Nineteenth and twentieth century texts on the kingdoms of the sub-continent were silent on the mode of the final end of the Kingdom of Delhi.<sup>44</sup>

Another challenge was assessing the significance in law, if any, of a common assertion in nineteenth century and contemporary historical texts that Bahadur Shah was a ‘nominal’ or ‘titular’ sovereign. For example, in a 1993 text, it was said that “the Emperor himself remained the nominal sovereign of virtually all India until 1858”<sup>45</sup> and in an 1858 text, it was said that Bahadur Shah was:

allowed by the British to enjoy the style and title of sovereignty, and to receive a considerable proportion of the revenues of the province, by which he was enabled to support his nominal dignity with some degree of splendour.<sup>46</sup>

One early object of research was to determine the meaning of ‘nominal’ or ‘titular sovereignty’. Had Bahadur Shah been deposed well before 1857, bearing a courtesy title only? Was the decline in the EIC’s observance of Mughal customs of kingship, noted by Buckler, a gradual withdrawal of recognition, so that by 1857 the ‘King of Delhi’ was no longer recognised as a Sovereign? What was a ‘Sovereign’ in nineteenth century

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<sup>41</sup> *ibid* 221.

<sup>42</sup> Keith, *Constitutional History of India*, above n 24, 212-213: “A vital change in the relations of the government and the Indian states resulted from the transfer of authority to the Crown and the deposition of the last King of Delhi.” With his passing, “a new position emerged...The Crown was now in India what the Emperor once had been, a completely sovereign power predominant over all others and claiming allegiance”.

<sup>43</sup> C A Bayly, *An Illustrated History of Modern India 1600-1947* (1991), 102.

<sup>44</sup> For example, D K Sen, *History of the Indian States, their Status, Rights and Obligations* (1985 [1930]), William Lee Warner, *The Native States of India* (1971 [1884]), J Chacko, “India’s Contribution to the Field of International Law Concepts”, *Recul des Cours*, 1958 (1), L R Sethi, “India in the Community of Nations”, 14 *Canadian Bar Review* (1936) 63.

<sup>45</sup> Michael J Fisher, *The Politics of the British Annexation of India 1757-1857* (1993), 9.

<sup>46</sup> Charles Ball, *The History of the Indian Mutiny* (n.d. 1858-59), I, 71.

international law? As the key object of the thesis was to assess the trial against international law, it was not necessary to investigate Mughal conceptions of sovereignty.

The research method was to examine first the broad nature of British rule in India and the transformation of the EIC from a commercial venture to a government. Broad reading on the workings of the British administration in India led to the unexpected discovery of two opinions of the Judicial Committee of the Privy Council which provided, on analysis, indisputable evidence that the Kings of Delhi had been “recognised” by Britain as late as 1857. A synopsis of the case *Rajah Saligram v Secretary of State for India in Council*<sup>47</sup> (which cited Lord Cairns’ opinion in the second case, *Lalla Narain Doss v Estate of the ex-King of Delhi*)<sup>48</sup> was found in a digest of British cases on the powers of the Government of India, appended to the classic text, *The Government of India*, published by Sir Courtenay Ilbert at the turn of the century.<sup>49</sup> The digest stated:

In the Delhi case, *Raja Salig Ram v Secretary of State for India in Council* (1872), the question was as to the validity of the seizure, after the Indian Mutiny, of estates formerly belonging to the titular King of Delhi. Here also it was held that the seizure was an act of State, and as such was not to be questioned in a municipal court.<sup>50</sup>

Was this case significant for understanding the legal status of Bahadur Shah?<sup>51</sup> What did the term ‘the titular King of Delhi’ mean? According to principles of international law and British constitutional law, the application of the Act of State doctrine (that acts of government under prerogative power were not justiciable by municipal courts)<sup>52</sup> surely implied the existence of foreign relations between Britain and ‘the titular King of Delhi’. On retrieval of the case, it was clear. The Judicial Committee expressly stated that the King of Delhi was “recognised” by the British Government,<sup>53</sup> he was deposed by Britain in October 1857, and the rightfulness of his deposition could only be assessed by the “law of

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<sup>47</sup> XII Bengal Law Reports (1872) 167; Moo Ind App Supp Vol 19; 1 *British International Law Cases* (1965) 575.

<sup>48</sup> [1867] XI Moo Ind App 277; 20 ER 106.

<sup>49</sup> The synopsis appears in a footnote on the liabilities of the Secretary of State for India (a post established by the *Government of India Act 1858* (UK)), in Sir Courtenay Ilbert, *The Government of India, Being a Digest of the Statute Law relating thereto, with Historical Introduction and Explanatory Matter* (2<sup>nd</sup> edition, 1907), 173.

<sup>50</sup> *ibid.*

<sup>51</sup> The two cases are discussed in **Chapter 4 A Recognised King**, below.

<sup>52</sup> The Act of State doctrine is discussed in **Chapter 4 A Recognised King**, below.

<sup>53</sup> at 185.



nations”.<sup>54</sup> The Judicial Committee did not qualify its use of the term ‘King of Delhi’ with the word ‘titular’. The word ‘titular’ was an editorial insertion by Ilbert.

Research then centred on the significance of a pronouncement by a British court on the status of the King of Delhi. The cases were heard 15 and 10 years respectively after the Rebellion of 1857. Were they merely *ex post facto* opinions? Research on the role of British courts in dealing with the prerogative showed that the courts’ role was confined to determining the consequences of the exercise of the prerogative and that it was the consequences of the assertion of the Government of India that Bahadur Shah was a recognised sovereign that were addressed in both cases. They were not *ex post facto* opinions. Study turned to assessing the significance of that status in international law, leading to a close review of British case law on the treatment of sovereigns under British protection before the Rebellion of 1857, the effect of recognition in international law, and the consequences of protection for privileges and immunities under international law, in particular, sovereign immunity.

### Sources

This thesis takes a multi-disciplinary approach to the analysis of jurisdiction: international law; municipal law; and Indian history. The review of jurisdiction in this thesis is concerned with jurisdiction at international law and does not consider this issue from the perspective of British military law or Mughal law.

Sources relied on for the international law analysis include domestic case law, the writers of international law, in particular, Emmerich de Vattel, *The Law of Nations*,<sup>55</sup> W E Hall, *Treatise on International Law*,<sup>56</sup> Henry Wheaton, *Elements of International Law*,<sup>57</sup> other texts current in the mid-nineteenth century, such as Sir Travers Twiss, *The Law of Nations*,<sup>58</sup> and later editions of texts containing histories of the well-established principles of international law current in the 1850s. Supplementary secondary sources include

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<sup>54</sup> at 184.

<sup>55</sup> E de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (1758).

<sup>56</sup> W E Hall, *Treatise on International Law* (3<sup>rd</sup> ed, 1890).

<sup>57</sup> Henry Wheaton, *Elements of International Law* (2<sup>nd</sup> ed, 1866).

<sup>58</sup> Travers Twiss, *The Law of Nations considered as Independent Political Communities, On the Right and Duties of Nations in Times of Peace* (1861).

### Introduction

commentators on British law and practice and international law.<sup>59</sup> As noted above, the thesis is strictly a legal analysis of jurisdiction in the trial of Bahadur Shah and does not draw on materials assessing the political use of international law. The scope and application of international law of the time relevant to jurisdiction in Bahadur Shah's trial, in particular, the application of international law outside Europe, are discussed in **Chapter 1 International Law and the Kingdom of Delhi**. The particular rules are discussed in detail in the body of the thesis.

This thesis also relies on British sources on the history of the sub-continent, drawing on primary and secondary historical sources to paint a broad-brush picture of the decline of the Mughal Empire, the ascendancy of the EIC, and the British view of the position of the Kings of Delhi in the nineteenth century.<sup>60</sup> A key primary source for the treatment of events in Delhi in the 1800s is the official correspondence from 1804 to 1805 of then Governor-General of India, the Marquess Richard Colley Wellesley, published in 1837 as *Wellesley's Despatches*.<sup>61</sup>

The Rebellion is extensively documented and has been examined by imperial historians,<sup>62</sup> social historians,<sup>63</sup> military historians,<sup>64</sup> and re-examined as a part of post-colonial discourse.<sup>65</sup> Chapters dealing with the events of 1857 are intended as background to show the immediate events leading to the trial of the King of Delhi and do not purport to be a study of the Rebellion itself.<sup>66</sup> Further, issues such as the mode of prosecuting 'rebels' and 'mutineers', the establishment of law and order, and the assertion of British authority on the sub-continent, are not discussed in this thesis, for they relate to a broader study of the Rebellion trials, rather than to the legal question of the right at law to prosecute the King of Delhi which is the chief concern of this thesis. Sources relied on in this thesis for background on the events of 1857 are records of correspondence of Government of India

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<sup>59</sup> For example, Herbert Smith, *Great Britain and the Law of Nations* (1932) and James Crawford, *The Creation of States in International Law* (1979).

<sup>60</sup> See **Chapter 3 The 'Titular' King of Delhi**, below.

<sup>61</sup> Montgomery Martin (ed), *The Despatches, Minutes and Correspondence of the Marquess Wellesley KG during his Administration in India* (1837).

<sup>62</sup> For example, George Malletson (ed) *Kaye and Malletson's History of the Indian Mutiny of 1857-58* (1898).

<sup>63</sup> For example, Thomas Metcalf, *Ideologies of the Raj* (1995).

<sup>64</sup> For example, George Macmunn, *The Indian Mutiny in Perspective* (1931).

<sup>65</sup> For example Ranajit Guha (ed), *Subaltern Studies, Writings on South Asian History and Society* (1982-89).

officials published by the House of Commons in 1858,<sup>67</sup> and later by the Government of India<sup>68</sup> and secondary sources: memoirs of the Rebellion by British civilians and retired officers,<sup>69</sup> and contemporary and later histories of the period.<sup>70</sup> The laws passed by the Government of India in 1810<sup>71</sup> and 1857,<sup>72</sup> and the proceedings of the Legislative Council of India 1857-1858,<sup>73</sup> which have not previously been studied in detail by historians of the Rebellion, are key sources relied on in this thesis. Analysis is supplemented by secondary sources including nineteenth century legal texts and twentieth century histories of law in India.<sup>74</sup>

A key document analysed in this thesis is the *Proceedings*, the official record of the trial published by the House of Commons in 1859,<sup>75</sup> supplemented by first-hand accounts of the trial published in 1859.<sup>76</sup> The *Proceedings* has limitations as a single source against which to analyse jurisdiction in Bahadur Shah's trial, largely because the document was produced as a military record of a court-martial and follows closely the requirements for this record under British military law. Unsolicited comments made by an accused, for instance, when entering a plea, or by his 'friend' or counsel, who had no right to address the court, were not recorded. Yet such commentary is relevant to determining the rightfulness of jurisdiction – statements may show submission to jurisdiction or, conversely, rejection of the proceedings.<sup>77</sup>

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<sup>66</sup> See **Chapter 7 The Imprisonment of the King of Delhi in 1857** and **Chapter 8 The Decision to Try the King of Delhi**.

<sup>67</sup> House of Commons, *Parliamentary Papers*, XII, 1857-58.

<sup>68</sup> For example: Government of the Punjab, *Mutiny Records Correspondence* (1911) and W Coldstream (ed) *Records of the Intelligence Department of the Government of the North-West Provinces of India during the Mutiny of 1857* (1902).

<sup>69</sup> For example, William W Ireland, *History of the Siege of Delhi by An Officer Who Served There* (1861).

<sup>70</sup> For example, Michael Maclagan, *Clemency Canning, Charles John 1<sup>st</sup> Earl Canning* (1962).

<sup>71</sup> Reproduced in John Herbert Harrington, *An Analysis of the laws and regulations enacted by the Governor-General in Council at Fort William in Bengal* (1821).

<sup>72</sup> Reproduced in House of Commons, *Parliamentary Papers*, 1857, Session II, XXX.

<sup>73</sup> *Proceedings of the Legislative Council of India*, 1856-59.

<sup>74</sup> For example, Harrington, above n 71; James Fitzjames Stephen, *A History of the Criminal Law of England* (1963) [1883]; and G Rankin, *Background to Indian Law* (1946).

<sup>75</sup> See also **Note on the Trial Proceedings**, above, and **s2.2 The Record of Proceedings in Chapter 2 Overview of the Trial**, below.

<sup>76</sup> Ball, *History of the Indian Mutiny*, above n 46, *Chambers' History of the Revolt in India* (1859) and Montgomery Martin, *The Indian Empire* (1859).

<sup>77</sup> See also **s11.2.6 Waiver of Immunity in Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

Non-official accounts of the trial include material not contained in the *Proceedings*, in particular, statements by Bahadur Shah and his counsel, Ghulam Abbas, disputing the authority of the court and refusing to submit a defence.<sup>78</sup> This additional material raises questions, for example, about the proper interpretation to be placed on a statement entitled in the *Proceedings* as “Translation of the Written Defence put in by Bahadur Shah, ex-king of Delhi”, which discusses events in Delhi 1857 but does not explicitly plead a defence to the charges. Accordingly, this thesis also relies on non-official accounts of the trial. Since they do not stem from an official source, this thesis treats them as suggestive of events, rather than authoritative.

Incidental commentary on the conduct of the trial is supplemented by privately authored British military law texts, in particular Hough’s *Precedents in Military Law* (1855),<sup>79</sup> for no authorised textbook on British military law was commissioned until 1868.<sup>80</sup> Clode’s *Administration of Justice under Martial and Military Law* (1872)<sup>81</sup> and Carey’s *Military Law and Discipline* (1877)<sup>82</sup> provide historical background on British military law.

### Structure

The thesis first places the legal issues in the context of mid-nineteenth century international law and sketches the main features of the trial. The thesis then analyses Bahadur Shah’s status in law as at 1857 before recounting the British response to the Rebellion in 1857 which led to Bahadur Shah’s capture, and trial in 1858. The thesis, building on the conclusions reached in the earlier chapters, then identifies and analyses the basis for the assertion of jurisdiction against the principles of international law of the time, and any entitlement to sovereign immunity.

The thesis opens with an account of international law in the nineteenth century in

**Chapter 1 International Law and the Kingdom of Delhi.** The chapter highlights the

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<sup>78</sup> See s2.9 The ‘Defence’ in Chapter 2 Overview of the Trial, below.

<sup>79</sup> Hough was Deputy Judge-Advocate-General of the Bengal Army for fourteen years: William Hough, *Precedents in Military Law: including The Practice of Courts-Martial; the Mode of Conducting Trials; the Duties of Officers at Military Courts and Inquests, Courts of Enquiry, Courts of Requests etc* (1855), v.

<sup>80</sup> The commissioned work by Robert Carey, *Military Law and Discipline*, was circulated in 1877 but was never published following the introduction of a statutory code: G R Rubin, “The Legal Education of British Army Officers 1860-1923”, 15 *Legal History*, No 3, (1994) 223, 230.

<sup>81</sup> Charles M Clode, *The Administration of Justice under Military and Martial Law* (1872).

supremacy of State Sovereignty and the doctrine of the ‘Equality of States’ in nineteenth century international law, and discusses the application of this law to States outside Europe including the kingdoms of the Indian sub-continent.

**Chapter 2 Overview of the Trial of Bahadur Shah** reviews the main features of the trial: the composition of the Court, the record of proceedings, the charges, the plea, the prosecution and defence, the interpreter, and the finding of the Court.

The thesis takes as its starting point in the analysis of jurisdiction the determination of the status of Bahadur Shah as the King of Delhi as at his capture by British forces in September 1857. Was his title one of courtesy or was he a recognised Sovereign? **Chapter 3 The ‘Titular’ King of Delhi** sketches the position of the Mughal Emperors from the late eighteenth century to the mid-nineteenth century, highlighting the disintegration of the Mughal Empire as a territorial unit in the eighteenth century, the extension of protection by the Government of India in 1803 to the Kingdom of Delhi and the British use of the term ‘titular’ in references to the King thereafter. **Chapter 4 A Recognised King** brings to light two opinions of the Judicial Committee of the Privy Council which unequivocally show that the King of Delhi held the status of a Sovereign recognised by Britain until he was deposed, and the Kingdom of Delhi extinguished, in October 1857. **Chapter 5 A Sovereign in English Law** explains that the role of English courts being confined under constitutional law to the question of whether the Government had in fact accorded recognition, the cases constitute evidence of Bahadur Shah’s status in law and that this was in conformity with British practice of the time, Britain recognising Indian sovereigns and protected states, at least until 1857. **Chapter 6 A Sovereign in International Law** explains that under the law of the time, recognition sufficed to constitute a nation as a ‘State’ at international law, even if the State was under the protection of another. As a King recognised by Britain, Bahadur Shah held the status of a King at international law and was accordingly entitled to privileges and immunities of international law. Collectively, these four chapters show that as at September 1857, despite his dependence on Britain’s Government of India, Bahadur Shah held the status of a Sovereign recognised in British and international law. His title was not merely one of courtesy.

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<sup>82</sup> Carey above n 80.

In May 1857, a mutiny in the EIC's Bengal Army and a civil revolt against British rule broke out in North India.<sup>83</sup> Bahadur Shah apparently lent support to the Rebellion, though he may also have tried to negotiate a surrender with the British forces as they besieged the city of Delhi. Bahadur Shah's role in these events led to his capture by British forces in September, deposition in October and court-martial in January 1858. These events are discussed in **Chapter 7 The Imprisonment of the King of Delhi in 1857**. **Chapter 8 The Decision to Try the King of Delhi** explains that the trial of Bahadur Shah was instituted with two purposes in mind: a "political enquiry" into the progress of the Rebellion; and an investigation of the guilt of Bahadur Shah of rebellion crimes. None of the records shows discussion of the application of the laws authorising the Military Commission, Bahadur Shah's status in law or of the legality of trying a king. Bahadur Shah would be tried under laws passed by the Legislative Council of India in 1857 to punish mutineers and 'rebels'. **Chapter 9 The Rebellion Laws** reviews the laws which created new crimes 'against the State' and provided for trial by civil and military commissions. The military commission trying Bahadur Shah was established under *Act XIV* and he was charged with crimes under *Acts XI, XIV and XVI of 1857*.

The basis for exercising jurisdiction over Bahadur Shah is discussed in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**. Bahadur Shah was charged with committing crimes established by, *inter alia*, *Act XI of 1857*. That Act only applied to those who owed "allegiance" to the Government of India. In proving charges alleging *Act XI* crimes, the Prosecutor called evidence to show that Bahadur Shah owed "allegiance" because he was a "subject of the British Government in India". In so doing, a basis for exercising jurisdiction on the grounds of nationality over Bahadur Shah was laid before the Court. The Prosecutor's argument was that Bahadur Shah had become a British subject on the basis of the "protection" accorded to the King of Delhi by the EIC, including the provision of a "pension". The chapter assesses this argument against the rules of international law and concludes that the argument was not sustainable under the law, for protection did not, at law, effect a change in nationality. Moreover, though protected, the Kingdom of Delhi was recognised by Britain and its sovereignty remained intact until

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<sup>83</sup> Collectively termed 'the Rebellion' in this thesis – see **Note on Terminology**, above.

October 1857. Accordingly, the chapter contends that Bahadur Shah owed no duty of allegiance and this ground for exercising jurisdiction was invalid at law.

**Chapter 11 The King of Delhi's Entitlement to Sovereign Immunity** reviews the law on sovereign immunity according to which recognised Sovereigns were completely immune from criminal prosecution by the courts of another State. The chapter concludes that as Bahadur Shah was a recognised king, he was entitled, even as a protected, and then deposed, sovereign, to immunity from British courts. Evidence suggesting submission to jurisdiction is weighed against the evidence that the lawfulness of jurisdiction was denied. Even if Bahadur Shah had become a British national upon the capture and occupation of Delhi in 1857 (which was not argued at his trial), his status as a former foreign head of state was a complete bar to prosecution. The chapter concludes that his prosecution was a stark breach of then prevailing standards of international law.

The final chapter, **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, contends that while it is not certain why Bahadur Shah's status as the King of Delhi was, in the event, thought not to found immunity for his crimes, examination of the *Proceedings* suggests immunity was deliberately overridden on the grounds that the gravity of his crimes outweighed any immunity to which he would otherwise be entitled or that his standing as a 'titular' king founded no immunity from prosecution, or on both grounds. Jurisdiction asserted on either basis would constitute a significant development of international law.

## Chapter 1 International Law and the Kingdom of Delhi

### 1.0 Introduction

During the Rebellion of 1857,<sup>1</sup> a British court-martial, established under laws passed by the Legislative Council of India in 1857,<sup>2</sup> tried Bahadur Shah, styled variously at the trial as the ‘King of Delhi’, the ‘ex-King of Delhi’, and the ‘titular King of Delhi’, for crimes against the State. The charges alleged that Bahadur Shah held the status of “a pensioner of the British Government in India” and “a subject of the British Government in India”.<sup>3</sup> The Prosecutor, Deputy Judge Advocate General Major Frederick Harriott,<sup>4</sup> called the most senior Government official<sup>5</sup> present in Delhi, the Acting Commissioner of Delhi, Charles Saunders, to state the circumstances under which the Kings of Delhi had become “subjects of the British Government in India”.<sup>6</sup> Saunders testified that the Kings of Delhi had become “pensioned subjects of the British Government” on the extension of “protection” by “the British authorities” in September 1803. Throughout the trial, the Prosecutor emphasised the ‘titular’ nature of Bahadur Shah’s sovereign status and in closing the prosecution case, invited the Court by its verdict to override “the respect due to deposed majesty” allowing Bahadur Shah to rank “as one of the great criminals of history”. “Kings” he said, “by crime are degraded to felons.”<sup>7</sup>

From the above summary of the trial, four issues can be immediately identified which provoke the attention of the international lawyer: recognition of sovereigns (the title ‘King of Delhi’); sovereignty under protection (the extension of “protection” by British authorities); acquisition of nationality (became “subjects of the British Government in India”); and the rule of sovereign immunity (“the respect due to deposed majesty”). A related issue is the application of international law in relations between European and

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<sup>1</sup> The Rebellion of 1857 is discussed in **Chapter 7 The Imprisonment of the King of Delhi in 1857**, below.

<sup>2</sup> The laws passed in 1857 are discussed in **Chapter 9 The Rebellion Laws**, below.

<sup>3</sup> See s2.3 **The Charges** in **Chapter 2 Overview of the Trial**, below. The charges are set out in *Appendix I*.

<sup>4</sup> See s2.5 **The Appointment of a Prosecutor** in **Chapter 2 Overview of the Trial**, below.

<sup>5</sup> On the British Government in India, see **Chapter 3 The ‘Titular’ King of Delhi**, below.

<sup>6</sup> *Proceedings*, 94. Saunders’ testimony is set out at **Appendix 8** and discussed in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below. The events of 1803 are discussed in **Chapter 3 The ‘Titular’ King of Delhi**, below.



Asian States in the nineteenth century in general and to kingdoms of the Indian sub-continent in particular.

The question addressed in this thesis is whether the exercise of jurisdiction over the King of Delhi in his trial in January 1858 was sustainable under international law as then in force. It will be shown in the following chapters that this question is to be answered by the application of the rules of international law relating to recognition, protection, acquisition of nationality and sovereign immunity.

This chapter outlines key features of the international law of the time relevant to the assessment of jurisdiction in Bahadur Shah's trial and reviews the application of international law in relations between Britain and Asian States. The particular rules of international law applied in the analysis of the exercise of jurisdiction over Bahadur Shah are discussed in detail in later chapters.

### 1.1 Key Features of Nineteenth Century International Law

The nineteenth century is seen by some as a series of "achievements" which, in effect, set the landscape for twentieth century international law.<sup>8</sup> For example, the Congress of Vienna (September 1814-June 1815) is commonly seen as having developed important principles and practices of international law, such as the denunciation of the slave trade, uniform treaty practice, and new forms of multilateral diplomacy. The nineteenth century is seen by others as a century marked by failures of the promise of international law, as seen in new scholarship on the use of international law as a tool of imperialism.<sup>9</sup>

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<sup>7</sup> *Proceedings*, 145.

<sup>8</sup> See for example Jianming Shen, "The Relativity and Historical Perspective of the Golden Age of International Law", 6(1) *International Legal Theory* 15, 21-26.

<sup>9</sup> The discipline of Third World Approaches to International Law (TWAIL) has emerged since Charles Alexandrowicz appealed for research into links between colonialism and the "extraneous" status of Asian States in nineteenth century international law jurisprudence: "Some Problems of the History of the Law of Nations in Asia", (1963) *Indian Year Book of International Affairs*, 3-11, 9. TWAIL highlights "the role that international law has played in the subordination of third world peoples": Shirley Scott, *International Law and World Politics* (2004), 133. Recent scholarship includes Anthony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 40 *Harvard International Law Journal* (1999) 1-86 and J T Gathi, "International Law and Eurocentricity", 9 *European Journal of International Law*, (1998) 184-211. Martti Koskenniemi has suggested that little has been written on international law and imperialism and that international lawyers have largely "treated the subject as a part of the history of territorial acquisition", *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960* (2001), 99, Note 6. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, forthcoming 2005, may redress this imbalance.

But most would agree that international law of the nineteenth century was coloured by a growing ascendancy of positivist conceptions of international law, the supremacy of the sovereign State, and the doctrine of the ‘Equality of States’ in law. These features can be seen in the nineteenth century international law applied in this thesis to assess the lawfulness of Britain’s exercise of jurisdiction over the King of Delhi in 1858.

### 1.1.1 The Ascendancy of Positivist Conceptions of the Law

International law in the nineteenth century is typically treated in international law texts as falling within the period marked by “philosophical controversies between naturalism and positivism”<sup>10</sup> such that positivist conceptions of law overtook the earlier naturalist orientations of, for example, the Italian scholar Alberico Gentili (1552-1608) and the Dutch scholar Hugo Grotius (1583-1645).

At issue was whether there existed a ‘natural’ law of nations, a ‘law of nature’, as was thought in the sixteenth and seventeenth centuries, or whether the only source of law was the will of the State, as evidenced by the practice of States. The question sought to be answered by these writers was, essentially, how does international law become binding on sovereign States?

According to naturalist theory, the ‘law of nature’ was applied to “the conduct of nations, in the character of moral persons, susceptible of obligations and laws.”<sup>11</sup> The basic principles of law “were derived not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason; law was to be found, not made”.<sup>12</sup> For Hugo Grotius:

Natural law is the rule of right reason which teaches us that an act is just in so far as it conforms to natural reason, and morally just or unjust and consequently forbidden or commended by God himself as the Author of nature. This natural law does not change. God Himself cannot change the scheme of things so that two and two do not make four.<sup>13</sup>

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<sup>10</sup> David Kennedy, “International Law and the Nineteenth Century: History of an Illusion”, 17 *Quinnipiac Law Review* (1998) 99, 100.

<sup>11</sup> Henry Maine, *Lectures on International Law* (1878), Lecture on International Law: Its Authority and Sanction, The Avalaon Project at Yale Law School, [www.yale.edu/lawweb/avalon/econ/intmenu.htm](http://www.yale.edu/lawweb/avalon/econ/intmenu.htm).

<sup>12</sup> Michael Akehurst, *An Introduction to Modern International Law* (6<sup>th</sup> ed 1987), 13.

<sup>13</sup> Hugo Grotius, *The Law of War and Peace* (1625), xxxiii, cited by Scott, above n 9, 89.

For Grotius, the law of nature supplemented “the voluntary law of nations”, as a measure against which to judge its adequacy. The will of states could not be “the exclusive or even, in the last resort, the decisive source of the law of nations.”<sup>14</sup>

In contrast, according to the positivist thinking emerging in the eighteenth century, the obligation to obey international law derived not from any ‘natural law’ but from “the consent of individual States”.<sup>15</sup> International law, it was said by positivists, was founded on consent and usages, “a system of positive institutions”.<sup>16</sup> International law was binding because States had consented to the rules. Instead of looking for a natural law as guidance, resort was had to State custom: what did States do in particular circumstances? A “clear line of demarcation was drawn between the actual law of nations and the law of nations as it ought to be.”<sup>17</sup> Positivism “extinguished international law’s flirtation with religion and ideology”<sup>18</sup> and the science of international law was now conceived as ‘legal’ or ‘juridical’.<sup>19</sup>

Some writers in the nineteenth and twentieth centuries argued that international law became binding on both bases of natural law and State practice.<sup>20</sup> For example, Oppenheim argued that while late eighteenth and nineteenth century writers of international law such as Martens, Phillimore, Twiss, Maine and Westlake, based themselves on the practice of States, they still recognised some form of natural law.<sup>21</sup> Other suggested that the Swiss writer Emerich von Vattel (1714-1767) combined both approaches in his work.<sup>22</sup>

The two ways then in which positivist thought is said to have dominated in the nineteenth century are first, that the law was seen to be binding because States consented to be bound and not because it was morally incumbent to do so; second, that these principles of law could be deduced from the practice of States. Evidence of State practice would be found in

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<sup>14</sup> H Lauterpacht, “The Grotian Tradition in International Law” (1946) *British Year Book of International Law* 53, 21-22, cited in Scott, above n 9, 90.

<sup>15</sup> James Crawford, *The Creation of States in International Law* (1979), 12.

<sup>16</sup> Maine, above n 11.

<sup>17</sup> Nussbaum, *A Concise History of the Law of Nations* (1947), 223.

<sup>18</sup> Kennedy, above n 10, 113.

<sup>19</sup> Nussbaum, above n 17, 222.

<sup>20</sup> Maine, above n 11.

<sup>21</sup> H Lauterpacht (ed), *Oppenheim’s International Law* (7<sup>th</sup> ed, 1948), s59, 102; Scott, above n 9, 90.

<sup>22</sup> Akehurst, above n 12, 15.

treaties, the works of jurists setting out general principles of international law, and in decisions of national courts. Oppenheim noted that the cumulative effect of uniform decisions afforded evidence of international custom, though they were not in themselves sources of law.<sup>23</sup> In an American 1900 case on prize law, Gray J observed that in the absence of a treaty, judicial decision or controlling legislative or executive act:

resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is.....<sup>24</sup>

Uniform evidence of a rule of international law and State practice can be seen clearly, for example, in the articulation of the rule of sovereign immunity by British and American courts.<sup>25</sup>

In English courts of the mid to late nineteenth century, parties in their pleadings, and the courts in their judgments, often cited the writers of international law as evidence of particular rules of international law. The writers most commonly cited in the cases discussed in this thesis included Vattel,<sup>26</sup> W E Hall (1835-1894),<sup>27</sup> and Henry Wheaton (1785-1848).<sup>28</sup> For example, in *Ex-Rajah of Coorg (Veer Rajundur Wadeer) v The East India Company* (1860),<sup>29</sup> concerning the consequences of the annexation of the Kingdom of Coorg in 1834, the parties relied, *inter alia*, on Vattel, Wheaton, and Phillimore. In *Doss v Secretary of State for India in Council* (1875),<sup>30</sup> concerning the consequences of the annexation of Oudh in 1856, parties relied on Vattel, Wheaton, Phillimore and Texas.

<sup>23</sup> Oppenheim, above n 21, s19a, 30.

<sup>24</sup> *The Paquete Habana* 175 US SC Rep (1900) 677, cited in T McCorquodale and M Dixon, *Cases & Materials on International Law* (4<sup>th</sup> ed, 2003), 48.

<sup>25</sup> See **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>26</sup> E deVattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, 1758. Vattel's text met the need for a "systematic and detailed reference book on international law" and was regarded in the first half of the nineteenth century as "a kind of oracle with diplomats": Naussbaum, above n 17, 160.

<sup>27</sup> W E Hall, *Treatise on International Law* (3<sup>rd</sup> ed, 1890).

<sup>28</sup> Henry Wheaton, *Elements of International Law* (2<sup>nd</sup> ed, 1863).

<sup>29</sup> [1860] 30 LJ Ch 226. See **Chapter 4 A Recognised King** and **Chapter 5 A Sovereign in English Law**.

<sup>30</sup> (1875) XIX Law Reports 509.

In the sovereign immunity case *Mighell v Sultan of Johore* (1894),<sup>31</sup> parties cited Martens,<sup>32</sup> Vattel and Grotius, and Lopes LJ relied on Vattel in his judgment.

Some of the rules of international law applied in this thesis were justified by writers on the basis of their inherent rightfulness, some on the practice of states, others on both bases. For example, a nineteenth century rule of international law applied in this thesis, resting on both natural law and positivist bases, is the rule of sovereign immunity.<sup>33</sup> The identification of the ‘Sovereignty’ of a State with the person of the Sovereign can be said to rest on natural law, the extension of immunity to the Sovereign similarly rests on a natural law foundation. Nineteenth century views of immunity found support in both the earlier writers of international law and in nineteenth century State practice. References can be found from Vattel:

what are the rights of a sovereign, who happens to be in a foreign country, and how is the master of that country to treat him? If that prince be come to negotiate, or to treat about some public affair, he is doubtless entitled, in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveler, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction.<sup>34</sup>

to Hall:

It is universally agreed that sovereigns and the armies of a state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue...<sup>35</sup>

The practice of States according Heads of State absolute immunity from criminal prosecution was universal European practice – there were no instances in the nineteenth century of criminal prosecutions of recognised serving or former heads of state. The position would be different for persons bearing a courtesy title only.

An example of a rule of international law in the nineteenth century resting purely on a positivist basis is the law of recognition. The law of recognition was not a topic addressed by the classical writers of international law. Nineteenth century writers on the other hand, perhaps reflecting the growth of new States, such as the emancipated States of Latin

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<sup>31</sup> [1894] 1 QB 149.

<sup>32</sup> F Von Martens, *The Law of Nations* (4th ed, 1829).

<sup>33</sup> See **Chapter 11 The King of Delhi’s Entitlement to Sovereign Immunity**, below.

<sup>34</sup> Quoted in *Mighell v Sultan of Johore* [1894] 1 QB 149, at 160.

<sup>35</sup> Hall, above n 27, 163.

America, analysed the mode in which a nation would be regarded as a ‘State’ on the basis of State practice. In the nineteenth century, “recognition, express or implied, solely created their membership and bound them to obey international law”.<sup>36</sup> If States recognised an entity as a State, it was a ‘State’.

The rules of international law applied in this thesis were well-established rules supported by principle and State practice. For example, the notion that a State could enter a relationship of even extreme dependency and retain its standing as a ‘Sovereign’ State can be traced in the writers of international law and observed in State practice. For example, Vattel stated:

A weak state which for greater security puts itself under the protection of a more powerful one, and agrees to perform certain acts in return, without, however, divesting itself of its right of self-government and of its sovereignty, such a State, I repeat, does not cease for that reason to rank among sovereign States, whose only rule of conduct is the Law of Nations.<sup>37</sup>

State practice reflected the stance taken by the writers - there were many instances demonstrating that, as a matter of practice, States under the protection of another State were recognised in the nineteenth century as ‘States’ for the purposes of international law.<sup>38</sup> For example, the Ionian Islands under the protection of Britain from 1815 and the Principality of Monaco under the protection of France in the seventeenth century and again from 1814. A further example is the leading case *Statham v Statham and the Gaekwar of Baroda*.<sup>39</sup> In determining “the true status” of the Gaekwar of Baroda, Bargrave Deane J quoted Grotius and Vattel to establish that “in unequal alliances the inferior power remains a Sovereign State” and that “its subjects or citizens owe allegiance only to their own sovereigns”.<sup>40</sup>

Whether justified on positivist or naturalist conceptions of the law, or on a hybrid conception, the rules of international law applied in this thesis were in the mid-nineteenth century commonly observed by States and regarded as binding law.

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<sup>36</sup> Crawford, above n 15, 13.

<sup>37</sup> Vattel, above n 26, Book 1, Ch I, s6, 1.

<sup>38</sup> See s6.2 Protected States in International Law in Chapter 6 A Sovereign in International Law, below.

<sup>39</sup> [1912] P. 92; 105 LT 991.

<sup>40</sup> at 992.

Another feature of the international law of the time relevant to this thesis is the nineteenth century's significance "as a classical period in which sovereignty and the state were consolidated as the fundamental doctrinal and philosophical underpinnings for international law."<sup>41</sup> 'Sovereignty', and the related doctrine of the 'Equality of States', it is commonly thought, were the pillars of nineteenth century international law.

### 1.1.2 The Supremacy of 'State Sovereignty'

'Sovereignty' is notoriously difficult to define, the more so because different centuries have laid on it different emphases. Underlying the nineteenth century conception of what was entailed in being a 'Sovereign State' was the notion that the State enjoyed wide-ranging freedom to pursue its own interests. A State had a right to territorial inviolability and a right of absolute jurisdiction over all persons and all things within its territory. International law had little concern with internal arrangements of government, or treatment of a State's nationals. A State had untrammelled freedom in the conduct of its foreign policy, could choose to recognise a State or not, and could wage war at will. Sovereigns were completely immune from criminal prosecution in the Courts of another State. In short, 'Sovereignty' represented the will of the State.

Moreover, it has been argued that many of the rules of international law of the nineteenth century were in fact "deductions from the idea of sovereignty".<sup>42</sup> Indeed, the supremacy of a State's 'Sovereignty' is found in this thesis to be central to the topics of international law noted at the start of this chapter: recognition; protection; nationality, and sovereign immunity. For example, the effect of recognition in international law (did recognition by one State transform an entity into a 'Sovereign State'? Did British recognition of the Kingdom of Delhi show that the Kingdom was a Sovereign State?);<sup>43</sup> protected sovereignty under international law (were protected 'States' 'Sovereign States'? Did the Kingdom of Delhi, once protection was extended by Britain, remain a 'Sovereign State'?);<sup>44</sup> the determination of nationality (did a change in nationality follow a change in

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<sup>41</sup> Kennedy, above n 10, 101.

<sup>42</sup> *ibid* 130.

<sup>43</sup> The effect of recognition is discussed in **Chapter 5 A Sovereign in English Law**, below.

<sup>44</sup> Sovereignty under protection is discussed in **Chapter 5 A Sovereign in English Law** and **Chapter 6 A Sovereign in International Law**, below.

territorial sovereignty? Did residents of the Kingdom of Delhi become British nationals after 1803?);<sup>45</sup> and the application of sovereign immunity (what rights and duties flowed from a Sovereign status? Was the King of Delhi entitled to immunity?).<sup>46</sup>

The rules of international law applied to answer these questions were based on the notion that the State was supreme. As will be shown in subsequent chapters, in terms of recognition, a State was free to choose for itself which entities it would regard as a 'State' and a State so recognised was entitled to the rights and subject to the duties of statehood at international law. With reference to the acceptance of protection, entry into an alliance of even extreme dependency could be an exercise of 'sovereignty' rather than a derogation of sovereignty. As for the acquisition of nationality - a State was free at international law to bestow nationality on the residents of territory over which it had acquired 'sovereignty' and to accord them different classes of rights. Finally, Sovereigns had complete immunity for criminal conduct committed whilst Head of State.

These rules were beyond controversy in the mid-nineteenth century. They were supported by the leading writers of international law and widely observed in State practice.

Nonetheless, two strands of thought ascertainable in the proceedings of the trial of Bahadur Shah show that the supremacy of the notions of sovereign immunity and protected sovereignty was under challenge. Jurisprudential debate raged in the late nineteenth century on whether protected States should be accorded full rights and duties at international law, and absolute immunity for heads of state would begin to falter in the twentieth century. The emphasis in the trial on the 'titular' sovereignty held by the King of Delhi and suggestions that he should be held accountable because of the nature of the atrocities, while novel and unsustainable at law in 1858, heralded shifts in later thinking.<sup>47</sup>

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<sup>45</sup> Nationality is discussed in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>46</sup> Sovereign immunity is discussed in **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity** and **Chapter 12 The Overriding of Sovereign Immunity: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>47</sup> See **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, and **Chapter 12 The Overriding of Sovereign Immunity: Gravity of the Crimes and 'Titular' Sovereignty**, below.



### 1.1.3 The Doctrine of the ‘Equality of States’

The doctrine of the ‘Equality of States’, which was also central to nineteenth century international law, is found in this thesis to be pivotal to determining the lawfulness of jurisdiction over Bahadur Shah.

According to this doctrine, all States were equal in law regardless of power, size, or territory. The most colourful expression of this doctrine is to be found in Vattel’s comparison of giants and dwarfs, made in 1758:

Strength or weakness, in this case counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.<sup>48</sup>

‘Equality’ in this doctrine refers to “an equality of rights”. As Vattel explained, “[F]rom this equality it necessarily follows that what is lawful or unlawful for one Nation is equally lawful or unlawful for every other Nation.”<sup>49</sup> A key consequence of the doctrine highly relevant to this thesis was that no State could claim jurisdiction over another. Marshall CJ observed in 1825:

No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.<sup>50</sup>

The application of the doctrine is illustrated in *Mighell v Sultan of Johore* (1894), in which the Court upheld the immunity of a sovereign of a protected State.<sup>51</sup> At first instance, Wills J commented that the Sultan, though protected, “was still an independent sovereign” and that the case had to be “decided upon exactly the same considerations as if the ruler of some undoubted great Power – such as the King of Italy or the President of the French Republic”.<sup>52</sup> On appeal, Esher MR observed “the independent sovereign of the smallest state stands on the same footing as the monarch of the greatest”<sup>53</sup> and upheld the Sultan’s claim of immunity.

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<sup>48</sup> Vattel, above n 26, Introduction, s18, 7.

<sup>49</sup> *ibid* s19.

<sup>50</sup> *Antelope* (1825) 10 Wheat. 66, 122, cited in *Moore’s Digest of International Law* (1906), 1, s24, 62.

<sup>51</sup> (1894) 1 QB 149.

<sup>52</sup> at 153

<sup>53</sup> at 158.

This thesis explains in later chapters that the Kingdom of Delhi, as at 1857, was small, impoverished, and heavily dependant on Britain.<sup>54</sup> Nonetheless, according to the doctrine of the ‘Equality of States’, if recognised as a ‘State’ it would have a standing in law the equal of any other State, and would be entitled to the rights and duties which flowed under international law.<sup>55</sup> Political power was irrelevant to the capacity to enjoy rights.

But the doctrine was thought by some to be incongruous in the colonial era. The frustration of mid-nineteenth century Government of India officials with the effects of the doctrine is illustrated by a minute dated 8 November 1859 by Sir Charles Trevelyan, the Governor of Madras, appended to the report in *Moore’s Indian Appeals* of the celebrated case *Secretary of State for India in Council v Kamachee Boye Sahaba* (1859), “*The Rajah of Tanjore Case*”.<sup>56</sup> In that case, Lord Kingsdown had said:

The Rajah was an independent Sovereign of territories undoubtedly small, and bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company...<sup>57</sup>

Trevelyan commented:

Tanjore was not a Native State. The Rajah had neither people nor territory beyond the walls of his palace. He had no duties of Government to perform. He and his numerous dependants were a heavy charge upon the industrious portion of the population, without rendering any return. So far as any political effect was produced, it was decidedly injurious, because the arrangements kept alive pretensions which circumstances might at any time quicken into open hostility, as lately happened at Delhi.<sup>58</sup>

The substance of Trevelyan’s complaint was the absurdity of continuing to recognise these powerless ‘Sovereigns’ of tiny territories. The strength of the doctrine waxed and waned in subsequent years.<sup>59</sup>

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<sup>54</sup> See **Chapter 3 The ‘Titular’ King of Delhi**, below and **s6.4 Consequences of International Law of Statehood** in **Chapter 6 A Sovereign in International Law**, below.

<sup>55</sup> See **Chapter 6 A Sovereign in International Law**, below.

<sup>56</sup> (1859) 7 Moo Ind App 476. The minute set out how the government would distribute the property of the late Rajah in light of the opinion of the Judicial Committee.

<sup>57</sup> at 532.

<sup>58</sup> at 540.

<sup>59</sup> See for example, Gerry Simpson, *Great Powers and Outlaw States: unequal sovereigns in the international legal order* (2004).

## 1.2 The Application of International Law Outside Europe

Many of the British cases of the nineteenth century discussed in this thesis show that before the Rebellion, Britain regarded its relations with Sovereign States on the Indian sub-continent as being governed by international law. For example, the Judicial Committee of the Privy Council said of Bahadur Shah in a case highly significant to this thesis, *Raja Saligram v The Secretary of State for India in Council* (1872)<sup>60</sup> (emphasis mine):

The Government, when they deposed and confiscated the property of the late King [of Delhi], as between them and the King, did not affect to do so under any legal right. *Their acts can be judged of only by the law of nations....*<sup>61</sup>

As will be suggested in later chapters, the application of international law principles in this case was in keeping with British practice of the time.<sup>62</sup> But this conclusion must be reconciled with two contrary views sometimes expressed in texts of international law: that international law did not apply outside of Europe before the late nineteenth century; and that the kingdoms of the Indian sub-continent had no status in international law.

### 1.2.1 International Law and Asian States

Many of the nineteenth century texts of international law asserted that the law of nations did not apply to “uncivilized” nations. For example, Wheaton thought it was “limited to the civilized and Christian people of Europe or to those of European origin”.<sup>63</sup> He noted however that

recent intercourse between the Christian nations in Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom.<sup>64</sup>

Hall suggested “[S]tates outside European civilisation must formally enter into the circle of law-governed countries”.<sup>65</sup>

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<sup>60</sup> XII *Bengal Law Reports* (1872) 167. This case is discussed in **Chapter 4 A Recognised King**, below.

<sup>61</sup> at 184.

<sup>62</sup> See **Chapter 5 A Sovereign in English Law** and **Chapter 6 A Sovereign in International Law**, below.

<sup>63</sup> Wheaton, above n 28, 17.

<sup>64</sup> *ibid* 21.

<sup>65</sup> Hall above n 27, 43.

Some of the leading texts of the early twentieth century, such as Oppenheim, also stated that international law did not apply to non-European States before 1856.<sup>66</sup> These writers suggested that the conclusion on March 30 1856 of the *Treaty of Paris*, ending the Crimean War, made Turkey the first non-Christian power to be admitted to the law of nations.<sup>67</sup> Under the Treaty, the signatories agreed that Turkey should be “*admise à participer aux avantages du droit public et du concert européens*”.<sup>68</sup> Writing in 1910, Westlake suggested that “international society”, which “develops international law”, was “composed of all the states of European blood, that is, of all the European and American states except Turkey, and of Japan.”<sup>69</sup> He conceded that international law applied to Liberia, Congo and Abyssinia in the nineteenth century.<sup>70</sup>

However, Lindley, writing in 1926, thought that while this view was widely expressed in the early twentieth century, it derived little support from the classical writers of law:

Phillimore referred to the doctrine ‘that International Law is confined in its application to European territories’ as a detestable one, and he maintained that the *principles* of international justice do govern, or ought to govern the dealings with the infidel community; that they are binding, for instance, upon Great Britain in her intercourse with the native Powers of India; upon France with those of Africa; upon Russia in her relations with Persia or America; and upon the United States of North America in their intercourse with the native Indians.<sup>71</sup>

Smith, writing in 1932, pointed out that “[F]or many centuries Turkey had maintained diplomatic intercourse and concluded treaties with Great Britain and other European powers”.<sup>72</sup> He illustrated his point with Britain’s proclamation of neutrality during the Greek rebellion of 1821: “the official documents which accompany this intercourse make it quite clear that the general body of international law was considered to apply.”<sup>73</sup>

Alexandrowicz also took issue with the view that the *Treaty of Paris* marked the first application of international law to countries outside Europe.<sup>74</sup> He attributed the “*volte-face* in the literature of international law” to ideological changes in the eighteenth and

<sup>66</sup> John Westlake, *International Law* (2<sup>nd</sup> ed, 1910).

<sup>67</sup> For example, *Moore’s Digest*, above n 50, I, 9.

<sup>68</sup> Herbert Smith, *Great Britain and the Law of Nations* (1932), I, 16.

<sup>69</sup> Westlake, above n 66, I, 40.

<sup>70</sup> *ibid.*

<sup>71</sup> M F Lindley, *The Acquisition and Government of Backward Territory in International Law, being a Treatise on the Law and Practice relating to Colonial Expansion* (1926), 45-46.

<sup>72</sup> Smith, above n 68, I, 16-17

<sup>73</sup> *ibid.*

<sup>74</sup> C H Alexandrowicz, “Mogul Sovereignty and the Law of Nations” (1956) *Indian Year Book of International Affairs*, 318.

nineteenth centuries, such as “self-centredness” in Europe after the Congress of Vienna and the rise of positivism.<sup>75</sup>

Following from this scholarship, the better view is that State practice shows that the general body of international law was considered by some countries to apply to non-European states before 1856. Alexandrowicz, for instance, noted the extensive treaty practice of Portugal, France and Holland in the seventeenth and eighteenth centuries in relations with Asian countries.<sup>76</sup> Examples of British practice include relations between Britain and China in the eighteenth and nineteenth centuries (illustrated in the *Treaty of Nanking* of 1842),<sup>77</sup> Britain and Siam,<sup>78</sup> and Britain and the Fijian Islands.<sup>79</sup> Indeed, as Smith related:

Within the period covered by the present work no record can be found of any definite and authoritative action based upon the principle that non-Christian states as such lie outside the range of international law. There are various *obiter dicta*, both diplomatic and judicial, to the effect that the rules cannot be applied with the same rigidity in the case of non-Christian and uncivilised states, but the general application of the rules is not denied.<sup>80</sup>

The view taken by Smith is also born out by judicial decisions of the nineteenth century demonstrating that Britain regarded its relations with the kingdoms of the subcontinent as being governed by international law (see further below, **s1.2.2 Indian States and International Law**).

The debate on international law and Europe in the nineteenth century extends not only to the application of international law outside of Asia but to its content – was the body of law universalised in the nineteenth century essentially European law or did it reflect earlier Asian/European State practice?

For example, Grewe suggested that it was an essentially European law of nations which eventually included the United States of America after 1776, and the emancipated Spanish

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<sup>75</sup> Alexandrowicz, “Problems in the History of the Law of Nations”, above n 9, 6-7.

<sup>76</sup> *ibid* 5-6.

<sup>77</sup> Smith, above n 68, 17, Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967). For example, in *Rustomjee v The Queen* 2 QBD 69 (1876), the Court of Appeal said on the *Treaty of Nanking*: “[I]t is a treaty between herself [the Queen] as sovereign, and the Emperor of China as sovereign”, at 74.

<sup>78</sup> Nussbaum, above n 17, 190.

<sup>79</sup> Arnold McNair, *International Law Opinions* (1956), I, 156.

<sup>80</sup> Smith, above n 68, 14.

and Portuguese colonies in Latin America.<sup>81</sup> The admission of Liberia in 1825 and Haiti in 1848 to the “international legal community” were important precedents, leading the way for the inclusion of Asian States by the end of the nineteenth century.<sup>82</sup> The nineteenth century, he suggested, saw the universalisation of the “formerly Christian-European law of nations”<sup>83</sup> - in short it remained a European body of law.

In contrast, Alexandrowicz, a pioneer in the study of Asia and international law, argued that international law was applied before the nineteenth century to relations between Asian States and European States but was gradually regionalised to become an essentially European body of law. For example, he noted that “[A]ccording to Gentili the law of nations applied to all independent nations of the world, whether they were Christian or not”; and that Gentili had quoted instances of Asian State practice in relation to the enjoyment of full sovereignty by Non-Christian States.<sup>84</sup> In Alexandrowicz’s view,

diplomatic intercourse between England and the Mogul Empire was established on the assumption that both Powers were members of the family of nations and that there was no need of mutual formal recognition.<sup>85</sup>

Nussbaum suggested that while there was no fusion of Asian and European ideas, and European ideas prevailed in form and substance,<sup>86</sup> the process of territorial expansion of international law in itself divested the law of nations of its ‘European’ character’.<sup>87</sup>

The extent to which international law applied outside Europe in the nineteenth century is still subject to debate. Nonetheless, it is clear that it was British practice to apply international law to countries outside Europe and, at least until the Rebellion, to kingdoms of the Indian subcontinent. The key role played by recognition in defining which nations would be able to participate in the ‘society of nations’ of the nineteenth century, including States outside of Europe, is discussed in the **Chapter 6 A Sovereign in International Law**, below.

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<sup>81</sup> Wilhelm Grewe, *The Epochs of International Law* (2000 [1984]), 462.

<sup>82</sup> *ibid* 463. Alexandrowicz noted that Liberia and Haiti had Christian populations, implying that their “admission” to the law of nations was not a radical departure from previous practice: “Some Problems in the History of the Law of Nations”, above n 9, 4.

<sup>83</sup> Grewe, above n 81, 465.

<sup>84</sup> Alexandrowicz, “Mogul Sovereignty”, above n 74, 316-317.

<sup>85</sup> *ibid* 318.

<sup>86</sup> Nussbaum, above n 17, 191.

<sup>87</sup> *ibid* 191.

### 1.2.2 Indian States and International Law

As noted above, many of the cases discussed in this thesis show that before the Rebellion, Britain regarded its relations with Sovereign States on the Indian sub-continent as being governed by international law. This was in keeping with British practice of viewing its relations with countries outside of Europe as being governed by international law.

British practice can be identified, for example, in the decisions of British courts on the Act of State doctrine, starting in 1793. As is discussed in **Chapter 4 A Recognised King**, below, the Act of State doctrine was a product of British constitutional law. Under that law, powers exercised by the Government under the prerogative were not subject to judicial review. In contrast, powers exercised under law were subject to judicial review. Foreign relations were conducted under the prerogative and were therefore not open to scrutiny in the courts. This meant that an act of the Government taken under the prerogative could not be challenged in the judicial system. To establish that an act of government was not open to scrutiny, that it was an ‘Act of State’, it would have to be shown that the act in question was undertaken under the prerogative. In the following cases, the prerogative in question was the right to conduct foreign relations. Accordingly, to plead Act of State, and thus to oust the jurisdiction of the court, it had to be established that the act was the exercise of power in the domain of foreign, not municipal, relations.<sup>88</sup> In these Act of State cases, it was the actions of the EIC Government which were under challenge. The Courts characterised the EIC as an agent of the British State, exercising sovereign powers on behalf of Britain.<sup>89</sup>

In *Nabob of the Carnatic v The East India Company* (1793),<sup>90</sup> the Lord Commissioner Eyre stated that the treaty between the Nabob of the Carnatic and the EIC was

entered into with them, not as subjects, but as a neighbouring independent state, and is the same thing, as if it was a treaty between two sovereigns; and consequently is not a subject of private, municipal jurisdiction.<sup>91</sup>

<sup>88</sup> The Act of State doctrine is discussed in **Chapter 4 A Recognised King** and **Chapter 5 A Sovereign in English Law**, below.

<sup>89</sup> The status in law of the EIC is discussed further in **s3.1 The Decline of the Mughal Empire and Acquisition of Territory by the EIC** in **Chapter 3 The ‘Titular’ King of Delhi**, below.

<sup>90</sup> (1793) 2 Ves Jun 56.

<sup>91</sup> at 59.

In *Elphinstone v Bedreechund* (1830),<sup>92</sup> the position of the Peishwa was that of a Sovereign, and a seizure of property was made “if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place and the person”.<sup>93</sup> As noted above,<sup>94</sup> in the *Rajah of Tanjore Case* (1859), the Judicial Committee noticed the sovereignty of the Rajah of Tanjore.<sup>95</sup> Similarly in the *Ex-Rajah of Coorg v The East India Company* (1860),<sup>96</sup> Sir John Romilly MR noticed the sovereignty of the Rajah of Coorg until Coorg was conquered in 1834. In *Sirdar Bhagvan Singh v Secretary of State for India* (1874)<sup>97</sup> the Judicial Committee noticed the Sovereignty of the Sikh Kingdom until it was annexed in 1849: “it is a matter of history that the territory was conquered about 1849” and quoted a proclamation issued by the Government “the Governor-General of India has declared, and hereby proclaims, that the Kingdom of the Punjaub is at an end, and that all the territories of Maharajah Dulip Singh are now and henceforth a portion of the British Empire in India”.<sup>98</sup> In *Doss v Secretary of State for India in Council* (1875),<sup>99</sup> the Court noticed the Sovereignty of the Kingdom of Oudh until the Kingdom was annexed in 1856. The Court considered itself bound to notice judicially “a very important event historically”, “the annexation of the territories of the King of Oudh to the territories of India”.<sup>100</sup>

In these cases, the Court did not query the status of these States as anything other than ‘States’ and used the language of international law in relating the facts, viz. “sovereign”, “territories”, “conquest”, and “annexation”. In all these cases, the Act of State doctrine was applied because the facts established that the acts were indeed within the domain of foreign relations. The doctrine of non-justiciability of acts of the EIC in the exercise of its sovereign powers in “annexing” the territories of Indian rulers in this line of cases was

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<sup>92</sup> (1830) 1 *Knapp* 316.

<sup>93</sup> at 361.

<sup>94</sup> See s1.1.3 **The Doctrine of the ‘Equality of States’**, above.

<sup>95</sup> (1859) 7 Moo Ind App 476; 19 ER 388, at 408. See s1.1.3 **The Doctrine of the ‘Equality of States’**, above.

<sup>96</sup> (1860) 30 LJ Ch 226.

<sup>97</sup> (1874) LR 2 Ind App 38.

<sup>98</sup> at 42.

<sup>99</sup> (1875) XIX LR 509.

<sup>100</sup> (1875) 19 LR 509 at 530.



approved in the leading cases *Cook v Sprigg* (1899),<sup>101</sup> *West Rand Central Gold Mining Company v R* (1905)<sup>102</sup> and more recently in *Buttes Gas & Oil v Hammer* (1982).<sup>103</sup>

British practice until the Rebellion of recognising Indian sovereigns is also ascertainable in the treaties concluded by the EIC in the first half of the nineteenth century, such as Scindia (the *Treaty of Salkae*), Holkar, Hyderabad, Alwar, Bhopal, Udaipur, and Kutch.<sup>104</sup> For example, Article One of the *Treaty of Protection with Udaipur*, concluded in 1818, provided (emphasis mine): “There shall be perpetual friendship alliance and unity of interests between *the two states* from generation to generation and the friends and enemies of one shall be friends of enemies of both.” Article II provided: “The British Government engages to protect the principality and territory of Oudepore”.<sup>105</sup> Article III of the *Treaty of Alliance between the East India Company and his Highness the Maharao of Kutch*, concluded in 1819, provided: “The infant son of the late Rao Bharmuljee having been unanimously elected by the Jhareja Chiefs to succeed to the vacant throne, he and his legitimate offspring are accordingly acknowledged by the Honourable Company as the lawful sovereigns of Kutch under the name and title of Maharaja Mirzo Rao Dessuljee.”<sup>106</sup> The language of these treaties, like the language of the Courts, was unmistakably that of international law: “territories”, “States”, and “Sovereign”.

However, the British Government perceptions of the status of the kingdoms of the Indian sub-continent, estimated at around six hundred in the 1850s,<sup>107</sup> changed after the Rebellion. By the end of the nineteenth century, the Government would say that it did not regard the kingdoms of the Indian sub-continent as having any international status<sup>108</sup> and by the 1920s, that they had *never* held any international status.<sup>109</sup> Some international lawyers,

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<sup>101</sup> [1899] AC 572.

<sup>102</sup> (1905) 2 KB 391.

<sup>103</sup> [1982] AC 888. Wilberforce LJ noted that the doctrine of non-justiciability, expressed clearly in *Duke of Brunswick* as being that “the courts of England will not adjudicate upon acts done abroad by virtue of sovereign authority”, was carried by the *Rajah of Tanjore Case* and *Cook v Sprigg* “into a wider area of transactions in the international field”, at 932.

<sup>104</sup> D K Sen, *History of the Indian States, Their Status, Rights and Obligations* (1985 [1930]), 199-201.

<sup>105</sup> *ibid* 214.

<sup>106</sup> *ibid* 217.

<sup>107</sup> H H Dodwell, *Cambridge History of India* (1962, [1932]) VI, 489.

<sup>108</sup> The Manipur Declaration, 1891, see further below.

<sup>109</sup> The Butler Committee, 1928, see further below.

such as WE Hall, voiced similar views<sup>110</sup> and recent editions of Oppenheim claim that “the Indian vassal States of Great Britain” had “no international relations whatever between themselves and foreign states.”<sup>111</sup> Smith also suggested that the states were “part of the British Empire” and therefore did not “come directly within the scope of international law”, but qualified his remark by saying that the Government’s attitude on this issue had not “varied since the consolidation of the Indian Empire in its present form”.<sup>112</sup>

As noted in the **Introduction** to this thesis, a legal issue is to be determined by the law prevailing at the time of the events giving rise to the legal issue. This thesis is concerned with the legal position of an Indian sovereign, the King of Delhi, as at 1857-1858. Statements by the Government in 1891 or 1928 do not affect the legal position as it was in 1857-58. Further, these statements were made in relation to the Indian States extant at the time of making the statement whereas the Kingdom of Delhi was extinguished in 1857.

Accordingly, later statements made by the Government on the status in law of the Indian kingdoms do not cast doubt on their status in law as at 1857-58, clearly indicated in judicial decisions of Britain’s highest courts.

However, as the attention paid to these later statements has tended to obscure the kingdoms’ quite different position until at least 1858, it is necessary to examine briefly later views on their status at law.

It is generally accepted that, after 1858, many of the Kingdoms of the sub-continent became members of the British Empire”.<sup>113</sup> Copland’s study of the princely states explains that the Rebellion was a water-shed in relations with the Crown.<sup>114</sup> The Rebellion generated two insights which created a “new-found affection for the princes”: the territorial expansion of the EIC had provoked hostility by some rulers; the support of other rulers had been crucial to the success of the British in suppressing the revolt.<sup>115</sup> A proclamation by the Queen marking the transfer of territories to the Crown pledged to

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<sup>110</sup> Hall stated that the Indian States were not subject to international law, above n 27, 29, Note 1.

<sup>111</sup> *Oppenheim’s International Law* (8<sup>th</sup> ed), s90-91, 189, Note 1; (9<sup>th</sup> ed, 1979), 267 Note 3 190.

<sup>112</sup> Smith, above n 68, 40.

<sup>113</sup> Dodwell, above n 107, 494-5.

<sup>114</sup> Ian Copland, *The princes of India in the endgame of Empire, 1917-1947* (1997), 16.

<sup>115</sup> *ibid* 16-17.

“respect the rights, dignity and honour of the native princes as our own” and promised that “we desire no extension of our present territorial possessions”.<sup>116</sup>

After 1858, no State on the sub-continent was annexed by Britain.<sup>117</sup> The government however took control, for example, of post and telegraph networks and assumed jurisdiction over railway lines passing through princely states. Freedom to import weapons was curtailed, and a right to employ Europeans was removed.<sup>118</sup>

By 1891, statements from British officials were explicit that these States had disappeared from the international stage. In that year, the Government of India placed the ruler of the State of Manipur on trial. The Defence Counsel argued that “the State of Manipur was independent and that its rulers were not liable to be tried for waging war against the Queen Empress...”.<sup>119</sup> A review conducted by the Governor-General explained, in a statement known subsequently as ‘the Manipur Resolution’:

The Governor-General cannot admit this argument...it must be taken to be proved conclusively that Manipur was a subordinate and protected state which owed submission to the Paramount Power; and that its forcible resistance to a lawful order, whether it be called waging war, treason, rebellion, or by any other name, is an offence the commission of which justifies the exaction of adequate penalties from individuals concerned in such resistance, as well as from the state as a whole. The principles of international law have no bearing upon the relations between the Government of India as representing the Queen-Empress on the one hand, and the Native States under the suzerainty of Her Majesty on the other....<sup>120</sup>

In 1928, a government committee appointed to report on “the relationship between the Paramount Power and the Indian States”<sup>121</sup> stated that “none of the states had ever had international status”:

It is not in accordance with historical fact that when the Indian States came into contact with the British Power they were independent, each possessed of full sovereignty and of a status which a modern international lawyer would hold to be governed by the rules of international law. In fact, none of the States ever held international status. Nearly all of them were subordinate or tributary to the Mughul Empire, the Mahratta supremacy, or the Sikh kingdom and dependant on them. Some were rescued, others were created by the British.<sup>122</sup>

<sup>116</sup> Sen, above n 104, Appendix D, 196.

<sup>117</sup> Copland, above n 114, 17. Though some rulers were still deposed (such as the rulers of Jhalawar, Panna, Indore, and Baroda).

<sup>118</sup> *ibid* 20.

<sup>119</sup> Smith, above n 68, 42.

<sup>120</sup> Resolution of 21 August 1891, *ibid* 42-43.

<sup>121</sup> The Indian States Enquiry Commission, also known as the ‘Butler Committee’ was appointed December 1927: *ibid*, 40. The committee was established following criticism of a report on relations between the Government of India and the Nizams of Hyderabad: P Mehra, *Dictionary of Modern Indian History 1707-1947* (1985), 121.

<sup>122</sup> Excerpted in Sen, above n 104, 198-99.

From the turn of the century, the status of the kingdoms of the sub-continent, often termed the 'Indian Native States' and 'the Princely States of India', became a vexed issue in the context of moves towards Dominion status.

Close examination of the commentary on the status in law of the kingdoms in the late nineteenth and early twentieth century shows that the leading international lawyers of the time, such as Wheaton, Westlake and Lindley, thought that international law had originally governed relations with these States but their standing had changed in the second half of the nineteenth century from States at international law to states with no international standing.<sup>123</sup> The idea was that "[A]t one time in Indian history...some of the States enjoyed sovereign rights and were, as such, distinct personalities in international Law." But "during the course of British rule in India numerous changes have taken place in the relationships of the states to the Crown, such as the surrender of external policy".<sup>124</sup>

For example, Wheaton doubted that the Manipur Resolution was correct in law or observed in practice.<sup>125</sup> Westlake suggested Oudh was annexed on the application of principles of international law "which it was necessary to apply to independent states in India"<sup>126</sup> and went on to say "[T]he native states have since lost the character of independence, not through any epoch-making declaration of British sovereignty, but by a gradual change in the policy pursued towards them by the British Government".<sup>127</sup> Lindley similarly suggested that while in the early twentieth century, international law had no application to the kingdoms of the subcontinent, during EIC rule, "the relations between Great Britain and the Native States...were not considered to be outside the purview of the Law of Nations".<sup>128</sup> He illustrated his point with a treaty concluded by the EIC and the Rajah of Nagpore in 1826. The treaty described an attack made by the previous Rajah upon British troops as having been committed "in violation of pure faith and the laws of nations".<sup>129</sup> Others however argued that treaties concluded with those states could not be compared

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<sup>123</sup> See also statements collected by Sen, *ibid* 56-57.

<sup>124</sup> L Sundaram, "The International Status of India", *Grotius Society* 17 (1931) 35-51, 47 and L R Sethi, "India in the Community of Nations", 14 *Canadian Bar Review* (1936), 46.

<sup>125</sup> Quoted by Sen, above n 89, 51-52.

<sup>126</sup> H Lauterpacht, *The Collected Papers of John Westlake on Public International Law* (1914), 204-5.

<sup>127</sup> *ibid* 205.

<sup>128</sup> Lindley, above n 71, 199.

<sup>129</sup> *ibid*.

with European treaties, suggesting they were instruments of British constitutional law, not of international law.<sup>130</sup> Hall thought the “conditions of English sovereignty” had changed since these treaties were concluded.<sup>131</sup>

Keith also considered that in the first half of the nineteenth century relations with the Indian kingdoms were governed by international law, but, unlike the other writers, linked their altered status in law in the second half of the nineteenth century with the deposition of the King of Delhi:

The disappearance of the Emperor was an event of greater importance in Indian history than is commonly admitted. It rendered the direct sovereignty of the Crown natural as well as inevitable, and it rendered the Crown entitled if it so desired to make use of all of the Mogul prerogatives which the Emperor still claimed, though he could not effectively make them operative. The tone of the British contentions from this moment is decisively changed. Nothing more is heard of international law as regulating the relations of the Company and the states...All are now dependant, because the Emperor had been, or had claimed to be, titular superior of every Indian state.<sup>132</sup>

Similarly, the Butler Committee statement can also be read as implying that Mughal sovereignty, at least, was recognised by Britain, for the Committee’s reasoning was that it was the subordination of the Indian States to, *inter alia*, the ‘Mogul Empire’, which gave them an earlier non-international status.

The commentary noted above arose in the context of ascertaining the status of the kingdoms of the sub-continent extant at the end of the nineteenth century, at least fifty years after the extinction of the Kingdom of Delhi.

A change in the perceived status of the Indian states was probably, as Westlake suggested (above), the result of a gradual change in the policy by the British Government. It is incorrect to say that they never had any international status – judicial decisions show quite clearly that they had held an international status until 1858. But, by the end of the nineteenth century, the political interests of the Government were evidently served by the policy of “Paramountcy” – in essence that the Indian States were bound to obey Britain as “the rightful superior”<sup>133</sup> – and not by a policy of recognising the sovereignty of these

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<sup>130</sup> For example, Dodwell above n 98, 489 to 492. See also **s11.2.3 Immunity of Protected Heads of State in Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>131</sup> Hall, above n 27, 29, Note 1. In *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (1894), Hall suggested that the “turning point” was the proclamation of Queen Victoria as Empress of India (1876), 205-6, Note 1.

<sup>132</sup> A B Keith, *A Constitutional History of India 1600 -1935* (2<sup>nd</sup> ed, 1937), 125.

<sup>133</sup> Westlake, *Collected Papers*, above n 126, 210.

States. As is discussed in **Chapter 5 A Sovereign in English Law**, below, recognition was always a political decision for the government of the day. The government chose to recognise Indian kingdoms earlier in the century because it was politically convenient to do so. From the late nineteenth century onwards, the government, for the same reason of convenience, chose not to accord recognition of the kingdoms as 'States', although, as will be discussed in **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, it nonetheless accorded the rulers of these States some of the rights flowing from an international status.

### **1.3 Conclusions**

This chapter has highlighted the concept of Sovereignty, and the related doctrine of the 'Equality of States', as the touchstone of the nineteenth century rules of international law applied in this thesis' assessment of jurisdiction over Bahadur Shah. The chapter has also shown that, despite debate of some writers of international law, as a matter of State practice, international law applied between European States and States of Asia, including between Britain and the kingdoms of the sub-continent, at least in the first half of the nineteenth century.

## Chapter 2 Overview of the Trial

### 2.0 Introduction

Bahadur Shah's trial opened on 27 January 1858. The trial was held in the *diwan-i-khas*, the Emperor's audience hall in the Lal Qila. A sketch of the *diwan-i-khas* c1858 by a British officer, Major Turnbull, is overleaf (**Figure II**).

This chapter reviews the key features of the court-martial of Bahadur Shah. As this thesis is concerned with the validity at international law of the exercise of jurisdiction over Bahadur Shah, there is no attempt to assess the conduct of the trial against British military law.

### 2.1 The General Court-Martial

Bahadur Shah was tried by a military commission composed of British officers of the EIC's Bengal Army and the British Army.<sup>1</sup>

The trial commenced with a reading out of the orders convening and forming the Court and the appointment of a President of the Court. Bahadur Shah was invited to challenge the officers appointed to sit on the Military Commission and is recorded as having made no objection.<sup>2</sup>

The Military Commission trying Bahadur Shah was constituted under *Act XIV of 1857*, enacted by the Government of India shortly after the outbreak of rebellion.<sup>3</sup> This Act authorised the convening of General Courts-Martial (GCM) to try civilians accused of offences established by *Acts XI* and *Act XIV of 1857*.<sup>4</sup> Under *Act XIV*, five or more officers were to be appointed to the GCM, as determined by the officer appointing the court-martial.<sup>5</sup> The Military Commission trying Bahadur Shah was nominated by General

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<sup>1</sup> A list of the court personnel is at *Appendix 2*.

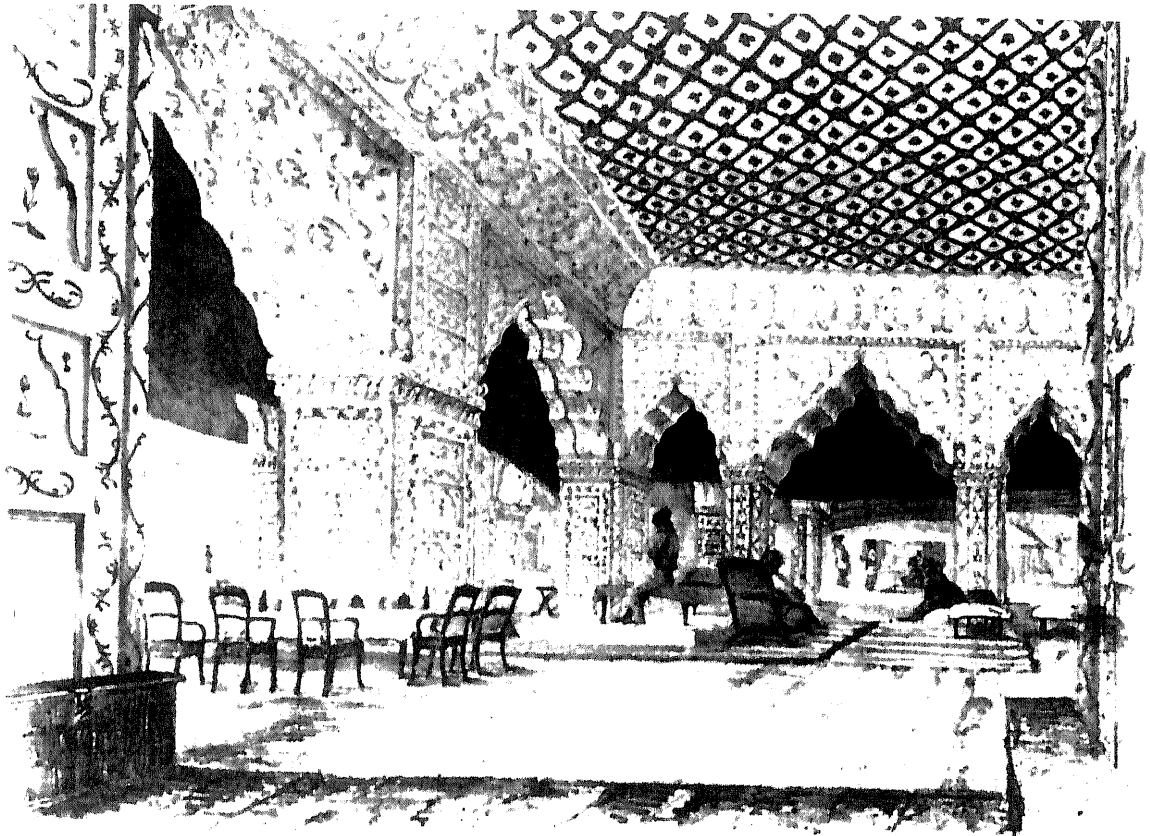
<sup>2</sup> *Proceedings*, I.

<sup>3</sup> *Act XIV of 1857*, one of a series of Acts passed in 1857 in response to the Rebellion, is reviewed in **Chapter 9 The Rebellion Laws**, below.

<sup>4</sup> A list of Rebellion offences is at *Appendix 7*.

<sup>5</sup> Section IV, *Act XIV of 1857*.

Figure II: Sketch of the *diwan-i-khas*, Delhi, c1858.





Nicholas Penny, Commander of the Delhi Field Force.<sup>6</sup> As the officer in command of the troops, he held authority under *Act XIV* to appoint a GCM.<sup>7</sup> He appointed five officers to the Military Commission trying Bahadur Shah: three officers of the British Army; and two of the Army of the EIC; and appointed a President of the Court.<sup>8</sup>

The President of a court-martial was responsible for “the order and regularity of its procedure”.<sup>9</sup> He did not conduct the trial.<sup>10</sup> Key duties included ensuring that any discussion was noted down;<sup>11</sup> that no “reproachful words” were used to witnesses or prisoners and that all attending the Court were treated with respect.<sup>12</sup> British military tradition also obliged the President to give “scrupulous attention to all questions of jurisdiction, whether or not they are urged at the hearing upon the attention of the Court”.<sup>13</sup>

The *Proceedings* identified “Lieutenant-Colonel Dawes of the Artillery” as President.<sup>14</sup> The Members of the Military Commission were Major Palmer, 60th Regiment of Foot (the King’s Royal Rifle Corps), Major John P Redmond (61st Regiment of Foot (South Gloucestershire)), Major Sawyers (6th Dragoon Guards (‘the Carabineers’)), and Captain Octavius Rothney (the 4<sup>th</sup> Seikh Infantry). Members of a Military Commission were “judges of the Military Court”.<sup>15</sup>

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<sup>6</sup> The British military force which captured Delhi in September 1857 was known as the ‘Delhi Field Force’. See further **Chapter 7 The Imprisonment of the King of Delhi in 1857**, below.

<sup>7</sup> Section IV, *Act XIV of 1857*.

<sup>8</sup> *Act XIV* was silent on the method of appointment of a President to a GCM. According to Article 93 of the Bengal Articles of War, the senior officer sat as President without being so appointed by warrant.

<sup>9</sup> Charles M Clode, *The Administration of Justice under Military and Martial Law* (1872), 109.

<sup>10</sup> William Hough, *Precedents in Military Law: including The Practice of Courts-Martial; the Mode of Conducting Trials; the Duties of Officers at Military Courts and Inquests, Courts of Enquiry, Courts of Requests etc etc* (1855), 703.

<sup>11</sup> *ibid* 784.

<sup>12</sup> Clode, above n9, 109.

<sup>13</sup> *ibid* 116. Hough suggested that members of a Military Commission would only assume their positions if they were certain the Commission had jurisdiction: *Precedents*, above n 10, 709, 780.

<sup>14</sup> According to the *Press List of the Mutiny Papers* (1921), i, a Lieutenant-Colonel Dundas of the Bengal Horse Artillery was appointed President. According to the Martin account, on the third day of the trial, a letter was handed to the Prosecutor from Brigadier Longfield “in which he stated that, having been appointed president of the commission for the trial of the king, he requested to know at what time the court assembled. The Court then adjourned.” Martin, *The Indian Empire* (1859), 163. Hereinafter “The Martin Account”. This incident is not mentioned in the *Proceedings* nor was any change in personnel noted. Under British military law, errors in appointment were “a legal flaw in the constitution of the court”: Hough, above n10, 678. Such errors would make the proceedings “null and void” unless identified before confirmation: Robert Carey, *Military Law and Discipline* (1877), 88.

<sup>15</sup> Hough, above n 10, 793.

Courts-martial were open courts and seats were allowed.<sup>16</sup> The trial of Bahadur Shah was open to the public, for the Martin account<sup>17</sup> mentions that when witnesses had testified about the massacre of around fifty women and children in the Palace at Delhi:<sup>18</sup> “[T]here was a larger number of listeners than usual in court on this day; and the prisoner appeared the least interested person present.”<sup>19</sup> The Court usually sat from 11 am to 4 pm. There is no indication in the *Proceedings* that the Court adjourned for lunch. British courts-martial often adjourned at two o’clock “for the convenience of members” but in India, “some members bring a little refreshment with them, and a little wine or beer.”<sup>20</sup>

No specific procedural law was enacted to govern the conduct of military commissions with jurisdiction over rebellion offences. On construction of the Rebellion legislation, the Bengal Articles of War, enacted in 1848 and amended in May 1857, applied to all rebellion trials conducted by military commissions in Bengal, including court-martial of civilians.<sup>21</sup> British military custom would also have governed the conduct of Rebellion courts-martial, for Articles of War were not a detailed manual for running a court-martial.<sup>22</sup> In British military practice of the time, Articles of War were supplemented by custom, set out in privately authored military textbooks.<sup>23</sup>

In this thesis, the term ‘British military law’ extends to both the Bengal Articles of War and established British military custom.

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<sup>16</sup> *ibid* 778.

<sup>17</sup> On Martin’s account of the trial, see **Note on the Trial Proceedings**, above, and **s2.2 The Record of Proceedings**, below.

<sup>18</sup> See further **s2.3 The Charges** and **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>19</sup> The Martin Account, 169.

<sup>20</sup> Hough, above n 10, 786, Note 5.

<sup>21</sup> See **s9.2.5 Key Elements of the Rebellion Laws** in **Chapter 9 The Rebellion Laws**, below.

<sup>22</sup> The Bengal Articles of War dealt with contempt of court, arrest, place of the trial, powers of the Commander-in-Chief, constitution and powers of a District, General, Regimental and Detachment Courts-Martial, confirmation and commutation of sentence, powers of the convening officer, execution of sentences, the form of proceedings, manner of voting, affirmations, summoning of witnesses, powers and duties of the Provost Marshal and courts-martial conducted by European Officers.

<sup>23</sup> See discussion of military law texts in the **Introduction** to this thesis, above.

## 2.2 The Record of Proceedings

The text of the *Proceedings* is not verbatim and follows the standard form of records of proceedings of nineteenth century British courts-martial – a *pro forma* record identifying the parties, the charges, invitations to challenge and to make a plea, and the questions and answers of witnesses.<sup>24</sup>

The *Proceedings* is edited, with occasional explanatory footnotes. For example, a letter labelled as having been written by Bahadur Shah contains the sentence: “let me have my answer, and I shall swallow a diamond and kill myself”. A footnote states:

that is, literally: ‘Tell me plainly that you do not intend to heed my wishes and I shall swallow a diamond and go to sleep’. It is a prevailing idea in India that swallowing a diamond is an effectual means of suicide.<sup>25</sup>

Some textual notes contain commentary. For example, a document is annotated in the *Proceedings* as:

Address from Mirza Moghul, on the part of the King, attested with the official seal of the Commander-in-Chief, rambling and unconnected, and from the style appearing to have been written from the King’s dictation, dated 9<sup>th</sup> August 1857.<sup>26</sup>

How accurate was the *Proceedings* as a record of the trial?

As noted earlier,<sup>27</sup> three similar non-official, first-hand accounts of the trial are commonly cited additional sources of the trial. The most detailed first-hand account of the trial is in Montgomery Martin’s *The Indian Empire* (hereinafter referred to as ‘the Martin account’).<sup>28</sup> Two shorter accounts paraphrasing the Martin account are contained in Ball’s *The History of the Indian Mutiny*<sup>29</sup> and in *Chambers’ History of the Revolt in India*.<sup>30</sup>

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<sup>24</sup> The requirement to prepare a record of proceedings is implicit in the Articles 74 and 94 of the Bengal Articles of War. Article 74 is concerned with the constitution of a GCM. The Article provides in part “...no sentence of a general court-martial shall be put in execution until after a report shall have been made of the whole proceedings to the Commander-in-Chief...” Article 94 deals with revision of sentences. Where not all members of the Commission are present when revising a sentence, “the circumstances are to be duly certified on the face of the proceedings”. Read together, there was a clear legislative requirement to make a record of the proceedings.

<sup>25</sup> *ibid* 22.

<sup>26</sup> *ibid* 22

<sup>27</sup> See **Note on the Trial Proceedings** and the **Introduction** to this thesis, above.

<sup>28</sup> Montgomery Martin, *The Indian Empire*, III, n.d. [1858?].

<sup>29</sup> Charles Ball, *The History of the Indian Mutiny* (1981 [n.d 1859?]).

<sup>30</sup> *Chambers’ History of the Revolt in India and the expedition to Persian, China and Japan 1856-7-8* (1859).

A comparison of the texts reveals significant differences between the *Proceedings* and the Martin account.

First, the Closing Address<sup>31</sup> of the Prosecutor appears in the *Proceedings* only. It is not mentioned in the Martin account.

Second, some material appears in the Martin account only. In particular, as noted above, according to the Martin account, Bahadur Shah's *vakeel*<sup>32</sup> disputed the authority of the Court to try Bahadur Shah. His statement of disputation of jurisdiction does not appear in the Ball and Chambers' versions. Similarly, discussion on Defence Counsel's repeated refusal to submit a defence appears in the Martin account only. The Martin account also includes commentary of the Prosecutor which does not appear in the *Proceedings*. For example:

Each paper, as it was read, was shown to the prisoner's vakeel; and thus the business of the court proceeded up to about 1 o'clock PM, when a document, translated into English was read – apparently a remonstrance from one Nubee Bux Khan to the prisoner, urging him to reject the request of the army for permission to massacre the European women and children confined in the palace. The writer submitted that such massacre would be contrary to the Mohammedan religion and law; and stated, that unless the army could procure a futwa,<sup>33</sup> it should not be put into execution. This document, the government prosecutor informed the court, was the only one among the heap before him in which the spirit of mercy and kindness to Europeans could be traced; and it was remarkable, that it was one of the very few upon which the prisoner had not entered some remarks.<sup>34</sup>

The Ball account also contains references to Bahadur Shah often speaking during the proceedings. For example:

During the trial the king displayed a mingled silliness and cunning that revealed much of his character. Sometimes, while the evidence was being taken, he would coil himself up on his cushion and appear lost in the land of dreams. Except when anything particular struck him, he paid, or appeared to pay, no attention whatever to the proceedings. On one of the days he was aroused from sleep, to reply to a question put by the court. Sometimes he would rouse up as if by some sudden impulse, and make an exclamation in denial of a witnesses' statement.....Once, when the intrigues of Persia were under notice, he asked whether the Persians and the Russians were the same people.<sup>35</sup>

<sup>31</sup> See further s2.10 **The Closing Address**, below.

<sup>32</sup> *Vakeel*: A person vested with authority to act for another, an authorised public pleader in a court of justice. See s2.6 **The Appointment of Defence Counsel**, below.

<sup>33</sup> *Fatwa*: A legal opinion.

<sup>34</sup> The Martin Account, 162.

<sup>35</sup> Ball, above n 29, 177.

On the twelfth day of the trial, when witnesses testified on a murder of British officers and civilians on 11 May in the Palace at Delhi,<sup>36</sup> the Martin account said “[T]he prisoner was more lively than usual; he declared his innocence of everything several times and amused himself by twisting and untwisting a scarf round his head and occasionally asking for a stimulant”.<sup>37</sup>

In contrast, the *Proceedings* records Bahadur Shah speaking only once during the trial. The witness Jat Mall, ‘newswriter to the Lt-Governor at Agra’, testified that the Fakir Hasan Askari, a Sufi healer, had interpreted a dream to the effect that the Persians would invade and ‘restore’ Bahadur Shah to his throne.<sup>38</sup> Jat Mall said that Hasan Askari had claimed to have “miraculous gifts from heaven, the gift of prophecy, the power of interpreting dreams”.<sup>39</sup> According to the *Proceedings*:

The prisoner here voluntarily declares his belief that Hasan Askari did really possess the powers here attributed to him.<sup>40</sup>

This is the sole utterance of Bahadur Shah recorded in the *Proceedings*. The Martin account depicts Bahadur Shah as somewhat removed from the proceedings, describing him as “dozing or contemplating his son” while documents were read aloud on the first day of the trial.<sup>41</sup> Neither Bahadur Shah nor his son “appeared to be much affected by their position, but, on the contrary, seemed to look upon the affair as one of the necessities of their destiny”.<sup>42</sup> Bahadur Shah appeared

unmindful of what was passing around. Occasionally, however, when a particular passage was read from any of the documents, the dull eye might be seen to light up, and the bowed head would be raised to catch every word.<sup>43</sup>

Third, there are minor differences between the *Proceedings* and the Martin account in style, tone and language. For example, a sentence in an *akhbar*<sup>44</sup> extracted in the *Proceedings* is

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<sup>36</sup> Bahadur Shah was not charged with murders committed on 11 May in Delhi. However, these deaths were examined in detail in the trial. See further s2.3 **The Charges** and **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>37</sup> The Martin Account, 168.

<sup>38</sup> A list of witnesses is at *Appendix 3*.

<sup>39</sup> *Proceedings*, 71.

<sup>40</sup> *ibid.*

<sup>41</sup> The Martin Account, 162.

<sup>42</sup> *ibid.*

<sup>43</sup> The Martin Account, 163.

<sup>44</sup> *Akhbar*: newsletter. “[N]ews, intelligence, a newspaper; especially the written intelligence of the proceedings of Native Courts and Princes, circulated to other Courts and Princes by their appointed agents –

translated as “shouting cheers for the success of their religion” and in the Martin account, it is translated as “with shouts of *hyderee*<sup>45</sup> (usually exclaimed on a victory)”.<sup>46</sup> The differences are probably to be accounted for by the former being an official document tabled before the Parliament and the latter being contained in a popular history.

The omission of this material from the *Proceedings* accords with military requirements, for the record of the proceedings was *pro forma* – the format was limited to Opening and Closing Addresses, questions put to the prisoner and the prisoner’s answers. The additional detail in the Martin account is however useful for the light it sheds on Bahadur Shah’s role in, and attitude towards, the trial. Further, as noted in the **Introduction** to this thesis, additional commentary can be relevant to determining the rightfulness of jurisdiction – statements may show submission to jurisdiction or, conversely, rejection of the proceedings.<sup>47</sup>

### 2.3 The Charges

The four charges laid against Bahadur Shah were read out on the first day of the trial.<sup>48</sup>

In essence, Charge One alleged that he was accessory to mutiny and to rebellion by military personnel. Charge Two alleged that he was an accessory to rebellion and to war by civilians. Charge Three alleged that he had proclaimed himself reigning king and sovereign of India, that he was a principal conspirator and instigator in war and rebellion and that he had committed acts of war. Charge Four alleged that he had committed three ‘heinous offences’: that he feloniously caused and became accessory to the murder of forty-nine women and children in the Palace at Delhi on 11 May; encouraged others to murder Europeans officers and other British subjects; and issued orders to native rulers

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a regular practice under the Native administrations: H H Wilson, *Glossary of Judicial and Revenue Terms and of Useful Words occurring in Official Documents relating to the Administration of the Government of British India* (1855), 16.

<sup>45</sup> *Haidari* of or belonging to Haidar. Presumably a Shia cheer.

<sup>46</sup> *Proceedings*, 102, The Martin Account, 172.

<sup>47</sup> See further s.2.4 **The Plea** and s.2.9 **The ‘Defence’**, below, and s.11.2.6 **Waiver of Immunity in Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>48</sup> The charges are set out at *Appendix 1*.

with “local authority in India” to murder “Christians and Europeans”.<sup>49</sup> Altogether, the charges alleged the commission of ten separate offences.

Only one count in the four charges identified the law alleged to have been breached,<sup>50</sup> making it difficult to determine precisely the offences. Analysis of the Rebellion legislation shows that the military commissions had jurisdiction over civilians solely under *Acts XIV and XVI of 1857* for offences established by *Acts XI and XIV*.<sup>51</sup> Accordingly, for the charges to be within the cognizance of the Military Commission, the charges had to disclose offences under these Acts.

Charge One was made up of two counts, both alleging conduct occurring between 10 May and 1 October. The first count, accessory to mutiny, was not an offence under the Rebellion legislation, for the sole law concerned with mutiny and civilians, *Act XIV of 1857*, prohibited incitement to mutiny and did not admit to accessories. The second count, accessory to rebellion, was an offence under *Act XI*.<sup>52</sup> Charge Two could be regarded as disclosing two offences under *Act XI*, viz. aiding and abetting those committing Rebellion crimes and waging war.<sup>53</sup> Charge Three alleged conduct taking place on 11 May and between 10 May and 1 October. The charge used the language of the English law of treason, for example, ‘treasonous’, and ‘false traitor against the State’. While a British national seizing territory and proclaiming sovereignty, would, if established, breach the English law of treason, that law did not apply in India.<sup>54</sup> On analysis, the three counts in Charge Three could be seen as alleging, respectively, the offence of rebellion (an offence under *Act XI*), conspiracy to wage war (an offence under *Act XI*), and waging war (an offence under *Act XI*). Charge Four alleged conduct taking place on 16 May (count one,

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<sup>49</sup> See further **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>50</sup> The third count of Charge Four states “the whole or any part of such conduct being a heinous offence under *Act XVI of 1857*”.

<sup>51</sup> See **Chapter 9 The Rebellion Laws**, below.

<sup>52</sup> The charge may have been invalid, at least in part, for retrospectivity. *Act XI*, which was passed on 4 June, was expressly prospective, whereas the conduct alleged in this count extended from 10 May to 1 October.

<sup>53</sup> The validity of this charge is also doubtful for retrospectivity, for the same reasons as for Charge One.

<sup>54</sup> See further **Chapter 9 The Rebellion Laws**, below. Similarly, the *Treason-Felony Act 1848* (11 & 12 Vic c.12) which punished a person who sought, *inter alia*, “to deprive or depose” the Queen from the “Style, Honour or Royal Name of the Imperial Crown of the United Kingdom, or of any other of Her Majesty’s Dominions and Countries” (s.3), did not apply in India. In view of the Prosecutor’s leaking of draft charges to the English language press before a decision had been made by the Government to go to trial (see **Chapter**

the massacre of women and children in the Palace) and between 10 May and 1 October. Alone among the charges, Charge Four identified the conduct as “heinous crimes”, cognizable under *Act XVI*.

The charges were loosely drawn, for example, using inconsistent language, such as “waging war” in Charge Two and “levying war” in Charge Three, and, alleging conduct occurring before the passage of the Rebellion legislation, were marred by retrospective application of the law.<sup>55</sup> The cognizance of the offences by the Military Commission, and their validity under British military law (laxity of the charges could void the whole of the proceedings of a court-martial),<sup>56</sup> was not raised as an issue by Defence Counsel. Nor were these issues raised in a written statement included in the *Proceedings*, labelled “the Written Defence of Bahadur Shah, ex-King of Delhi”.<sup>57</sup>

This thesis is concerned with the exercise of jurisdiction over Bahadur Shah at international law and does not assess the trial, including the validity of the charges, against domestic law. The key aspect of the charges relevant to this thesis is that Charges One, Two and Three appear to allege conduct which breached *Act XI*, an Act which applied only to those owing “allegiance to the British Government”. As will be discussed in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below, the Prosecutor attempted to prove that Bahadur Shah owed “allegiance” and in doing so, laid out a basis for the assertion of jurisdiction.

## 2.4 The Plea

Bahadur Shah was called to plead on the first day of the trial. A plea of “not guilty” was entered in the record.

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<sup>7</sup> **The Decision to Try Bahadur Shah**, below), the language may have been chosen to highlight the perceived ‘treacherous’ nature of the conduct of Bahadur Shah.

<sup>55</sup> The presumption against retrospectivity was strong in the British legal tradition. Chief Justice Erle articulated the general rule in 1861: “Those whose duty it is to administer the law very properly guard against giving to an act of parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one’s sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment... wherever it is possible to put upon an act of parliament a construction not retrospective, the courts will always adopt that construction.” *The Midland Railway Co. v Pye* (1861) 10 CB (NS) 179, at 191. Approved in *Young v Adams* [1898] AC 469 (PC).

<sup>56</sup> Hough, above n 10, 548-9.

<sup>57</sup> See further s.2.9 **The Defence**, below.



<b>Question</b>	Muhammad Bahadur Shah, are you “Guilty” or “Not Guilty” of the charges preferred against you?
<b>Answer</b>	Not Guilty. <sup>58</sup>

The entry on the record of a plea of ‘not guilty’ did not necessarily mean that Bahadur Shah had pleaded ‘not guilty’, for under British military law, the accused “standing mute” was treated as entering a plea of ‘not guilty’.<sup>59</sup> Indeed, the non-official accounts suggest an express reluctance to enter a plea.

The Martin account stated that on the first day of proceedings:

The Prosecutor then put the question, through the interpreter, ‘guilty or not guilty?’ which the prisoner either did not, or affected not to understand; and there was some difficulty in explaining it to him. He then declared himself profoundly ignorant of the nature of the charges against him, although a translated copy of them was furnished and read to him, in the presence of witnesses, some twenty days previous. After some delay, the prisoner pleaded ‘not guilty’ and the business of the court proceeded.<sup>60</sup>

The Ball account stated that Bahadur Shah moreover disputed the authority of the Court to try him: on being called to enter a plea, he declared himself ignorant of the charges and of “the authority by which he was then questioned”.<sup>61</sup> The *Proceedings* records no objection to the Court’s jurisdiction.<sup>62</sup> According to British military law, an accused who pleaded ‘not guilty’ should at the commencement of the trial “show any valid objection that would avail for his defence”, such as “not being amenable to the Court, either in regard of its constitution or to his status as civilian, – or to his crime not being cognizable by a Military Tribunal.”<sup>63</sup> The general rule was that if a prisoner pleaded to a charge, it was “an admission” that he was “amenable to the jurisdiction of the Court.”<sup>64</sup>

Bahadur Shah may not have been fit to enter a plea. He was around eighty-two at the time of his trial.<sup>65</sup> A photograph of Bahadur Shah, c1858, attributed to P H Egerton, is overleaf (**Figure III**).

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<sup>58</sup> *Proceedings*, 2.

<sup>59</sup> Clode, above n 9, 123.

<sup>60</sup> The Martin Account, 162.

<sup>61</sup> Ball, above n 29, 172.

<sup>62</sup> On Bahadur Shah’s apparent questioning of the authority of the Military Commission over him, see further s2.9 The ‘Defence’, below and s11.2.6 Waiver of Immunity in Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity, below.

<sup>63</sup> Clode, above n 9, 116.

<sup>64</sup> Hough, above n 10, 722.

<sup>65</sup> Bahadur Shah’s age is not certain. He is thought to have been born in either 1773 or 1775 (28th Shaban, A.H. 1189): Sir Thomas Metcalf, “Reminiscences of Imperial Delhi,” 1844, (not paginated) reproduced in M

He attended court every day but was clearly ill at the start of the trial. In January 1858, he was said to be on his deathbed: “[P]rivate letters from Delhi speak of the King as dying. It is a wonder he has lived so long.”<sup>66</sup> One officer said:

that he was very weakly during the trial was clear to everyone and it is likely that the destruction of his family and the privations he experienced in prison, had given him a most severe blow.<sup>67</sup>

According to the Martin account, on the first day of the trial, he was summoned into the *diwan-i-khas* at noon.

He appeared very infirm, and tottered into court supported on one side by his favourite son, Jumma Bakht and on the other by a confidential servant. He sat coiled up on a cushion at the left of the President; and ‘presented such a picture of helpless imbecility, as under other circumstances must have awakened pity.’ His son stood a few yards to the left, and a guard of rifles beyond all.<sup>68</sup>

Proceedings were adjourned early that afternoon, at the request of Bahadur Shah, and likewise the next day, on his “complaining of faintness”.<sup>69</sup> As the Martin account put it: “the prisoner, who had been for some time reclining in a lethargic state, commenced to groan and to complain of feeling unwell...”<sup>70</sup>

His health evidently improved, for by the sixteenth day of the trial, Bahadur Shah

came, as usual, in a palanquin under a guard of HM’s 61<sup>st</sup> Regiment. On alighting from his conveyance at the Dewan Khass, he declined the offer of support from his attendants and walked to the couch assigned to him, evidently in better health than he was on his last appearance.<sup>71</sup>

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M Kaye (Ed) *The Golden Calm, An English Lady’s Life in Moghul Delhi, Reminiscences by Emily, Lady Clive Bayley, and by her father, Sir Thomas Metcalf* (1980); *Beale’s Oriental Biographical Dictionary*, (1971 [1894]), 95.

<sup>66</sup> William Colstream (ed) , *Intelligence Records* (1902), I, 352. Hereinafter ‘*Intelligence Records*’.

<sup>67</sup> [WW Ireland], *History of the Siege of Delhi by An Officer Who Served There* (1861), 317.

<sup>68</sup> The Martin Account, 161.

<sup>69</sup> *Proceedings*, 26.

<sup>70</sup> The Martin Account, 162.

<sup>71</sup> *ibid* 171.

Figure III Photograph of Bahadur Shah, c1858.



## 2.5 The Appointment of a Prosecutor

Major Frederick J Harriott, Deputy Advocate-General, conducted the prosecution for the Government. Under the Bengal Articles of War, a judge advocate, or an European officer of not less than ten years service, was to conduct proceedings in a GCM.<sup>72</sup> Hough recommended that an Advocate-General be appointed, but noted they were not necessarily “regularly-educated lawyers”.<sup>73</sup> Carey explained that whereas in a regimental court-martial the prosecutor should be acquainted with “the rules, usage and customs of the service”, a prosecutor in a GCM

should be specially selected from an officer of the staff or from a regiment, one having some practical knowledge and experience in military law; and he should, as far as necessary, be relieved from other military duties so that he might give full time to study the case, and thus avoid all unnecessary delay or a failure of justice.<sup>74</sup>

Major Harriott had drafted the charges laid against Bahadur Shah and had pushed hard for charges to be laid against Bahadur Shah and for a formal court-martial to be convened.<sup>75</sup> He was the brother-in-law<sup>76</sup> of Charles Saunders, a Government of India official who had prepared the prosecution case against Bahadur Shah and who would be called by Major Harriott as a witness for the prosecution to testify on the status of Bahadur Shah.<sup>77</sup> Harriott was attached to the Third Light Cavalry, stationed at Meerut at the commencement of the Rebellion. He was appointed Deputy Advocate-General to the Court of Inquiry held on 25 April 1857 to investigate the refusal of the Meerut sepoys to use cartridges supplied by the Bengal Army.<sup>78</sup> The subsequent court-martial and imprisonment of the eighty-five sepoys of the Third Light Cavalry on 9 May is regarded as the spark precipitating the Rebellion. As Canning noted: “the first great act of rebellion was the immediate result of a severe sentence carried out, with every degrading accessory, at Meerut”.<sup>79</sup> Fellow sepoys mutinied in Meerut on 10 May 1857, released their colleagues, and made for Delhi. The

<sup>72</sup> Article 91.

<sup>73</sup> “If you cannot trust your judge-advocates, you must give higher pay to regularly-educated lawyers”: Hough, above n 10, 781.

<sup>74</sup> Carey, *Military Law*, above n 14, 85.

<sup>75</sup> See further **Chapter 8 The Decision to Try the King of Delhi**, below.

<sup>76</sup> Harriott’s sister Matilda (“Tilly”) was married to Saunders: G R Kaye and E H Johnstone, *Catalogue of Manuscripts in European Languages*, II, 1445.

<sup>77</sup> See **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>78</sup> J A B Palmer, *The Mutiny Outbreak at Meerut in 1857* (1966), 38 and 63.

<sup>79</sup> 5 June 1857, quoted in Thompson, *The Other Side of the Medal* (1926), 35.

sepoys of the Third Light Cavalry were regarded as the leading protagonists among the mutinous sepoys in Delhi.

A Prosecutor had to ensure that the prisoner had a copy of the charges, that these had been read and, if necessary, explained to an accused. He examined prosecution witnesses before charges were framed and summonsed witnesses.<sup>80</sup> He had to facilitate any request by the prisoner to call witnesses for the defence and provide a list of the names of intended prosecution witnesses. Although conducting the prosecution, the judge-advocate had also to assist the accused:

No man of character as a judge-advocate will ever act upon the principle that he may take every advantage of his position, and endeavour to secure a conviction in any possible manner. The author has a firm conviction, from his intimate knowledge of the character of the officers of the Indian army, that there is always every assistance given to a prisoner. It is his duty to see that material justice shall be done to all parties; both to the service and to the prisoner.<sup>81</sup>

## 2.6 The Appointment of Defence Counsel

On the second day of the trial, Bahadur Shah was granted, at his request, the assistance in court of Ghulam Abbas. Ghulam Abbas told the Court that he had held a pre-Rebellion position as 'a servant' of Bahadur Shah, and that his duty had been to 'interchange' information between the Lieutenant-Governor at Agra and Bahadur Shah.<sup>82</sup>

According to the *Proceedings*, Ghulam Abbas did not attend Court every day. He was present on the third and fourth day in the capacity of witness called by the prosecution (see further below s 2.8 **The Conduct of the Prosecution**). He was absent on the fifth day, when documents under the headings 'Pay' and 'Military' were introduced, and on the thirteenth day, when witnesses Ahasanullah Khan, an official of the Mughal Court, and Mrs Aldwell, the wife of a British soldier, gave incriminating evidence on Charge Four. None of the absences was explained in the *Proceedings* and they were not noted in the Martin account. He was also absent from Court on the day that Saunders gave evidence on Bahadur Shah's status.<sup>83</sup>

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<sup>80</sup> Hough, above n 10, 774.

<sup>81</sup> *ibid* 787.

<sup>82</sup> *Proceedings*, 28.

<sup>83</sup> On Saunders' testimony, see **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

Provision of legal assistance was a generous concession. The Bengal Articles of War made no reference to provision of defence counsel and under British military law, there was no obligation to provide legal representation. As military text writer Alexander Tytler warned in 1845:

For lawyers being in general as utterly ignorant of Military Law and practice as the members of courts-martial are of civil jurisprudence and the forms of the ordinary courts; so nothing could result from the collision of such warring and contradictory Judgments, but inextricable embarrassment or rash, ill founded and illegal decisions.<sup>84</sup>

British military custom allowed a ‘friend’, not necessarily legally qualified, to assist an accused in court.<sup>85</sup> The ‘friend’ could “take notes”, “quietly make suggestions and give advice”.<sup>86</sup> He could “suggest in writing the questions to be put to witnesses”, but was not permitted to examine witnesses orally.<sup>87</sup> He could prepare and even write the defence.<sup>88</sup> He could not address the Court.<sup>89</sup> Nonetheless, military law did not prohibit lawyers from assisting an accused and in India the practice of providing non-British prisoners with British counsel was not unknown.<sup>90</sup> In some 1857 Rebellion trials by Civil Commission, the accused was permitted defence counsel.<sup>91</sup> However, there is no evidence that Ghulam Abbas was by profession a *vakeel*. Similarly, although styled variously in the *Proceedings* as ‘the prisoner’s assistant’,<sup>92</sup> ‘lawyer’,<sup>93</sup> and ‘attorney’,<sup>94</sup> there is no evidence that he was versed in British military law.

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<sup>84</sup> Alexander Tytler, *An Essay of Military Law and the Practice of Courts Martial*, 253, cited in J Stuart-Smith, “Without Partiality, Favour or Affection, An account of the history and present functions of the Judge Advocate at a British Court-Martial”, (1963) *Revue de droit penal militaire et de droit de la guerre*, II, 232, 223.

<sup>85</sup> Hough, above n 10, 721. Clode, above note 9, 120-121.

<sup>86</sup> Clode, above n 9, 120-121, Hough, above note 10, 721.

<sup>87</sup> Clode, *ibid*.

<sup>88</sup> Hough, above n 10, 789.

<sup>89</sup> *ibid* 669 Note 1 and 779, Note 1.

<sup>90</sup> For example, at the conclusion of the Second Sikh War in 1849, the Diwan Mul Raj was granted the assistance of a British officer at his trial by mixed Civil and Military Commission. This officer questioned witnesses, prepared a defence, and made opening and closing addresses. The Governor-General was unhappy with the appointment: Sita Ram Kohli, (ed) *The Trial of Diwan Mul Raj* (1971 [1932]), 15.

<sup>91</sup> For example, the Raja of Jamkhandi engaged a British barrister to defend him in his Rebellion trial: Surendra Nath Sen, *Eighteen Fifty Seven* (1957), 151. Similarly, the Nawab of Farrukhabad was defended by Arthur St John Carruthers, a respected British attorney practicing in Calcutta: *Government vs Tufuzool Hosayn, ex Raees of Furruckabad, India*, in *Foreign and Political Proceedings*, 17 June 1859. Hough noted that GCMs in Ireland in cases of rebellion under martial law allowed prisoners the assistance of ‘counsel’: Hough, above n 10, 677.

<sup>92</sup> *Proceedings*, 17.

<sup>93</sup> *ibid* 17.

<sup>94</sup> *ibid* 80.

## 2.7 The Appointment of an Interpreter

The language of the Court proceedings was English, but much of the oral evidence and all the documentary evidence was in Hindi/Urdu and Persian.

In line with the Bengal Articles of War, James Murphy, described in the *Proceedings* as “previously Deputy Collector of Customs at Delhi”, was appointed interpreter for the duration of the trial.<sup>95</sup> An interpreter had to affirm at the commencement of a court-martial that he would “faithfully interpret and translate the proceedings of the court”.<sup>96</sup> He was expected “to know well both his own language and the foreign language he translates from”.<sup>97</sup> The standard expected was a “faithful”, though not necessarily “exact literal” translation.<sup>98</sup>

According to the Prosecutor’s Opening Address, Murphy translated the vernacular documents before the trial.<sup>99</sup> On the basis of the quality of the translations, he was then appointed Interpreter to the Court. It is not clear how well Murphy knew Urdu or how clearly he understood the language of the witnesses - ranging from the highest ranking courtier to the lowliest servant. Nor can it be established how clearly he was understood by non-British witnesses.

## 2.8 The Conduct of the Prosecution

In his Opening Address, Major Harriott tabled correspondence on the decision to try Bahadur Shah and laid before the Court a letter from General Penny, his commanding officer, approving the laying of charges against Bahadur Shah and the commencement of a trial “with the forms usual in such cases”. Harriott said the trial would serve two purposes - a judicial investigation of the guilt of Bahadur Shah and a political enquiry into the causes of the Rebellion.<sup>100</sup> Credible evidence, he said, would not be rejected merely because it did

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<sup>95</sup> Murphy was also appointed interpreter and translator at other Rebellion trials held in Delhi preceding the trial of Bahadur Shah: letter from Saunders to Richard Temple, 12 April 1858, *Punjab Mutiny Correspondence*, II, 381.

<sup>96</sup> Article 97, Bengal Articles of War.

<sup>97</sup> Hough, above n 10, 702.

<sup>98</sup> *ibid* 702.

<sup>99</sup> *Proceedings*, 3.

<sup>100</sup> See s8.4 Factors in the Decision to Try the King of Delhi in Chapter 8 The Decision to Try Bahadur Shah, below.

not comply with “some unimportant formula”. He also said the trial would be used “to record all the circumstances connected with the Rebellion”. The Court did not object.

Flowing from the dual purpose of the trial, not all evidence was relevant to Bahadur Shah’s guilt, but related to the extra-judicial purpose of the trial. Evidence was taken on, *inter alia*, the significance of the circulation of *chapattis*<sup>101</sup> in the months before the outbreak of rebellion, the impact on local opinion of the annexation of Oudh in 1856,<sup>102</sup> social reform legislation<sup>103</sup> and alleged links between the Mughal Court and the Shah of Persia.<sup>104</sup> The Prosecutor said:

The scope of the investigation is not in any way confined by the observance of technicalities, such as belong to a more formal and to a regular trial.<sup>105</sup>

The prosecution case began with the calling of the first witness, Ahsan Ullah Khan, and the tabling of thirty-four documents. Much of the trial was taken up with reading out the documentary evidence. The Prosecutor Major Harriott introduced, and called witnesses to authenticate, one hundred and fifty-eight documents translated from Hindi/Urdu into English. English translations of these documents were reproduced in the *Proceedings*. The documents were largely correspondence between three of Bahadur Shah’s sons and military subordinates, letters alleged to have been written by Bahadur Shah to his son Mirza Moghal, and local Persian and Urdu newsletters (*akhbar*). Fifty extracts from four *akhbars* published in Delhi in 1857 were reproduced in the *Proceedings*: the Persian *Sadik-ul-Akhbar* (translated in the *Proceedings* as “*The Authentic News*”) edited by

<sup>101</sup> *Chapatti*: unleavened bread. Chapattis were passed from village to village in the months before the Rebellion. Some thought it a sign of imminent uprising: Christopher Hibbert, *The Great Mutiny* (1978) 59.

<sup>102</sup> The annexation of the Kingdom of Oudh in 1856 proved unpopular. As many of the sepoy in the Bengal Army were from Oudh, some thought the annexation may have been a contributing factor in the uprising.

<sup>103</sup> For example, an Act allowing the re-marriage of Hindu widows (*Act XV of 1856*). On the impact of British ‘social reform’ see for example Ira Klein, “Materialism, Mutiny and Modernization in India”, *Modern Asian Studies* 34, 3 (2000), 545-580.

<sup>104</sup> A Peace Treaty was concluded in Paris in May 1857 on the conclusion of the Anglo-Persian War of 1856-57. See further J F Standish, “The Persian War of 1856-7”, *Middle Eastern Studies* 3 (1966-71) 18-45, Barbara English, *John Company’s Last War* (1971). Britain was concerned that Persia was seeking to stir up hostility against the British in India. Some evidence examined in the trial suggested secret missions were sent to Persia from the Mughal Court in 1855, 1856 and 1857.

<sup>105</sup> *Proceedings*, 2. A Military Court had a wide discretion in assessing the admissibility of evidence and was not bound by common law rules of evidence. Evidence was subjected to “such an honest examination of the case as the circumstances will admit: *Grant v Gould* 2 H Blackstone’s Rep, per Lord Loughborough, *Rex v Suddis* 1 East Rep. 327, *Wright v Fitzgerald* 29 State Trials 760; cited by W F Finalson, *Commentaries on Martial Law* (1867), 37. In practice, military commissions observed rules of evidence. Hough, above n 10, devotes several chapters to the treatment of evidence before a military court.



Jamiluddin Khan, the Urdu *Delhi News*, the *Delhi Urdu Akhbar* (translated in the *Proceedings* as the “*Delhi ‘Urdu News’*”) and the *Urdu News*, a paper described as “the Newspaper in the Urdu tongue and styled *Compendium of News*”. The *Proceedings* also included issues of the *Suraj-ul-Akhbar*, a Persian eight page weekly with five pages devoted to the daily engagements of the King, which was treated at the trial as an official circular of the Mughal Court.<sup>106</sup> It included foreign and local news and weather reports, for example: “this year the summer is so hot in Delhi that even by writing about it the tongue of the pen is blistered.”<sup>107</sup>

The heavy reliance on documentary evidence stemmed from the use of the trial as an enquiry into the Rebellion, noted above. These papers had been abstracted under Saunders’ auspices by the beginning of October. In January 1858, Sir Richard Temple, Secretary to Sir John Lawrence, Chief Commissioner of the Punjab and Saunders’ immediate superior, had examined the “vernacular papers, captured after the recent operations and supposed to be treasonable,”<sup>108</sup> describing them as

written by Mahomedan fanatics to their co-religionists, describing the downfall of the British power. It was the suddenness of the catastrophe that impressed them; and this impression was set forth in Oriental imagery far more graphic than that which would be employed in any European language. The spirit of fanaticism pervading these letters was as a fiery breath. I had before me the papers discovered in the cabinet of the ex-King of Delhi and in the office of his minister, after their hasty flight from the palace. Many documents bore his [Bahadur Shah’s] signature or his annotations, and he had quite acted his part when placed at the head of a revolution.<sup>109</sup>

Major Harriott called and examined twenty-one witnesses.<sup>110</sup> The prosecution witnesses included servants and officials from the Mughal court, an editor of an Urdu *akhbar*, Government officials and civilians, military personnel, and servants employed by the British. Neither Bahadur Shah’s principal wife, Zeenat Mahal,<sup>111</sup> nor his son, Jivan

<sup>106</sup> It is difficult to characterise the *Suraj-ul-Akbar*. One historian of Indian journalism claims that its contents mostly derived from the *akhbars*: Abdus Salam Khurshid, *History of Newsletters in the Indo-Pakistan Sub-Continent* (1956), 90.

<sup>107</sup> Nadir Ali Khan, *A History of Urdu Journalism (1822-1857)*, Idarah-i Adabiyat -I Delli (1991), 119.

<sup>108</sup> Richard Temple, *The Story of My Life* (1896), 89.

<sup>109</sup> *ibid.*

<sup>110</sup> A list of witnesses is at *Appendix 3*.

<sup>111</sup> Bahadur Shah’s principal wife Zeenat Mahal negotiated an amnesty for herself, her father Nawab Ahmed Kooli Khan and for her son Jivan Bakht. Her father died “of old age and fever” during British imprisonment in December 1857, *Mutiny Correspondence*, above n 95, 320.

Bakht,<sup>112</sup> gave evidence at the trial. Bahadur Shah was initially accompanied in Court by Jivan Bakht. However, he was ordered to leave,<sup>113</sup> as he “appeared animated, and laughed and chatted with his father’s attendant without appearing at all embarrassed.”<sup>114</sup>

Bahadur Shah’s Defence Counsel, Ghulam Abbas, was also called as a witness for the Prosecution. On the third day of the trial, he was “affirmed as a witness” and examined over two days.<sup>115</sup> At the conclusion of his evidence, the *Proceedings* noted “the witness resumes his seat as assistant to the prisoner”, pointing to a dual role as prosecution witness and ‘friend’ of the accused. The evidence was not given on Bahadur Shah’s behalf, for Ghulam Abbas was examined on his own knowledge of the events in the Palace on 11 May 1857 and was asked about Bahadur Shah’s guilt of the murder charge:

**Question**        Were these women and children murdered with the prisoner’s consent?  
**Answer**            I have no further knowledge on the subject beyond what I heard from Ahsan Ulla Khan, who said that the king had prohibited the slaughter, but unavailingly.<sup>116</sup>

Ghulam Abbas appears to have given evidence against Bahadur Shah only reluctantly. According to the Martin account, he was

one of the *non mi recordo* class, determined to know nothing that could, by recital, criminate the prisoner, his family, himself, or any one connected with the palace; and this soon became so apparent, that he was twice or thrice reminded, through the interpreter, that he was giving his evidence *upon oath*.<sup>117</sup>

A dual role as prosecution witness and ‘friend’ of the accused was permissible in military courts-martial in the mid-nineteenth century:

If an officer on his trial wishes to have a friend in court, and that friend is to be examined and to give evidence, he should be sworn and give his evidence at once, and before he shall be allowed to remain in court as the friend or *amicus curiae*.<sup>118</sup>

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<sup>112</sup> Jivan Bakht, also known as Jumma Bukht, was seized with his brothers Bukhtawar Shah and Mendoo near Humanyon’s Tomb on 27 September 1857. While his brothers were tried and executed, Saunders successfully argued that Jivan Bakht should not be tried on the grounds of his youth (aged around 16) and the scarcity of evidence. His only ‘crime’ was to have been “the son of his father”: *ibid* 315.

<sup>113</sup> His conduct in court may have been considered contempt of court, for, under the Bengal Articles of War, the use of “menacing or disrespectful words, signs or gestures, in the presence of a court-martial then sitting” was a punishable offence: Article 66. Hough cites as examples spitting in the face of a Member or throwing a turban at the President: Hough, above n 10, 675.

<sup>114</sup> Ball, above n 29, 171.

<sup>115</sup> *Proceedings*, 26-30.

<sup>116</sup> *ibid* 29.

<sup>117</sup> Martin Account, 163.

<sup>118</sup> Hough, above n 10, 657.

As noted above,<sup>119</sup> Bahadur Shah is recorded in the *Proceedings* as having spoken only once, though according to the Martin account, he spoke often during the trial. It is difficult to ascertain how much Bahadur Shah understood of the proceedings. As he attended Court every day, in theory, he heard the evidence against him. According to the Martin account, statements of witnesses given in English were read out by the interpreter “for the benefit of the prisoner and his counsel”.<sup>120</sup> It is not clear if Court instructions and commentary from the Court were also translated into Urdu/Hindustani. Bahadur Shah was educated entirely in the Lal Qila under the supervision of his grand-father, Shah Alam II.<sup>121</sup> While it is said that he had mastered Persian, Urdu, Braj Bhasha and Panjabi,<sup>122</sup> his knowledge of English is not known. According to examples in the Martin account, Bahadur Shah was addressed by the Prosecutor through the interpreter Murphy. Sir Richard Temple claimed that he interviewed Bahadur Shah in Urdu.<sup>123</sup> That Bahadur Shah’s son Mirza Moghal did not speak English is suggested by an undated petition which noted in passing that translations of some English documents had been made “by one able to read English”.<sup>124</sup> The official records of observation of Bahadur Shah during his imprisonment in Rangoon after the trial mention that Jivan Bakht was anxious to learn English, indicating that English was not known by close family members.<sup>125</sup> The attitude held by Delhi nobles towards the English language also suggests it was unlikely that Bahadur Shah and members of the Mughal Court spoke English. For example, “[T]he father of the great Urdu novelist Nazir Ahmad went so far as to tell the boy he would rather see him dead than learning English.”<sup>126</sup> Similarly, Omeid Singh, later tutor to the Maharaja of Holkar, in a letter to British authorities on the looting of Delhi in 1857 by British forces, noted the antipathy of ‘rebels’ in Delhi towards English language speakers:

My own family has been punished more severely by the rebellion than the King of Delhi himself! When the rebels first entered Delhi, about 300 sepoys attacked and plundered my house, because we

<sup>119</sup> s2.2 The Record of Proceedings, above.

<sup>120</sup> Martin account, 182.

<sup>121</sup> F W Pritchett, *Nets of Awareness, Urdu Poetry and Its Critics* (1994), 5.

<sup>122</sup> *ibid* 5.

<sup>123</sup> Temple, above n 105, 90.

<sup>124</sup> *Proceedings*, 24.

<sup>125</sup> Letter from the Commissioner of Pegu, to the Secretary of the Government of India, 16 April 1859: quoted in Mahdi Husain, *Bahadur Shah II and the War of 1857 in Delhi with its Unforgettable Scenes* (1987), 423.

<sup>126</sup> Pritchett, above n 121, 6.

were old servants and partizans of the English and could read their language. My nephew was caught, as every English reader was to be murdered, and only escaped by a bribe!<sup>127</sup>

## 2.9 The ‘Defence’

Little effort was made by the Defence to refute the charges. It is difficult to assess from the available evidence whether this stemmed from an incompetent defence or a rejection of the proceedings.

On the one hand, a defence was barely made out. Bahadur Shah presented no evidence – he called no witnesses and introduced no documentary evidence. He made no address to the Court. The *Proceedings* records no objection to the introduction of any of the evidence. As noted above,<sup>128</sup> halfway through the trial, on 12 February 1858, a day when the Defence Counsel Ghulam Abbas was absent from Court - Saunders was asked by the Prosecutor to “give the Court any information as to the circumstances under which the Kings of Delhi became subjects and pensioners of the British Government in India”.<sup>129</sup> At the conclusion of his testimony, the *Proceedings* records: “[T]he prisoner declines to cross-examine”.<sup>130</sup> An opportunity to refute the basis for the claimed authority of the Government of India over Bahadur Shah was lost.

On the other hand, there were some steps which suggest a defence was mounted, however feeble. First, Bahadur Shah or Gulam Abbas did cross-examine six of the twenty-one witnesses. It is not clear from the *Proceedings* who conducted the cross-examination. While the headings in the *Proceedings* record “Cross Examination by the Prisoner”, the text of some cross-examination is expressed in the third person.<sup>131</sup> Second, the Martin account suggests that at various times Bahadur Shah denied that seals and handwriting on some of the documents introduced into evidence were his.<sup>132</sup> Third, an undated statement, written in the first person and headed in the *Proceedings* as “Translation of the Written

<sup>127</sup> Letter forwarded to Charles Saunders by the Foreign Department, Government of India, 30 December 1857, *Mutiny Correspondence*, above n 92, 285.

<sup>128</sup> See s2.6 **The Appointment of Defence Counsel**, above.

<sup>129</sup> *Proceedings*, 94. See also **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>130</sup> *ibid.*

<sup>131</sup> For example, in the cross-examination of Jat Mall a question put by the Prisoner has the answer in the third person; Captain Forrest has the question in the first person and the answer in the third person; cross-examination of Makhan and Chuni Lal is in the third person, *Proceedings*, 76, 78-80.

<sup>132</sup> See s.2.2 **Record of Proceedings**, above.

Defence put in by Bahadur Shah, ex-king of Delhi” was submitted at the conclusion of presentation of the Prosecution evidence.<sup>133</sup> It set out a version of events in Delhi 1857, disputed the probity of some of the evidence submitted by the Prosecutor and disclaimed responsibility for acts of sepoys hostile to the Government of India. It did not explicitly address any of the charges and did not describe itself as a ‘defence’. It expressed no allegiance to the British Government.<sup>134</sup>

Yet, as noted above,<sup>135</sup> the Ball account stated Bahadur Shah questioned the authority of the proceedings. Further, the Martin account stated that at the close of the Prosecution case, on 9 March 1858, Ghulam Abbas disputed the authority of the Court to try Bahadur Shah and refused to provide a defence. Martin stated that Ghulam Abbas:

declared, in the name of his royal master, that he did not recognise the authority of the tribunal before which he had been brought, and therefore declined to make answer to any charges brought against him.<sup>136</sup>

No record is available to corroborate these accounts. Neither of these statements are recorded in the *Proceedings*, hence there is no indication that the Military Commission investigated the disputation of jurisdiction. Abbas’ important statement is not recorded in Chambers,<sup>137</sup> Ball<sup>138</sup> or any other history of that period. The absence from the *Proceedings* may reflect, in the case of Ghulam Abbas’ statement of disputation, the military custom of not allowing the ‘friend’ of the accused to address the Court,<sup>139</sup> and in the case of Bahadur Shah’s statement of disputation, the requirement merely to record the plea. In the absence of further evidence, it is sufficient to note here that jurisdiction may have been raised as an issue by Bahadur Shah.<sup>140</sup>

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<sup>133</sup> The statement is described as having been written in “Hindustani” in the *Proceedings*, 131. As the statement disputes items of the oral and documentary evidence adduced by the Prosecutor, it was clearly drafted during or after the trial.

<sup>134</sup> The Court adjourned for five days to allow translation of the statement and to enable the Prosecutor to prepare a reply and summing up, *Proceedings*, 131.

<sup>135</sup> See s2.4 **The Plea**, above.

<sup>136</sup> The Martin Account, 184.

<sup>137</sup> *Chambers History of the Revolt in India*, 1859.

<sup>138</sup> Ball, above n 29.

<sup>139</sup> Hough, above n 10, 779.

<sup>140</sup> See further **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

## 2.10 The Prosecutor's Closing Address

The Court re-convened for one last sitting on 9 March and the day was taken up with reading the Defence 'statement' and delivery of the Prosecutor's Closing Address. In the Address, the Prosecutor attempted to re-construct a narrative of events in Delhi from 9 May to 11 May 1857 and to establish Bahadur Shah's responsibility for the killing of the British victims in the Lahore Gate of the Red Fort on 11 May.<sup>141</sup>

The Address highlighted the character of the military forum as a court dispensing justice which demanded proof beyond mere inference. The court venue, the *diwan-i-khas*, was described by the Prosecutor as "this shrine of the higher majesty of justice" – whether in reference to a Mughal function or its purpose as a forum for British military justice is not apparent.<sup>142</sup> The Address focused on the supremacy of the rule of law and the view that no-one, not even a king, was above the law. Of the four charges, the Prosecutor focussed on Charge Three alleging a treasonous form of conduct<sup>143</sup> and Charge Four, alleging murder. It was an appeal for a conviction, though analysis of the evidence was slight. Themes highlighted in the Address – Bahadur Shah's ingratitude, the magnitude of his crimes, and the titular nature of his sovereignty – were reflected in arguments put forward to assert jurisdiction and to override sovereign immunity.<sup>144</sup> Bahadur Shah's conduct during the Rebellion was presented as unspeakably treacherous. The 'generosity' displayed towards the Mughals by the British was contrasted with the perfidious acts displayed towards the British by the Mughal Royal Family: "like the snake in the fable, they have turned their fangs upon those to whom they owed the very means of their existence."<sup>145</sup> The language played on contrasts between Bahadur Shah and his illustrious forebears, restraint and depravity, and Christian purity and the barbarism of Islam. Bahadur Shah was both belittled and demonised. He was "[D]ead to every feeling that falls

<sup>141</sup> See also s12.2 First Ground for Overriding Immunity: Gravity of the Crimes in Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty, below.

<sup>142</sup> *Proceedings*, 145.

<sup>143</sup> See further s9.1.2 Treason not a Crime in EIC Territories in Bengal, in Chapter 9 The Rebellion Laws, below.

<sup>144</sup> See Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality, Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity and Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty, below.

<sup>145</sup> *Proceedings*, 139.

honourably on the heart of man, this shrivelled impersonation of malignity...”<sup>146</sup> and also “[A]n enfeebled tremulous old man striving with palsied hand to reach a sceptre far too powerful for his puny grasp...”.<sup>147</sup> Portrayals of Bahadur Shah and his royal house in the Closing Address emphasised the flimsiness of the Mughal Court, and his “cold-blooded hardened villainy”.<sup>148</sup> His kingly status was mocked, “[T]he distant glimmer of a crown” was a “mockery of a sceptre”,<sup>149</sup> the imagery underlining the Prosecutor’s view that the King of Delhi’s sovereignty was without substance. Bahadur Shah was the “possessor of mere nominal royalty”,<sup>150</sup> “the adopted sovereign” of the sepoys<sup>151</sup> and “the titular majesty of Delhi”.<sup>152</sup>

## 2.11 The Finding

The Court had met twenty-one times over thirty-seven days, from 27 January to 9 March 1858. The Court handed down its finding on 9 March 1858. *Act XIV* specified that voting was by majority.<sup>153</sup> The *Proceedings* does not indicate whether the finding was unanimous or by majority:

The Court, on the evidence before them, are of opinion that the prisoner Muhammad Bahadur Shah, ex-King of Delhi, is guilty of all and every part of the charges preferred against him.<sup>154</sup>

There was no obligation to record the reasons. There was no right of appeal: “the judgment of [the] Court shall be final and conclusive”.<sup>155</sup>

Under the Bengal Articles of War, the finding or sentence of a GCM could be reviewed by a military officer, the ‘confirming officer’.<sup>156</sup> This officer had to satisfy himself as to the

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<sup>146</sup> *ibid.*, 141.

<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*, 143. See also **Chapter 7 The Imprisonment of the King of Delhi in 1857** and **Chapter 12 Sovereignty Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>149</sup> *Proceedings*, 138.

<sup>150</sup> *ibid.* 134.

<sup>151</sup> *ibid.* 135.

<sup>152</sup> *ibid.* 136. See further **Chapter 3 The ‘Titular’ King of Delhi**, **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, and **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>153</sup> Section V, *Act XIV of 1857*.

<sup>154</sup> *Proceedings*, 154.

<sup>155</sup> Section IX *Act XIV of 1857*.

<sup>156</sup> Article 94.

legal constitution of the court and its jurisdiction over the prisoner<sup>157</sup> and as to whether the accused had had “a fair trial upon the merits”.<sup>158</sup>

On 2 April 1858, the finding of the Military Commission was confirmed by the commanding officer, General Nicholas Penny, under whose authority the trial had been convened. The trial proceedings were also approved by Sir John Lawrence. On 15 June 1859, the EIC’s Court of Directors<sup>159</sup> approved the decision to bring Bahadur Shah to trial to investigate “charges involving traitorous hostility to the British Government, and the murderous sacrifice of European life” and to obtain information on the origin and progress of the military rebellion. The Court of Directors informed the Governor-General:

Her Majesty’s Government are satisfied that the finding is entirely borne out by the evidence brought before the Court, that the prisoner’s only claim to consideration is the guarantee upon which he surrendered; and that the clemency of the British Government and the imperative demands of justice are sufficiently asserted by the punishment you have awarded, namely, banishment beyond seas.<sup>160</sup>

Bahadur Shah, accompanied by his principal wife Zeenat Mahal and sons Mirza Jivan Bakht and Shah Abbas (and eleven servants), was exiled to Burma in late 1858.<sup>161</sup> He died in Rangoon on 7 November 1862 and was buried in an unmarked grave.<sup>162</sup>

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<sup>157</sup> Clode, above n 9, 144-145.

<sup>158</sup> *ibid* 146.

<sup>159</sup> On the nomenclature of the British administration of EIC territories, see **s3.1 Decline of the Mughal Empire and Acquisition of Territory by the EIC** in **Chapter 3 The ‘Titular’ King of Delhi**, below.

<sup>160</sup> Jatindra Kumar Majumdar, *Raja Rammohun Roy and the Last Moghuls, A Selection from Official Records (1803-1859)* (1939), 309-310.

<sup>161</sup> Letter from Governor-General to the Court of Directors, 16 November 1858, *ibid* 305.

<sup>162</sup> A mausoleum was built in the early 1930s near a tree believed to be the site of the grave. See further Husain, above n 125, Appendix O, and Sayed Moinul Haq, *The Great Revolution of 1857* (1968), 226. It is *de rigour* for dignitaries to visit Bahadur Shah’s mausoleum, for example, the Foreign Secretary of India Shyam Saran visited the Bahadur Shah Zafar Memorial in Rangoon in October 2004: Government of India, Ministry of External Affairs, Press Release, 5 October 2004.



## Chapter 3 The ‘Titular’ King of Delhi

### 3.0 Introduction

At his trial, Bahadur Shah was styled variously as “the King of Delhi”, the “Titular King of Delhi”, the “Ex-King of Delhi”, and more simply, Muhammad Bahadur Shah. The House of Commons described the *Proceedings* of the trial of Bahadur Shah as “A Copy of the Evidence taken before the Court appointed for the Trial of the King of Delhi”.<sup>1</sup> The *Proceedings* itself was entitled: “Proceedings on the Trial of Muhammad Bahadur Shah, Titular King of Delhi, upon a charge of Rebellion, Treason, and Murder, held at Delhi, on the 27th day of January 1858, and following days”<sup>2</sup> and sub-titled: “Trial of Muhammad Bahadur Shah, Ex-King of Delhi”.<sup>3</sup> He was called to plead as “Muhammad Bahadur Shah”.<sup>4</sup> He was addressed by the Court as “Prisoner”. The Court found “Muhammad Bahadur Shah, ex-King of Delhi” guilty of all charges.<sup>5</sup>

The use of the title ‘King of Delhi’ *prima facie* suggests the holding of a Sovereign status.

The trial of a recognised Sovereign by another State would be unprecedented.

Well-established principles of international law current in 1858 precluded the exercise of jurisdiction of the courts of one State over the Head of State of another.<sup>6</sup> The trial of a recognised Sovereign would *prima facie* constitute a contravention of those principles.

However, the trial of a person whose title was merely a courtesy title<sup>7</sup> would not constitute such a contravention. The issue addressed in this and the next three chapters is the status of Bahadur Shah as the King of Delhi as at his capture by British forces in September 1857:<sup>8</sup> was his title merely one of courtesy or was he a recognised Sovereign?

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<sup>1</sup> Capitals omitted. See s2.2 **The Record of Proceedings** in **Chapter 2 Overview of the Trial**, above.

<sup>2</sup> *Proceedings*, 1.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.* 2. See s2.4 **The Plea** in **Chapter 2 Overview of the Trial**, above.

<sup>5</sup> *ibid.* 154. See s2.11 **The Finding** in **Chapter 2 Overview of the Trial**, above.

<sup>6</sup> See **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>7</sup> Satow noted that “Emperors and Kings who have ceased to reign in consequence of their abdication, or for other reasons, continue sometimes to receive the title of ‘Majesty’ from friendly sovereigns”. He cites as example the Treaty of Paris of 11 April 1814 which provided that the Emperor Napoleon preserve this title: *Satow’s Guide to Diplomatic Practice* (1979), 28.

<sup>8</sup> See **Chapter 7 The Imprisonment of the King of Delhi in 1857**.

This chapter sketches some key events in Mughal-British relations to enable understanding of the position of the King of Delhi at his imprisonment by the British in 1857. The next three chapters assess his status at law.

### 3.1 Decline of the Mughal Empire and the Acquisition of Territory by the EIC

In 1600, Queen Elizabeth I granted a charter of incorporation to the EIC to trade in the East Indies. At that time, the Mughal Empire was at its height, and the Mughal Emperor Akbar<sup>9</sup> ruled over an empire stretching from Kabul in the north, to Gujrat in the south, from Bengal in the east and to Rajasthan in the West. The Emperor granted the EIC trading rights in the Mughal Empire. The EIC sent representatives to the courts of the Mughal Emperor, and, as his authority waned, to the courts of quasi-independent regional powers. A map of the Mughal Empire c1690 is overleaf (**Figure IV**).

Over the next two hundred and fifty years, the EIC became a powerful trading body, bringing wealth and prestige to its investors in Britain. In competition with Portuguese, French and Dutch interests in India, the EIC became a powerful body in India, not only in trade, but as a political force wielding great power and influence.

To protect its trade interests in India, and the better to pursue its political interests, the EIC relied on small European armed forces. Successive charters granted to the EIC empowered the company to raise local forces and to make laws regulating military discipline. In 1748, the EIC established forces made up of native soldiers ('sepoys') and British officers, organised on the British model.<sup>10</sup> By 1789, EIC forces were 100,000 strong. By the Napoleonic Wars, at 150,000 it was one of the largest European-style standing armies in the world.<sup>11</sup>

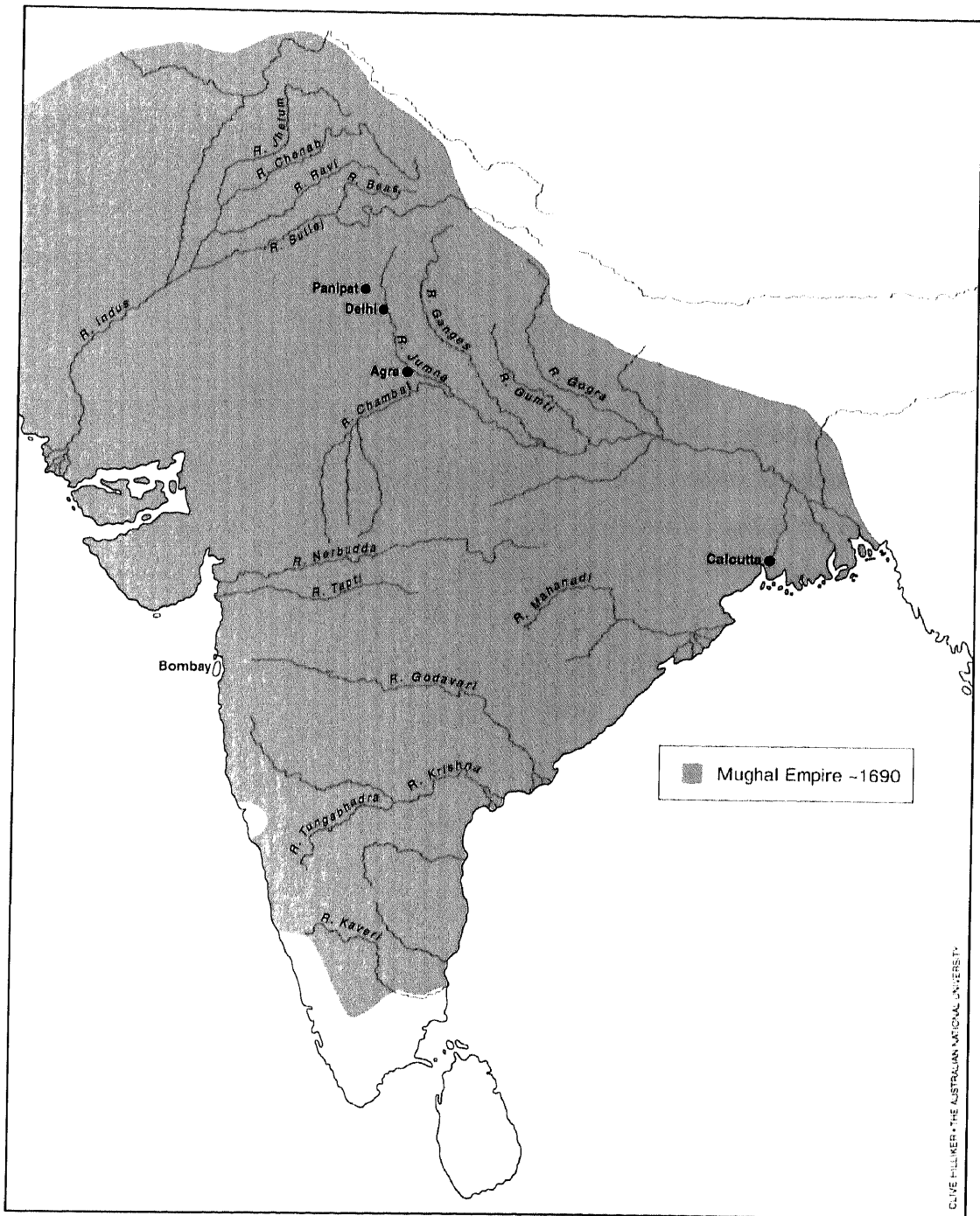
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<sup>9</sup> A Genealogical Chart of the Mughal Emperors is at *Appendix 4*.

<sup>10</sup> Sir Ilbert Courtenay, *The Government of India, being a Digest of the Statute Law relating thereto with historical introduction and explanatory matter* (2<sup>nd</sup> ed, 1908), 33.

<sup>11</sup> Barbara D Metcalf and Thomas R Metcalf, *A Concise History of India* (2002), 60.

Figure IV: Map of the Mughal Empire c1690.



Chapter 3 The 'Titular' King of Delhi

The Mughal Empire began to disintegrate as a territorial unit on the death of the Emperor Aurangzeb in 1707.<sup>12</sup> It is commonly viewed as having collapsed by 1759-1761 and the last three Mughal Emperors who ascended the throne after that date, Shah Alam II, Akbar Shah II and Bahadur Shah II, are often referred to as ‘the late Mughals’. The Empire had always been de-centralised, with administration of territories delegated to local figures. But by the 1750s the Mughal Emperors had lost effective control of the Empire and the regional governors had become largely independent. The Empire had become “an empire existing only in name amidst a landscape of competing regional powers”<sup>13</sup> – such as the Afghans, the Sikhs, the Marathas, the Rajputs, the Rohillas, and the Nawabs of Oudh. The rulers of these regional powers (‘local rulers’) engaged in their own diplomatic and military activity and withdrew from attendance at the Mughal Court.<sup>14</sup>

Although local rulers no longer sent revenue to Delhi (with dire consequences for the strength of the Empire) many still offered allegiance to the Emperor as the fountain of all honour, and continued to seek his confirmation of their succession, rendering the Emperor a “symbolic overlord”, as it were.<sup>15</sup> These rulers “still struck coins in the Emperor’s name”, prayers were read in mosques in the Emperor’s name, and the seals used to authenticate public documents “still declared them the humble servants of the emperor”.<sup>16</sup> The Emperor “was still acknowledged by all subordinate Powers as the originator and grantor of legal titles to local territories all over India”.<sup>17</sup>

The “cloak of imperial authority”,<sup>18</sup> in the historian Percival Spear’s words, was a commodity sought not only by regional powers such as the Marathas, but by the British and the French. Spear describes it thus: “The Emperor’s was the ultimate legal authority in

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<sup>12</sup> See further for example John F Richards, *The Mughal Empire* (1993), M Athar Ali, “The Passing of Empire: The Mughal Case”, *Modern Asian Studies* 9, 3 (1975) 385-396, M N Pearson, “Symposium: Decline of the Mughal Empire”, XXXV *Journal of Asian Studies* (1976) 221-35, and Karen Leonard, “The ‘Great Firm’ Theory of the Decline of the Mughal Empire”, *Comparative Studies in Society and History*, 21 (1979) 151-167.

<sup>13</sup> Metcalf and Metcalf, above n 11, 1.

<sup>14</sup> *ibid* 30.

<sup>15</sup> *ibid* 2.

<sup>16</sup> H H Dodwell, *The Cambridge History of India*, (1962 [1932]), V, 602.

<sup>17</sup> C H Alexandrowicz, “Mogul Sovereignty and The Law of Nations”, (1955) *Indian Year Book of International Affairs*, 316, 319-320.

<sup>18</sup> Percival Spear, *Twilight of the Mughuls*, *Studies in Late Delhi* (1991 [1951]), 9.

India, and there was for his authority something of the reverence and spirit of acceptance which exists in Britain for Parliament.”<sup>19</sup> Alexandrowicz suggested:

Historians who consider them empty shells over-simplify the position and ignore the fact that the Mogul Emperor participated in the struggle for the balance of power as the agency distributing legal titles....Even the Mahrattas who initiated a vigorous movement for national unity relied on Mogul titles for the formalisation of their conquests.<sup>20</sup>

Thus while the local rulers were increasingly financially, militarily and administratively independent, they nonetheless sought imperial sanction for their acts and the Mughal Court remained “the school of manners for Hindustan”.<sup>21</sup> Indeed:

From the time of Akbar it had much the same influence upon Indian manners as the Court of Versailles upon European...From Bengal to the Punjab, and as far as Madura in the South, Mughal etiquette was accepted as the standard of conduct and Persian was the language of diplomats and the polite.<sup>22</sup>

From the eighteenth century onwards, through wars of annexation, unopposed annexation, and peaceful cession by treaty, the EIC acquired quasi-independent states on the Indian sub-continent such as the Sikh Kingdom in 1849.

What was the status in law of these acquisitions?

Britain, through the EIC, acquired sovereignty, as understood by international law, over these states, for example, Coorg in 1834,<sup>23</sup> the Sikh Kingdom<sup>24</sup> and the Kingdom of Oudh in 1856.<sup>25</sup> At international law, the EIC was treated as part of the State of Britain. For example, Wheaton noted that a “state” at international law did not include corporations created by the State itself. The EIC could not be considered a State, even though it exercised the sovereign powers of war and peace, for its powers were exercised

in subordination to the supreme power of the British Empire, the external sovereignty of which is represented by the company towards the native princes and people, whilst the British government itself represents the company towards other foreign sovereigns and states.<sup>26</sup>

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<sup>19</sup> *ibid.*

<sup>20</sup> Alexandrowicz, above n 17, 320-321.

<sup>21</sup> Spear, above n 18, 82.

<sup>22</sup> *ibid.*

<sup>23</sup> *Ex-Rajah of Coorg v The East India Company* (1860) 30 LJ Ch 226.

<sup>24</sup> *Sirdar Bhagvan Singh v Secretary of State for India in Council* (1874) LR 2 Ind App 38.

<sup>25</sup> *Doss v Secretary of State for India in Council* (1875) 19 LR 509. See discussion in **s1.2.2 Indian States and International Law in Chapter 1 International Law and the Kingdom of Delhi**, above.

<sup>26</sup> Henry Wheaton, *Elements of International Law* (2<sup>nd</sup> ed, 1863), 33.

It was also clear in British law by the mid-nineteenth century that territory acquired by the EIC was acquired on behalf of Britain.

First, the EIC was characterised by British courts as a body exercising delegated powers of sovereignty on behalf of the British Crown.<sup>27</sup> Thus, in the leading cases *Nabob of the Carnatic v The East India Company* (1793)<sup>28</sup> and *Gibson v the East India Company* (1839) (“*Gibson*”),<sup>29</sup> the EIC was treated as a body exercising powers as a sovereign. In the latter case, Tindal CJ stated:

It is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India), power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India.

The effect of treating the EIC as a body exercising sovereign powers was that, as Westlake pointed out, the part which the EIC played in India was played by Britain.<sup>30</sup>

Second, acquisitions of territory by the EIC were regarded in mid-nineteenth century English law as acquisitions made on behalf of the Crown.<sup>31</sup> The House of Commons had resolved in 1773 that all “acquisitions made under the influence of a military force or by treaty with foreign princes do of right belong to the State”.<sup>32</sup> House of Commons resolutions had no binding force but they indicated the political intention of the House.<sup>33</sup> Sir William Scott held in *The Indian Chief* (1801)<sup>34</sup> that “as a creation of this country, the Company could acquire territory in the international sense only for and on behalf of the Crown.”<sup>35</sup> The *East India Company Act* (1813)<sup>36</sup> asserted “the undoubted Sovereignty of

<sup>27</sup> *Gibson v The East India Company* (1839) 5 Bing NC 262, *Elphinstone v Bedreechand* (1830) 1 Knapp 316, *Secretary of State for India in Council v Kamachee Boye Sahaba* (the ‘Rajah of Tanjore case’) [1859] 7 Moo Ind App 476, *Doss v Secretary of State for India in Council* (1875) 19 LR 509, *Frith v The Queen* LR 7 Ex 365, and *Rajah of Coorg v EIC* (1860) 30 LJ Ch 226.

<sup>28</sup> (1793) 2 Ves Jun 56.

<sup>29</sup> (1839) 5 Bingham NC 273. This paragraph was quoted with approval by Lord Kingsdowne in the *Rajah of Tanjore Case*. See also Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, 40 *Harvard International Law Journal*, 61, 38-41.

<sup>30</sup> John Westlake, *Collected Papers on Public International Law* (1914), 195-7.

<sup>31</sup> British case-law on issues on arising from these annexations and cessions is discussed in **Chapter 5 A Sovereign in English Law** and **Chapter 6 A Sovereign in International Law**, below.

<sup>32</sup> J E S Fawcett, *The British Commonwealth in International Law* (1963), 109-111, citing Holdsworth, *History of English Law*, X, 163.

<sup>33</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution*, (8<sup>th</sup> ed, 1920), 52-53.

<sup>34</sup> 3 Ch Rob 31, cited by Fawcett, above n 32, 109.

<sup>35</sup> *ibid.*

The Crown of the United Kingdom of Great Britain and Ireland in and over the said Territorial Acquisitions” of the EIC. By 1839, Tindal CJ could say that “the general principles prevailing in the law” are that “all conquests made by subjects must necessarily belong to the Crown”.<sup>37</sup> By 1879, the sovereign authority of the EIC did not have to be pleaded in British courts as “the Courts would have judicial notice of it”.<sup>38</sup>

However, determining *when* territory had been ‘acquired’ was not always clear-cut. In particular, had the EIC in 1765 separately acquired, through Mughal law, sovereignty over what remained of the Mughal Empire?<sup>39</sup> At issue was how to characterise the *diwani*: a grant in perpetuity by the Mughal Emperor Shah Alam II<sup>40</sup> in 1765 to the EIC of the right, on behalf of the Emperor, to collect revenue and administer civil justice in the provinces of Bengal, Bihar and Orissa, in return for the annual payment of 24 *lakhs*.<sup>41</sup> These rights contained in the *diwani* were traditionally delegated by the Mughal Emperor to a revenue minister. The same year, the EIC acquired the *nizamat* of Bengal – a similarly delegated right to administer the criminal justice system.<sup>42</sup>

As a consequence of acquiring the *diwani* and the *nizamat*, from 1772 the EIC collected the revenue and administered justice in large parts of the sub-continent in the name of the Mughal Emperor. Did this mean that the EIC was henceforth ‘the sovereign ruler’ of Bengal, Bihar and Orissa? The significance, if any, in British and international law of the acquisition of the Mughal right of *diwani* was unclear. Ilbert suggested the British acquisition of the *diwani* was an acquisition “of the substance, though not the name, of territorial power, under the fiction of a grant from the Mogul Emperor”.<sup>43</sup> The renowned nineteenth century English criminal lawyer J F Stephens defined the *diwani* as powers “not substantially distinguishable from those of sovereigns”.<sup>44</sup>

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<sup>36</sup> 53 Geo III c.155, section XCV.

<sup>37</sup> *Gibson* at 172.

<sup>38</sup> “...the sovereign authority conferred upon the East India Company appears in Acts of Parliament, and therefore, without being pleaded, the Courts would have judicial notice of it”: per Sir Montague E Smith, *Musgrave v Pulido* [1879] 5 AC 102, at 113.

<sup>39</sup> The significance of the *diwani* in relation to the standing of Bahadur Shah was not raised at his trial.

<sup>40</sup> Shah Alam II, born 1728, died 1806.

<sup>41</sup> H G Keene (ed), *Beale's Oriental Dictionary* (1971 [1894]), 361. The text of the *firman* is at **Appendix 6**.

<sup>42</sup> G Rankin, *Background to Indian Law* (1946), 163.

<sup>43</sup> Ilbert, above n 10, 37.

<sup>44</sup> James Fitzjames Stephen, *A History of the Criminal Law of England* (1963 [1883]), II, 285.

Even after obtaining the *diwani* and the *nizamat*, the EIC continued apace to acquire, piecemeal, in the modes recognised by British and international law, viz cession and conquest, sovereignty over the territory of many of the quasi-independent states noted above. As one imperial historian put it: “an aggregate of territorial atoms, thrown, bit by bit, under a single rule, by the bold spirit of adventure, the rough chances of war, and the subtle agencies of diplomacy.”<sup>45</sup> Any subsisting rights of sovereignty of the Mughal Emperor in these states were simply ignored.

The assertion of Crown sovereignty was accompanied by increasing parliamentary control of the EIC. By 1857, the EIC was under the ultimate authority of the British Parliament in administering territorial acquisitions. The ‘Government of India’ comprised the “Home Government” in London and the ‘Supreme Government’ in Calcutta. The Home Government was made up of the EIC (the Court of Directors) and the Crown (the ‘Board of Commissioners for the Affairs of India,’ known as the Board of Control).<sup>46</sup> The Court of Directors was itself composed of directors appointed by qualified EIC stockholders and by the Crown. The Court of Directors was effectively the managing body of the EIC in England. The Board of Control was presided over by a Cabinet Minister. The Government in India was formed by the Governor-General in Council, sitting at Calcutta.<sup>47</sup> The Governor-General was appointed by the Court of Directors with the approval of the Crown. Both the British Parliament and the Governor General in Council had the power to legislate for territories in India, but the British Parliament had a reserve power to alter or repeal laws made by the Governor-General in Council.<sup>48</sup>

The EIC legal system was complex and only brief note of its main features by 1857 will be made here. Britain divided its territory into three “Presidencies”: Bengal, Bombay and Madras. Each Presidency had its own legal system. Within each Presidency, different systems of law applied. In Bengal, one system applied to the city of Calcutta and another to territories administered by the Government of India in the *mofussil*.<sup>49</sup>

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<sup>45</sup> Arthur Mills, *India in 1858: A Summary of the Existing Administration, Political Fiscal and Judicial, of British India; together with the Laws and Public Documents relating thereto* (1858), 29.

<sup>46</sup> *ibid* 30-45.

<sup>47</sup> *ibid*.

<sup>48</sup> *ibid* 72.

<sup>49</sup> *Mofussil*: country areas outside Calcutta.



The prevailing law in Calcutta as at 1857 was English law, for the city was treated as having been acquired by settlement.<sup>50</sup> The Supreme Court of Judicature, established by the King of England in 1773, had jurisdiction over all persons of British descent, wherever resident in Bengal and over all residents of Calcutta. The laws prevailing in Calcutta applied to all people of European descent wherever resident in Bengal. In contrast, as at 1857, the laws of England did not apply in EIC territories in the *mofussil*. Rather, local law was in force, for example, the *shariya*, as modified by Government of India regulations. The disinclination of the Government of India to introduce English law is well-documented but whether this stemmed from convenience or doubts about sovereignty was not clear. J F Stephens thought:

For a considerable period they were extremely reluctant to assume ostensibly the authority which they really possessed, finding it more convenient for their purposes to leave the superintendence of all the business of government and the administration of justice as much as possible in the hands of the natives whom they found in the exercise of it.<sup>51</sup>

### 3.2 The Mughal Emperors in the Eighteenth Century

What was the position of the Mughal Emperors in the eighteenth century?

The Mughal Emperors became increasingly impoverished as constituent parts of the Empire ceased providing financial support to the Emperor. Spear explains how, under the Mughal system of administration, revenue to maintain the empire had been land-based. At the time of the Emperor Akbar, landowners had made cash payments to the imperial treasury. In the seventeenth century, the Emperor had assigned land to noblemen who retained the revenue but provided men for the royal armed forces. Land revenue was also collected from a large area of imperial territory to maintain the Mughal Court and a small standing army. However, by the late-eighteenth century, only the land in the immediate vicinity of Delhi remained and even that “was only sufficient to maintain the Court and the numerous imperial family on a moderate scale”.<sup>52</sup>

While the Empire had slowly disintegrated, and the territories of the EIC had expanded, the Mughal Emperor was left undeposed. The circumstance of the EIC both administering

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<sup>50</sup> English law was introduced by the Charter of George I in 1726.

<sup>51</sup> Stephen, above n 44, III, 285.

<sup>52</sup> Spear, above n 18, 8-9.

territory under the *diwani* in the name of an Emperor left on his throne, and annexing states not completely independent of the Mughal Empire, was often described as a system in which: ‘the Mughal Emperor was the *de jure* sovereign of India and the EIC Government its *de facto* sovereign’;<sup>53</sup> ‘the Mughal Emperor was the ‘nominal sovereign’ of India, and the EIC the ‘real’ ruler’; or “the fiction of the Mogul government”.<sup>54</sup> On the one hand, the EIC was gradually obtaining sovereignty over previous constituent parts of the Mughal Empire, and on the other, it did not claim sovereignty over the whole empire and left the Emperor enthroned. The full remit of British sovereignty over the remnants of the Mughal Empire remained unclear at law.

Why did the EIC not depose Shah Alam after 1765? After all, the EIC had assumed the burden of rule and generally deposed the heads of annexed states, such as the infant ruler of the Sikh Kingdom, Duleep Singh.<sup>55</sup>

There is little agreement among commentators. One view is that Shah Alam was not deposed because his name still carried immense authority in India, and his removal would have been strenuously opposed in India.<sup>56</sup> A British view of the lingering authority of the name of the Emperor was that “[N]otwithstanding his Majesty’s total deprivation of real power, dominion, and authority, almost every state and every class of people in India continue to acknowledge his nominal sovereignty.”<sup>57</sup> Macaulay stated:

Even to this day we have never formally deposed the King of Delhi... In fact, it was considered, both by Lord Clive and by Warren Hastings, as a point of policy to leave the character of the Company thus undefined, in order that the English might treat the princes... just as might be most convenient.<sup>58</sup>

Another view is that the EIC was cautious about openly acting in India as a territorial sovereign, fearing the further curtailment of its powers by the British Parliament, and

<sup>53</sup> For example, Dodwell, above n 16, VI, 593, T K Banerjee, *Background to Indian Criminal Law* (1963) 30.

<sup>54</sup> *ibid* Dodwell, 605, citing the private journal of then Governor-General Lord Hastings.

<sup>55</sup> See for example *Salaman v Secretary of State in Council of India* [1906] 1 KB 613.

<sup>56</sup> For example: R Kemal, “The Evolution of British Sovereignty in India”, *Indian Year Book of International Affairs* (1957), 154.

<sup>57</sup> Montgomery Martin (ed), *The Despatches, Minutes and Correspondence of the Marquess Wellesley during his Administration in India* (1837) (hereinafter “*Wellesley’s Despatches*”), IV, 153.

<sup>58</sup> Undated minuted, quoted by A Parel, “A Letter of Bahadur Shah to Queen Victoria”, *XLVII Journal of Indian History*, (1969), 285.

preferred to be seen as exercising power in the name of the Mughal Emperor.<sup>59</sup> In the 1770s, “no-one in England was yet ready to accept the idea of filling with British sovereignty the void created by the dissolution of the Moghul power.”<sup>60</sup> The unwillingness to depose the Mughal Emperor may also be explained by the reluctance of Britain to assume the burden of colonies and its pursuit of “strategies of informal influence”,<sup>61</sup> known also as ‘indirect rule’.<sup>62</sup>

By the 1780s, representatives of the British, the French and the Marathas competed for influence over the Mughal Emperor Shah Alam II, seeking his “cloak of imperial authority”. The British were fearful that the Emperor would side with the French. Shah Alam initially chose to ally himself with the Marathas. In 1784, he appointed a Maratha chief ‘Deputy Regent of the Empire’, and Commander of the Mughal Forces, giving him command of the provinces of Agra and Delhi.<sup>63</sup> In turn, the French allied themselves with the Marathas.

However, in 1788, the Rohillas temporarily usurped the authority of the Marathas over the Emperor. Shah Alam was personally attacked and blinded by a Rohilla chief, Ghulam Qadir Khan, blinding a ruler being a “regular method” to “disqualify competitors for power”.<sup>64</sup> Nonetheless, the authority of the Marathas, who allotted revenue of six *laks*<sup>65</sup> of rupees per year for the maintenance of the Emperor and his family,<sup>66</sup> was soon restored.

By the 1800s, the Marathas were again in such close alliance with the Emperor that the Governor-General Lord Wellesley could say that the Marathas had

possession of the person of his Majesty, Shah Alam, under the immediate power of the forces commanded by French officers in the service of Dowlat Rao Scindia and the exercise of the nominal authority of the Moghal through those French officers.<sup>67</sup>

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<sup>59</sup> For example, Douglas Dewar, “A Reply to F Buckler’s ‘Political Theory of the Indian Mutiny’ (1923), 88 and S M Edwards “A Few Reflections on Buckler’s Political Theory of the Indian Mutiny”, 82, in M N Pearson, *Legitimacy and Symbols, The South Asian Writings of F W Buckler* (1985).

<sup>60</sup> Dodwell, above n 16, 599.

<sup>61</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001), 112.

<sup>62</sup> For example, Michael H Fisher, *Indirect Rule in India, Residents and the Residency System 1764-1858* (1998 [1981]).

<sup>63</sup> Spear, above n 18, 27.

<sup>64</sup> *ibid* 28.

<sup>65</sup> *Lakh*: a unit of measurement.

<sup>66</sup> Spear, above n 18, 29.

<sup>67</sup> Despatch No.XXXIII, July 1804, in *Wellesley’s Despatches*, above n 57, 134-5.

Arriving in India in 1798, and “[S]purred on by a new vision that saw the British Empire encompassing the entire sub-continent”,<sup>68</sup> the new Governor-General Wellesley had soon turned his attention to the Marathas. A map of the Indian subcontinent showing the extent of British control as at 1798 is overleaf (**Figure V**).

Events in 1803 would dramatically alter relations between the Mughal Emperors and Britain. According to the Prosecutor in Bahadur Shah’s trial, an extension of protection by the EIC in 1803 effectively extinguished the sovereign status of the King of Delhi.<sup>69</sup> According to Britain’s highest court, the Judicial Committee of the Privy Council, the protection was merely an incident of the foreign relations between the Kings of Delhi and Britain.<sup>70</sup>

The next section attempts, as far as possible, to extract the key episodes of this period according to the official British record of the time.<sup>71</sup>

### 3.3 The Mughal Emperors in the Nineteenth Century

#### 3.3.1 The Extension of Protection to the Mughal Emperor in 1803

The chiefs of the Maratha Empire had built up “a powerful military machine”, though they were “dependant on fragile alliances with local elites and European adventurers.”<sup>72</sup> Concerned about the capacity of the Marathas to “affect the security of the British Empire in India”, Wellesley in 1803 decided to go to war (known subsequently as the Third Anglo-Maratha War) and set out his reasons for doing so in a lengthy despatch to the Court of Directors.<sup>73</sup>

<sup>68</sup> Metcalf, *Concise History of India*, above n 11, 67.

<sup>69</sup> See **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

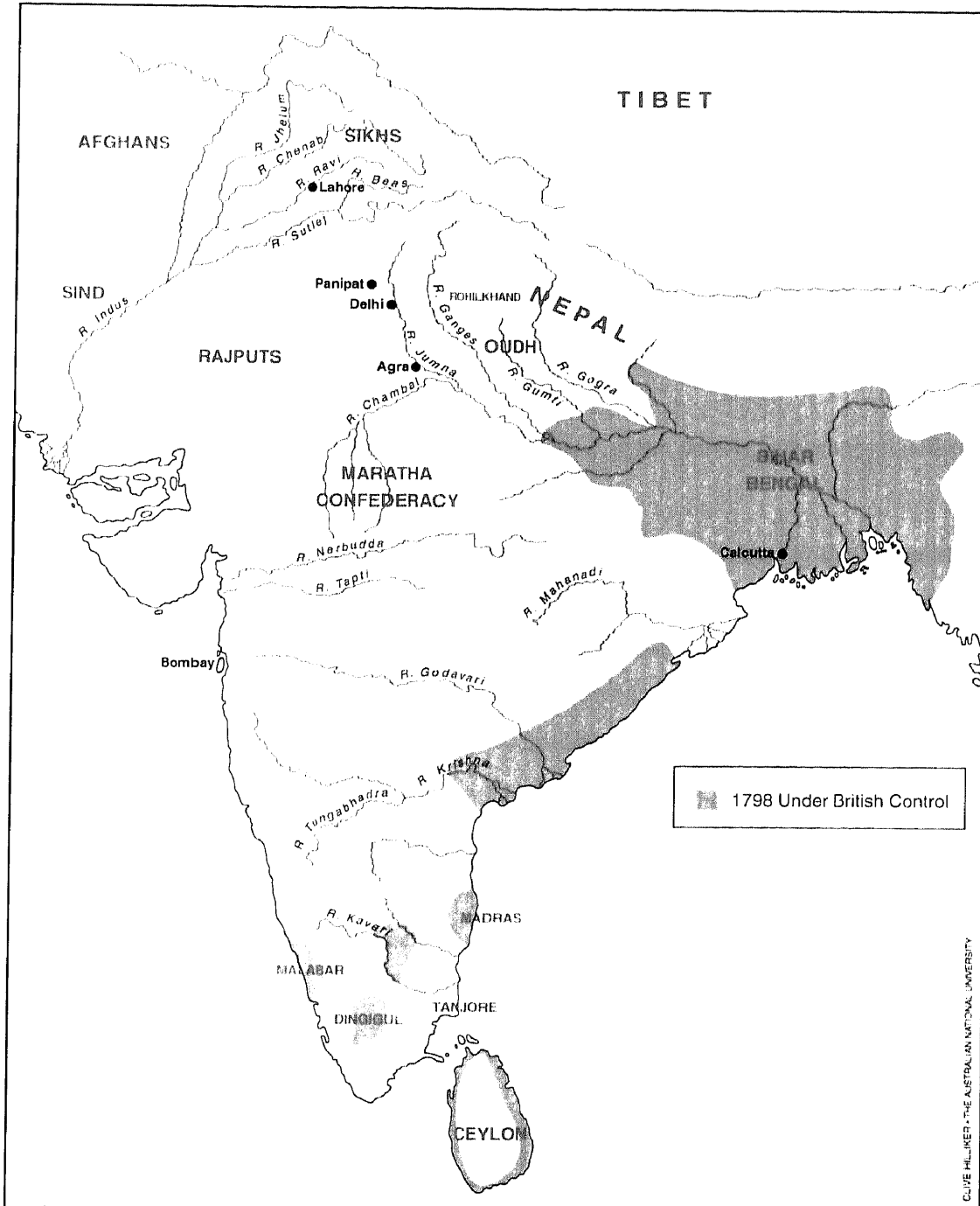
<sup>70</sup> See **Chapter 4 A Recognised King**, below.

<sup>71</sup> Official correspondence between the Governor-General and the Court of Directors as published in *Wellesley’s Despatches*, above n 57, and between EIC officials in India, in Jatindra Kumar Majumdar, *Raja Rammohun Roy and the Last Moghuls, A Selection from Official Records (1803-1859)* (1939).

<sup>72</sup> Metcalf, *Concise History of India*, above n 11, 71.

<sup>73</sup> *Wellesley’s Despatches*, above n 57, 132-177.

Figure V: Map of the Indian subcontinent showing British control c1798



Chapter 3 The 'Titular' King of Delhi

Wellesley said the power of the Marathas extended from an efficient military establishment under the direction of European officers, with a large and well-disciplined body of troops, to “the possession of the person of his Majesty, Shah Allam”.<sup>74</sup> Maratha power was dangerous to British interests, through “the facilities which it afforded to the French of injuring the British interests in India” and by “maintaining against the British Government a rival and hostile influence throughout every native state in India”.<sup>75</sup> Moreover, French influence over Shah Alam, though not formally connected with the State of France, was alarming.<sup>76</sup> The consequences of that influence are demonstrated by an extract of a letter from a French officer which fell into the hands of the Governor-General:

Shah Alam ought to be the undisputed sovereign of the Moghul Empire... The English Company by its ignominious treatment of the Great Moghul, has forfeited its right as dewan and treasurer of the empire... thus the Emperor of Delhi has a real and indisputable right to transmit to whomsoever he may please to select, the sovereignty of his dominions, as well as the arrears due to him from the English.<sup>77</sup>

The objects of war therefore included “the protection of the person and nominal authority of his Majesty Shah Aulum.”<sup>78</sup>

In 1803, when it was apparent that British forces were close to defeating the Marathas, Shah Alam – after much vacillation – switched sides and, offering Delhi’s Lal Qila to the victorious British forces, entered an alliance of protection with the EIC. On 29 August, and again on 11 September, Shah Alam had written to Lord Lake, the British Commander in Chief, asking for “the protection of the British Government”.<sup>79</sup>

The Marathas, led by Dowlat Rao Scindia, with forces under the command of French officers, were soundly defeated by the British forces in the Battle of Delhi (also known as the Battle of Patparganj) on 11 September 1803. Lord Lake was granted an audience by Shah Alam on 16 September and on 21 September, Shah Alam conferred a *khilat*<sup>80</sup> and

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<sup>74</sup> *ibid* 134-5.

<sup>75</sup> *ibid* 136.

<sup>76</sup> *ibid* 138.

<sup>77</sup> Dodwell, above n 16, 652.

<sup>78</sup> *Wellesley’s Despatches*, above n 57, 141.

<sup>79</sup> Spear, above n 18, 36.

<sup>80</sup> *Khilat*: ceremonial robe.

high title on him.<sup>81</sup> A widely-quoted eyewitness description by Major Thorn of the meeting with Lord Lake reads:

The descendant of the great Akbar and Aurangzib was found...blind and aged, stripped of authority and reduced to poverty, seated under a small tattered canopy, the fragment of regal state and the mockery of human pride.<sup>82</sup>

The official report of this important meeting was:

His Majesty received me seated on his Throne when the presents were delivered and the forms usual on these occasions were observed. His Majesty and his whole court were unanimous in testifying their joy at the change that has taken place in their fortunes.<sup>83</sup>

The EIC Government entered a peace treaty, the *Treaty of Sarji Anjangaon*, concluded 30 December 1803, with their defeated foe. This treaty included a clause in which the Marathas promised no longer to exercise influence over the Emperor:

By the twelfth article, Dowlut Rao Scindiah renounces all claims upon his Majesty Shah Aulum, and engages to abstain from all interference in the concerns of his Majesty.<sup>84</sup>

Wellesley explained that the Emperor, having been “rescued” from “the sanguinary violence” of the Rohilla Ghulam Qadir Khan (see above), and having appointed Marathas to high office in the Empire, the “person and family of the aged and unhappy monarch of Delhi” had been in the “control” of the Marathas. But Shah Alam having subsequently appointed a Frenchman Perron (in the service of the Marathas) to “the office of commandant of the fortress at Delhi, which is the residence of the royal family”, the “possession of the person and of the nominal authority of the Emperor”, could also be said to have fallen into the hands of the French.<sup>85</sup>

The name of the Emperor still carried great weight:

Princes and persons of the highest rank and family still bear the titles, and display the insignia of rank which they or their ancestors derived from the throne of Delhi, under the acknowledged authority of Shah Aulum, and his Majesty is still considered to be the only legitimate foundation of similar honours.<sup>86</sup>

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<sup>81</sup> Spear, above 18, 36.

<sup>82</sup> quoted in Sarkar, above n 71, 246.

<sup>83</sup> Letter from Lord Lake to Governor-General Wellesley, 17 September 1803, extracted in Majumdar, above n 71, 6.

<sup>84</sup> *Wellesley's Despatches*, above n 57, 152.

<sup>85</sup> *ibid* 152-153.

<sup>86</sup> *ibid* 153.

Thus, said Wellesley, “[U]nder these circumstances, the person and authority of his Majesty Shah Aulum might form a dangerous instrument” in the hands of a country such as France.<sup>87</sup> It was beyond doubt that the Government of France intended “to establish on the foundation of her possessions in India a political and military state, and to strengthen and augment it by every practicable connection with the native states of India, by every art of indefatigable intrigue and systematic ambition.”<sup>88</sup> Wellesley considered that France would have “derived essential aid from the possession of the person and family of the Emperor.” Of even greater concern was the possibility that “the Emperor might have been compelled to constitute the territorial possessions of France in India an independent sovereignty”, causing much injury to British interests.<sup>89</sup>

Accordingly, it had been important to place “the person, family and nominal authority of his Majesty Shah Aulum under the protection of the British Government”.<sup>90</sup> An additional “political benefit” to be derived from placing Shah Alam under protection, was

the reputation which the British name would acquire by affording an honourable and tranquil asylum to the fallen dignity and declining age of the King of Delhi, and by securing the means of comfort to his Majesty’s numerous and distressed family.<sup>91</sup>

In closing his despatch, Wellesley re-capitulated the benefits of “the operations of war and the arrangements of the peace”: the reduction of military power and territorial resources of Scindia; the destruction of French territorial power; the annexation of territory formerly occupied by French forces; and “the deliverance of the Emperor Shah Allum from the control of the French power...”.<sup>92</sup>

### 3.3.2 The Form of Protection Granted to the Mughal Emperor in 1803

No written treaty of alliance or protection was concluded between the King of Delhi and the EIC.<sup>93</sup> No written agreement set out the terms of the alliance, the extent of the powers exercisable by Britain over the Kingdom of Delhi, or the powers retained by the King of

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<sup>87</sup> *ibid* 153

<sup>88</sup> *ibid* 154.

<sup>89</sup> *ibid* 155-156.

<sup>90</sup> *ibid* 156.

<sup>91</sup> *ibid* 156.

<sup>92</sup> *ibid* 171-172.



Delhi. In canvassing opinion in 1804 on proposed arrangements for the maintenance of Shah Alam and his family, Wellesley said:

The Governor-General does not deem it advisable to enter into any written engagement whatever with his Majesty, nor is it his Excellency's intention to solicit any concession, nor to interdict or oppose any of those outward forms of sovereignty to which his Majesty has been accustomed. His Excellency is desirous of leaving his Majesty in the unmolested exercise of all his usual privileges and prerogatives.<sup>94</sup>

However, a written financial agreement between the EIC and Shah Alam, known as the '1805 Arrangements',<sup>95</sup> was negotiated in 1804 and settled in 1805. A despatch of May 1805 from the Governor-General to the Resident at Delhi details the Arrangements, described as "the final determination" of the Government.<sup>96</sup>

The Arrangements promised that territory on the right bank of the River Jumna, comprising land ceded to the EIC under the *Treaty of Serjie Anjemgaum*,<sup>97</sup> would be assigned to Shah Alam for his support ("the Assigned Territory"). The territory would be under the management of a British 'resident' at Delhi. Shah Alam was to appoint a *diwan* to attend at the office of collection to ascertain and report to him on the amount of revenue received from the assigned territory.

Two courts were to be established "for the administration of civil and criminal justice, according to the Mahomedan law, to the inhabitants of the city of Delhi and of the assigned territory lying without the precincts of the city."<sup>98</sup> Judges were to be appointed from "amongst the most respectable and learned of the Mussulman inhabitants of Delhi and no sentences of the criminal courts extending to death should be carried into execution without the express sanction of his Majesty".<sup>99</sup>

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<sup>93</sup> H G Keene noted that "native tradition asserts that one was executed, but afterwards suppressed, the copy recorded in the palace archives being purloined at the instigation of the British", *The Fall of the Moghal Empire* (1876), 277.

<sup>94</sup> Notes of proposed instructions to the Resident at Delhi, 17 November 1804, appended to Despatch No. L.III, *Wellesley's Despatches*, above n 57, 240.

<sup>95</sup> The arrangements are discussed further in **Chapter 4 A Recognised King** and **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>96</sup> Despatch no.CX, N B Edmonstone, Secretary to Government, to Lieut-Colonel Ochterlony, Resident at Delhi, 23 May 1805, *Wellesley's Despatches*, above n 57, 542.

<sup>97</sup> Described in the Arrangements as "all that portion of the territory on the right bank of the Jumna, ceded to the Honourable Company under the Treaty of Serjie Angemgaum, which is situated to the north-west of a town or village named Kaboolpore, in the map of the ceded and conquered provinces constructed by Lieut-Colonel Colebrook." *ibid* 542.

<sup>98</sup> *ibid* 543.

<sup>99</sup> *ibid* 543.

Shah Alam would have the right to approve modifications suggested by the Governor-General in Council:

if the arrangements now to be introduced into the assigned territory shall be found to be ill calculated to promote the improvement of the country, and to ensure the realization of the public revenues, the Governor-General in Council will hereafter submit for his Majesty's approbation such modifications of the proposed system, as shall in his judgment appear to be necessary to ensure to his Majesty all the advantages which the country is capable of yielding, and at the same time, to secure the happiness and prosperity of the people.<sup>100</sup>

Regular revenue would be paid to Shah Alam “to provide for the immediate wants of his Majesty, and his royal household”. The amount, then set at 90,000 *sicca* rupees (double that allotted by the Marathas, see above), could be increased should resources permit.<sup>101</sup> Payment was to be raised from revenue of the Assigned Territory, collected in the name of Shah Alam. Finally, a military force would be established “for the protection of the assigned territory”.<sup>102</sup> The EIC maintained a military contingent to support the Kingdom, lodged outside the city, but the King of Delhi was not barred from raising an armed force. The EIC territory surrounding Delhi became known as the ‘Conquered Provinces’. Pockets of territory within the Conquered Provinces were independently held by, inter alia, the Rajas of Ballabgurh and Jhajjar.<sup>103</sup> EIC law was in force in the Conquered Provinces. However, the Assigned Territory was not treated as EIC territory and EIC regulations were not in force. *Regulation VIII of 1805* extended EIC regulations over the Conquered Provinces but stipulated

[T]he city of Delhi and the conquered territory situated on the right bank of the river Jumna, the revenues of which are assigned to His Majesty Shah Alam, are hereby declared not to be subject to any of the laws and regulations of the British Government.....<sup>104</sup>

In June 1805, Wellesley informed the Court of Directors of the arrangements adopted to provide for the “future maintenance” of Shah Alam and the Royal family and for the “general settlement” of his affairs. He emphasised that the purpose of the protection extended to Shah Alam was not to use

the Royal prerogative as an instrument of establishing any control or ascendancy over the states and chieftains of India, or of asserting on the part of his Majesty any of the claims which in his capacity

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<sup>100</sup> *ibid* 544.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid* 545.

<sup>103</sup> *Delhi Gazette* (1912) 40.

<sup>104</sup> Section IV.

of Emperor of Hindostan his Majesty may be considered to possess upon the provinces originally composing the Moghul empire.<sup>105</sup>

Rather, placing “the throne of Delhi under the protection of the honourable Company” would avoid potential embarrassment to British interests by either the Marathas or the French acting “in the name and under the authority of the Emperor”.<sup>106</sup> Moreover, the British Government had secured “advantages of reputation” by substituting “a system of lenient protection, accompanied by a liberal provision for the ease, dignity and comfort of the aged monarch and his distressed family” for the “oppressive control” and “degraded condition of poverty, distress and insult under which the unhappy representative of the house of Timour and his numerous family had so long laboured.”<sup>107</sup> Finally, the Governor-General had considered it “unnecessary and inexpedient to combine with the intended provision for his Majesty and his household, the consideration of any question connected with the future exercise of the imperial prerogative and authority.”<sup>108</sup>

From 1803 to 1857, the Mughal Emperors lived under this British protection. Shah Alam’s successors were rarely styled “the Mughal Emperor” in British writing thereafter. The title henceforth in general British use was “the King of Delhi”. This title, *Sultan-i-Dehli*, was in fact of long European usage. For example, in 1516 Duarte Barbosa termed the Mughal Emperor “the king of Dely”.<sup>109</sup>

Over this period, as noted above, the EIC’s territory expanded on the sub-continent. A map showing the general extent of British control c1856 is overleaf (**Figure VI**).

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<sup>105</sup> *Wellesley’s Despatches*, above n 57, 554-555.

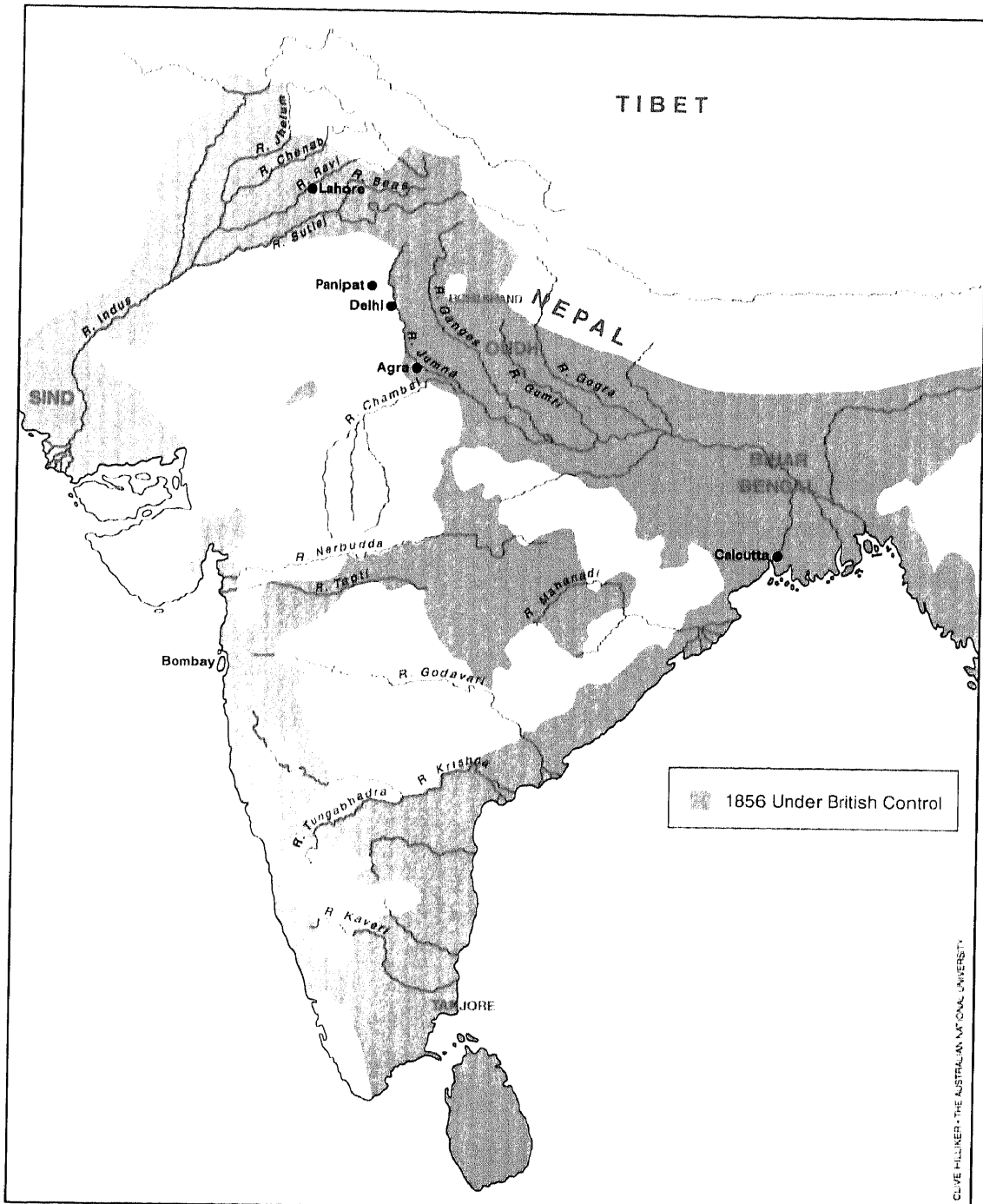
<sup>106</sup> *ibid* 554.

<sup>107</sup> *ibid* 554-555.

<sup>108</sup> *ibid*.

<sup>109</sup> H Yule and A C Burnell, *Hobson-Jobson, The Anglo-Indian Dictionary* (1996 [1886]), 302.

Figure VI: Map of the Indian subcontinent showing British control c1856.



Chapter 3 The 'Titular' King of Delhi

The following section attempts to show how, in British writing, references to the Kings of Delhi from the death of Shah Alam in 1806 underlined a “titular” status. The remainder of the chapter argues that, at least from 1805, the Kings of Delhi were viewed by the British as largely powerless, impoverished, entirely dependant on British generosity. This thesis contends in later chapters that this view can also be traced in the trial of Bahadur Shah.<sup>110</sup> The view of the Kings of Delhi that emerges in this writing is to be contrasted with that of the Judicial Committee of the Privy Council, discussed in the next chapter.

### 3.4 Akbar Shah II (r.1806-1837)

Shah Alam died in 1806 and his son Akbar Shah II ascended the throne.<sup>111</sup> A portrait of Akbar Shah, with the British Resident Sir Charles Metcalf standing to the left, is overleaf (**Figure VII**).

The Palace, the city and its immediate environs became increasingly impoverished during Akbar Shah’s reign. In 1809, revenue paid by the Government under the 1805 Arrangements became a regular fixed amount of one *lakh* per month.<sup>112</sup> Akbar Shah was unsuccessful in his attempts to persuade the EIC to increase the payments (which remained capped until the final payment was made in 1857), though he received an “augmentation” of 10,000 rupees per month for the support of his eldest son.<sup>113</sup>

In 1829, Akbar Shah appointed an Envoy to the Court of St James, Raja Ram Mohan Roy, to plead his case to increase the monthly payments.<sup>114</sup> Despite the attempt by EIC officials in India to avoid official recognition of the envoy, the Board of Control recognised his title and mission, received his memorial petitioning for an increase in revenue, and presented him to King William IV.<sup>115</sup> But he was ultimately unsuccessful in his quest to increase payment.

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<sup>110</sup> See Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality, Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity, and Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty, below.

<sup>111</sup> Akbar Shah II, born 1760, died 1837. Beale, above n 39, 46.

<sup>112</sup> Majumdar, above n 71, 181.

<sup>113</sup> Beale, above n 39, 46.

<sup>114</sup> On Indian diplomatic missions to London, see Michael H Fisher, “Indian Political Representations in Britain during the Transition to Colonialism”, *Modern Asian Studies* (2004), 38, 649-675.

<sup>115</sup> Spear, above n 18, 40.

Figure VII: The King of Delhi, Akbar Shah II, c1825.



In 1832, *Regulation V* transferred responsibility for EIC administration of the Assigned Territory from the Resident, who reported directly to the Governor-General, to a new office, the ‘Commissioner of the Delhi Territory’, who would be responsible to the Government of the North West Provinces.<sup>116</sup> While in the conduct of civil and criminal trials and the administration of revenue, the Commissioner was to “ordinarily conform to the principles and spirit of the Regulations”,<sup>117</sup> EIC regulations were not extended to Delhi. Impoverishment was accompanied by a decline in observance of Mughal customs of royalty and steps to remove any suggestion of EIC subordination to the King of Delhi. For example, then Governor-General Lord Hastings refused to meet Akbar Shah unless he “waived all ceremonial implying supremacy over the Company’s dominion”. However, Akbar Shah met Hastings’ successor, Lord Amherst, without such ceremony.<sup>118</sup>

Ceremonial presents ceased to be presented in the name of the Governor-General, “since they implied inferiority”<sup>119</sup> and likewise the payment of regular *nazar*.<sup>120</sup> Lord Hastings discarded from his seal the words “Tidree Akber Shah” (‘Vassal of the King’), seeing the words as an admission of subordination.<sup>121</sup> New epistolary forms were adopted in the late 1820s for communication between “the Head of the British Government in India” and Akbar Shah, which acknowledged the “superior rank” of Akbar Shah “as possessing kingly dignity” without using any terms “indicating vassalage or political dependency” on the part of the Governor-General. The new forms, identical to those used in correspondence between the Governor-General and the Shah of Persia, said the Governor-General to the Court of Directors on 3 July 1828, were

as near to equality as can be expected or required whilst we continue to recognise the King of Delhee as a Titular Sovereign<sup>122</sup>

<sup>116</sup> *Delhi Gazette*, above n 103, 40.

<sup>117</sup> Section III. Administrative responsibility for the ‘Delhi Territory’ was transferred to the Lieutenant-Governor of the Punjab by *Act XXXVIII of 1858*.

<sup>118</sup> “The two entered the Diwan-i-khas at Delhi from opposite sides at the same moment; they met in front of the throne, exchanged embraces, and then took their seats, the emperor on his throne, the governor-general on a state-chair placed on the right; no *nazar* was offered; and on Amherst’s departure, the emperor presented him with a string of pearls and emeralds”, Dodwell, above n 16, 606.

<sup>119</sup> A B Keith, *A Constitutional History of India 1600 -1935* (2<sup>nd</sup> ed, 1937), 117.

<sup>120</sup> Spear, above n 18, 55. But the amount in lieu of *nazar* was to be added to “the Royal Stipend”, letter from Deputy Secretary to Government, 5 October 1827, Majumdar, above n 71, 180.

<sup>121</sup> Keith, above n 119, 117 and Majumdar, above n 71, 190.

<sup>122</sup> Letter from Governor-General in Majumdar, *ibid* 172 and 190.

### 3.5 Bahadur Shah II (r.1837-1857)

The final Mughal Emperor to bear the title *Sultan-i-Dehli*, was Bahadur Shah who ascended the throne in 1837 on the death of his father Akbar Shah. The Governor-General wrote a letter of congratulations on his accession “to the throne of [his] illustrious ancestors”.<sup>123</sup> A portrait of Bahadur Shah at Court, c1838, is overleaf (**Figure VIII**).

Said to have been a ‘philosophic prince’ who studied Sufi philosophy and practised calligraphy, Bahadur Shah is described as “a man of spare figure and stature, plainly apparelled”<sup>124</sup> and as one who “loved poetry and philosophy, gardens and nature in all its guises”.<sup>125</sup> But above all he is remembered as a literary patron,<sup>126</sup> an excellent scholar and an elegant Urdu poet, with the *nom de plume* ‘Zafar’, or ‘Victory’. He composed volumes of poetry in Urdu, Persian, Braj Bhasha and Panjabi<sup>127</sup> and is still known by many as ‘Bahadur Shah Zafar’. Despite poverty and political decline, the Mughal Court under Bahadur Shah remained a cultural influence, and Urdu literature and the Delhi school of painting flourished. The Mughal Court remained “the last refuge of a traditional culture”.<sup>128</sup>

Like his father, Bahadur Shah sought unsuccessfully to increase the monthly revenue payments and borrowed heavily from Delhi bankers.<sup>129</sup>

Ceremonial courtesies observed by the British were few and in 1844, Bahadur Shah complained to Queen Victoria.<sup>130</sup> In his letter, Bahadur Shah lauded the “Tree of Friendship” that had grown between his forebears and the sovereigns of Great Britain. Ever the poet, he lamented that “the flower of my Kingdom had faded” and pleaded for Queen Victoria to “restore the ancient customs and usages” to “the Imperial Family of Hindostan.” The letter never reached the Queen, but the Court of Directors was sufficiently moved to request officials in India to pay him an immediate sum to settle his debts.

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<sup>123</sup> *ibid* 255.

<sup>124</sup> Spear, above n 18, 73.

<sup>125</sup> *ibid* 74.

<sup>126</sup> *ibid*.

<sup>127</sup> F W Pritchett, *Nets of Awareness, Urdu Poetry and Its Critics* (1995), 5.

<sup>128</sup> Spear above n 18, 83.

<sup>129</sup> See further **Chapter 4 A Recognised King**, below.

<sup>130</sup> The letter to Queen Victoria is reproduced in Majumdar, above n 71, 287 and Parel, above n 58, 299.



Figure VIII: The King of Delhi, Bahadur Shah II, c1838.



In the early 1850s, government officials attempted to interfere with the succession of the throne, and urged, without success, that he be moved out of the Palace, or deposed or that the title be allowed to lapse after his death.<sup>131</sup> Then Governor-General Lord Ellenborough contemplated offering the title of the Mughal Emperor, *Padshah Ghazi* (literally: the Champion of Islam) to the Queen.<sup>132</sup>

### 3.6 The ‘Titular’ King

Bahadur Shah had in 1837 inherited a kingdom which was in such close alliance with the British, with such little freedom of action left to its Head of State that he and his immediate forbears were dismissed by many at the time as merely ‘titular’ or ‘nominal’ kings – kings in name only. The acquisition of the *diwani* in 1765, granting what seemed to be the ‘substance’ of Mughal rule to the EIC, fed into that view. The emphasis in the nineteenth century on the Delhi Kings’ ‘titular’ status also reflected changes more generally in British perceptions of the Mughal Emperors.

These changes in nineteenth century British attitudes towards India, such that the Mughal Emperors were suffered, rather than respected, have been traced by contemporary historians.<sup>133</sup> Spear thought, for example, that romantic sympathy for the late Mughals’ “fallen majesty” gave way to a “revulsion of feeling towards the Mughals in Indian government circles”.<sup>134</sup>

An early indication of the decline in respect for the Mughal Emperor in the nineteenth century appears in Wellesley’s description in 1803 of Shah Alam as “unfortunate”<sup>135</sup> and “unhappy”,<sup>136</sup> and the Royal Family as “numerous and distressed”.<sup>137</sup> Wellesley was

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<sup>131</sup> Narayani Gupta, *Delhi Between Two Empires 1803-1931* (1998), 14, Keith, above n 119, 124. Dodwell above n 16, 606 stated that Canning decided in 1856 that the imperial rank should no longer be recognised after Bahadur Shah’s death. A letter from the Governor-General to the Court of Directors dated 8 September 1856, recommended that in the event of Bahadur Shah’s death, his son Prince Mirza Mahomed Korash should be “recognised as Head of the Family” and “instead of the Title of King, and the external signs of Royalty, he shall have the designation and position of Prince or Shahzadah of the House of Timour...”, in Majumdar above 71, 304.

<sup>132</sup> Dodwell, above n 16, 606, date not specified.

<sup>133</sup> For example, Thomas R Metcalf, *Ideologies of the Raj* (1985).

<sup>134</sup> Spear, above n 18, 56.

<sup>135</sup> *Wellesley’s Despatches*, above n 57, 172.

<sup>136</sup> *ibid* 153.

<sup>137</sup> *ibid* 172.

explaining to the Court of Directors the new alliance entered into with Shah Alam in 1803, following the British defeat of the Marathas, outlined above.

In 1809, Lord Minto said of Akbar Shah (emphasis mine):

The King, bent on his unattainable purpose but destitute of power to attempt it openly and too feeble even to avow it, stoops to every little artifice, engages in every petty intrigue.....An opening is furnished for such practices by the liberal courtesy with which the exterior observances due to the *real sovereignty* of his ancestors are, most properly, extended to his *nominal title*; and under cover of the formal homage which a tenderness for his personal feelings alone prompts us to render him, he seeks to advance a silent and gradual claim to the substantial attributes of greatness.<sup>138</sup>

Captain Mundy would write in his memoirs after an audience with Akbar Shah in 1827:

the impoverished old Sultan...the descendent of Baber, Achar, Shah Jehen and Aurungzebe, reduced as he is now, to the mere shadow of a monarch...the dependent pensioner of a handful of merchants.<sup>139</sup>

On the ritual ceremony of *nazar*, Mundy said:

But it is hard to grudge the poor old fallen king this little meed of mockery, or to deny to the descendant of Tamurlane, the shadow, whilst we possess the substance, of monarchy in India.<sup>140</sup>

The rhetoric of the ‘shadow’ as descriptive of the Mughals’ status in the nineteenth century was a play on the royal style of the Mughal Emperors, a Persian title *zill-i-ilahi* (‘shadow of God’). Bibadal Khan, a seventeenth century Mughal courtier at the Court of the Emperor Shah Jehan, elaborates:

*That which was your throne as majestic as heaven  
Was the ornament of your justice over the world  
Thou wilt last as long as God exists  
For substance is ever accompanied by its shadow*<sup>141</sup>

There was a growing frustration among officials at the continuing existence of the King of Delhi. In 1818, a British Parliamentary Select Committee had said:

If we were to have the power of the Emperors of Delhi, let us assume their name and dignity. This would put an end to many equivocal circumstances, [and] render our situation less anomalous.<sup>142</sup>

<sup>138</sup> Lord Minto, Minute of 1809, quoted in Mahdi Husain, *Bahadur Shah II and the War of 1857 in Delhi with its Unforgettable Scenes* (1987), 112.

<sup>139</sup> Captain Mundy, *Pen and Pencil Sketches, being the Journal of a Tour in India* (1833, 2nd ed), II, 80, 83.  
<sup>140</sup> *ibid* 84.

<sup>141</sup> Quoted in Michael Brand, *The Vision of Kings: Art and Experience in India* (1995), 107.

<sup>142</sup> Quoted in G S Mukherjee, “Controversy over the Question of Sovereignty (A Study of Mughal-British Relations)”, *Quarterly Review of Historical Studies*, XVII, No 2, (1978-79), 183, note 28.

In 1833, government official Thomas Babington Macaulay<sup>143</sup> described Akbar Shah as one “whom we have allowed to play at being a sovereign at Delhi.”<sup>144</sup>

The notion of the ‘titular king’, the king in name only, the king who did not rule, permeated most contemporary accounts of 1857 and can be traced in subsequent commentary on the Mughals in the nineteenth century. In Ball’s 1858 text *A History of the Indian Mutiny*, Akbar Shah merely “enjoyed the shadow of a royal title” and by 1857:

Beyond the palace walls these remnants of royalty had no power; they had no territory, no revenue, no authority. In *our* eyes they were simply pensioners and puppets. Virtually, indeed, the Mogul was extinct...<sup>145</sup>

Cave-Brown in his 1861 personal narrative of the 1857 siege of Delhi saw “...an imbecile puppet who, in pensioned pomp, was permitted to occupy the Musnud<sup>146</sup> at Delhi...”<sup>147</sup>

In *Kaye and Malleon’s History of the Indian Mutiny of 1857-58*, Bahadur Shah was presented as a political paradox, “a pensioner, a pageant, and a puppet. He was to be a King, yet no King – a something and yet a nothing – a reality and a sham at the same time.”<sup>148</sup>

As noted above, Spear, in his seminal work on Delhi, saw this view of the nineteenth century Mughals as part of a more general change in attitude towards things Indian.<sup>149</sup>

The “fallen state of majesty”, once regarded kindly, was now mocked as a court living in “ridiculous splendour”.<sup>150</sup> Moreover, “the possession of the Mughal name”, the ‘cloak of imperial authority’ came to be seen as “an encumbrance” and officials asked “to what purpose is this waste?”<sup>151</sup>

The old interest in and respect for Indian civilisation was changing to criticism and distaste...Should so unworldly a thing as the Mughal dynasty, and so useless an object as a titular monarch, escape?<sup>152</sup>

<sup>143</sup> Macaulay was at that time a Law Member of the Governor-General’s Executive Council in India, P Mehra, *A Dictionary of Modern History of India 1707-1947* (1985), 413.

<sup>144</sup> Quoted in J Cave-Browne, *The Punjab and Delhi in 1857*, (1970 [1861]), I, 7.

<sup>145</sup> Charles Ball, *A History of the Indian Mutiny* (1858), 68 and 69.

<sup>146</sup> *Musnud*: throne.

<sup>147</sup> Cave-Brown, above n 144, 7.

<sup>148</sup> Bernard S Cohn, “Representing Authority in Victorian India”, in E Hobsbawm and T Ranger, *The Invention of Tradition* (1992 [1983]), 171.

<sup>149</sup> Spear, above 18, 50. Other scholarship on attitudes towards India in the nineteenth century include J S Grewal, *Muslim Rule in India, The Assessments of British Historians* (1970); Francis G Hutchins, *The Illusion of Permanence, British Imperialism in India* (1967); and Metcalf, *Ideologies of the Raj* (1995).

<sup>150</sup> Spear, above n 18, 50.

<sup>151</sup> *ibid* 50-51.

<sup>152</sup> *ibid* 50-51.

Writers of today suggest that in the nineteenth century, Delhi remained a rich cultural centre and a continuing locus of Mughal authority.<sup>153</sup> British commentary of the nineteenth century, as illustrated above, tended to ignore his continuing importance within the Indian polity and to emphasise his apparent powerlessness, financial dependence on Britain and merely ‘titular’ standing as King.

As the following chapters will show, the trial of Bahadur Shah was dominated by this notion of ‘titular sovereignty’.

As noted at the start of this chapter, Bahadur Shah’s historic status as the King of Delhi was described as ‘titular’ and the charge sheet alleged that he was by birth “a subject of the British Government in India”. The view that Bahadur Shah’s kingship was of little consequence determined the assertion of jurisdiction and the nature of the charges; it resonated throughout the Addresses of the Prosecutor. He was characterised as a subject owing a duty of allegiance who had treasonously proclaimed himself “the reigning King and sovereign of India”, not as a recognised sovereign reigning from his imperial city. His apparent disputation of any authority of the Court over him was ignored. His sovereign status was denounced by the Prosecutor – “Kings by crime are degraded to felons”<sup>154</sup> – and the “titular majesty of Delhi”<sup>155</sup> emphasised:

Insignificant and contemptible as to any outward show of power, it would appear that this possessor of mere nominal royalty has ever been looked upon by Mahomedan fanaticism as the head and culminating star of its faith.<sup>156</sup>

His claim to kingship was mocked:

By embarking in [sic] so forlorn a cause he imperiled everything; his own life, and those of all belonging to him, and for what? The distant glimmer of a crown, which common reason, or the slightest consideration, would have convinced him was a mere ignis fatuus – a mockery of a sceptre, that would evade his grasp.<sup>157</sup>

But it was more than hyperbole. The Prosecutor argued in the trial that the protection extended to Shah Alam in 1803 had effectively terminated Shah Alam’s substantive sovereignty, making Shah Alam and his successors “subjects of the British Government in

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<sup>153</sup> For example, Pritchett, above n 127.

<sup>154</sup> *Proceedings*, 145.

<sup>155</sup> *ibid* 136.

<sup>156</sup> *ibid* 134.

<sup>157</sup> *ibid* 138.

India” and entitling the Government to subject the last Mughal Emperor, Bahadur Shah, to criminal prosecution.

Did Wellesley’s placing of “the throne of Delhi under the protection of the honourable Company”<sup>158</sup> in 1803 terminate the status of the Kingdom of Delhi as a Sovereign State? Was ‘titular sovereignty’, so entrenched in the trial of Bahadur Shah, a proper depiction of his status in law?

The next three chapters address the status in law of the King of Delhi in 1857, an issue central to assessing the authority of the Government of India to prosecute him in 1858.

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<sup>158</sup> *Wellesley’s Despatches*, above n 57, 554.

## Chapter 4 A Recognised King

### 4.0 Introduction

In May 1857, Bahadur Shah was living in his Palace in the Lal Qila in the city of Delhi. A mutiny in the armies of the EIC, starting in the town of Meerut, was closely followed by a civil rebellion in areas under British control in Northern India.<sup>1</sup> A group of mutinous sepoys from Meerut arrived in Delhi, and all British civilians and military personnel were either killed, held captive, or fled to areas where a British presence remained. Over the following months, British forces besieged the city and finally broke through the city walls on 14 September 1857. Bahadur Shah, who apparently lent support to the Rebellion, fled the city during the final British assault and was captured by British forces at the nearby Humayun's Tomb, on 21 September 1857.<sup>2</sup>

At issue is the status in law of Bahadur Shah as at his capture by British forces.

This chapter reviews two cases before the Judicial Committee of the Privy Council, *Lalla Narain Doss v Estate of the ex-King of Delhi* (1867)<sup>3</sup> ('Doss') and *Raja Saliqram v Secretary of State for India in Council* (1872)<sup>4</sup> ('Saliqram'), which unequivocally show that Bahadur Shah was in law a Sovereign recognised by Britain until he was deposed and the sovereignty of the Kingdom of Delhi extinguished in October 1857.

### 4.1 Background to the Cases *Doss* and *Saliqram*

As was noted in the previous chapter, the impoverished Bahadur Shah borrowed heavily from bankers in Delhi. Two cases brought by bankers for unpaid debts were heard by the Judicial Committee of the Privy Council. The substantive issue in both cases was the consequence of Bahadur Shah's former status as a Sovereign vis-à-vis creditors, Lalla Narain Doss and Raja Saliqram, seeking payment in unrelated proceedings from the

<sup>1</sup> A map of the area affected by rebellion is in **Chapter 7 The Imprisonment of the King of Delhi in 1857**.

<sup>2</sup> The events of 1857 are discussed in **Chapter 7 The Imprisonment of the King of Delhi in 1857**, below.

<sup>3</sup> (1867) XI Moore's Indian Appeals 277; 2 *British International Law Cases*, 1965, 204.

<sup>4</sup> (1872) XII Bengal Law Reports 167; Indian Appeals Supp. Vol 119; 1 *British International Law Cases*, 1965, 575. The Bengal Law Report spells the plaintiff's name as "Saliqram" but the correct spelling of the name in Hindi is 'Saligram'.

Government of India of debts incurred by Bahadur Shah before 1858. Both cases proceeded on the basis that the Government of India had recognised the King of Delhi as a Sovereign.

On 3 October 1857, after Bahadur Shah's capture, his real and personal property, including his personal estate, was appropriated by the Government of India, including his royal land, *tayul-i-shahi*.<sup>5</sup> The Order of confiscation, made by the most senior official then in Delhi, Charles Saunders, Acting Commissioner of Delhi, provided:

The confiscation of all Crown lands (*tayul-i-shahi*), villages, lands, gardens, etc, and of all the *jagirs*<sup>6</sup> of sultans, begums, etc, having been deemed proper, it is ordered that *perwannas*<sup>7</sup> be issued to the *tehsildars*<sup>8</sup> of the south, north, and east, to confiscate all the villages and lands above specified, and also to confiscate any other village, lands, gardens, etc of the above description not mentioned in the accompanying list;<sup>9</sup> and that they should submit a statement of the extent of area and the amount of *jumma*<sup>10</sup> and quality of land. A copy of this proceeding to be forwarded to the Collectors of the districts of Panceput, Goorgaon, Rohtuck, Hissar and Sirsa, with a view to the confiscation being carried out. A copy of this proceeding to be forwarded to the Commissioner of Meerut districts, with a view to orders being issued by him for the confiscation of any village, lands, etc, that may be situated in his districts.<sup>11</sup>

In October 1858 Bahadur Shah was exiled to Rangoon.<sup>12</sup>

In August 1859, the Government of India issued "Circular 112". This Circular provided that the Government would pay "proved" liabilities on estates confiscated from estate-holders convicted of rebellion, provided they were "just and properly supported" and had been "contracted prior to the act of rebellion, and with no view to its commission."<sup>13</sup> The Circular annexed two letters between a Judicial Commissioner and the Governor-General, Lord Canning.

The first letter stated:

As to the general rule, His Excellency considers that all debts contracted upon the security of the estate confiscated should be paid, but he would leave all other debts, such as ordinary personal and contract debts, to be dealt with according to the circumstances of each case. There is no reason why,

<sup>5</sup> *tayul-i-shahi*: the royal domain. This was land in the neighbourhood of the city of Delhi, the occupants of which paid rent to the King of Delhi.

<sup>6</sup> *jagir*: a form of land tenure.

<sup>7</sup> *perwanna*: an order, a written precept or command.

<sup>8</sup> *tehsildar*: a collector of revenue.

<sup>9</sup> The list mentioned in the Order was not included in the reports of *Saliqram*.

<sup>10</sup> *jumma*: the total amount, applied especially to the rental of an estate.

<sup>11</sup> *Saliqram*, at 171.

<sup>12</sup> See s2.11 **The Finding**, in **Chapter 2 Overview of the Trial**, above.

<sup>13</sup> The Circular annexed the letters "for the information and guidance of officials": *Saliqram*, at 172.



in the case of prodigality and extravagance on the part of one who has become a rebel, the State should suffer, or why his creditors should benefit by his having rebelled.<sup>14</sup>

The second letter said:

All debts secured by mortgage are to be paid, provided, of course, that they are just and properly supported, and have been contracted prior to the act of rebellion, and with no view to its commission.<sup>15</sup>

In 1860, the Government issued an Order of the Governor-General of India in Council that it would pay claims against “the Ex-King of Delhi” out of the Estate of the King, provided that the claimants were “loyal subjects of the British Government” and that the claim could be proved. Claims would be heard and adjudicated by the ordinary judicial tribunals of the British Government.<sup>16</sup>

In short, with the seizure of Bahadur Shah’s real and personal property by the Government of India, and his removal from Delhi, creditors of Bahadur Shah were left with money due. There were two possible remedies: the Government’s offer to pay liabilities on confiscated estates of ‘rebels’ (Circular 112); and the Government’s offer to pay personal debts of the “Ex-King of Delhi” (the 1860 Order). It is not known how many creditors of Bahadur Shah sought payment under these offers.

Two Delhi bankers, Lalla Narain Doss and Raja Saliqram,<sup>17</sup> in separate actions, attempted to remedy their loss by seeking payment from the Government of India under these offers. Doss’ claim, the first to reach the Courts, was for repayment of an unsecured personal bond and was made under the 1860 Order against the Estate of Bahadur Shah. Saliqram’s claim was for repayment of a bond secured against Bahadur Shah’s *tayul-i-shahi* and was made under Circular 112 of 1859 against the Secretary of State for India in Council.<sup>18</sup>

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<sup>14</sup> Secretary to the Government of India, 9 August 1859, to the Lieutenant-Governor, *Saliqram*, at 172.

<sup>15</sup> Secretary to the Government of India, not dated, to the Lieutenant-Governor, *Saliqram*, at 172.

<sup>16</sup> *Doss*, at 278-279.

<sup>17</sup> A second plaintiff was Raja Devi Singh.

<sup>18</sup> The Secretary of State for India was an office established under the *Government of India Act 1858 (UK) 21* and 22 Vic c106. Under s65, property owned by the EIC was vested in the Crown and the Secretary of State could sue and be sued as the successor to the EIC.

## 4.2 *Doss*

### 4.2.1 Facts

The plaintiff banker, Lalla Narain Doss, sued the Estate of the King of Delhi for payment of the principal and interest of a *shooka* (personal bond) executed by Bahadur Shah in 1840 in favour of Doss' father, a banker. Bahadur Shah had fallen into arrears. When the plaintiff tried to enforce payment in the Civil Court at Delhi in 1852, the Judge held that the debt was unenforceable as Bahadur Shah was not amenable to the Court's jurisdiction, the debts having been contracted "within the Palace and the Fort", the Red Fort "being considered and treated by the Court as if it had been a Foreign State".<sup>19</sup> A painting of the Red Fort, c 1780-90, is overleaf (**Figure IX**).

The plaintiff was unable to obtain any further payment from Bahadur Shah, and the debt remained unpaid when the Rebellion broke out in 1857.

In 1860 the Government of India offered to compensate "loyal" creditors of Bahadur Shah for loss during the Rebellion and Doss sought re-payment of the 1840 bond under this offer (see above s4.1 **Background to the Cases**). The assessor, an Assistant Commissioner, found in December 1862 that the Plaintiff was "loyal" and a debt was due and therefore the Government would pay the principal of the debt.<sup>20</sup> However, the decision was reviewed in March 1863 by the Commissioner of Delhi who held against Doss:

had the Ex-King now been alive, and in *statu quo*, the Plaintiff would have no better prospect of recovering his claim, supposing it to be quite just. It is the desire of the Government that faithful subjects should not be losers by the attainder of the Ex-King, but it does not profess to make them gainers by that event. I, therefore, dismiss the claim of the Plaintiff.<sup>21</sup>

By the time Doss' claim was assessed, Bahadur Shah had died.<sup>22</sup>

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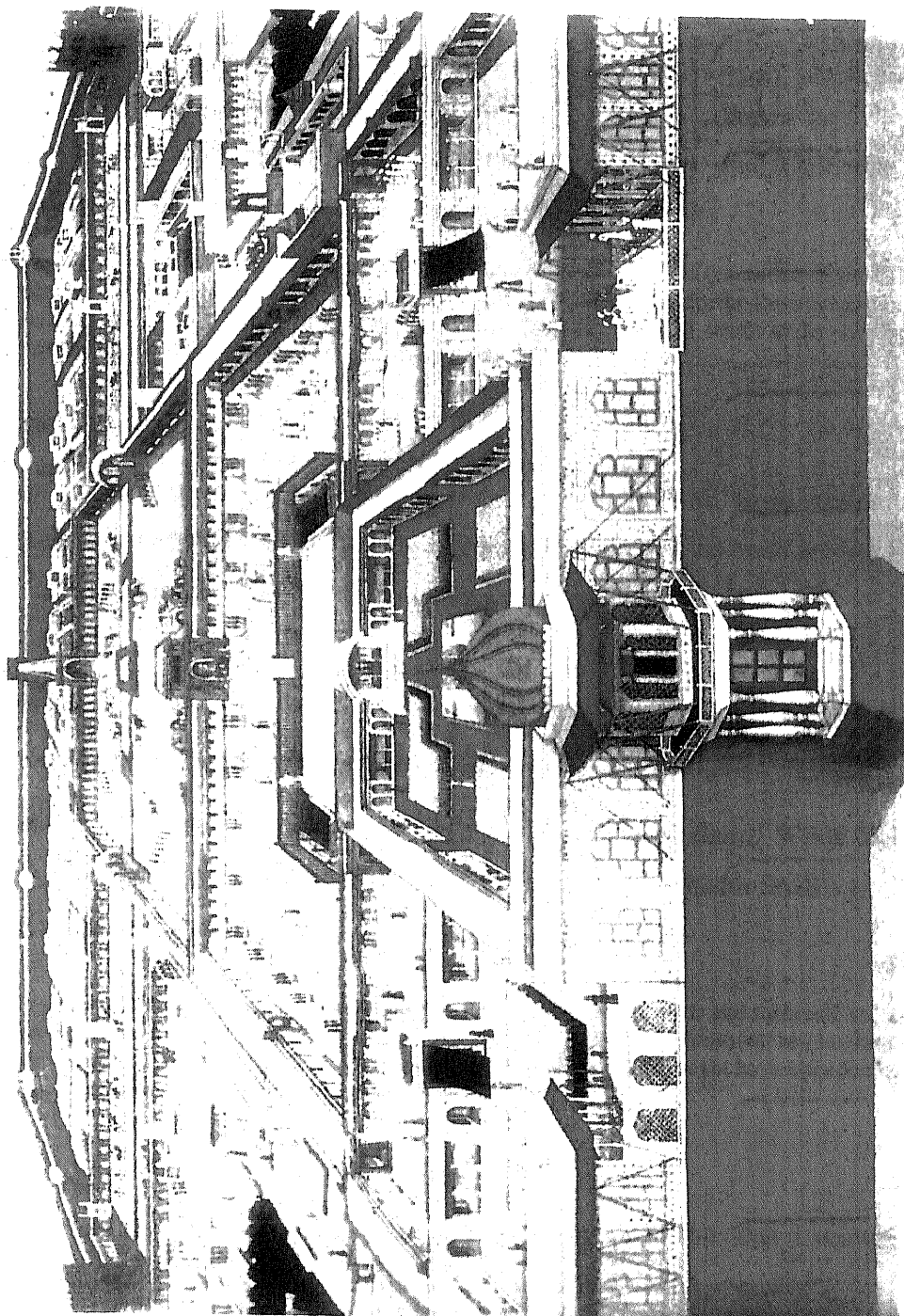
<sup>19</sup> at 107. As the Judicial Committee did not have before it copies of the transcripts of the earlier proceedings, it is not known if these earlier decisions referred to any legal authorities (at 112). The Palace was within the walls of the Red Fort (see also sketch of the city of Delhi, c 1856, in **Chapter 7 The Imprisonment of the King of Delhi in 1857**, below).

<sup>20</sup> at 285.

<sup>21</sup> at 287-288.

<sup>22</sup> Bahadur Shah died on 7 November 1862 in Rangoon – see s2.11 **The Finding** in **Chapter 2 Overview of the Trial**, above.

Figure IX: The Red Fort, Delhi, c1780-90.



Doss appealed to the Court of the Judicial Commissioner of the Punjab which dismissed the appeal, holding that the claim was out of time and that a decree was

an act of mere grace and benevolence – that no legal claim can be made against Government, either in law or equity. The Court which investigates these cases is one of conscience, and decrees can only issue in those in which it is clear that had the King remained in power the Claimant had some chance of satisfaction....the claim is a very doubtful one.<sup>23</sup>

Doss then appealed to the Judicial Committee of the Privy Council. Judgment was delivered in July 1867. The Government of India argued, *inter alia*

the Ex-King of Delhi, as a Sovereign power, could not be sued for a debt contracted in the Palace, as a judgment, if obtained against him, could not be enforced; consequently the Government of India, who stand in his place, is not under any legal obligation to pay the debt, which under the Order in Council is only a matter of grace and favour on their part.<sup>24</sup>

#### 4.2.2 Issue

At issue was whether the Government, having offered to compensate “loyal creditors” of Bahadur Shah, could now rely on the previous unenforceability of the bond arising from Bahadur Shah’s immunity as a Sovereign to deny compensation to the Plaintiff.

#### 4.2.3 Holding

Judgment was delivered by the eminent jurist Lord Cairns.

The Judicial Committee found the bond proved and allowed Doss’ claim. While the Government, in shouldering the duty of satisfying claims out of Bahadur Shah’s assets, was entitled to scrutinise all claims:

any claim which justly and fairly, in equity and conscience, could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial Officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his Sovereignty....<sup>25</sup>

#### 4.2.4 The Status of the King of Delhi in *Doss*

The significance of *Doss* for appreciating the status of Bahadur Shah is that it shows that the Government of India had recognised Bahadur Shah as “a Sovereign power”.

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<sup>23</sup> at 288.

<sup>24</sup> at 291.

<sup>25</sup> at 293.

Throughout all stages of this case, it was common ground both at the time of the incurring of the debt (1840) and at the time of the hearing before the EIC Court (1852), that Bahadur Shah was immune from action in the civil courts as a Sovereign. There was no suggestion that his status changed at any material time - that he was a Sovereign was the basis of the defence raised by the Government of India in 1867. The factual basis of the defence was accepted by the Judicial Committee. The argument failed because, in the circumstances, it was irrelevant. The reference to “technical difficulties” related to the justiciability of the claim against Bahadur Shah, not to the existence of the debt. It was unenforceable against him during his Sovereignty. It was only after his deposition following the Rebellion and after the issue of the Order in 1860, that his Estate became amenable to civil action.

By proceeding on the basis that Bahadur Shah was indeed a Sovereign at all material times, the Privy Council accepted as a fact that Bahadur Shah was recognised as a Sovereign. The existence of that Sovereign status at all material times was part of the *ratio decidendi*, not merely *obiter dicta*, for the Judicial Committee was deciding on consequences of the sovereignty for the enforceability of the plaintiff’s claim. Even if it had been *obiter*, any dictum of the Judicial Committee, especially a Committee presided over by Lord Cairns, is strong authority.

#### **4.2.5 The Reasoning of the Judicial Committee in *Doss***

In *Doss*, it being clear that the debt had been unenforceable against Bahadur Shah before the Rebellion because of Bahadur Shah’s immunity as a Sovereign from the EIC’s Courts, the sole issue for the Court was whether the debt was now enforceable against the Government of India. The Committee held that the debt’s unenforceability against Bahadur Shah was irrelevant to the liability of the Government of India. Since the Government had undertaken the obligation of meeting all “just” claims, the only question was, “is this a just claim?”

#### **4.2.6 Liabilities of an Extinguished State**

*Doss* falls into that category of cases dealing with the question of whether any rights or liabilities of an extinguished State devolve upon a successor State. The Judicial Committee proceeded on the basis that the shouldering of the debt was a voluntary, not

obligatory, assumption of a liability of the King of Delhi, saying that in this particular case, “the Government of India takes upon itself to pay out of the assets of the Ex-King of Delhi such claims as can be established against the Ex-King...”.<sup>26</sup>

*Doss* is then an instance of the principle of that time that private creditors of an extinguished State had no right under English law against Britain as the successor State. McNair notes a Foreign Office Opinion of 1874 on the cession of the Fijian Islands to the effect that the British Government

declined to accept any legal responsibility for the liabilities of the Fijian Islands but it was prepared, as an act of grace and a matter of discretion, to undertake to pay certain debts incurred by the Government of these islands before the cession.<sup>27</sup>

The principle that no legal obligation arose on State succession was discussed in detail in *Doss v Secretary of State for India in Council* (1875),<sup>28</sup> *Cook v Sprigg* (1899),<sup>29</sup> and in *The West Rand Central Gold Mining Co v The King* (1905).<sup>30</sup> In *Cook v Sprigg*, the Lord Chancellor held that it was, at most, a rule of international law that State succession “ought not to affect private property”.<sup>31</sup> In *West Rand*, Lord Alverstone CJ doubted there was such a rule in international law, but if there was, it was at most “ethical”.<sup>32</sup>

### 4.3 *Saliqam*

#### 4.3.1 Facts

In the 1840s and early 1850s, Bahadur Shah had mortgaged land by four “mortgage bonds”<sup>33</sup> to the plaintiffs, Delhi bankers Raja Saliqam and Raja Devi Singh. The financial arrangement does not equate exactly with English instruments but appears to have been a personal debt secured against land. Bahadur Shah defaulted on the loan in 1855.<sup>34</sup>

<sup>26</sup> at 292.

<sup>27</sup> Lord McNair, *International Law Opinions* (1956), I, 156.

<sup>28</sup> [1875] XIX Law Reports 509.

<sup>29</sup> [1899] AC 572.

<sup>30</sup> [1905] 2 KB 391.

<sup>31</sup> at 578.

<sup>32</sup> at 406.

<sup>33</sup> Bahadur Shah executed four bonds acknowledging debts in 1845, 1846, 1847 and 1851 respectively. *Saliqam*, at 170.

<sup>34</sup> at 170.

In May 1857, “the King resumed the management of his own affairs”.<sup>35</sup> On 18 September, he “was captured by the British Government and made a prisoner of war, having been for some time the nominal head of the insurgents in Delhi”.<sup>36</sup>

On 3 October 1857, Bahadur Shah’s *tayul-i-shahi*, including the land encumbered with the mortgage, was confiscated by Commissioner Saunders on behalf of the Government in accordance with a written order.<sup>37</sup>

In unrelated proceedings, the plaintiffs were tried, convicted of rebellion offences and fined.<sup>38</sup>

In 1860, the plaintiffs lodged a claim for compensation from the Government of India under Circular 112 for the bonds defaulted on by Bahadur Shah in 1855.<sup>39</sup> The claim was submitted to the Commissioner of Delhi. The Commissioner thought that the payment of any debts under the Circular was a favour, not an entitlement, and referred the matter to the Judicial Commissioner of the Punjab, who in turn sought instructions from the Governor-General, Lord Canning. Canning denied the claim. As the plaintiffs “not only foresaw, but assisted to produce the catastrophe”, the “interests of justice” did not “require that they should be protected from its effects”.<sup>40</sup>

In 1864 the plaintiffs commenced proceedings in the Court of the Assistant Commissioner of Delhi. Unlike the proceedings of the lower court in *Doss*, these proceedings were apparently adversarial, for the Government of India was a party to the case. The Government successfully argued before the Assistant Commissioner of Delhi that the land on which the personal debt had been secured was seized “on behalf of the British Crown on political grounds as an act of State”,<sup>41</sup> that the Act of State was “during the continuance and in the prosecution of war” and that the Circular was a non-binding private order.<sup>42</sup>

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<sup>35</sup> at 170.

<sup>36</sup> at 170-171.

<sup>37</sup> The Order is reproduced above s4.1 **Background to the Cases *Doss* and *Saliqram***.

<sup>38</sup> at 171. The dates and trial proceedings are not specified in the law report. **Chapter 9 The Rebellion Laws**, below, reviews the laws governing Rebellion trials.

<sup>39</sup> See above s4.1 **Background to the Cases *Doss* and *Saliqram***.

<sup>40</sup> *Saliqram*, at 174.

<sup>41</sup> See further s4.3.5 (iv) **The Act of State Doctrine in *Saliqram***, below.

<sup>42</sup> *Saliqram*, at 174-175.

The Assistant Commissioner held that the case was governed by the *Tanjore Case*<sup>43</sup> (as to which see further below) and *The East India Company v Syed Ally*.<sup>44</sup> (The latter case concerned the validity of the resumption by the EIC of a *jagir*<sup>45</sup> granted in 1789. Sir John Leach MR held that the treaty in question vested “the rights of Sovereignty” in the EIC. The EIC “in the exercise of what they considered their right of Sovereignty” had resumed a *jagir*<sup>46</sup> and the Supreme Court of Madras “had no authority to question an act of Sovereignty exercised on the part of the East India Company...”).

The decision of the Assistant Commissioner that the seizure of the King of Delhi’s property was a non-justiciable Act of State and an act of war was confirmed by the Commissioner of Delhi in 1866.<sup>47</sup>

Still without remedy for their loss, in 1867 the plaintiffs commenced fresh proceedings in the Chief Court of the Punjab.<sup>48</sup> The Court unanimously held in favour of the Government, dismissing the appeal on the ground that the suit was not cognizable in a Municipal Court. The seizure was an Act of State on political grounds during the continuance and in the prosecution of war. The case was governed by the principle on which *Veer Rajender Wadeer v East India Company* (also known as *The Ex-rajah of Coorg v East India Company case*)<sup>49</sup> was decided: “the courts of law cannot take cognizance of acts of power exercised by the Government in matters of State arising out of war”.<sup>50</sup> (*Veer Rajender Wadeer* concerned the seizure by the EIC of a promissory note during war. The Court held that as the promissory note was taken from the plaintiff in the exercise of the EIC’s sovereign and political power, and not as a commercial body, the Court could not interfere.)

Accordingly, the plaintiffs were denied compensation by the Chief Court of the Punjab.

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<sup>43</sup> *Secretary of State for India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476.

<sup>44</sup> (1827) 7 Moo Ind App 476.

<sup>45</sup> *jagir*: a form of land tenure.

<sup>46</sup> at 578.

<sup>47</sup> at 176.

<sup>48</sup> The Chief Court of the Punjab replaced the Court of the Judicial Commissioner under *Act IV of 1866*: H Cowell, *History and Constitution of the Courts and Legislative Authorities in India* (6<sup>th</sup> ed, 1936), 246.

<sup>49</sup> 30 LJ Ch 226.

<sup>50</sup> *Saliqam*, at 176.



The plaintiffs then appealed to the Judicial Committee of the Privy Council against all three judgments. Their arguments were first that if the property was confiscated by Act of State, the confiscation did not extinguish *bona fide* encumbrances created before the Act of State and the charges therefore survived Bahadur Shah's deposition. Second, if the property was confiscated by forfeiture on conviction of rebellion, confiscation did not extinguish *bona fide* encumbrances created before the forfeiture.<sup>51</sup> Third, in any case, Circular 112 (which called on those who sought payment of debts secured before the Rebellion to submit claims for compensation to the Government) had the force of law, entitling payment to the mortgagees of estates held by the King of Delhi.

The Government of India argued, as it had done before the Court of the Deputy Commissioner of Delhi and before the Chief Court of the Punjab, that the confiscation was by Act of State during a state of war and was a matter into which no Municipal Court could enquire. The cases of *East India Company v Syed Ali* (1827)<sup>52</sup> and the *Rajah of Tanjore Case* (1859)<sup>53</sup> applied, the circumstances of the King of Delhi and the Rajah of Tanjore were "similar in every way".<sup>54</sup> In any case, the Circular did not have the force of law and was no ground for relief.

#### 4.3.2 Issue

The only issue raised by the pleadings was whether or not the Circular conferred a right of action at large. The judgment of the Judicial Committee, delivered by Sir Barnes Peacock, answered this question in the negative, but because of the way the case was conducted before and below the Privy Council, the Judicial Committee dealt with wider issues, namely whether the seizure was an act in respect of which Municipal Courts had jurisdiction; whether the plaintiff had an interest in the property which was not affected by the confiscation of "the King's domains"; and whether Circular 112 vested an enforceable right of action.

<sup>51</sup> The fourth charge laid against Bahadur Shah alleged the commission of a 'heinous offence' under *Act XVI of 1857*. Under that Act, a 'heinous offence' was punishable by forfeiture of all property and effects. See s9.2.24 *Act XVI of 1857* in Chapter 9 *The Rebellion Laws*, below.

<sup>52</sup> 7 Moo Ind App 555.

<sup>53</sup> 7 Moo Ind App 476.

<sup>54</sup> at 179.

### 4.3.3 Holding

Judgment was delivered by Sir Barnes Peacock.

The Judicial Committee held in favour of the Government of India, upholding the Government's denial of compensation to the plaintiffs. There were two grounds. First, the territory was seized by a non-justiciable Act of State not by forfeiture for conviction and not by colour of legal title. Second, Circular 112 was discretionary and did not found any legal rights.

The Committee explained that the territory was assigned by Act of State to Shah Alam II, then King of Delhi, in 1803, and then seized by Act of State after the capture of the King of Delhi, Bahadur Shah, in 1857. A Municipal Court could not review the seizure of "the King of Delhi's domains" and the Government had no legal obligation to compensate creditors for their losses arising from the seizure.

### 4.3.4 The Status of the King of Delhi in *Saliqam*

*Saliqam*, like *Doss*, is evidence that the Government of India had recognised Bahadur Shah as a foreign sovereign and that the Kingdom of Delhi was a foreign 'State' in British law and did not form part of British territory.

In the context of reviewing the factual basis for the Government of India's assertion that the seizure was an Act of State,<sup>55</sup> the Judicial Committee observed:

He was treated and recognized by the British Government as a king...He was the grandson of Shah Alam, and neither he nor any of his ancestors had ever been deposed by his own subjects, or by the British Government, or by any other power.<sup>56</sup>

The Committee described the captured Bahadur Shah as a 'prisoner of war'. It also stated that the annual sums of revenue paid to the Kings of Delhi from 1803 onwards was essentially a term of a treaty between the Emperor Shah Alam II and the EIC concluded in 1805 which was still on foot in 1857.<sup>57</sup>

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<sup>55</sup> See further s4.3.5(iv) **The Act of State Doctrine**, below.

<sup>56</sup> *Saliqam*, at 185.

<sup>57</sup> The circumstances of the agreement to pay revenue to the King of Delhi are discussed in **Chapter 3 The 'Titular' King of Delhi**, above. The characterisation of the payments as a "pension" in the trial of Bahadur Shah is discussed in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

### 4.3.5 The Reasoning of the Judicial Committee in *Saliqram*

#### (i) Confiscation of the *tayul-i-shahi* was not ‘Forfeiture for a Crime’

The principal argument for the plaintiffs was that the “confiscation” was forfeiture for a crime, and that, as is the case of such forfeiture under English law, pre-existing charges on the forfeited property were preserved.<sup>58</sup> This would have left intact the plaintiffs’ rights under their mortgage bonds. However, the Judicial Committee held that the confiscation was not in purported exercise of any legal right. The English law of forfeiture was not in force in the *mofussil* and the Government did not purport to act under any such law.<sup>59</sup> The use of the word “confiscation” in the Order of 3 October 1857 did not “import that the appropriation to the public use was for a crime”. Rather, “confiscation” was applicable to “appropriations by Government as an act of state of the property of a public enemy, or of a subdued or deposed ruler”.<sup>60</sup> Finally, the confiscation took place before Bahadur Shah’s trial in 1858:

[T]he Assistant Commissioner found as a fact, that which is well known as a matter of history, that the King was not tried by a regular Court, and that his trial by a Court under a special commission did not take place for some months after the attachment had taken place.<sup>61</sup>

#### (ii) Confiscation was by Act of State and not by colour of Legal Title

The Judicial Committee held that, as was argued by the Government of India, the confiscation was by Act of State.<sup>62</sup>

The confiscation was governed by the principles laid down in the *Rajah of Tanjore* case (1859) and in *The East India Company v Syed Ali* (1827). (Both cases were authority for the proposition that annexation of territory by the EIC was an Act of State which was not justiciable by Municipal Courts.)

The “seizure and confiscation were acts of absolute power, and were not acts done under colour of any legal right, of which a Municipal Court could take cognizance”.<sup>63</sup>

Accordingly, compensation was not justiciable by a municipal court.

<sup>58</sup> *Saliqram*, at 181.

<sup>59</sup> at 182.

<sup>60</sup> at 182.

<sup>61</sup> at 182.

<sup>62</sup> See further s4.3.5(iv) The Act of State Doctrine in *Saliqram*, below.

The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property.<sup>64</sup>

Bahadur Shah's title to the land as the King of Delhi was a fact to be established in order to draw the conclusion that the seizure was an Act of State. The Judicial Committee therefore considered what title the Kings of Delhi had to the land at issue and decided that title derived from an arrangement made by the Governor-General in Council in 1805<sup>65</sup> which was "the final determination of the Governor-General in Council" on "the nature and extent of the provision to be assigned for the support of His Majesty and of the royal household."<sup>66</sup> The arrangement "was as much an Act of State as if it had been carried into effect by formal treaty signed by the British Government".<sup>67</sup> The Judicial Committee explained that Municipal Courts had no jurisdiction to enforce engagements between sovereigns founded upon treaties, citing *The East India Company v Syed Ally* and the *Nabob of the Carnatic v The East India Company*.<sup>68</sup> Like the rightfulness of the deposition of the King, it was not open to question.

The Judicial Committee said the King of Delhi "was taken a prisoner of war" and held that the territories which had been assigned to his grandfather Shah Alam II under the 1805 arrangement were confiscated by Act of State:

The King of Delhi having joined in hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support, was for a time suspended. Delhi fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the King of Delhi was taken as a prisoner of war. The revenues and territories which in 1804 were, by an act of State, assigned for the maintenance of Shah Alum and his household, were in 1857, also by an act of State, resumed and confiscated.<sup>69</sup>

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<sup>64</sup> at 184.

<sup>65</sup> at 184.

<sup>66</sup> See also s3.3.1 **The Extension of Protection to the Mughal Emperor** in **Chapter 3 The 'Titular' King of Delhi**, above. The arrangement was negotiated over 1803-04 and settled in 1805.

<sup>67</sup> At 183, set out in a letter from the Secretary to Government to the Resident at Delhi, 23 May 1805, reproduced in Montgomery Martin (ed), *The Despatches, Minutes and Correspondence of the Marquess Wellesley KG during his Administration in India*, (IV, 1837), 542.

<sup>68</sup> *Saliqam* at 184.

<sup>69</sup> (1827) 7 Moo Ind App 555, (1793) 2 Ves Jun 56.

<sup>70</sup> at 184. The Government of India also argued that the Act of State in 1857 "was an appropriation of an enemy's property *flagrante bello*". However the Committee said it was not necessary to express an opinion on this as Bahadur Shah's title to the property was founded on the agreement between Shah Alam and the EIC, which was not justiciable: at 183-4.

The Sovereign status of Bahadur Shah was relied on by the Judicial Committee to distinguish the present case from an opinion of the Judicial Committee in *Forester v The Secretary of State for India*,<sup>70</sup> to the effect that land seized from rulers who were not sovereigns had been “taken under colour of a legal title” and a seizure was thus justiciable.<sup>71</sup> In contrast

The status of the King of Delhi was that of a King. He was treated and recognized by the British Government as a king, and not merely as a *jagidar*<sup>72</sup> holding under an ordinary grant from the British Government. He was the grandson of Shah Alum, and neither he nor any of his ancestors had ever been deposed by his own subjects, or by the British Government, or by any other power.<sup>73</sup>

The King of Delhi held his land as assignee for the support of “his Royal dignity” and “the due maintenance of himself and family in their high position”.<sup>74</sup> All charges and encumbrances created by him out of the lands so held fell with the estate itself:

If he had died or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.<sup>75</sup>

The confiscation was not by colour of legal title because Bahadur Shah, a “recognised” Sovereign, held the confiscated land by treaty and not as a subject “deriving title under an ordinary tenure”.<sup>76</sup>

### (iii) The Circular did not Amount to a Law

The Judicial Committee had no difficulty in deciding that the Circular “did not amount to a law”, but was merely “for the information and guidance” of Commissioners.<sup>77</sup>

The Judicial Committee expressly distinguished *Doss* (above) in which the plaintiffs had shown that they were intended beneficiaries of the Circulars. The Committee said that the issues for the Court in *Doss* were such that a finding in those terms was all that was required, whereas in *Saliqram* the plaintiffs were “peremptorily excluded from the benefit

<sup>70</sup> (1872) XII Bengal Law Reports 120.

<sup>71</sup> at 185.

<sup>72</sup> *jagidar*: holder of a *jagir*

<sup>73</sup> at 185.

<sup>74</sup> at 186.

<sup>75</sup> at 186.

<sup>76</sup> at 183.

<sup>77</sup> at 186.

of the Circular”.<sup>78</sup> The 1872 decision in *Saliqram* therefore casts no doubt upon the reasoning in *Doss*.

#### 4.3.6 The Act of State Doctrine in *Saliqram*

The term ‘Act of State’ has various meanings in English law. In *Saliqram*, the term denoted the principle of English law that “acts done in execution of...Sovereign powers were not subject to the control of the Courts”.<sup>79</sup> The gist of the doctrine in this sense is that the propriety of the act in question is not justiciable.

Lord Kingsdown summarised the doctrine in *The Rajah of Tanjore Case*:

The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer; such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.<sup>80</sup>

In *West Rand Central Gold Mining Co v R* (1905), Lord Alverstone CJ noted the “series of authorities from the year 1793 to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts”.<sup>81</sup> As noted earlier,<sup>82</sup> the Act of State doctrine in the sense of a non-justiciable act of political power was applied in *The Nabob of the Carnatic v The East India Company* (1793) and in *East India Company v Syed Ally* (1827). It was explored in detail in the *Rajah of Tanjore case* (1859)<sup>83</sup> and subsequently applied in, for example, *The Ex-Rajah of Coorg v The East India Company* (1860),<sup>84</sup> *Doss v Secretary of State for India* (1875),<sup>85</sup> and *Cook v Sprigg* (1899).<sup>86</sup>

The earliest of the Act of States cases confirmed that it applied in cases where the EIC was the body pleading Act of State. As noted earlier,<sup>87</sup> in *The Nabob of the Carnatic v The East*

<sup>78</sup> at 188.

<sup>79</sup> *The Rajah of Tanjore Case* [1859] 7 Moo Ind App 476 at 408.

<sup>80</sup> At 529. See also Sir Charles Trevelyan’s view of this case, s1.1.3 The Doctrine of the ‘Equality of States’, in Chapter 1 International Law and the Kingdom of Delhi, above.

<sup>81</sup> (1905) 2 KB 391 at 408-409.

<sup>82</sup> See s1.2.1 International Law and Asian States in Chapter 1 International Law and the Kingdom of Delhi, above.

<sup>83</sup> (1859) 7 Moo Ind App 476.

<sup>84</sup> (1860) 30 LJ Ch 226.

<sup>85</sup> (1875) 19 LR 509.

<sup>86</sup> [1899] AC 572.

<sup>87</sup> See s31.1 The Decline of the Mughal Empire and the EIC’s Acquisition of Territory, in Chapter 3 The ‘Titular’ King of Delhi, above.

*India Company* (1793)<sup>88</sup> and in *Gibson v the East India Company* (1839),<sup>89</sup> the EIC was treated as a body exercising powers as a sovereign. The view that the EIC had authority to exercise, on behalf of the Crown of Great Britain, delegated powers of Sovereignty was followed in the above Act of State cases.

The Judicial Committee in *Saliqram*, unlike *Doss*, reviewed the evidence of Bahadur Shah's status in some detail. The detailed review arose because it was an Act of State case. Although as a matter of English constitutional law the courts could not adjudicate on the actual exercise of sovereign powers,<sup>90</sup> the courts could enquire into whether or not an alleged Act of State was indeed an Act of State. Accordingly, pleas of Act of State required a detailed examination of the facts establishing the Act of State.

A plea of Act of State differed from the ordinary plea to the jurisdiction in that it did not refer to any other Court as having jurisdiction over the matter - it was not in substance a plea in bar.<sup>91</sup> Rather, the plea asserted "the incompetence of the Court to enquire into their lawfulness at all". As the Court had "to determine for itself" whether or not it was a matter of State, the plea had to "contain a sufficient averment of facts to enable the Court to perform its function."<sup>92</sup> Thus, in any case alleging an Act of State, the assertion on which it was based had to be investigated by the Court and the political nature of the act was a fact to be pleaded by the party pleading Act of State.

In *Saliqram*, the plea contained an averment of the facts to enable the Court to determine whether the confiscation of land was an Act of State. *Saliqram* was cited in the leading case *Musgrave v Pulido* (1879)<sup>93</sup> as an example of a proper judicial exploration of facts alleged to establish an Act of State. In *Musgrave v Pulido*, the Judicial Committee held that the question whether an Act of State had taken place was a question of fact.

Accordingly, the facts relied on to establish that it was an Act of State had to be explored before the question of non-justiciability arose. On the facts in that case, there was no attempt to show that the act complained of was in the nature of an Act of State, thus the

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<sup>88</sup> (1793) 2 Ves Jun 56.

<sup>89</sup> (1839) 5 Bingham N C 262. This paragraph was quoted with approval by Lord Kingsdown in *The Rajah of Tanjore Case*.

<sup>90</sup> See **Chapter 5 A Recognised King**, below.

<sup>91</sup> W H Moore, *Act of State in English Law* (1906), 41.

<sup>92</sup> *ibid.*

action failed.<sup>94</sup> The Court looked at earlier authorities, including *Saliqram*, to show that in each of those cases the facts relied on to establish that an action was an Act of State were pleaded:

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shown, with more or less particularity, the nature and character of the acts complained of and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the Courts. (See the *Nabob of Carnatic, Ex-Rajah of Coorg and Rajah Saliq Ram*).<sup>95</sup>

In those cases, said Sir Montague E Smith, “the Court entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of state that it was decided they could not take further cognizance of them.”<sup>96</sup> Similarly, Fletcher Moulton LJ in *Salaman v Secretary of State in Council of India* (1906)<sup>97</sup> said: “[T]he Courts must decide whether it was in truth an act of State, and what was its nature and extent...”.<sup>98</sup>

It is clear that in holding that the Act of State doctrine applied to the conduct of the EIC in its acquisition of territory from a sovereign ruler, making the seizure of the Royal lands not justiciable, the Judicial Committee was not breaking new ground. *Saliqram* became a precedent in the well-established chain of English authorities on Act of State, and is still authoritative in English law.<sup>99</sup>

#### 4.4 Conclusions

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<sup>93</sup> [1879] AC 102.

<sup>94</sup> at 114.

<sup>95</sup> at 113.

<sup>96</sup> at 113.

<sup>97</sup> [1906] 1 KB 613.

<sup>98</sup> at 639.

<sup>99</sup> See for example the chain of authority approved in *Buttes Gas and Oil Co v Hammer* [1982] AC 888, per Wilberforce LJ at 933.



The cases *Doss* and *Saliqram* contain views of both the Government of India and the Judicial Committee of the Privy Council, as to relations between the Kingdom of Delhi and Britain before Bahadur Shah's capture in September 1857. Both cases proceeded on the basis that the King of Delhi was a Sovereign recognised by Britain. The next chapter examines the significance of those findings in the broader context of British law and practice on the recognition of Foreign States.

## Chapter 5 A Sovereign in English Law

### 5.0 Introduction

The previous chapter showed that the cases of *Doss* and *Saliqram* proceeded on the basis that Bahadur Shah was a Sovereign. This chapter assesses whether, in proceeding on that basis, the two cases were breaking new ground. The assessment focuses on recognition of foreign States under English law of the time and the practice of Britain in the mid-nineteenth century vis-à-vis recognition of Indian sovereigns and protected States.

### 5.1 Recognition of States in English Law

In *Doss*, the Judicial Committee accepted that Bahadur Shah had been a “Sovereign”. As a Court could not notice an unrecognised State or Sovereign (see further below), it follows that the Judicial Committee found him to be a recognised Sovereign. In *Saliqram*, the Judicial Committee expressly stated that Bahadur Shah was a recognised king: “[H]e was treated and recognized by the British Government as a king...”<sup>1</sup>

As will be explained below, recognition was an act by a State acknowledging that another country had the status of a Sovereign State as far as its own relations with it were concerned. English law drew a distinction between a decision by the Government to recognise a foreign State or Sovereign and notice of this decision by the Courts. Recognition of a foreign State was a political decision for the Government and the Courts were bound by the Government’s decision. However, the Courts could investigate whether recognition had in fact been accorded by the Government.

#### 5.1.1 The Crown Accorded Recognition

Recognition of a foreign State was a Royal Prerogative of the Crown.

Blackstone defined the Royal Prerogative as “that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law,

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<sup>1</sup>XII Bengal Law Reports 167 at 185.

in right of his regal dignity”.<sup>2</sup> Dicey stated that the prerogative “appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown”.<sup>3</sup>

The Crown had prerogative powers over foreign affairs. As the conduct of foreign affairs was an exercise of the prerogative, the Government alone had the right to pronounce on the status of Sovereigns. Matters of state such as the making of treaties, whether a state of war existed, the political status of a territory, or whether a particular territory was hostile or foreign, were also determined by the Government as an exercise of the prerogative.<sup>4</sup>

As noted in **Chapter 1 International Law and the Kingdom of Delhi**, above, the exercise of prerogative powers was by Act of State. An Act of State was

an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal Courts must accept it, as it is, without question.<sup>5</sup>

In other words, in for example the field of foreign affairs, the Crown enjoyed “complete irresponsibility in law”.<sup>6</sup>

### 5.1.2 The Courts Bound by the Crown’s Decision to Accord Recognition

The courts were bound by a decision of the Government to recognise, or to refuse to recognise, a foreign Sovereign or State. As Shadwell VC observed in *Taylor v Barclay* (1828): “sound policy requires that the courts of the King should act in unison with the Government of the King”.<sup>7</sup>

#### (i) Recognition Was Not Justiciable

Recognition of a foreign Sovereign or State by the British Government was not justiciable. Moore suggested that “it would be intolerable that the door be left open for an appeal to our

<sup>2</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Book I, Ch 7, 232.

<sup>3</sup> *Ridge’s Constitutional Law* (8<sup>th</sup> ed, 1950), 203.

<sup>4</sup> 26 *Halsbury’s Laws of England* 247.

<sup>5</sup> *Salaman v Secretary of State for India in Council* [1906] 1 KB 613, per Fletcher Moulton LJ at 639. On the Act of State doctrine, see also s4.3.6 **The Act of State Doctrine in *Saliqam*** in **Chapter 4 A Recognised King**, above.

<sup>6</sup> *Ridges*, above n 2, 218.

courts against the determination of the executive in a matter so vital to the conduct of those relations which are committed by the Constitution to the Crown".<sup>8</sup> Thus, if the British Government asserted that an individual was a foreign Sovereign, it was not for the Court to challenge the validity of that assertion. Moore suggested that, for example, in the case of foreign sovereigns, diplomatic representatives and their suites, and public ships of foreign states,

the question whether the individual person or vessel concerned has the *status* which gives exemption [from British jurisdiction] is a political fact in regard to which the Court cannot go behind the claim of the foreign sovereign or representative, or the recognition by our own executive.<sup>9</sup>

## (ii) Court Could Not Accord Recognition

A Court could not itself undertake the task of recognising a State. For example, Lord Eldon observed in 1823:

The Government of Colombia, so called, was not yet recognized by the King in Council, and it was not for him to do anything in that Court which would imply that it was there recognised as an Imperial Government...he could not undertake, in the proceedings of the Court, to assume a character for that government which had not been allowed to it by an authority much higher than his own.<sup>10</sup>

## (iii) A Court Took Judicial Notice of Recognition

A foreign Sovereign or State recognised by the Government had to be noticed by the Courts.<sup>11</sup> Conversely, an unrecognised State had no standing in an English Court. As Lord Eldon observed in 1823: "I know of no government but such as is acknowledged by my Sovereign".<sup>12</sup>

How did a Court satisfy itself that a Sovereign or a State had indeed been accorded recognition by the Crown?

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<sup>1</sup> *Taylor v Barclay* (1828) 2 Sim 213 at 221. Reiterated by Farwell J in *Foster v Globe Venture Syndicate* [1900] Ch D 811 and again by Lord Atken in 1939: "[O]ur state cannot speak with two voices...the judiciary saying one thing, the executive another" in *The Arantzazu Mendi* [1939] AC 256, at 264.

<sup>8</sup> W H Moore, *Act of State Doctrine in English Law* (1906), 35.

<sup>9</sup> *ibid* 37-38.

<sup>10</sup> Reported in *The Times*, January 21 1823, quoted by P L Bushe-Foxe, "The Court of Chancery and Recognition 1804-31", 12 *British Year Book of International Law* (1931), 67.

<sup>11</sup> *City of Berne in Switzerland v The Bank of England* (1804) 9 Ves Jun. 347.

<sup>12</sup> *The Government of Peru*, reported in *The Times*, 13 February 1823, 2 *British International Law Cases* 13.

In the lead case *City of Berne v Bank of England* (1804),<sup>13</sup> Lord Eldon held that whether a “foreign Government is recognised is a matter of public notoriety”.<sup>14</sup> In other words, formal evidence of a matter of public notoriety was unnecessary; the matter was proved by ‘judicial notice’.<sup>15</sup> Lord Eldon’s approach was confirmed in *Yrissari v Clement* (1826),<sup>16</sup> in which Chief Justice Best held “[I]f a foreign state is recognised by this country, it is not necessary to prove that it is an existing state, but if it is not so recognized, such proof becomes necessary.” He added, somewhat enigmatically, “[T]here are hundreds in India, and elsewhere, that are existing states, though they are not recognized.”<sup>17</sup>

Parties began to turn to the Executive for information on whether an existing State had been recognised. In cases of judicial doubt, the Court also had the right to consult the Government as to its views, but was not obliged to do so.

The utility of a direct statement from the Government was affirmed in the lead case of *Taylor v Barclay* (1828).<sup>18</sup> In this case, the parties disputed whether Guatemala had been recognised by Britain and the Court itself consulted the Foreign Office as to its status.

Shadwell VC held (my emphasis):

I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized, as an independent government, by the Government of this country. . . . I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of the country and *I am bound to take the fact as it really exists and not as it is averred to be.*<sup>19</sup>

But *Taylor v Barclay* did not settle finally how to identify “the fact as it really exists” and doubt arose over the weight to be accorded to assertions by the Executive that it had, or had not, recognised a Sovereign or State. Was a statement from the Executive conclusive or was it merely one piece of evidence to be weighed up by the Court? Holdsworth suggested that legal opinion throughout the nineteenth century tended toward the principle that a statement of the Crown was binding on the Courts but it did not emerge as a distinct

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<sup>13</sup> (1804) 9 Ves Jun 347.

<sup>14</sup> at 349.

<sup>15</sup> *Osborn's Concise Law Dictionary* (7<sup>th</sup> ed, 1983), 190.

<sup>16</sup> (1826) 2 C & P 223.

<sup>17</sup> at 225.

<sup>18</sup> (1828) 2 Sim 213.

<sup>19</sup> at 220-221.

principle until the end of the nineteenth century.<sup>20</sup> The issue was confused by inconsistent practice of the Courts – in some cases, matters of state were proved by affidavit evidence,<sup>21</sup> in others the Court was assumed to ‘know’ the matter as it did a statute.

The issue was thrown into relief in the well-known case *The Charkieh* (1873),<sup>22</sup> decided one year after *Saliqram*, for despite a communication from the Foreign Office, Sir Robert Phillimore treated the question of the status of the Khedive of Egypt as one for judicial investigation. Sir Robert conducted his own review of historical texts and *firman*s and regarded the Crown statement, which he had himself obtained, as a “mere matter of information to be weighed with other facts”.<sup>23</sup>

The method of ascertaining the status of an alleged sovereign in *The Charkieh* was expressly disapproved by Lord Esher MR in *Mighell v Sultan of Johore* (1894), and in other cases,<sup>24</sup> but not before it introduced a further period of uncertainty in the law vis-à-vis the conclusiveness of statements from the Executive. The weight to be placed on a statement from the Executive was not resolved until *Duff Development Co v Kelantan Government* (1924)<sup>25</sup> in which the House of Lords decided that a Foreign Office statement was binding as to the existence of a particular State but the interpretation of the legal consequences of that fact remained with the Court.

In reaching a decision on the conclusiveness of the statement of the Executive, the Court in *Duff v Kelantan* gave useful summaries of the previous practice on how a court could satisfy itself that an alleged Sovereign or State was recognised. Viscount Cave stated

It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when such information is so obtained, the Court does not permit it to be questioned by the parties....Such information was obtained and accepted in *Taylor v Barclay, Mighell v Sultan of Johore*....<sup>26</sup>

<sup>20</sup> W S Holdsworth, “The History of Acts of State in English Law”, XLI *Columbia Law Review* (1941), 1322-4.

<sup>21</sup> *Triquet v Bath* (1764) 3 Burr 1478.

<sup>22</sup> (1873) LR 4 Adm & Eccl, 59.

<sup>23</sup> Moore, above n 8, 33.

<sup>24</sup> For example, in *Statham v Statham and the Gaekwar of Baroda* [1912] PD 92, 105 LT 991, the status of the Gaekwar of Baroda was a disputed issue between the parties. Bargreave Deane J conducted his own research into the status of the Gaekwar even though a certificate had been obtained by one of the parties from the India Office. The conclusions derived from his historical research coinciding with that of the India Office, the judgment does not indicate which he found of more weight.

<sup>25</sup> [1924] AC 797.

<sup>26</sup> at 805-6.

Lord Sumner explained how a court takes judicial notice of “chiefs of foreign states”:  
 “[I]nstead of requiring proof to be furnished on these subjects by the litigants, [the judges] act on their own knowledge, or, if necessary, obtain the requisite information for themselves.” Where the sovereignty was *not* notorious:

the best evidence is a statement which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. It is the prerogative of the Crown to recognise or to withhold recognition from States or chiefs of States and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognises as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty’s name. Accordingly, where such a statement is forthcoming, no other evidence is admissible or needed.<sup>27</sup>

In sum, where the recognised State was a matter of public notoriety, a judge took judicial notice of that fact. Where the judge was in doubt, advice could be sought from the Executive as to whether or not the Government had accorded recognition to an alleged Sovereign. A statement by the Executive was probably more than *prima facie* evidence but its conclusiveness was not confirmed until 1928.

## 5.2. *Doss and Saligram* as Evidence that Bahadur Shah was Recognised as a King

The cases *Doss* and *Saligram* constitute both a record of the decision of the Government of India on the status of the King of Delhi and a finding of fact by the Privy Council that such decision had indeed been made by the Government.

Was the Government’s assertion that Bahadur Shah was a king, made in civil litigation, as good as a statement from the Government issued at the request of the parties or the Court?

### 5.2.1 The Government of India’s Assertion that it had Recognised Bahadur Shah

As explained above, the decision to recognise a foreign sovereign was a matter for the Government. Accordingly, the decision, at some time in the past, to recognise the Kings of Delhi was a political decision for the government. Nawaz suggested that the formal accreditation by King James I in 1615 of Sir Thomas Roe as Ambassador to the Mughal

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<sup>27</sup> at 824.

Court indicates that “the sovereignty of the Mughal Emperors was never called in question by any of the European Powers...”.<sup>28</sup>

The status of Bahadur Shah as a king was asserted as a fact by the Government of India in *Doss* and in *Saliqram*.<sup>29</sup> The Government in both cases based its legal argument on that fact. In *Doss*, the legal issue was the enforceability of the debt against the Government of India. The fact upon which the legal argument turned was his sovereign status, which had made the debt previously unenforceable. Similarly, in *Saliqram*, a legal issue was whether Bahadur Shah’s territory was seized by an act of sovereign power (not justiciable by a municipal court) or by “colour of legal title” (justiciable by a municipal court). One fact upon which legal argument turned was the status of Bahadur Shah as a recognised sovereign.

The import of the English cases on recognition discussed above is that it was for governments to judge whether or not a State was recognised. The Government of India was therefore the appropriate organ to pronounce on Bahadur Shah’s status in law.

In contrast to the cases of *Doss* and *Saliqram*, authorities discussed above questioning the conclusiveness of Executive statements were not only cases in which the status of the purported sovereign was disputed, they were cases in which the Government was not itself a party to the case and provide no guidance on this point.

On principle, it would seem that the Government being a party to contested proceedings would not affect the authority of its assertion of fact. First, before 1924 there was no established method of obtaining the Executive’s views on the status of an individual or country. There was no need for the Court in *Doss* or *Saliqram* to obtain a ‘statement’ from the Government, for the Government had made a statement in the course of the litigation and there is no suggestion in the reports that the Court sought from the Government an additional account. Second, the status of Bahadur Shah as a Sovereign in both *Doss* and *Saliqram* was not in contention and the Privy Councillors endorsed, rather than doubted, the factual assertion made by the Government. Third, Counsel present their case according

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<sup>28</sup> M K Nawaz., “Some Legal Aspects of Anglo-Mogul Relations”, (1956) *Indian Year Book of International Affairs*, 70-83, 82. See also discussion in s1.2.1 **International Law and Asian States** in **Chapter I International Law and the King of Delhi**, above.

<sup>29</sup> *Doss*, at 111; *Saliqram* at 178.



to instructions from the Government. The Government had consistently asserted the same fact in four different Courts since 1864,<sup>30</sup> and there is no evidence to suggest that the Government resiled from the assertions of fact put to the Court on its behalf in *Doss* and *Saliqram*.

*Doss* and *Saliqram* therefore constitute a record of the political decision of the Government of India to recognise Bahadur Shah as the King of Delhi until it deposed him in October 1857.

### 5.2.2 The Finding by the Privy Council that the Government had Recognised Bahadur Shah

As noted above, the Court could not challenge recognition by the Government and was bound by such recognition. However, it was free to investigate whether or not recognition had in fact been accorded.

The fact of recognition of Bahadur Shah as the King of Delhi by the Government of India was not disputed by the parties in *Doss* and *Saliqram*. The Judicial Committee in both cases examined the evidence and found the recognition of his status as Sovereign proved. In *Saliqram*, the Court scrutinized the Government's assertion of recognition in some detail because an Act of State was alleged.<sup>31</sup>

The findings of the Judicial Committee on the status of the Kings of Delhi in the nineteenth century were findings of fact. They were not holdings of law. The findings were judicial confirmation of the assertion that recognition had indeed been accorded to Bahadur Shah by the Government of India. In *Saliqram*, the Court's reliance on historical materials, viz. *Wellesley's Despatches*,<sup>32</sup> *prima facie* suggests that the Court was, like Sir Robert Phillimore in *The Charkieh*, conducting its own investigation into the status of Bahadur Shah and that the Government's statement was merely one item of evidence to be weighed up by the Court. However, on close examination, the reliance on *Wellesley's Despatches*

<sup>30</sup> Courts presided over by the Civil and Sessions Judge at Delhi in 1852, the Assistant Commissioner of Delhi in 1865, the Commissioner of Delhi in 1866, and the Judicial Commissioner of the Punjab in 1867.

<sup>31</sup> See discussion of the need to investigate alleged Acts of State in s4.3.6 **The Act of State in *Saliqram*** in **Chapter 4 A Recognised King**, above.

<sup>32</sup> Montgomery Martin (ed), *The Despatches, Minutes and Correspondence of the Marquess Wellesley during his Administration in India* (1837). See also discussion on this text in the **Introduction** to this thesis.

concerned the nature of Bahadur Shah's title to the Royal lands and not his status as Sovereign. Nonetheless, even if, as Sir Robert Phillimore assumed, a statement from the Executive was merely one piece of evidence to be weighed up by the Court, and, even if the Court in *Saliqram* did conduct its own historical investigation, the Court in both cases endorsed the version of facts put forward by the Government of India.

The authority of the cases *Doss* and *Saliqram* as an accurate record of the Government's decision is thus reinforced by the findings of fact by the Judicial Committee that the evidence supported the assertion of recognition by the Government.

### **5.3 Recognition in British Practice: Indian Sovereigns and Protected States**

In making its political decision to recognise Bahadur Shah as a Sovereign, the Government did not depart from its practice of according recognition to other Indian rulers, even 'protected' rulers, as 'Sovereigns'. Similarly, the Judicial Committee did not forsake its constitutional role of not adjudicating on the Government's exercise of the prerogative.

#### **5.3.1 Recognition of Indian Rulers as Sovereigns in British Practice**

As was discussed in **Chapter 1 International Law and the Kingdom of Delhi**, British practice before the Rebellion was to recognise Indian rulers as Sovereigns. That practice is evidenced by the decisions of British Courts and in the treaties concluded by the EIC in the first half of the nineteenth century. As a matter of British practice at least until 1857 when the King of Delhi was deposed, being an Indian State outside of the community of European nations was no bar to recognition as a Sovereign State by Britain.

#### **5.3.2 Recognition of Indian Sovereigns and International Law**

The evidence before the Judicial Committee in *Doss* was explicit that the basis of Bahadur Shah's immunity from jurisdiction from the courts of the Government of India was that the Lal Qila was a foreign state.<sup>33</sup> The Judicial Committee found in *Saliqram* no material change in the status of the Kings of Delhi between 1803 and October 1857: he was "treated and recognized by the British Government as a king...neither he nor any of his ancestors

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<sup>33</sup> *Doss*, at 280.

had ever been deposed by his own subjects or by the British Government or by any other power.”<sup>34</sup> The Committee pointed out that the rightfulness of Britain’s conduct in relation to the Kingdom of Delhi over the period from 1803 to 1857 - ranging from the ‘1805 Arrangement’ to the deposition of Bahadur Shah in 1857 - could “be judged of only by the law of nations”.<sup>35</sup>

As was discussed in **Chapter 1 International Law and the Kingdom of Delhi**, regardless of later policy, the Act of State cases discussed above show that at least until 1857/58, British practice was to recognise Indian Kingdoms as Sovereign States and to regard relations between Britain and those States as being governed by international law.

### 5.3.3 Recognition of ‘Protected States’ in British Practice

The recognition by the Government of India of the King of Delhi, a protected Sovereign, was also in keeping with British practice of recognising protected states as Sovereign States. Many of the recognised States in the Act of State cases cited in *Saliqram* and the cases discussed above were under the ‘protection’ of the EIC. In particular, States under the protection of Britain were not only on the Indian sub-continent, they extended to the Malay States, and to Europe, for example, the Ionian Islands. This shows that well before Bahadur Shah’s trial, the Sovereignty of even protected States was recognised by the British Government, such that arrangements between the EIC and a protected Indian State were not justiciable by municipal courts. Protected States at international law are discussed further in the next chapter.

The Privy Council in *Doss* and *Saliqram* did not elaborate on the nature of the ‘Sovereignty’ held by Bahadur Shah. In *Doss*, Lord Cairns merely used the term, without qualification, “his Sovereignty”. However, the Judicial Committee in *Saliqram*, in discussing Bahadur Shah’s title to the confiscated land, observed that Shah Alam had been “placed under the protection of the British Government” on his “rescue from the power of

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<sup>34</sup> *Saliqram*, at 185.

<sup>35</sup> *ibid* 184.

Dowlut Rao Scindia”.<sup>36</sup> The Committee also noted Bahadur Shah’s ‘protected’ status in its description (*obiter*) of his conduct during the Rebellion:

The King of Delhi having joined in the hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support, was for a time suspended.<sup>37</sup>

This suggests that renouncing protection rendered Bahadur Shah fully independent. There was no further comment on protection, and protection was not noted as qualifying in any way the proposition that his status as the King of Delhi was recognised by the Government.

In recognising Bahadur Shah as the King of Delhi, the Government of India continued its practice of treating protected states as Sovereign States. As will be shown in the next chapter, the position adopted by the Judicial Committee conformed with English and international law on the consequences of protection for sovereignty.

#### 5.4 Conclusions

This chapter has explained that the recognition of a State under the English law of the time was an exercise of the Royal Prerogative and was thus a decision for the Government. The role of the court was not itself to accord recognition, but was confined to the question of whether or not the Government had accorded recognition. The cases *Doss* and *Saliqram* constitute both a record of the decision of the Government on the status of the King of Delhi and a finding of fact by the Judicial Committee of the Privy Council that such decision had indeed been made by the Government.

The chapter has also suggested that while the cases of *Doss* and *Saliqram* alone are indisputable authority in English law for the proposition that Bahadur Shah held the status in law of a recognised King, the authority of these cases as evidence of his status is strengthened by the evidence that in practice the British Government, at least until 1858, recognised Indian Sovereigns and recognised protected States.

<sup>36</sup> *Saliqram* at 183. See also s3.3 **The Mughal Emperors in the Nineteenth Century** in **Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>37</sup> *Saliqram* at 184.

## Chapter 6 A Sovereign in International Law

### 6.0 Introduction

The previous two chapters demonstrated that Bahadur Shah was a sovereign recognised by Britain.

This chapter addresses the consequences flowing in international law from British recognition of Bahadur Shah as the King of Delhi. The chapter reviews what constituted a ‘State’ in nineteenth century international law, focussing in particular on the status of States under the ‘protection’ of another State.

### 6.1 Sovereignty and Statehood at International Law

In the nineteenth century, the Sovereign was identified with the State. The Head of State was regarded as “embodying or representing its sovereignty” and symbolised “something to which deference and respect are due”.<sup>1</sup> A “Sovereign in his person” united “both a public or international character and that of an individual”.<sup>2</sup> As Wheaton explained:

the peculiar objects of international law are those direct relations which exist between nations and states. Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: *l’Etat c’est moi*. Hence the public jurists frequently use the terms sovereign and State as synonymous.<sup>3</sup>

No rules determined what were ‘States’ for the purpose of international law, “the matter was within the discretion of existing recognised States”.<sup>4</sup> States were members of the ‘society of nations’ only if recognised by other States as ‘States’.<sup>5</sup> According to the writers of international law, the entity which was capable of being ‘recognised’ as a ‘State’ bore certain features: a population, territory and a sovereign or independent government. These were not prescriptive: the key was recognition.

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<sup>1</sup> W E Hall, *International Law* (3<sup>rd</sup> ed, 1890), 164.

<sup>2</sup> Henry Wheaton, *Elements of International Law* (2<sup>nd</sup> ed, 1863), 34, Note 14.

<sup>3</sup> *ibid* 35.

<sup>4</sup> James Crawford, *The Creation of States in International Law* (1979), 5.

<sup>5</sup> See further **s6.2.4 Recognition of a Protected State**, below.

Wheaton thought:

The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.<sup>6</sup>

Hall stated:

The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control.<sup>7</sup>

Westlake defined a 'State of international law' as an entity which had relations with the outside world. It had a certain territory, a population and "a corporate will distinct from the will of its members".<sup>8</sup>

The features of territory and population were largely free of controversy. However, the notion of 'independent government' was contentious. Many States were in close alliance with others. When the alliance could be characterised as a form of dependency, where one State was under the protection of another, did the protected State lose its identity as a 'State'?

The answer of the writers of international law was that the protected State retained its identity as a 'State' for the purposes of international law, although the proper juridical classification of protected States proved controversial in the late nineteenth century (see further below).

## 6.2 Protected States at International Law

The protection of one State by another was one of the oldest features of international relations.<sup>9</sup> The general principle in international law was expressed by Vattel:

A weak state which for greater security puts itself under the protection of a more powerful one, and agrees to perform certain acts in return, without, however, divesting itself of its right of self-government and of its sovereignty, such a State, I repeat, does not cease for that reason to rank among sovereign States, whose only rule of conduct is the Law of Nations.<sup>10</sup>

<sup>6</sup> Wheaton, above n 2, 33.

<sup>7</sup> Hall, above n 1, 18.

<sup>8</sup> John Westlake, *International Law*, (2nd ed, 1910), 1, 2-3.

<sup>9</sup> Crawford, above n 4 187.

<sup>10</sup> E deVattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758), Book I, Ch I, s6, 1. See also **Chapter 1 International Law and the Kingdom of Delhi**, above.

That one State could be under the protection - “a kind of international guardianship”<sup>11</sup> - of another State without thereby losing its status as a State was established State practice in the nineteenth century.

Due to the diversity of international arrangements, there was no precise definition of a relationship of protection. Protected sovereignty was formed by agreement, a bargain between States.<sup>12</sup> It was a consensual transaction, whereby the protected State surrendered certain aspects of sovereignty to the protecting State without being annexed.<sup>13</sup> A protected State might not possess the full range of international rights and duties but the exact distribution of power depended on the terms of the agreement.

Well-known examples of protected States in State practice have included the city of Cracow,<sup>14</sup> the Ionian Islands,<sup>15</sup> the Principalities of Moldavia, Wallachia and Serbia,<sup>16</sup> the Principality of Monaco,<sup>17</sup> the Republic of Andorre,<sup>18</sup> and the Republic of San Marino.<sup>19</sup> Terminology covered a range of States with international personality in relationships of protection - ‘protected states’, ‘international protectorates’, and, in the late nineteenth century, ‘colonial protectorates’. Little can be deduced from the terminology, for the legal aspects of the relationship varied with the circumstances.<sup>20</sup> As Fawcett explained

The traditional terms ‘sphere of influence’, ‘suzerainty’ and ‘protection’ have that penumbra of imprecision which is both the weakness and strength of political concepts. They are loose descriptions of particular relationships between countries, ranging from the influences, political, economic or military, which are customarily at work between countries which are relatively to each other stronger and weaker, to a formal subordination, hardly distinguishable in practice from annexation.<sup>21</sup>

<sup>11</sup> L. Oppenheim, *International Law, a Treatise* (6<sup>th</sup> ed), 174.

<sup>12</sup> T. Baty, “Protectorates and Mandates”, 3 *British Year Book of International Law* (1921) 109.

<sup>13</sup> Crawford, above n 4, 187.

<sup>14</sup> Cracow “was declared by the Congress of Vienna to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria and Prussia. The city was later annexed to the Empire of Austria: Wheaton, above n 2, 59.

<sup>15</sup> Article 2 of the Convention concluded at Paris on 5 November 1815, declared that the Ionian Islands were “placed under the immediate and exclusive protection” of Britain: *ibid.*

<sup>16</sup> *ibid.* 61.

<sup>17</sup> *ibid.* 63. Monaco was a protectorate of France from 1641 to 1789, and again from 1814.

<sup>18</sup> *ibid.*, 65, Note 26. The Republic of Andorre was under the joint protection of France and Spain.

<sup>19</sup> *ibid.* The Republic of San Marino was under the protection of the Holy See.

<sup>20</sup> Ian Brownlie, *Principles of Public International Law* (3<sup>rd</sup> ed, 1979), 119.

<sup>21</sup> J E S Fawcett, *The British Commonwealth in International Law* (1963), 115-6.

### 6.2.1 Characteristics of a Protected State

While the mode or degree of the distribution of sovereignty was a question of fact in each case,<sup>22</sup> protected States had common features under international law. The essential characteristic of protected sovereignty was that a protected State retained its separate identity as a State, thus remaining an international person. As the British Law Officers explained in 1894:

In cases of protection between civilized nations, the weaker or protected nation usually obtains a guarantee of its territory by the stronger or protecting Power, reserving to itself the full right of administering its own Government; such an arrangement in no way derogates from the sovereignty of the protected Power...<sup>23</sup>

It was well-settled that several inter-related consequences in international law flowed from the characteristic that a protected State retained its separate identity as a State.

First, the territory of the protected State was not territory of the protecting State.<sup>24</sup> It remained foreign territory.

Second, following from the previous point, nationals of the protected State did not acquire the nationality of the protecting State, thus, for example, no penalties of treason applied.

For example, McNair quotes the Opinion of the Law Officers of 10 May 1855 concerning the Ionian Islands: “Ionians, being under the protection of the British Crown, are not in any degree liable” for treason.<sup>25</sup>

Third, either party was entitled to terminate the protection. As Vattel stated:

The law binds both of the contracting parties equally. If the protected State does not carry out faithfully its part of the agreement, the protecting State is no longer bound by its reciprocal duties and may refuse protection for the future and declare the treaty void, if it deems it to its advantage to do so.<sup>26</sup>

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<sup>22</sup> Sir Henry Maine, *Minute on Kathiawar*, cited by M F Lindley, *The Acquisition and Government of Backward Territory in International Law, being a Treatise on the Law and Practice relating to Colonial Expansion* (1926), 196.

<sup>23</sup> Arnold McNair, *International Law Opinions* (1956), I, 50. The opinion was in relation to protectorates in Africa but the principle so enunciated was of general application.

<sup>24</sup> Vattel, above n 10, 81, Ch XVI, note (a).

<sup>25</sup> McNair, above n 23, 40. In *Ionian Ships* (1855) 2 El & Ad 212, the Court held that the Ionian Islands, which by the Treaty of Paris 1815 was declared to be ‘free and independent under the Crown’, could be neutral when Britain was at war.

<sup>26</sup> Vattel, above n 10, s197.



When protection terminated, a protected state resumed its full sovereign independence, which had been “partially in suspense” during the relationship of protection.<sup>27</sup> For example, with respect to the Ionian Islands, in 1855 the Law Officers advised: “it will be proper to declare that the protection of the British Crown will be withdrawn from all Ionians in any matter aiding or abetting Her Majesty’s enemies.”<sup>28</sup> In *Mighell v Sultan of Johore*,<sup>29</sup> for example, Kaye LJ noted that if the Sultan of Johore were to disregard the terms of his treaty (of protection), it could lead to the loss of his protection.<sup>30</sup> Examples of State practice are few.<sup>31</sup> Kamanda cites the war against Turkey in 1877 by its dependants, Serbia and Montenegro, as an example of protection terminated by war.<sup>32</sup> Westlake suggested that a protected State ‘shaking off’ its dependence on the protecting State by an armed contention led to “a state of war”.<sup>33</sup> He further suggested that the protected State may be under a contractual obligation not to so.<sup>34</sup>

Fourth, Heads of State and governments of protectorates enjoyed jurisdictional immunities, at least in the courts of the protecting State.<sup>35</sup>

### 6.2.2 The Sovereignty of a Protected State

It was well established at international law that some dependence was not inconsistent with sovereignty - absolute independence was not an essential attribute of sovereignty.<sup>36</sup> For example, a State could be free in its internal sovereignty yet subject to the control of another State in its foreign relations.<sup>37</sup>

<sup>27</sup> Oppenheim, *Treatise on International Law*, (9<sup>th</sup> ed), 270. See further **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>28</sup> McNair, above n 23, 40.

<sup>29</sup> [1894] 1 QB 149.

<sup>30</sup> *Mighell v Sultan of Johore* at 162. Kaye LJ’s statement was in answer to the plaintiff’s contention that the treaty of protection abnegated the Sultan’s sovereign powers such that he was not an independent sovereign.

<sup>31</sup> At the trial of Warren Hastings, Burke referred to “natural equity and the law of nations” in support of his contention that a subordinate ruler could resist any violation of his rights by the suzerain or protector”: Charles Alexandrowicz, “G F De Martens on Asian Treaty Practice”, *Indian Year Book of International Affairs* (1964), 72.

<sup>32</sup> Alfred Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (1961), 245. Kamanda suggested, without explanation, that Serbia and Montenegro “lacked the qualification to make war”.

<sup>33</sup> Westlake, *International Law* above n 8, I, 24.

<sup>34</sup> *ibid* at 57-57.

<sup>35</sup> See further **Chapter 11 The King of Delhi’s Entitlement to Sovereign Immunity**, below.

<sup>36</sup> Hall, above n 1, 19.

<sup>37</sup> Westlake, above n 8, 21.

The forms and degrees of dependence and independence were many. Protected States have ranged from those with virtual plenary independence to those almost absorbed into the protecting State.<sup>38</sup> A protecting State might have even extensive powers of control over the protected state, but the protected State remained a sovereign State:

all that was involved in the relationship was a promise of protection in return for a *quid pro quo* - notably, a certain accommodation to the wishes of the protector in matters of policy.<sup>39</sup>

Protection need not be static - over the passage of time the dependency could deepen to the point where it became a colonial dependent of the protecting state.<sup>40</sup> Indeed, Westlake observed that the establishment of a protectorate effectively earmarked the country for the future enjoyment of the protecting State.<sup>41</sup> On the other hand, over time a dependency could advance towards statehood.

The spectrum of sovereignty extended from full independence to dependence but not to complete subordination. A difficult issue however was determining when such dependence impaired separate statehood. Viscount Cave in *Duff Development Co v Kelantan Government*<sup>42</sup> noted that “the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence”.<sup>43</sup> He added “the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine.”<sup>44</sup>

In doubtful cases where the degree of dependence on the protecting State was extreme, State practice shows that recognition as a ‘State’ was decisive - see further below, **6.2.4**

### **Recognition of a Protected State.**

#### **6.2.3 Theories of Protected Sovereignty**

It is clear then that as a matter of state practice, States under the protection of another State were recognized as ‘States’ for the purposes of international law.

<sup>38</sup> H L A Hart, *Concept of Law* (1994, 2<sup>nd</sup> ed), 223, Crawford, above n 4, 186.

<sup>39</sup> Baty, above n 12, 109.

<sup>40</sup> J H W Verzijl, *International Law in Historical Perspective*, 1, 416.

<sup>41</sup> Westlake, above n 8, 125.

<sup>42</sup> [1924] AC 797.

<sup>43</sup> at 808.

<sup>44</sup> *ibid.*

This thesis is concerned with international law as it stood as at 1857-58.<sup>45</sup> Nevertheless, it is to be noted that the concept of protected sovereignty was not without controversy in the late nineteenth century. A detailed exploration of the vast literature on this topic is beyond the terms of this thesis and it is sufficient here to note the schools of thought which later held sway.

What might be termed the ‘traditional view’ holds that, sovereignty being a divisible “aggregate of individual rights” capable of alienation,<sup>46</sup> a State could transfer an aspect of sovereignty and retain its status as a sovereign State. Put another way, “the powers connected with sovereignty need not necessarily be united in one hand”.<sup>47</sup> Verzijl explained that the effect of the *Treaty of Westphalia* of 1648 had been to free the constituent units of the Holy Roman Empire, enabling them to enter into treaties with foreign powers. However, as the treaties could not be directed against the Emperor or the Empire, a degree of subordination remained.<sup>48</sup> Legal theorists responded to this evolution of the concept of ‘sovereignty’ by classifying such entities (which had renounced their independence by putting themselves under the protection of another State) as, for example, *Halbsouveränität*, ‘*souveraineté imparfaite*’, or ‘half-sovereign’ states, or ‘states of imperfect independence’. The sovereignty of these States was limited and qualified in various degrees.<sup>49</sup> Nonetheless, the protected State retained sufficient international personality for the purposes of international law.<sup>50</sup>

Colonial expansion in the late nineteenth century saw an increasing use of “protection” to acquire control over foreign territory which “corresponded with a growing appreciation for the uses of the informal empire”.<sup>51</sup> This led to fresh attempts to explain and classify protected States and the emergence of a new jurisprudence on protected sovereignty.

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<sup>45</sup> See discussion on inter-temporal law in the **Introduction** to this thesis, above.

<sup>46</sup> Verzijl, above n 40, I, 259.

<sup>47</sup> Oppenheim’s *Treatise on International Law* (8<sup>th</sup> ed), 122.

<sup>48</sup> Verzijl, above n 40, I, 260.

<sup>49</sup> Wheaton, above n 2, 44.

<sup>50</sup> The consequences flowing from the possession of international personality are discussed in **s6.3 The Effect in International Law of Recognition of the King of Delhi** and **s6.4 Consequences in International Law of ‘Statehood’**, below.

<sup>51</sup> Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, (1999) 40 *Harvard International Law Journal* 1, 56.

Some legal theorists at the turn of the century argued that these new protected states were not States at all, half-sovereign or not. For example, Hall suggested in 1894:

A protectorate of the kind which used to be exercised by a European power over a smaller civilized state is far from being identical with the relation which links an Eastern protected state or community with a European country.<sup>52</sup>

Moore, writing in 1906, thought that in practice “so convenient and accommodating” the term ‘protectorate’ had proved to be that “its name has been applied to cases that really do not lie within the domain of semi-sovereignty.”<sup>53</sup> He cited as examples French protectorates in Indo-China, and “examples in Africa of protectorates where there was no recognized state to be protected.”<sup>54</sup> In similar vein, Westlake suggested in 1914 that

the term ‘protectorate’ as applied to the Empire in its relations to the [Indian] Princes...is etymologically correct; but they do not bear the technical meaning which belongs to the Republic of San Marino and its citizens by the Kingdom of Italy.<sup>55</sup>

Indeed, expanding European interests in Africa and Asia in the latter half of the nineteenth century had led to protective relationships with a diminution of sovereignty, often leading to the protected State being absorbed in the protecting State.<sup>56</sup> For example, Baty, writing in 1921 believed that “Europe was coming into official and formal contact with Africa and Asia: that is, with peoples whose civilisation is very different from that of Europe” who could “neither be ignored as States nor treated as quite on the footing of ordinary States.”<sup>57</sup>

He thought “protection” had assumed a new meaning:

The formula which was found convenient to express the relations between [Africa and Asia] and the States which desired to exploit their resources was that of Protection. And this meant protection in the new sense: not protection under contract...but protection involving a certain measure of control and a definite diminution (if not a total deprivation) of sovereignty.<sup>58</sup>

Lindley, writing in 1926, suggested that “the more modern protectorates have been usually intended or destined to result in the incorporation of the protected region into the dominions of the protecting power”.<sup>59</sup> He explained that these modern protectorates have a “backward society” and “such government as exists is often of the most rudimentary

<sup>52</sup> W E Hall, *A Treatise on the Foreign Jurisdiction of the British Crown* (1894), 204.

<sup>53</sup> J B Moore, *Digest of International Law* (1906), I, s14, 29.

<sup>54</sup> *ibid.*

<sup>55</sup> Westlake, above n 8, 215.

<sup>56</sup> Baty, above n 12, 112. See also Anghie, above n 51, 58-61.

<sup>57</sup> Baty *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> Lindley, above n 22, 182.

form”.<sup>60</sup> These ‘protected’ states were not really ‘States’, said Baty: “[V]irtually colonies; constitutionally foreign soil...juridical monsters”.<sup>61</sup>

This novel view that protected States were not true States at international law also found expression in a series of cases from the 1890s to the 1920s, in which plaintiffs unsuccessfully challenged the bestowal of immunity under international law on the rulers of protected States. These cases are discussed in **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below. The view that protected States were not true States can also be traced in the trial of Bahadur Shah.<sup>62</sup>

Despite the new use of ‘protection’ in the late nineteenth century as a vehicle for colonial expansion – in modern parlance, “disguised colonies”<sup>63</sup> or “a disguised form of annexation”<sup>64</sup> – and new thinking on the standing of these States, international law continued to view protected States as international persons. For example, the International Court of Justice in *US Nationals in Morocco* (1952) affirmed the principle that protected States retained international personality.<sup>65</sup>

But there was no dispute in the mid-nineteenth century, that protected States, including the kingdoms of the Indian sub-continent,<sup>66</sup> were ‘States’ for the purposes of international law and accorded the privileges and immunities of statehood, at least in the courts of the protecting State.<sup>67</sup> Indeed, as was discussed above,<sup>68</sup> British practice of the time was to recognise protected States as Sovereign States and to treat them in accordance with the principles outlined above.

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<sup>60</sup> *ibid.*

<sup>61</sup> Baty, above n 11, 114.

<sup>62</sup> See further below and **Chapter 12 The Overriding of Sovereign Immunity: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>63</sup> For example, Crawford, above n 4.

<sup>64</sup> Wilhelm Grewe, *The Epochs of International Law*, 2000 [1984], 473.

<sup>65</sup> (1952) ICJ Reports 21, at 188. The ICJ in that case noted that under the treaty of protection, “Morocco remained a sovereign State but it made an arrangement of a contractual nature whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco”.

<sup>66</sup> See s1.2.2 **The ‘Indian Native States’ and International Law** in **Chapter 1 International Law and the Kingdom of Delhi** and s5.3 **Recognition in British Practice: Indian Sovereigns and Protected States** in **Chapter 5 A Sovereign in English Law**, above.

<sup>67</sup> Crawford, above n 4, 196-197.

<sup>68</sup> See **Chapter 1 International Law and the Kingdom of Delhi** and **Chapter 4 A Sovereign in English Law**, above.

#### 6.2.4 Recognition of a Protected State

It was well-established that a recognised State was a member of the ‘society of nations’: Recognition was essential if a State wished to participate in the ‘society of nations.’

Wheaton explained:

If a State desires to enter that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect; and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognized.<sup>69</sup>

Twiss also thought that if a State seeks:

to hold international intercourse with other States, and claims to be received into the fellowship of Nations upon terms of equality and reciprocity with other Nations, it must obtain from them the recognition of its *Independence* as a preliminary step. Every other State is at liberty to grant or withhold this recognition...<sup>70</sup>

How recognition effects ‘Statehood’ at international law is still debated by the writers of international law. According to the ‘constitutive theory’, the act of recognition by a State is the mechanism by which a recognised state becomes an international person - it brings the State into legal existence. According to the ‘declaratory theory’, recognition is evidence that the entity is a ‘State’ - the act of recognition is merely an acknowledgement or declaration that the recognised State has international personality. The legal effect of recognition is principally relevant to a State’s decision as to whether or not to accord recognition, for example, when a new State is formed. It is in this context that debate between ‘constitutive’ and ‘declaratory’ theory finds particular resonance.

However, the role of recognition in the participation in the ‘society of nations’ of non-European states, and states exhibiting border-line features of ‘statehood’, points to a constitutive role of recognition in the nineteenth century (see further below). In the nineteenth century, if an entity was recognised by the international community as a ‘State’, then for the purposes of international law, it was a State. Recognition was “the agency of

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<sup>69</sup> Wheaton, above n 2, 39.

<sup>70</sup> Travers Twiss, *The Law of Nations* (1861), 19-20.

admission into ‘civilized society’ - a sort of juristic baptism, entailing the rights and duties of international law”.<sup>71</sup>

Judicial decisions show that recognition played a decisive role in nineteenth century State practice with respect to the participation of non-European or non-Christian States in the ‘society of nations’. State practice vis-a-vis States which were outside the European society of nations was that these States were members of the society of nations only if recognised by other States as ‘States’ at international law.<sup>72</sup> The key to protected States retaining international personality was recognition by another State.

For example, as was noted in **Chapter 1 International Law and the Kingdom of Delhi**, Hall stated that countries which inherited European civilization were presumed to intend to conform to law, but countries “outside European civilization must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law...”.<sup>73</sup> Thus, in the nineteenth century

international law was often regarded as applying between States with a European civilization. Other countries were only admitted to the ‘closed club’ if they were elected by the existing members and the election took place in the form of recognition.<sup>74</sup>

Crawford, for example, noted that the Kingdom of Siam<sup>75</sup> and the Maratha Empire<sup>76</sup> were early recognised as Sovereign States subject to international law.<sup>77</sup> By implication, in the opinion of these writers, European and non-European States were not bound by international law in their relations in the absence of recognition.

State practice has shown that recognition also played a decisive role in cases where the degree of dependence on the protecting State was extreme. For example, Crawford suggested that the extensive powers reserved to the protecting state (France) over the Principality of Monaco would indicate, in the absence of widespread recognition, that it

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<sup>71</sup> Crawford, above n 4, 14.

<sup>72</sup> *ibid* 13.

<sup>73</sup> Hall, above n 1, 43.

<sup>74</sup> P K Menon, *The Law of Recognition in International Law* (1994), 26.

<sup>75</sup> *The Temple of Preah Vihear* 1962 ICJ Rep 6.

<sup>76</sup> *Right of Passage over Indian Territory* 1960 ICJ Rep 6.

<sup>77</sup> Crawford, above n 4, 176.

was not a State.<sup>78</sup> The pivotal role played by recognition in doubtful cases is also illustrated in several of the Act of State cases discussed in the previous chapter. In the leading authorities *Mighell v Sultan of Johore*<sup>79</sup> and *Duff Development Company v Government of Kelantan*,<sup>80</sup> the respective plaintiffs argued that rulers seeking immunity from suit were not ‘Sovereign rulers’ because they were protected by Britain - not being ‘Sovereign rulers’ they had no immunity to the plaintiff’s suit.<sup>81</sup> The Court held in both cases that, if recognised by the Government as ‘States’ then they were conclusively ‘States’. In *Mighell v Sultan of Johore*,<sup>82</sup> Lord Esher MR, holding that a decision of the Executive that the Sultan of Johore was an independent sovereign was “conclusive”, said “[F]or this purpose, all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest”.<sup>83</sup>

Despite the different views on the mechanics of recognition, at least from the time when an entity was accorded recognition (regardless of its previous status), it undoubtedly held the status of a ‘State’ in nineteenth century international law.

### 6.3 The Effect in International Law of Recognition of the Kingdom of Delhi

Applying the principles discussed in the previous section to the position of the King of Delhi, what then was the effect in international law of British recognition of the King of Delhi?

The Kingdom of Delhi bore the features of statehood. It had a defined territory, a permanent population and a system of government.

The Kingdom was also a State under the protection of Britain, heavily dependent upon Britain for the administration of law and order, revenue, and defence.<sup>84</sup> The Judicial Committee in *Saligram* noted that Bahadur Shah had been under the “protection” of the

<sup>78</sup> *ibid* 193-194.

<sup>79</sup> [1894] 1 QB 149.

<sup>80</sup> [1924] AC 797.

<sup>81</sup> See further s11.2.3 **Immunity of Protected Heads of State** in **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>82</sup> [1894] 1 QB 149.

<sup>83</sup> at 158. See also **Chapter 1 International Law and the Kingdom of Delhi**, above.

<sup>84</sup> The protection of the Kingdom of Delhi is discussed in **Chapter 3 The ‘Titular’ King of Delhi**, above, and in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.



British Government with less than “absolute rights of Sovereignty”.<sup>85</sup> The Committee elaborated on neither the nature of the protection nor the sovereign rights. Nor did the Committee comment on the size of the territory or its form of government.

The protection extended by Britain - with obvious political implications for bilateral relations - had few effects in international law. As was explained above, the territory of a protected State did not become territory of the protecting State. The territory of the Kingdom of Delhi was therefore not the territory of Britain. Nationals of the protected State did not acquire the nationality of the protecting State, thus residents of Delhi remained subjects of the Kingdom of Delhi. Further, as either party might terminate the protection, hostilities directed at Britain by the King of Delhi in 1857 constituted a repudiation of Britain’s protection and a clear statement of termination of that alliance.

Over time dependency could deepen to the point where a protected State was absorbed by the protecting State. As was discussed in **Chapter 3 The ‘Titular’ King of Delhi**, above, historians have charted the political decline and growing dependence of the Kings of Delhi on Britain in the nineteenth century in tandem with a waning respect of the Government of India for the royal status of the Kings of Delhi. The decline of the Mughal sovereigns was mirrored by Britain’s increasing power and authority in India.

Where the degree of dependence on the protecting State is extreme, State practice shows that recognition has been decisive in the protected State being considered a ‘State’ at international law.

As was discussed in the last two chapters, the Kings of Delhi were recognised by Britain and treated as sovereigns until the deposition of Bahadur Shah in October 1857.

Notwithstanding the Mughals’ dwindling power and British lack of respect for Mughal sovereignty, the British Government expressly recognised the Kingdom of Delhi and the recognition was recorded in the two cases before the Judicial Committee of the Privy Council discussed in previous chapters - *Doss* and *Saliqram*. The continuing legal existence of the Kingdom of Delhi from 1803 to 1857, despite the extension of considerable protection, was consistent with established principles of international law.

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<sup>85</sup> *Saliqram* at 184.

If a state was recognised by the international community as a ‘State’, then it was a ‘State’ for the purposes of international law, at least with respect to the State which had accorded recognition. Accordingly, the Kingdom of Delhi, recognised by Britain, was a ‘State’ for the purposes of international law, certainly as far as its relations with Britain were concerned.<sup>86</sup>

#### 6.4 Consequences in International Law of ‘Statehood’

It was a well-established principle of English law that rules of customary international law automatically formed part of the law of England.<sup>87</sup> As Lord Chancellor Talbot said in *Barbuit’s Case* (1737)<sup>88</sup> “the law of nations in its fullest extent is and forms part of the law of England”.<sup>89</sup> Talbot LC’s dictum was affirmed by Lord Mansfield in *Triquet v Bath*<sup>90</sup> (1764) and again in *Heathfield v Clinton*<sup>91</sup> (1767), a case dealing with diplomatic immunity: “The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England”.

The principle held sway until 1876, when Cockburn J’s judgment in *R v Keyn*<sup>92</sup> provoked argument as to whether rules of international law were only part of English law where there was evidence that England had assented to those rules. This view became known as the ‘doctrine of transformation’, in contradistinction to the earlier rule, which became known as the ‘doctrine of incorporation’.<sup>93</sup> As the doctrine of transformation arose after the trial of Bahadur Shah, and after the decisions in *Doss* and *Saliqram*, and as this thesis is concerned with the law prevailing at the time of the events in question (1857-58), that doctrine is not relevant to the law governing Bahadur Shah’s trial.<sup>94</sup> In any case, as was noted in **Chapter 1 International Law and the Kingdom of Delhi**, above, the principal

<sup>86</sup> Other States may also have recognised the Kingdom of Delhi as at 1857. This thesis, being concerned with the validity of a British prosecution of the King of Delhi, has reviewed British/Mughal relations and has not investigated such records of relations with other countries as may show similar recognition.

<sup>87</sup> See also Westlake, *Collected Papers* (1914).

<sup>88</sup> *Buvot v Barbuit* (1737) (“Barbuit’s Case”) Forrester’s Cases, temp Talbot 281.

<sup>89</sup> Followed in *Dolder v Lord Huntingfield* (1805) 11 Ves. 283; *Viveash v Becker* (1814) 3 M & S, 284, 292, 298, *Wolff v Oxhalm* (1817) 6 M & S, 92, 100-6; *Emperor of Austria v Day* (1861) 30 LH Ch. 690, 702. (1764) 3 Burr 1478.

<sup>90</sup> (1764) 3 Burr 1478.

<sup>91</sup> (1767) 4 Burr 2015.

<sup>92</sup> (1876) 2 Ex D 63 (The ‘Franconia’ case).

<sup>93</sup> Brownlie, above n 20, 46-47.

<sup>94</sup> See discussion of the doctrine of inter-temporal law in the **Introduction** to this thesis, above.

rules of international law relevant to the trial of Bahadur Shah, in particular, sovereign immunity, are well-documented as having been assented to by Britain in the years preceding the trial and would therefore qualify as a part of English law under either doctrine.

The key effects of international law being a part of English law were that British courts took judicial notice of international law and that Britain applied the rules of international law in the conduct of its relations with other States. As international law was a part of the law of England, Britain was bound to respect the rules of international law governing its relations with States it had recognised. According to international law, the State so recognised was subject to the rights and duties of international law. As noted above, Wheaton said that all members of “the great society of nations” recognised “rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil”.<sup>95</sup> As Hall explained, States

have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence, and of holding and acquiring property, subject to the qualification that they are bound correlatively to respect these rights in others.<sup>96</sup>

Further, “monarchs enjoy privileges which, according to the Law of Nations, the municipal laws of the different states must grant to the monarchs of foreign states”.<sup>97</sup> In particular, monarchs of recognised States were entitled to immunity from the jurisdiction of the Courts of the recognizing States.<sup>98</sup>

The Kingdom of Delhi – though small and impoverished – was, like Britain and other powerful States of international law, bound by and subject to the rights and duties of international law. Limitations imposed by the protection extended by Britain did not affect the juridical status of the Kingdom of Delhi. It mattered not that States differ as regards power or territory, wealth or strength, for it was in the nineteenth century a fundamental principle of international law that all sovereign states were equal - the doctrine of the ‘Equality of States’. As was noted in **Chapter 1 The King of Delhi and International**

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<sup>95</sup> Wheaton, above n 2, 39.

<sup>96</sup> Hall, above n 1, 45.

<sup>97</sup> Oppenheim, *Treatise on International Law* (7<sup>th</sup> ed), 1, 115.

<sup>98</sup> See further, **Chapter II The Entitlement of the King of Delhi to Sovereign Immunity**, below.

**Law**,<sup>99</sup> above, according to the doctrine of the ‘Equality of States’, “on the ground of equality, regardless of extent of territory or number of population, each state of the family of nations has a similar status at international law.”<sup>100</sup> Twiss explained: “[I]t results from this equality that whatever is lawful for one Nation is equally lawful for another, and whatever is unjustifiable in the one is equally unjustifiable in the other.”<sup>101</sup>

The Kingdom of Delhi, though heavily dependent upon Britain, held a status equal in international law to other States. Legal equality, as Oppenheim warned, must not be confused with political equality.<sup>102</sup>

## 6.5 Conclusions

This chapter has shown that as the Kingdom of Delhi was recognised by Britain, the Kingdom was a ‘State’ for the purposes of international law. The practice of States being to equate the Head of State with the State itself, Bahadur Shah therefore as at May 1857 held the status of a Sovereign at international law and was subject to the rights and duties of international law.

At the start of **Chapter 3 The ‘Titular’ King of Delhi**, it was noted that Bahadur Shah was variously styled at his trial “the King of Delhi”, the “ex-King of Delhi” and the “Titular King of Delhi.” At issue is whether Bahadur Shah was a recognised sovereign. This and the preceding chapters have shown that, as at the outbreak of mutiny and rebellion in May 1857, despite his dwindling power and mounting dependence on the Government of India, Bahadur Shah held the status of a recognised Sovereign in British and international law. His title ‘the King of Delhi’ was not merely one of courtesy.

<sup>99</sup> See s1.1.3 **The Doctrine of the ‘Equality of States’**, above.

<sup>100</sup> E Dickinson, *The Equality of States in International Law* (1920), 109, citing Wilson, *Handbook of International Law* (1910).

<sup>101</sup> Twiss, above n 70, 109, cited by Dickinson, *ibid*.

<sup>102</sup> Oppenheim, *International Law* (1912), cited by Dickinson, *ibid* 127.

## **Chapter 7 The Imprisonment of the King of Delhi in 1857**

### **7.0 Introduction**

This chapter briefly relates the main events of the Rebellion, in which a British presence in large parts of North India was lost from May 1857, as background to the trial of Bahadur Shah. The chapter highlights Bahadur Shah's attempts to negotiate with the British forces as they besieged Delhi and the British policy on relations with the King of Delhi, and outlines the circumstances of his capture and imprisonment in September 1857.<sup>1</sup> A map of the areas affected by the Rebellion is overleaf (**Figure X**).

The discussion does not give a detailed account of Bahadur Shah's role in the Rebellion over this period as the key focus of this thesis is the assessment of jurisdiction in his trial and not a review of the conduct for which he was tried.

### **7.1 The Rebellion of 1857**

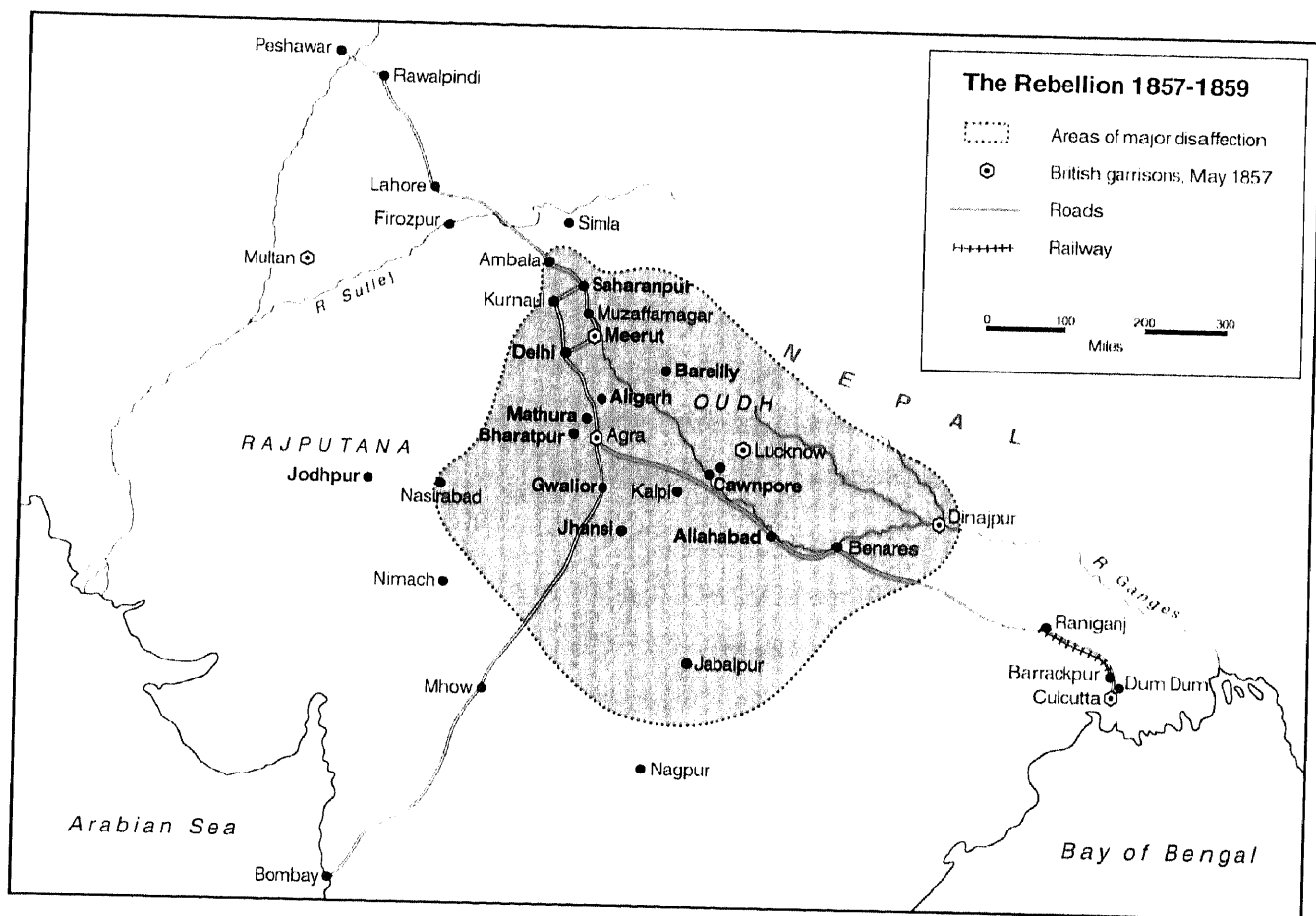
As was pointed out in **Chapter 3 The 'Titular' King of Delhi**, above, by 1857, the Kingdom of Delhi was small, impoverished and in decline. The Mughal Court subsisted on the limited income provided by the Government of India under terms agreed to by Shah Alam II and representatives of the EIC in 1803. Bahadur Shah was elderly, played a diminishing role in the affairs of India, and was heavily in debt. Nonetheless, as the King of Delhi, he retained authority and respect in North India as the 'fountain of all honour'. The Government of India, though seeking pretexts to dispose of him, did not depose him. The reach of the EIC's Government of India, based in Calcutta, had expanded across North India by the mid 1850s. Cantonments had been established in key cities along the main artery rivers serviced by a British commercial community. The Bengal Army in 1857 had an estimated 38,000 British officers commanding 313,500 sepoys.<sup>2</sup>

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<sup>1</sup> A list of relevant Government of India officials and military officers is at **Appendix 5**.

<sup>2</sup> S. L. Menezes, *Fidelity and Honour, The Indian Army from the Seventeenth to the Twenty-First Century* (1993), 26. Compare estimates of 40,000 European ranks and 311,000 sepoys (George MacMunn, *The Indian Mutiny in Perspective* (1931), 17) and 24,000 European and 135,000 sepoys (Saul David, *The Indian Mutiny 1857* (2002), 9).

Figure X: Map of area affected by the Rebellion.



Delhi in the mid-nineteenth century was a walled city surrounded by the ruins of old cities with “pockets of habitation around wholesale markets” separated by “large royal or aristocratic preserves, gardens or hunting lodges.”<sup>3</sup> A sketch of the city of Delhi, c1856, is overleaf (**Figure XI**).

The city was at that time said to be the largest city in India with a population estimated at around 151,000.<sup>4</sup> British civilians rented houses in Delhi and built houses outside the city walls and British officials undertook maintenance of the city. For example, a British Resident replanted trees, at his own expense, along the main boulevard of Delhi, the Chandni Chouk.<sup>5</sup> But the British presence in Delhi remained slight:

Those were the days when if a European was seen in Delhi, people considered him an extraordinary sample of God’s handiwork, and pointed him out to each other: ‘Look, there goes a European!’<sup>6</sup>

In May 1857, Indian sepoy of Bengal Army regiments stationed across central and northern India mutinied, killing their British officers and many British civilians. Mutiny in the EIC forces was followed in most towns by civil rebellion. The British presence in most of north and central India, including the major cities of Delhi, Lucknow and Cawnpore, disappeared.

The trigger for the first of the mutinies in the Bengal Army is generally regarded as the introduction of a cartridge for the new Lee Enfield rifle, the use of which offended both Hindu and Muslim sepoy. The cartridge was wrapped in grease-proof paper designed to be opened with the teeth. Rumours spread that the tallow was bovine or pig fat, offending both Hindus and Muslims. Sepoy were charged with mutiny under the Bengal Articles of War for refusing to load the new cartridges,<sup>7</sup> their treatment triggering further mutiny.

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<sup>3</sup> Narayani Gupta, *Delhi Between the Empires* (1998), 2.

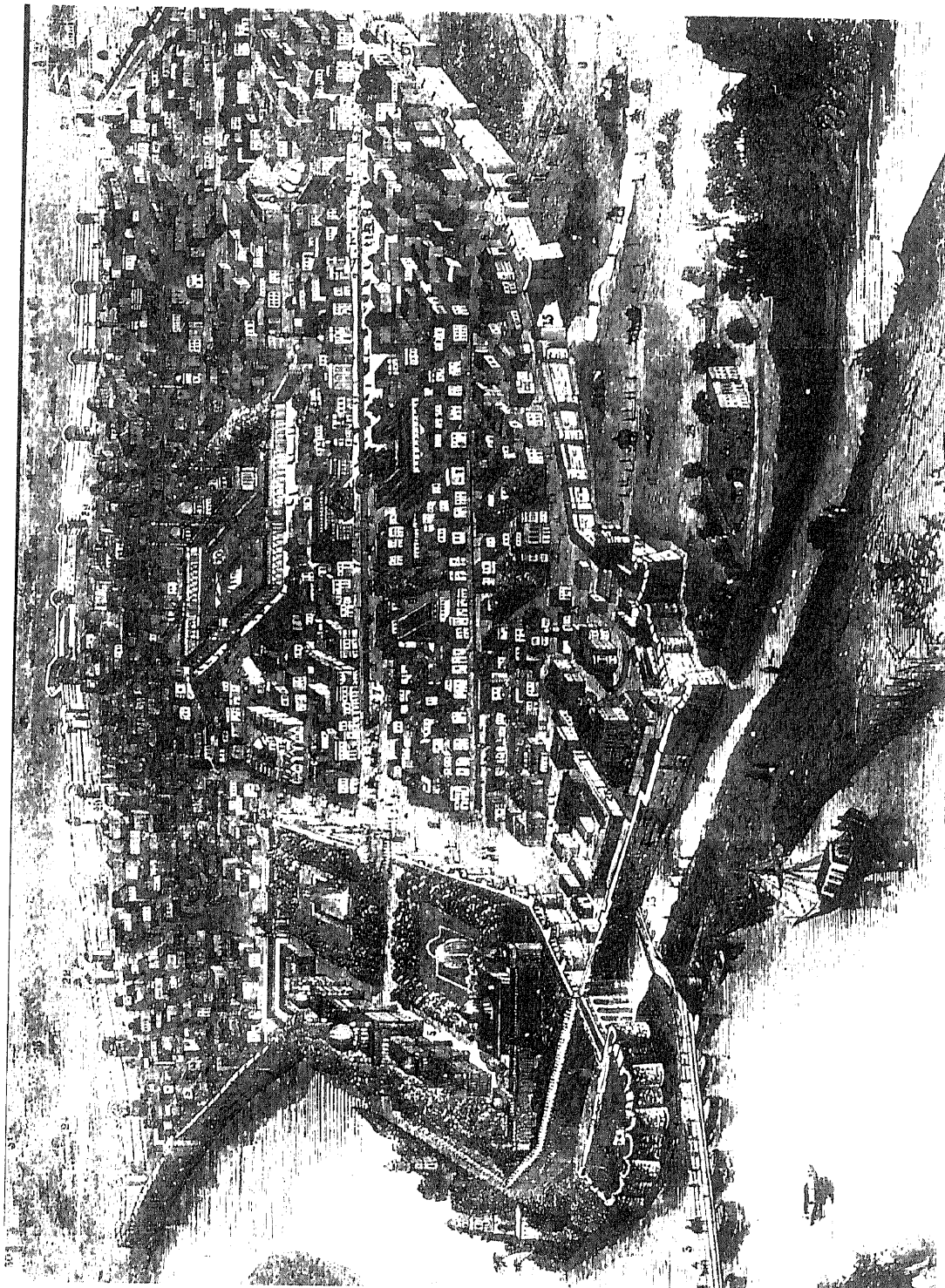
<sup>4</sup> *ibid* 4.

<sup>5</sup> *ibid* 17.

<sup>6</sup> F W Pritchett, *Nets of Awareness, Urdu Poetry and Its Critics* (1995), 6, quoting the poet Azad.

<sup>7</sup> As noted in **Chapter 2 Overview of the Trial**, above, the Prosecutor in Bahadur Shah’s trial had himself investigated the refusal of the sepoy in Meerut to use the cartridge in April 1857.

Figure XI: Sketch of the city of Delhi, c1856.





Underlying the cartridge issue were many grievances, for example, dissatisfaction with the conditions of service in the Bengal Army and unhappiness with the British annexation of Oudh the previous year, a key recruitment area for the Bengal Army.<sup>8</sup> The ensuing civilian rebellion is seen by many commentators as a reaction to the accelerated social change in India, as the Government allowed large numbers of British civilians to move to the subcontinent, and as the Government legislation began to encroach on social custom.

The disaffected sepoys, landowners, and some native princes, assumed authority over parts of North India over the following months, killing British soldiers and civilians, Christian converts and Eurasians. A massacre in the Palace at Delhi of around fifty women and children on 16 May, allegedly at the behest of Bahadur Shah,<sup>9</sup> and the slaying of over one thousand civilians in Cawnpore over June and July, horrified British audiences and fuelled British determination to suppress the hostilities.

The British moved quickly to put down the revolt, but it took forces two years to suppress the hostilities completely. Military reinforcements were called in from the Crimean peninsula and Hong Kong. The long campaign was punctuated by a series of victories as one by one the cities were occupied by British forces until rebel forces were captured or pushed back into the foothills of the Himalayas in the neighbouring Kingdom of Nepal.

Martial law was proclaimed district by district across parts of northern India by the Lieutenant-Governor of the North Western Provinces within six days of the outbreak of mutiny in the Bengal Army. The series of proclamations, made under an EIC law, *Regulation X of 1804*,<sup>10</sup> suspended the operation of the criminal courts in the districts of Meerut, Muzaffarnagar, Bulundshahr and “the Delhi territory east of the river Jumna”, and provided for immediate trial by court-martial of those who took up arms against the Government of India. Martial law was established “until further orders”.

In Calcutta, the Legislative Council began a review of the existing criminal law of Bengal. The review found that no crime equating with the English law of treason applied in India

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<sup>8</sup> See also s2.8 **The Conduct of the Prosecution** in **Chapter 2 Overview of the Trial**, above.

<sup>9</sup> Charge Four alleged that he was accessory to the killing – see s2.3 **The Charges** in **Chapter 2 Overview of the Trial**, above and **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and ‘Titular’ Sovereignty**, below.

<sup>10</sup> See further **Chapter 9 The Rebellion Laws**, below.

and that the law criminalising rebellion, *Regulation X*, was only of limited application. On 14 May 1857, the Governor-General gazetted an order facilitating speedy trials of sepoys. Over the next two months, the Legislative Council passed legislation creating new offences of 'rebellion' and 'waging war' and establishing temporary commissions, civil and military, to conduct trials. While it was British practice to administer justice by military commissions during and immediately after hostilities, the Rebellion so denuded the British forces of officers to conduct courts-martial that the Governor-General also authorised the establishment of civil commissions to try suspected rebels for their conduct.<sup>11</sup>

The pace of law-making was notable and members of the Council from time to time cautioned against hasty legislation.<sup>12</sup> Some 13 acts connected with the Rebellion were passed by the Council between 1857 and 1860, starting with an act to facilitate courts-martial of mutinous sepoys and culminating with an act to indemnify the acts of officers and civilians acting on the orders of Government to suppress the hostilities.<sup>13</sup>

From May 1857 to 1859, the Government of India tried civilians and soldiers for their conduct during hostilities under the new legislation. Estimates of the number convicted vary. According to Spear, in Delhi alone, the Special Commissions tried 3306 people, of which 1281 were acquitted and 2225 were convicted. Of those convicted, 392 were hung and 57 sentenced to life imprisonment.<sup>14</sup> According to Aitchison, of the 959 people punished by Military Commissions in the Punjab (including Delhi) from 1857 to 1858, 714 were executed and 245 imprisoned. In comparison, of the 4397 punished by Civil Commissions, 2384 were executed and 2971 were imprisoned or flogged.<sup>15</sup> Nearly half of all those punished were convicted in Delhi.<sup>16</sup> The Military Commission trying Bahadur Shah was convened under, and he was charged with offences created by, these laws.

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<sup>11</sup> See further **Chapter 9 The Rebellion Laws**, below.

<sup>12</sup> For example, comments by Sir John Peter Grant in May 1858: *Proceedings of the Legislative Council of India* (1857), III, 321. The legislation was not subjected to the usual two weeks cooling off period before taking effect and took effect the day of assent.

<sup>13</sup> See **Chapter 9 The Rebellion Laws**, below. No study of this legislation has previously been undertaken. Tapas Kumar Banerjee, *Background to Criminal Law in India* (1963), 125-6, outlines but does not discuss *Act XI of 1857* in detail. Neither G Rankin, *Background to Indian Law* (1946) nor M P Jain, *Outline of Indian Legal History* (1966) discuss the Rebellion legislation.

<sup>14</sup> Percival Spear, *Twilight of the Mughals, Studies in late Delhi* (1992 [1951]), 219, citing the *Delhi Gazette*.

<sup>15</sup> Charles Aitchison, *Rulers of India, Lord Lawrence* (1894), 107

<sup>16</sup> *ibid.*

## 7.2 The Rebellion in Delhi

In September 1857, as the following sections relate, the British captured Delhi and Bahadur Shah was taken into British custody.

It is well known that on Sunday May 10 1857, sepoys in the Bengal Army rose against their British officers in the town of Meerut, rode to Delhi, and the next day obtained an audience with Bahadur Shah. But it is difficult to form a complete picture of what actually happened in Delhi from that day until the city fell to British forces in mid-September.

As will be discussed in **Chapter 8 The Decision to Try the King of Delhi**, below, one purpose of the trial of Bahadur Shah was to establish a record of events of the Rebellion in Delhi. Indeed, historians have drawn heavily on the *Proceedings* to establish the events in Delhi in 1857.<sup>17</sup> In addition, the diary of the classical *ghazal* poet Mirza Asadullah Khan, *Ghalib's Diary*,<sup>18</sup> an account by nobleman Zakkah Ulla of his childhood memories in Delhi,<sup>19</sup> *Two Native Narratives*,<sup>20</sup> and the *Kotwal's Diary*,<sup>21</sup> are the principal non-British primary sources translated into English and relied on by many historians to establish the course of the Rebellion in Delhi. British sources include military memoirs, and compilations of Government of India records.

According to most accounts based on these sources, including the oral and documentary evidence reproduced in the *Proceedings*, Bahadur Shah, who may have been expecting a mutiny by the sepoys, and may have expected political or military support from the Shah of Persia, initially refused to sanction the uprising, but his will was overborne by mutineers and his eldest son Mirza Moghal. As noted above, British and Christian women and children who, on an outbreak of rioting and mayhem in the city on 11 May, had fled their homes and sought refuge in the Palace, were killed *en masse* in the Palace around 16 May.<sup>22</sup> The military force assembled to capture Delhi, the 'Delhi Field Force', besieged the city. Military leaders in Delhi, including Bahadur Shah's son Mirza Mogal, sent out

<sup>17</sup> For example, Spear, above n 4.

<sup>18</sup> Mirza Asadullah Khan Ghalib, *Dastanbuy, A Diary of the Indian Revolt of 1857* (1917).

<sup>19</sup> C F Andrews, *Zaka Ullah of Delhi* (1929).

<sup>20</sup> Charles Metcalf (ed and translator), *Two Native Narratives of the Mutiny in Delhi* (1898).

<sup>21</sup> Shah Sayyid Mubarak Shah, *The Kotwal's Diary*, (1994).

<sup>22</sup> See **Chapter 2 Overview of the Trial**, above, and **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

forces to repel the British advance but were ultimately overcome by a British assault on the city commencing on 14 September. The city fell to British forces on 21 September.

### 7.3 The Palace's Attempts to Negotiate with the British

Rumours of the Palace's support for the Rebellion had surfaced within days of the outbreak of the Rebellion.<sup>23</sup> The capture of Delhi - and its king - was, from the start, pivotal to British plans to suppress hostilities. "[E]very exertion must be made to regain Delhi; every hour is of importance"<sup>24</sup> telegraphed Canning to the Lieutenant-Governor of the North-West Provinces on 16 May 1857.

But rumours of the Palace's attempts to negotiate a surrender also circulated.<sup>25</sup> A message apparently from Bahadur Shah was delivered to the British camp near Delhi through a senior Mughal official, Ahasanullah Khan. Bahadur Shah would give the British a written agreement, with the royal seal, to assist them in obtaining possession of the city, in return for a formal promise to restore his "pension" and position. General Reed, then Commander of the Bengal Army,<sup>26</sup> commented:

how far this is to be depended upon remains to be proved; but we have been so busy with their attack on our rear that there has been no time to consider it; he has evidently been made a tool of and it might stop an immense deal of blood granting his pension for the remaining years of his life, which cannot be many.<sup>27</sup>

Sir John Lawrence, Chief Commissioner of the Punjab, also saw advantage in keeping negotiations open. He proposed reaching an understanding with Bahadur Shah to facilitate the admission of a regiment into the Palace.<sup>28</sup> Nevertheless, he worried that Bahadur Shah

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<sup>23</sup> Whether the negotiations were sanctioned by Bahadur Shah himself is not certain. The British records assume that messengers from the Palace spoke on his behalf, but the overtures may have been merely "bazaar gossip": Mehdi Hasan, "Bahadur Shah II, his Relations with the British and the Mutiny", (1959) *Islamic Culture*, XXXIII, 95-111, 101.

<sup>24</sup> House of Commons, *Parliamentary Papers*, Volume XXX, 1857, Session 2, 193.

<sup>25</sup> Bahadur Shah himself claimed in the statement appended to the *Proceedings* to have sent a letter on 11 May 1857 by camel express to the Lieutenant-Governor of the North-West Provinces, "acquainting him with the calumnious [sic] occurrences which had happened here." According to the testimony of Ghulam Abbas, the camel-rider had returned with neither a receipt nor reply but had been told a reply would be sent later. No evidence was introduced in the trial to confirm or rebut this claim. *Proceedings*, 133, 28.

<sup>26</sup> Reed was subsequently replaced by General Archdale Wilson.

<sup>27</sup> Letter dated 4 July 1857 in "Some Unpublished Documents Regarding the Mutiny of 1857", *Bengal Past and Present*, LXXVI, Jubilee No., 1957, 47.

<sup>28</sup> *ibid* 48.

would be “unable to give us Delhi, or what is the same thing, enable us to take it without loss”.<sup>29</sup>

However, the Government of India moved quickly to forbid any negotiation with the King of Delhi. On 20 June 1857, a message was sent from Calcutta to Hervey Greathed, Chief Political and Civil Officer with the Delhi Field Force:

The Governor-General desires that, on the fall of Delhi, the Lieutenant-Governor should neither make any promises to the King and the Royal family, nor enter into any engagements regarding them. The Lieutenant-Governor is requested to do nothing more than keep the King and such other members of his family as may be seized in close confinement, and report to the Governor-General for further orders.<sup>30</sup>

A further instruction was sent by telegram on 20 August 1857:

Rumours have more than once reached this Government that overtures have been made by the King at Delhi to the Officers Commanding the Troops there, and that these overtures may possibly be renewed upon the basis of the restoration of the King to the position which he held before the mutiny at Meerut and Delhi. The Governor-General wishes it to be understood that any concession to the King, of which the King’s restoration to his former position should be the basis, is one to which the Government, as at present advised, cannot for a moment give its consent...<sup>31</sup>

Despite refusals by the British to negotiate, in early September, Greathed reported:

a distinct offer to destroy the bridge and to enlist the services of the cavalry, and, with their aid, to put an end to the infantry, on condition of favour being shown to the Royal Family. General Wilson refused positively to entertain any communications from the Palace.<sup>32</sup>

#### 7.4 The Capture of Delhi in September 1857

By August, preparations for the assault on Delhi were well advanced. On 7 September General Wilson, Commander of the Delhi Field Force, issued the Delhi Field Force Orders:

when ordered to the assault, the Major-General feels assured British pluck and determination will carry everything before them, and that the bloodthirsty and murderous mutineers against whom they are fighting will be driven headlong out of their stronghold, or be exterminated....Major General Wilson need hardly remind the troops of the cruel murders committed on their officers and comrades, as well as their wives and children, to move them in the deadly struggle. No quarter should be given to any of the mutineers; at the same time, for the sake of humanity, and the honour of the country they belong to, he calls upon them to spare all women and children that may come in their way...<sup>33</sup>

<sup>29</sup> R Bosworth Smith, *Life of Lord Lawrence* (1883), II, 119.

<sup>30</sup> Telegram from Edmonstone, 20 June 1857, Government of the Punjab, *Mutiny Correspondence*, (1911), 303. Hereinafter “*Mutiny Correspondence*”.

<sup>31</sup> *ibid.*

<sup>32</sup> Greathed to Colvin, Lieutenant-Governor of the North West Provinces, 4 September 1857, Colstream (ed), *Records of the Intelligence Department* (1911), I, 508; hereinafter “*Intelligence Records*.”

<sup>33</sup> House of Commons, *Parliamentary Papers* (1860), L, 412, 10.

These orders did not state how British forces should treat Bahadur Shah should he be encountered in battle. Lawrence would later say “[I]t is a great pity that the old rascal was not shot directly he was seen – I would not have taken him prisoner.”<sup>34</sup> The international position at the time was not clear. Vattel suggested that while “the ancients” had rewarded one who succeeded in killing the King:

At the present day a soldier would not dare, ordinarily at least, to boast of having killed the enemy’s King. It is thus tacitly agreed among sovereigns that their persons shall be held sacred...But it is not a law of war that the person of the enemy’s King must be spared on every occasion, and the obligation to do so only exists when he can easily be made prisoner.<sup>35</sup>

Martens thought:

Neither the sovereign nor his family can be looked upon as sheltered, by the law of nations, from the violence of the enemy. Those of them who bear arms may be resisted or attacked, and, consequently, wounded or killed; and those who do not bear arms may be made prisoners of war. Nevertheless, according to modern manners, it would be against the laws of war to aim deliberately at the person of a sovereign or of a prince of the blood royal.<sup>36</sup>

Presumably the Government of India considered the matter settled by the 20 June telegram (above) instructing that Bahadur Shah and his family should be kept in “close confinement” and further orders sought from the Governor-General. In fact, officials in Delhi later claimed complete ignorance of these instructions (see further below).

One week later, the British commenced their assault on Delhi. With the capture of the principal mosque of Delhi, the Jama Masjid, on 19 September and the Royal Palace on 20 September, the city fell to the British.

## 7.5 The Capture of the King of Delhi

On 21 September, Bahadur Shah was taken into British custody. A British officer, Captain William Hodson of ‘Hodson’s Horse’, an irregular unit of the Bengal Army, is generally credited with having captured Bahadur Shah. The ‘aged King’ surrendering to the ‘gallant’ officer has long been part of ‘Mutiny mythology’. Hodson claimed:

I got permission, after much argument and entreaty, to go and bring in the King, for which (though negotiations for his life had been entertained) no provision had been made and no steps taken, and his favourite wife also, and the young imp (her son) whom he had destined to succeed him on the throne. This was successfully accomplished, at the expense of vast fatigue and no trifling risk...had

<sup>34</sup> Spear, above n 14, 219.

<sup>35</sup> E de Vattel, *Les Droits des Gens* (1758), Book III, Ch VII, s159, 290.

<sup>36</sup> G F Von Martens, *The Law of Nations* (4<sup>th</sup> ed, 1829), Book VI, Ch III, s7, 290-291.

he attempted either a flight or a rescue, I should have shot him down like a dog, as it is, he is the lion without his claws...<sup>37</sup>

The capture proved controversial, for despite the Government's prohibition on negotiating with Bahadur Shah, he had surrendered on guarantee that his life would be spared. Moreover, it was not clear who had authorised the negotiated surrender. Greathed, the recipient of the instructions prohibiting negotiations, had died on 19 September.<sup>38</sup> Hodson said he had received information that Bahadur Shah was hiding at Humayon's Tomb and had acted under the instructions of General Wilson.<sup>39</sup> General Wilson said that he had acceded to Hodson's request to bring in Bahadur Shah on the basis of a recommendation by the late Greathed.<sup>40</sup> Saunders, who was appointed Acting Commissioner on Greathed's death, said that Greathed had told him he was authorised to promise Bahadur Shah his life and that Hodson had told him (Saunders) that Wilson had given him permission to promise Bahadur Shah his life.<sup>41</sup> Saunders claimed ignorance of the Government's orders of 20 June forbidding any negotiation with the King of Delhi and said he had interpreted the August order as merely forbidding negotiation on the basis of restoration to his previous position.<sup>42</sup> Wilson and Hodson were asked to clarify their accounts but Hodson had died and Wilson had left the country before doing so.<sup>43</sup> Exacerbating official disapproval of the negotiated surrender of Bahadur Shah, was Hodson's return the day after the capture of Bahadur Shah to Humayun's Tomb where he shot three *Shahzadas*, Royal princes: Bahadur Shah's sons Mirza Mughal and Mirza Khwaja Sultan, and his grandson Mirza Abu Bakr.<sup>44</sup> Hodson's fag at Rugby, Francis Maud, thought this act unjustifiable<sup>45</sup> and a British parliamentarian condemned Hodson's conduct as "one of the foulest murders and atrocities recorded in human history... a great dishonour has been done to the English name".<sup>46</sup> A photograph of Humayon's Tomb, c1858, is overleaf (**Figure XII**).

<sup>37</sup> William Hodson, quoted by his brother Rev. George H. Hodson in (ed) H. K. Kaul, *Historic Delhi: An Anthology*, 1985, 405.

<sup>38</sup> *Intelligence Reports*, above n 32, I, 121.

<sup>39</sup> *Mutiny Correspondence*, above n 30, 323.

<sup>40</sup> *ibid* 305.

<sup>41</sup> *ibid* 310.

<sup>42</sup> *ibid* 311.

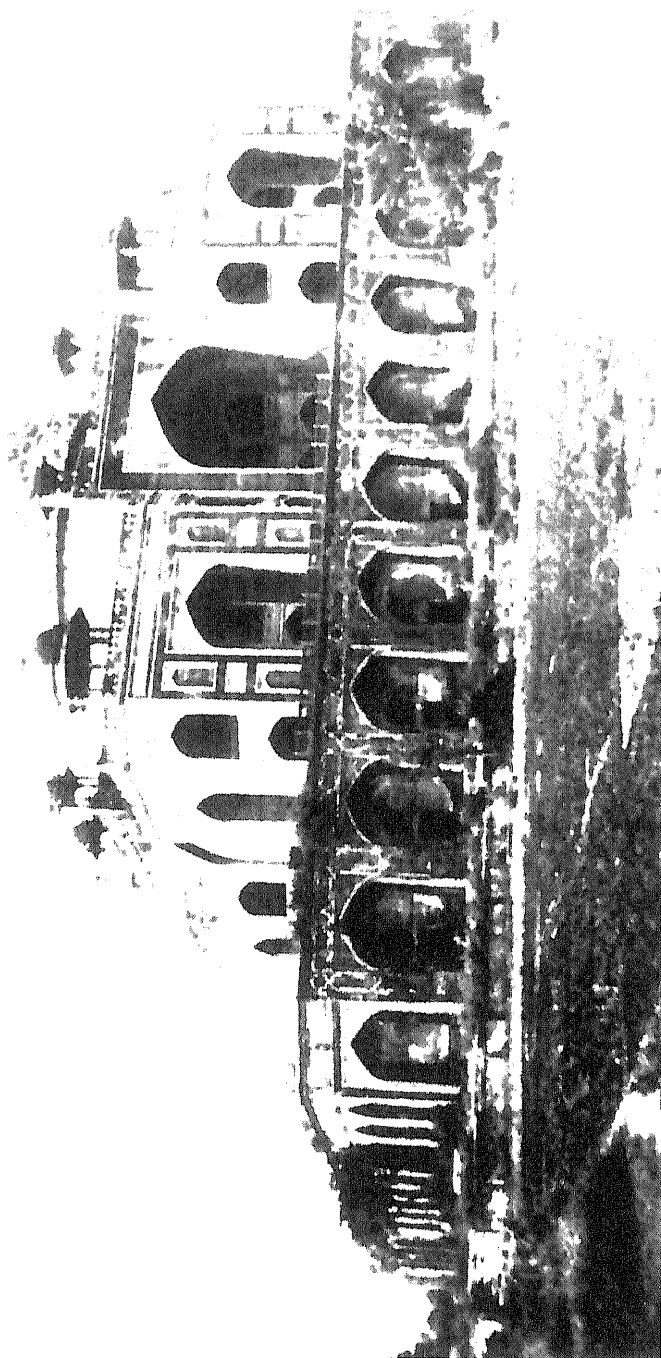
<sup>43</sup> *ibid* 355.

<sup>44</sup> H G Keene (ed), *Beale's Oriental Dictionary* (1971 [1894]), 95.

<sup>45</sup> Francis Cornwallis Maud, *Memories of the Mutiny* (1894), II, 411.

<sup>46</sup> General Thompson, Member of the House of Commons for Bradford, cited in Michael Edwardes, *Red Year: The Indian Rebellion of 1857* (1973), 165.

Figure XII: Photograph of Humayun's Tomb, c1858.





Sir Cecil Beadon, Home Secretary to the Governor-General, regretted that Bahadur Shah had been taken into custody:

It strikes me as most unfortunate that any terms should have been made with the King of Delhi, who certainly deserved summary punishment, such as was righteously inflicted on his sons and grandson. However, we have yet to hear the circumstances under which a promise of his life was given to the wretched old man; and if it be a promise which must be kept (as no doubt it is, however imprudent and unauthorised), the Govt will have to determine what is best to be done with him... The best thing to do with him is to send him to Hong Kong and give him a pittance enough to sustain life and no more...<sup>47</sup>

On 22 September, Muir, Head of the Intelligence Department, Agra, officially informed the Governor-General of events in Delhi:

All is going on wonderfully well here. The King and the Begum Zeenut Muhal, are close prisoners, and today the Princes Mirza Moghul, Aboo Bucker, and Khizzur Sultan were brought in by Hodson from Humayoon's Tomb, and shot at the Delhi Gate. Their bodies are now lying at the Kotwalie,<sup>48</sup> where so many of our poor countrymen were murdered, and exposed.<sup>49</sup>

The "British flag waved over the Palace of the Kings of Delhi" and General Wilson set up the headquarters of the Delhi Field Force in the Lal Qila.<sup>50</sup> Possession of the *diwan-i-khas*, the assembly rooms of Bahadur Shah and the site of his throne, highlighted the British victory.<sup>51</sup> That night, a toast was there drunk to Queen Victoria and a Royal Salute fired from the ramparts of the fort in honour of the capture of Delhi.<sup>52</sup> The following Sunday, the Field Force Chaplain held a Thanksgiving Service in the *diwan-i-khas* as a public celebration of the British success in occupying Delhi. He wrote that

it would hardly be possible to conceive anything more impressive than this assembly -- a small but victorious force, assembled within the Imperial Palace of the ancient Moslem capital of Hindustan, lining the four sides of that marble hall wherein the King and his advisers had not long before been convened, plotting and determining evil against the British cause...<sup>53</sup>

The capture of Delhi and its King in September 1857 was a turning point in the Rebellion, prompting this typical response "[T]he Fall of Delhi has struck terror into the hearts of

<sup>47</sup> *Intelligence Records*, above n 32, II, 361.

<sup>48</sup> *Kotwalie*: police station.

<sup>49</sup> *Intelligence Records*, above n 32, I, 523.

<sup>50</sup> *ibid* 117.

<sup>51</sup> See sketch of the *diwan-i-khas* c1858 in **Chapter 2 Overview of the Trial**, above.

<sup>52</sup> *Intelligence Records*, above n 32, I, 117-118, 522.

<sup>53</sup> J E Rotton, *The Chaplain's Narrative of the Siege of Delhi* (1858), 325-326.

them all” and “[T]he Mahometans have lost all excuse for opposition on religious grounds, as their King is gone.”<sup>54</sup>

Bahadur Shah was initially held under the charge of Saunders in the *haveli*<sup>55</sup> *Zeenat Mahal*, belonging to his principal wife, Begum Zeenat Mahal.<sup>56</sup> He was then moved to three rooms, protected by four sentries, in a building in the Lal Qila.<sup>57</sup>

His health was alleged to have suffered during his imprisonment in Delhi. A British parliamentarian later spoke at a public meeting in London on his poor physical condition:

He rose with some difficulty from his couch; showed me his arms, which were eaten into by disease and by flies, and partly from want of water; and he said in a lamentable voice, that he had not enough to eat...is this the way, as Christians, we ought to treat a king?<sup>58</sup>

The Government Surgeon responded:

There is no limit whatever but the individual’s own desire, to the amount of water used for bathing or other purposes. At one time the ex-king was suffering from a disease not uncommon in India, but rarely mentioned in polite English ears; the skin was abraded slightly in one or two small patches about the fingers, arms etc from scratching only. Although he has been months under my care, he has not once complained of deficiency of food, though, as has been his custom for thirty-five years, he usually vomits after every meal. I have on more than one occasion seen his superintending the preparation of sherbet by his own attendants.<sup>59</sup>

By the end of September 1857, Bahadur Shah was held a prisoner in his own palace and Prince Albert was pondering Queen Victoria’s assumption of the Mughal title:

Prince Albert thinks that there ought to be some solemn act by which she would assume to herself any title, such as the Great Mogul, which would connect itself with the ancient history of the country.<sup>60</sup>

Although Queen Victoria did not, in the event, assume the title ‘Empress of India’ until 1876,<sup>61</sup> the use of the words ‘Great’ and ‘ancient’ disassociated Bahadur Shah from his illustrious forebears – the Great Moghuls Akbar, Jahangir, Shah Jehan and Aurangzeb –

<sup>54</sup> *Intelligence Records*, above n 32, I, 44.

<sup>55</sup> *Haveli*: traditional mansion.

<sup>56</sup> *Intelligence Records*, above n 32, I, 123.

<sup>57</sup> HC Fanshawe, *Delhi - Past and Present* (1902), 41-42.

<sup>58</sup> The Martin Account, 185.

<sup>59</sup> *ibid* 185.

<sup>60</sup> Granville to Canning, James McAree, *The Passage of the Government of India Bill of 1858* (1961), 163.

<sup>61</sup> The title was changed to “Indiac Imperatrix, or Empress of India” by proclamation dated 28 April 1876 under the *Royal Styles and Title Act 1876* (UK) (39 & 40 Vic c 10): *Halsbury’s Laws of England*, 5, 528 note (p). The title ceased with the passage of the *Indian Independence Act 1947* (10 & 11 Geo.6 c.30). *Halsbury’s Laws of England*, 5, 462, note (e).

and heralded the end of the dynasty. A portrait of the Mughal Emperor Jahangir, with King James I of England on the left, c1620, is overleaf (**Figure XIII**).

In captivity, in a cruel inversion of the Mughal custom of *darshan*,<sup>62</sup> Bahadur Shah was put on public display, and many Rebellion memoirs described visits to his quarters.<sup>63</sup> Ruth Cooper, a chaplain's widow, said she saw cowering on a low *charpoy*<sup>64</sup> "a thin old man, dressed in a dirty white suit of cotton".<sup>65</sup> On her arrival

he laid aside the hookah he had been smoking, and he, who had formerly thought it an insult for anyone to sit in his presence, began salaaming to us in the most abject manner, and saying he was burree kooshee (very glad) to see us.<sup>66</sup>

A British officer said he saw

the King of Delhi and abused him like a pick-pocket, and treated him anything but as the Great Mogul. I saw his three sons also after they were killed, lying at the Kotwali, where the Europeans were treating their remains with every indignity...<sup>67</sup>

Sir Richard Temple, Secretary to Sir John Lawrence, writing more than thirty years later, was more magnanimous. Visiting Bahadur Shah to collect evidence, he said:

Then I had to visit the ex-King himself, the last of the Moguls, now a prisoner in the Palace. He was seated on a rug in a marble hall, nervous, almost trembling and counting beads. Watching his chiselled features and classic profile – remembering that he was the lineal descendant of the Mogul Emperors – I was moved by the sight of fallen greatness. I accosted him in courtly Urdu, that being *par excellence* the language of Delhi. He replied with an air of sublime indifference.<sup>68</sup>

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<sup>62</sup> *Darshan* was a ceremony in which the Emperor appeared daily before his subjects. It was "rigorously observed by the earlier Mughal Emperors, it being the only sign by which the people knew who was on the throne." *Monuments of Delhi*, I, 18.

<sup>63</sup> Napoleon was similarly exposed to the gaze of British tourists visiting St Helena. See for example Julia Blackburn, *The Emperor's Last Island, A Journey to St Helena* (1997).

<sup>64</sup> *Charpoy*: An Indian bedstead.

<sup>65</sup> Mrs Coopland, *A Lady's Escape from Gwalior* (1859), cited by Surenda Nath Sen, *Eighteen Fifty-Seven* (1957), 112.

<sup>66</sup> *ibid.*

<sup>67</sup> *Graham Mutiny Papers*, 82.

<sup>68</sup> Sir Richard Temple, *The Story of My Life* (1896), 90.

Figure XIII: The Emperor Jahangir, with King James I of England on the left, c1620.



## Chapter 8 The Decision to Try the King of Delhi

### 8.0 Introduction

As at September 1857, Bahadur Shah was in the custody of the British in his Palace at Delhi. This chapter reviews the official correspondence debating the treatment to be accorded to Bahadur Shah after his capture.<sup>1</sup> The political value to be derived from a trial was explicit in pre-trial official correspondence but officials were silent on the legal authority for exercising jurisdiction. At no stage was Bahadur Shah's status as 'the King of Delhi' raised as a possible impediment to a criminal prosecution.

### 8.1 Deciding on the Treatment to be Accorded to Bahadur Shah

Once Bahadur Shah was held prisoner by the British, with his surrender having been secured by a guarantee of his life, the burning issue was what to do with him.

Options for the treatment of 'rebels' held by the Government of India included a full pardon, trial under the Rebellion Legislation, execution without trial, or exile without trial. An option for the treatment of a recognised king was to be left *in situ* following diplomatic negotiation. As noted in the previous chapter, Bahadur Shah had been attempting a diplomatic negotiation since the first days of the outbreak in Delhi. However, the Government of India had consistently ruled this out. Some officials advocated summary execution. For example, Sir Cecil Beadon, Home Secretary to Canning, wrote to Muir on 13 October 1857:

I cannot doubt for a moment that the man is an arch ringleader and fully deserving of death, and I feel certain that to have hung him on the palace wall would have had the best effect throughout India, just as our omission to do so will be assuredly attributed to fear.<sup>2</sup>

A summary trial was the option chosen by the Government for many of the leaders of the Rebellion in Delhi. In November, Sir John Lawrence instructed Saunders that "all Chiefs and leading men" found guilty should be put to death.<sup>3</sup> In the months following the

<sup>1</sup> A list of relevant Government of India officials and military officers is at *Appendix 5*.

<sup>2</sup> William Coldstream (ed), *Records of the Intelligence Department of the Government of the North-West Provinces of India during the Mutiny of 1857* (1902), II, 361. (Hereinafter "Intelligence Records").

<sup>3</sup> Lawrence to Saunders, 17 November 1857, Government of the Punjab, *Mutiny Correspondence, Correspondence*, (1911), 300. Hereinafter "Mutiny Correspondence".

capture of Delhi, at least nine trials by Military Commission of Delhi noblemen were held.<sup>4</sup> All were found guilty and executed immediately. Prominent Delhi nobleman so executed included two sons of Bahadur Shah, Mirza Bakhtawar Shah and Mirza Mendoo, the Nawabs of Jhujjur, Dudree and Feroknugger, and the Raja of Bullubggurh. Other Rebellion leaders tried elsewhere and executed during the Rebellion include Tantya Tope,<sup>5</sup> the Nawab of Runnea,<sup>6</sup> and the Rajah Mitawlee Lonee Sing.<sup>7</sup> Unlike Bahadur Shah's trial, the transcripts of these trials were not published by the Government. Reporting to the Governor-General on the trial and execution of Mirza Bakhtawar and Mirza Mehndoo, Lawrence commented: "the execution of such men will strike terror, and produce a salutatory fear through the Mahomedan population."<sup>8</sup>

Bahadur Shah remained prisoner for four months while officials procrastinated about whether a trial should be held and the form of any proceedings. Uncertainty arose from Hodson having guaranteed Bahadur Shah's life, differences of opinion between the civil and military authorities, with General Penny in Delhi pushing for a criminal trial and Lawrence in Lahore seeking a political enquiry, and from delay in receiving instructions from Calcutta.

Bahadur Shah was tried in his own Palace by a panel of military officers under the laws passed in 1857 by the Government of India.<sup>9</sup> In the end, it was both a political enquiry into the circumstances and progress of the rebellion and a judicial investigation into Bahadur Shah's guilt.

## 8.2 The Lead-up to the Decision to Try the King of Delhi

Saunders sought instructions from Lawrence within a week of the surrender of Bahadur Shah: "Do you wish him to be tried by a military commission *pro forma*, for his life has been guaranteed to him?" He added "[T]he evidence which can be adduced against him will be conclusive to the share he took in the insurrection, for there are numerous

<sup>4</sup> *ibid* 376-377.

<sup>5</sup> See for example C L Showers, *A Missing Chapter of the Indian Mutiny* (1888), 146-149 and Charles Ball, *The History of the Indian Mutiny* (n.d, 1859?) II, 597.

<sup>6</sup> *ibid* Ball, II, 219.

<sup>7</sup> *ibid* 596.

<sup>8</sup> *Mutiny Correspondence*, above n 3, 360.

documents found with orders endorsed upon them in his own handwriting.”<sup>10</sup> Receiving no response, Saunders again telegraphed Lawrence:

I am decidedly of opinion that that he should be brought before a Military Commission or Court of Enquiry, and that the evidence to prove his guilt should be recorded against him, and his case finally submitted for the orders of Government, it being clearly understood that his life is not to depend on the issue of the trial. I have collected ample proof, both oral and documentary, against him.<sup>11</sup>

The next day, Lawrence responded: “By all means try him by a Commission and have an opinion recorded of his guilt or innocence. But pass no sentence.”<sup>12</sup>

Meanwhile in Calcutta, the Governor-General had decided that if it were established that Bahadur Shah had been guaranteed his life, he should not be tried.

If, as has been reported to the Governor-General in Council, the King of Delhi has received from any British officer a promise that his life will be spared, you are desired to send him to Allahabad..... the King is to be exposed to no indignity or needless hardship. If no promise of his life has been given to the King, he is to be brought to trial under *Act XIV of 1857*.<sup>13</sup>

If tried, Bahadur Shah would have one week to prepare a defence. If he chose not to select a person to conduct his defence, the Commissioners were to appoint a British officer as defence counsel. Saunders would collect the evidence, frame the charges and act as prosecutor. If Bahadur Shah was found guilty, the sentence was to be carried out without further reference to the Governor-General.<sup>14</sup>

The order proposing the trial by Civil Commission was not received in Delhi until 20 October and Lawrence had already approved a trial by Military Commission. Saunders sought fresh instructions from Lawrence, who replied “[T]he King’s life having been guaranteed there can be no object in sending down the three officers named by Government of India and I can ill spare their services at present.”<sup>15</sup> A trial was off the agenda.

Lawrence then initiated an investigation into the circumstances of Bahadur Shah’s arrest. Two issues stood out: squaring the apparent negotiated surrender with the Government

<sup>9</sup> See **Chapter 9 The Rebellion Laws**, below.

<sup>10</sup> Saunders to Lawrence, 29 September 1857, *Mutiny Correspondence*, above n 3, 358.

<sup>11</sup> 7 October 1857, *ibid* 359.

<sup>12</sup> 8 October 1857, *ibid* 359.

<sup>13</sup> *Mutiny Correspondence*, above n 3, 360.

<sup>14</sup> *ibid*.

<sup>15</sup> *ibid* 361.

instructions prohibiting any negotiation; and determining who, if anyone, had authorised negotiations.

Bahadur Shah's conditions of imprisonment were examined as a part of that investigation. Saunders was asked to explain himself in light of reports that Bahadur Shah's son, Jivan Bakht, had been taken out on an excursion by a British officer. "What are the merits of the matter? It requires much courage and discretion to stem the indiscriminate flood of feeling against all natives."<sup>16</sup> This followed a report in English language newspapers circulating in India, *The Friend of India* and the *Lahore Chronicle*, that

the youngest son of the King has been declared innocent on account of his youth,<sup>17</sup> and rides through Delhi on an elephant, with two British officers behind him to do him honour!...The King also, it is said...had a retinue to attend him, and coolly insults the British officers who visit him. It is things such as these - the honours paid to our murderers which exasperate Europeans to a fury... the sooner a special officer is ordered from Lahore to Delhi with power to do anything save pardon, the better for our interests in the North-West.<sup>18</sup>

Similarly, a Government official "drew on himself the wrath of the newspapers because he took off his hat when he went into the chamber where the old King was kept a prisoner".<sup>19</sup>

But Muir thought:

I should rather think that the wretched old man was sometimes the object of decided disrespect from the visitors... I think it is a matter of congratulation having at Delhi a man of so sound judgment as Saunders; for it is not every man who could have resisted the popular cry for indiscriminate vengeance which rings through Delhi...<sup>20</sup>

Muir also sought to soothe notions that Bahadur Shah was being accorded special treatment, saying he had heard Bahadur Shah "is looking very ill, and certainly not residing in that state that the newspaper writers would make out." Saunders eventually satisfied the Government that neither Bahadur Shah nor Jivan Bakht were being treated with honour in Delhi.<sup>21</sup>

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<sup>16</sup> 27 October 1857, *Intelligence Records*, above n 2, II, 95.

<sup>17</sup> On the decision not to try Jivan Bakht, see **s2.8 The Conduct of the Prosecution in Chapter 2 Overview of the Trial**, above.

<sup>18</sup> 10 October 1857, *Parliamentary Papers*, 1857, 44, 438.

<sup>19</sup> Charles Aitchison, *Lord Lawrence and the Reconstruction of India under the Crown* (1894) 105.

<sup>20</sup> *Intelligence Records*, above n 2.

<sup>21</sup> *Mutiny Correspondence*, above n 3.



The investigation into the circumstances of Bahadur Shah's arrest concluded that Bahadur Shah had indeed been promised his life.<sup>22</sup> A decision to honour Hodson's promise is testament to the determination of the Government to be seen to be 'just' in its response to the rebellion.<sup>23</sup> Sir John Lawrence emphasised the advantages of Hodson having arrested the King:

however great may be the evil of granting the King's life, it must be quite insignificant compared with those which would have arisen had he effected his escape. Every Englishman must have desired to see him brought to justice; few would, however, have hesitated in consenting to give him his life, if otherwise he might have escaped....<sup>24</sup>

Plans for a trial of Bahadur Shah, in line with the Governor-General's instructions of 10 October, should have been set aside. Indeed, on 20 November, Sir George Edmonstone, Foreign Secretary to the Governor-General, wrote to Saunders directing "all the members of the family saving the King, and all the Chiefs in custody, be at once brought to trial and dealt with according to law."<sup>25</sup> However, that instruction was not received in Delhi until 2 December, and by then the Civil and Military authorities in Lahore and Delhi had decided on a different course.

### 8.3 The Decision to try the King of Delhi by Military Commission

On 30 November, Saunders instructed the military authorities to convene a Military Commission to try Bahadur Shah. He told General Penny that "under instructions" from Lawrence, it had been "considered desirable, as well for the satisfaction of Government as for that of the public, to bring the ex-King of Delhi to trial before a Military Commission in order that his guilt or innocence in the late rebellion and its attendant atrocities" could be established.<sup>26</sup> The life of Bahadur Shah having been guaranteed to him by Captain Hodson, under instructions from Major-General Wilson, the Military Commission would not be

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<sup>22</sup> The allocation of responsibility for the issue of the guarantee was never settled, Hodson having died in March 1858, and General Wilson having left the country: *ibid* 355. Lawrence's view was that while Hodson had exceeded his authority, the escape of Bahadur Shah would have been a greater evil: *ibid* 308.

<sup>23</sup> The Nawab of Farukhabad was also guaranteed his life on surrender by a British officer. The (reluctant) decision to honour a written guarantee was preceded by several months of close analysis of the text: F R Cosens and C L Wallace, *Fatehgarh and the Mutiny* (1933), 234.

<sup>24</sup> 12 December 1857, *Mutiny Correspondence*, above n 3, 307-308.

<sup>25</sup> *ibid* 303.

<sup>26</sup> *ibid* 363.

competent to pass any sentence on him even if convicted.<sup>27</sup> He suggested that the Deputy Judge Advocate-General frame charges against Bahadur Shah and conduct the prosecution before a military court especially selected by General Penny for “so important an occasion.”<sup>28</sup>

However, Lawrence insisted that no charges were to be laid. On 1 December, he telegraphed Saunders and General Penny:

I do not think it would be expedient to prepare any specific charges against the King of Delhy on which to try him. I would propose that the Commission be at liberty to hear and place on record all evidence bearing against the King and connected with the late insurrection. This is simply for record. He is not being tried for his life.<sup>29</sup>

Saunders accordingly advised General Penny to consider his instructions to frame charges “cancelled” and said the Military Commission would “sit as a Court of Enquiry to hear and place on record all evidence bearing against the King and connected with the late insurrection”.<sup>30</sup> The next day, Saunders informed Calcutta:

notwithstanding that his life has been guaranteed, the King should be brought before a Military Court of Enquiry, not with a view to any sentence being passed upon him (which will remain for the Right Hon’ble the Governor-General in Council to determine), but in order that the whole of the valuable and voluminous documentary evidence found in the palace implicating him so strongly as it does and showing that after the mutinies had occurred he took a prominent and most important part in the insurrection, should be put on record as well for the information of the Government as for the satisfaction of the British public at large.<sup>31</sup>

On 6 December, Lawrence instructed General Penny that Bahadur Shah should be allowed to defend himself and examine witnesses. The Commission, he said, “should have the power, at their discretion, of hearing and recording all criminatory matter which might be produced.”<sup>32</sup> And on 10 December, Lawrence sought approval from Calcutta for his instructions. He noted that “as the man’s life has been guaranteed, the object of the enquiry is simply to place on record the part he played in the insurrection”.<sup>33</sup>

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<sup>27</sup> *ibid* 363.

<sup>28</sup> *ibid* 363-364.

<sup>29</sup> *ibid* 364.

<sup>30</sup> *ibid* 365.

<sup>31</sup> *ibid* 321.

<sup>32</sup> *ibid* 365.

<sup>33</sup> *ibid* 366.

However, Saunders, against these explicit instructions, on 5 January approved the laying of charges against Bahadur Shah.<sup>34</sup>

Saunders later explained to Lawrence that Major Harriott, the Judge-Advocate General in Delhi, had strongly recommended “a direct trial”, that General Penny had concurred, and that he (Saunders) had taken it upon himself to acquiesce to the views of the military authorities to “prevent further delay.”<sup>35</sup> Harriott had argued that:

2. To render such investigation satisfactory, it is in my opinion necessary that it should assume the form of a direct trial, viz., that charges should be framed and the ex-King be called upon to plead to them.
3. I do not perceive how under other circumstances any result can be arrived at as to the ex-King's guilt or innocence that will not be open to the objection of being one-sided and unjust.
4. If a verdict be sought on any point that may come under investigation, it is surely desirable that both sides of the case should be heard and equally considered. Such a verdict, whether one of conviction or acquittal, will have the stamp of authority and stand a final and decisive record either in favour of or against the prisoner.<sup>36</sup>

Lawrence cannot have been pleased. He said he would leave it in Saunders' hands as he thought little would “now be gained by his interference”.<sup>37</sup> However, he pointed out that the advantages of “a simple enquiry” had been that the Court would have been free to receive or reject such evidence which might now be rejected as irrelevant. Moreover, as Bahadur Shah's life had in any case been spared, a trial was pointless:

From the moment that his life was guaranteed there ceased, in the Chief Commissioner's judgment, to be any advantage in bringing him individually to trial. His complicity in the rebellion was open and notorious, and under no circumstances could he ever obtain his liberty or be restored to his former status.<sup>38</sup>

The object of the enquiry (“to elucidate important facts connected with the rebellion”) having been lost sight of, he could now only hope that “[A]ll weighty circumstances explanatory of the origin and progress of the rebellion” would still be recorded.<sup>39</sup>

On 20 January, Lawrence received Calcutta's approval of his December instructions - for a Court of Enquiry to hear and place on record all evidence bearing against the King.<sup>40</sup>

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<sup>34</sup> *ibid* 366.

<sup>35</sup> *ibid*.

<sup>36</sup> 5 January 1858, *ibid* 367. This advice was reproduced in the *Proceedings*, 3.

<sup>37</sup> 15 January 1858 *ibid* 369.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid*.

<sup>40</sup> *ibid* 371.

Saunders sought fresh instructions from Lawrence.<sup>41</sup> But, without waiting for a response from Lawrence, he went ahead and opened a criminal trial on 27 January 1858. Saunders' acquiescence to military views and institution of proceedings was apparently precipitated by Harriott's leaking of the charges to the English-language press in India in early January 1858. Once the option of a judicial investigation was in the public arena, he felt that he had had no choice but to try Bahadur Shah against charges.<sup>42</sup>

On 28 January, in ignorance of the trial having opened, Lawrence informed Saunders that he regretted publication of the charges and instructed him to postpone a criminal trial until the ailing Bahadur Shah was certified fit for trial by the Civil Surgeon.<sup>43</sup> If Bahadur Shah died, a political enquiry would nonetheless proceed.

Nonetheless, on 11 February, Canning approved the institution of criminal proceedings. He dismissed the "enquiry" / "trial" distinction as a matter of form, not substance. He did not object to framing charges as long as this was not used to reject evidence bearing on the rebellion.<sup>44</sup> However, Harriott was to be censored for leaking the charges: he had "unwarrantedly exceeded his duty".<sup>45</sup>

A criminal trial of Bahadur Shah was thus ultimately approved by all relevant authorities.

#### **8.4 Factors in the Decision to Try the King of Delhi**

Two reasons for investigating the conduct of Bahadur Shah were advanced by Major Harriott in his Opening Address on the first day of the trial: to build a historical record; and to secure a just verdict.

These reasons can also be traced in the debate on the form of the trial discussed above.

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<sup>41</sup> *ibid* 373.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid* 375.

<sup>44</sup> *ibid* 377-278.

<sup>45</sup> *ibid* 377.

The Opening Address commenced with the statement:

Gentlemen, - Before proceeding further in this case, it may be necessary to mention that evidence will be submitted to you which may not bear strictly on the charges that have just been perused. It is deemed that all the circumstances connected with the late rebellion,<sup>46</sup> even though not in direct relation to the indictment, may be here appropriately recorded...<sup>47</sup>

Harriott explained to the Court that until recently it had been decided that, as Bahadur Shah's life had been guaranteed, there should be no trial but an "investigation of reliable sources of information." Although it was subsequently decided that charges should be framed and Bahadur Shah called to plead upon them, "the original intention to enter into a full and complete investigation of all points in reference to the rebellion" was not abandoned and evidence which might appear "extraneous" would still be introduced.

This purpose of the trial built on earlier discussion by officials on the value of addressing public opinion - creating a historical record of events would publicise the evidence against Bahadur Shah, putting the conduct of the rebels, and the response of the British, into the public domain. In October 1857, when it had been decided that if Bahadur Shah had been guaranteed his life, he would not be tried, Saunders had suggested this would forfeit a valuable opportunity to justify British conduct in the Rebellion:

I regret that he is not to be tried, with a view, not to his being sentenced, but to the evidence being recorded against him, and his guilt or innocence asserted. The documentary evidence forthcoming against him is of a character the most convincing, and there certainly ought to be some means of making it public for the information of Europe and in justification of our conduct.<sup>48</sup>

An eye on public international opinion is also apparent in the Prosecutor's Addresses. For example, in the Closing Address the Prosecutor described Bahadur Shah as the chief actor in

that great drama which had more than England and Europe for its spectators, the progress of which was watched with such absorbing interest every where by the antagonistic powers of civilization and of barbarism.<sup>49</sup>

Publicising this material would demonstrate Bahadur Shah's role in the Rebellion and incidentally justify British conduct during the Rebellion. Extensive documents showing how the armed resistance in Delhi was organised were reproduced in the *Proceedings*

<sup>46</sup> As the Rebellion was not suppressed until mid-1859, the Prosecutor must be referring to the suppression of hostilities in Delhi.

<sup>47</sup> *Proceedings*, 3.

<sup>48</sup> *Intelligence Reports*, above n 2, I, 218.

which was shortly after published as a House of Commons paper.<sup>50</sup> Similarly, the Prosecutor dwelt at length on the atrocities committed in the Palace against women and children, allegedly at Bahadur Shah's command.<sup>51</sup>

The second stated reason for trying Bahadur Shah was to allow him to refute "by documentary or other testimony "specific and tangible" allegations."<sup>52</sup> This would avoid any suggestion that the trial was "one-sided and unjust". A verdict would have "the stamp of authority, and stand a final and decisive record, either in favour of or against the prisoner".<sup>53</sup>

The view that Bahadur Shah should be tried against charges was in line with the British tradition of justice that criminal guilt should be established according to law. The Government's willingness to observe Hodson's guarantee – even though it was extended on only the slimmest of authority – demonstrates the strength of conceptions of justice in guiding the conduct of its officials. Concern for the rule of law was such that Saunders was prepared to act against the instructions of his superior officer to ensure that Bahadur Shah's guilt was investigated judicially. Indeed, a trial on criminal charges was the treatment meted out to the leading rebels in Delhi. As noted above, Canning had directed that "all the members of the King's family" and "the Chiefs in custody" be brought to trial and dealt with according to law.<sup>54</sup> On the merits of trying Jeevan Bakht, Bahadur Shah's sixteen-year-old heir-apparent, Lawrence had said: "I think he should be tried also. He is an insurgent and rebel. Delay is only productive of evil. Example is wanted. If we don't punish now, we shall never do it."<sup>55</sup>

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<sup>49</sup> *Proceedings*, 139.

<sup>50</sup> See **Note on the Trial Proceedings**, above.

<sup>51</sup> See further **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**, below.

<sup>52</sup> *Proceedings*, 3.

<sup>53</sup> *Proceedings*, 3.

<sup>54</sup> See above, **s8.2 The Lead-up to the Decision to Try the King of Delhi**.

<sup>55</sup> *Mutiny Correspondence*, above n 3, 358. In the event, Jivan Bakht was not tried. See **s2.4 The Prosecution in Chapter 2 Overview of the Trial**, note 112.

## 8.5 Conclusions

The institution of judicial proceedings with a broad remit thus combined the original proposal for a political enquiry to construct the domestic historical record, submitted by Lawrence and approved by the Governor-General, and the alternative proposal for a judicial investigation proposed by Major Harriott and approved by General Penny. The decision to institute proceedings was driven by both the desire to uphold the rule of law - already manifest by the honouring of Hodson's promise of life to Bahadur Shah - and to create a record which would incidentally demonstrate the rightfulness of British conduct in the Rebellion. His status as a "political leader" of the Rebellion was clearly a factor in the decision to try him.

Even so, Bahadur Shah's long-standing style as 'the King of Delhi' was open and notorious. It ought to have prompted enquiry into the legality of a prosecution, for sovereign immunity under the law of the time was a complete bar to prosecution.<sup>56</sup> The earlier instructions directing officials to keep him a close prisoner may hint at an awareness of his standing as the King of Delhi. There is nothing to suggest that his status as a 'king' was seen as an impediment to a trial.

As will be shown in **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, once the proceedings were on foot, Bahadur Shah's status as a king was not overlooked.

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<sup>56</sup> See further **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

## Chapter 9 The Rebellion Laws

### 9.0 Introduction

As noted in the previous chapter, by January 1858, after much procrastination, officials had decided to launch a criminal prosecution of Bahadur Shah. This chapter reviews the laws under which Bahadur Shah was tried.

The laws passed in 1857 authorised the establishment of temporary military and civil commissions to try non-Europeans for conduct constituting, *inter alia*, ‘rebellion’ and ‘waging war’. The GCM trying Bahadur Shah was convened under *Act XIV of 1857* and he was charged with crimes under *Acts XI, XIV, and XVI of 1857*.<sup>1</sup> Particular attention is paid in this chapter to a requirement to prove “allegiance” under *Act XI*, for, as will be discussed in the next chapter, **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, once the trial had commenced, the Prosecutor argued, and called evidence to prove, that Bahadur Shah owed a “duty of allegiance” to the Government.

As this thesis focuses on jurisdiction over Bahadur Shah, there is no attempt to analyse the significance of the passage of the Rebellion legislation in relation to broader questions such as the British handling of the Rebellion or the strength of the rule of law.

### 9.1 The Law in Force on the Outbreak of Rebellion on 10 May 1857

This section outlines the laws governing rebellion in force at the commencement of the Rebellion, to enable understanding of the laws passed in subsequent months.

As noted in **Chapter 7 The Imprisonment of the King of Delhi in 1857**, above, the proclamations of Martial Law, made in May 1857, which suspended the operation of the courts and provided for immediate trial by court-martial of those who took up arms against the Government of India, were made under *Regulation X of 1804*. *Regulation X* was the sole law governing rebellion in force in those parts of Bengal affected by the revolt as at 10 May 1857.

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<sup>1</sup> See s2.3 **The Charges in Chapter 2 Overview of the Trial**, above. The Acts of the Legislative Council passed in 1857 are reproduced in House of Commons, *Parliamentary Papers*, 1857, Session I, XXX.



### 9.1.1 Regulation X of 1804

*Regulation X of 1804* gave military commissions jurisdiction over ‘rebels’. The regulation authorised the Government of India, in times of hostilities, to suspend the ordinary law, to proclaim ‘martial law’ and to try civilians by court-martial for taking up arms against the EIC. Martial law could exist “for any period of time” while the “British Government in India” was “engaged in war with any native or other power” or while “open rebellion against the authority of the Government” existed.<sup>2</sup> Applying only to principal offenders, acts constituting ‘rebellion’ became criminal acts only after martial law had been proclaimed. A person found guilty was liable to execution and forfeiture of property.<sup>3</sup> Liability rested on a person being:

taken in arms, in open hostility to the British Government, or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the state, or in the act of openly aiding and abetting the enemies of the British Government within any part of the said territories.<sup>4</sup>

*Regulation X* created a new crime of ‘rebellion’. *Regulation X* was a modification of the *shariya* law of Rebellion, *bughawat*, as set out in *The Hedaya*.<sup>5</sup> According to Harrington, the object of *Regulation X* was to provide a heavier punishment of rebels than had been available under *bughawat*.<sup>6</sup> *Regulation X* provided for punishment of death by hanging, whereas under *bughawat*, punishment was merely imprisonment until repentance. *Regulation X* retained elements of the *shariya*. Under *bughawat*, a rebel was only liable “when levying troops or in actual force and insurrection”. Similarly, liability in *Regulation X* rested on a person being ‘caught in the act’.

<sup>2</sup> Section II, *Regulation X*. *Regulation X* is reproduced in J H Harrington, *An Analysis of the laws and regulations enacted by the Governor-General in Council at Fort William in Bengal for the civil government of the British territories under that presidency* (1821).

<sup>3</sup> Section III, *Regulation X*.

<sup>4</sup> Section II, *Regulation X*.

<sup>5</sup> *Bughawat* was set out in Book IX (*Al Seyir* or “the Institutes of India”) of the twelfth century text *The Hedaya*, the version of the *shariya* authoritative in India from the turn of the eighteenth century. An English translation was published in 1790: Charles Hamilton, *The Hedaya or Guide: A Commentary on the Mussulman Laws*. *Bughawat* was omitted from the nineteenth century reprint of Hamilton’s translation of the *Hedaya*. The reprint states that *bughawat* was “inapplicable to India” and that “obsolete” parts of the *Hedaya* had been expunged, those parts being of historical interest only: Charles Hamilton, *The Hedaya, or Guide: A Commentary on the Mussulman Laws* (2<sup>nd</sup> ed, 1870), lvi, 206. The third edition (1957), being a reprint of the second, also omits *bughawat*.

<sup>6</sup> The decision to replace *bughawat* with EIC legislation was precipitated by the trial in 1801 of two men who, though charged with subversive conduct, were merely sentenced by the Muslim Law Officers to imprisonment until they repented: Harrington, above n 2, 294.

Those amenable to a trial by court-martial under *Regulation X* were “all persons owing allegiance to the British Government, either in consequence of their having been born, or their being resident, within its territories, and under its protection.”<sup>7</sup>

It is not clear what was meant by “allegiance to the British Government”. The term may have been an attempt: to mirror the *Hedaya* concept of allegiance owed to the Imam (for *bughawat* was breach of that allegiance)<sup>8</sup>; to present the EIC Government as having the character of a ‘State’;<sup>9</sup> or to introduce English notions of ‘allegiance’ (“the tie or ligamen which binds the subject to the king, in return for that protection which the king affords the subject”),<sup>10</sup> a product of British constitutional law.

*Regulation X* highlights the ill-defined position of the EIC in India in the 1800s, acting as both a delegate of the Mughal Emperor under the *diwani* and as a trading company exercising sovereign powers. While the reference to “allegiance” was probably an assertion that non-British residents of EIC territories owed a duty of obedience to the Government of India, the regulation could not, under English law, generate a constitutional duty of allegiance to the EIC’s Government, for that duty could only be owed to the British Sovereign.<sup>11</sup> It did not by its terms attempt to generate allegiance to the British Sovereign. This ill-defined mechanism of jurisdiction was repeated in *Act XI of 1857*.<sup>12</sup>

‘Martial law’ under *Regulation X* was not ‘martial law’ in the sense of the English constitutional law doctrine of martial law – that “in time of rebellion the Crown might, for the restoration of peace, declare war and exercise its severities, against rebels”.<sup>13</sup> Rather, ‘martial law’ denoted the measures specified in *Regulation X* for the suppression of rebellion in Bengal. That EIC martial law was not English martial law was acknowledged by the Government of India in 1857. In a Minute to the Court of Directors, Canning

<sup>7</sup> Section II, *Regulation X of 1804*.

<sup>8</sup> According to *The Hedaya* (emphasis mine): “[I]t is incumbent on the Imam to recal [sic] rebels to their allegiance, and show them what is right, in such a manner that the misunderstanding which occasioned their defection may be removed.” Hamilton, *The Hedaya* (1791), II, 248.

<sup>9</sup> The EIC was not a ‘State’. Rather, as was discussed in **Chapter 3 The ‘Titular’ King of Delhi**, above, it exercised delegated sovereign powers on behalf of the State.

<sup>10</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Book I, Ch 10, 354. On allegiance, see further **Chapter 10 The Ground for the Assertion of Jurisdiction: Nationality**, below.

<sup>11</sup> *Calvin’s Case* (1608) 7 Co Rep 1a, at p5a.

<sup>12</sup> *Act XI* is discussed further below **s9.2 Rebellion Legislation Enacted after 10 May**. See also **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, below.

<sup>13</sup> W F Finalson, *Commentaries on Martial Law* (1867), 1.

contrasted “the ordinary acceptation” of the term ‘martial’ law with “martial law in India”:<sup>14</sup>

Martial law, in the ordinary acceptation of the phrase, is no law at all, or, as it has been described, the will of the General. But martial law in India is proclaimed under special regulations...<sup>15</sup>

While English notions of martial law must have shaped the drafting of the Regulation – as the very use of the term ‘martial law’ suggests – use of the words ‘martial law’ could not operate to implement English law. The prevailing criminal law in the *mofussil* was *shariya* law as modified by the EIC, and English law was not in force.<sup>16</sup>

### 9.1.2 ‘Treason’ Not a Crime in EIC Territories in Bengal

British officials, in personal and official correspondence, frequently used the term ‘treason’ to describe the crimes committed by ‘rebels’ tried during the Rebellion. Further, the third charge<sup>17</sup> laid against Bahadur Shah, while not using the noun ‘treason’, adopted the language of that English crime, viz, charging that he did “traitorously seize” and “treasonably conspire”. Another feature of the charges laid against Bahadur Shah is that Charge Two alleged ‘waging war’ and Charge Three alleged ‘levying war’, *prima facie* suggesting a distinction was drawn between the two. *Act XI* used the term “waging war”. However, none of the 1857 Acts used the term ‘levying’ war – a term known to the English law of treason. This may be attributed either to poor drafting (using two different words for the same thing) or to charging him with the English crime of treason.

While from time to time the Government of India contemplated enacting laws penalising ‘treason’, the Government never did so. ‘Treason’ was not a crime in EIC territories in

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<sup>14</sup> Governor-General to the Court of Directors, 11 December 1857, No 144 (Public), House of Commons, *Parliamentary Papers*, XLIV, Part One, 1857-58, 2. Hereinafter “*Parliamentary Papers*”.

<sup>15</sup> Canning was here re-phrasing a speech of the Duke of Wellington to the House of Lords in 1851 in which Wellington had said: “Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all.” G A Forrest, *Ridges’ Constitutional Law* (8<sup>th</sup> ed, 1950), 254, citing 1851 *Hansard* Vol CXV, Col. 880.

<sup>16</sup> See **Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>17</sup> The charges are discussed in **s2.3 The Charges** in **Chapter 2 Overview of the Trial**, above, and are set out in *Appendix I*, below.

Bengal.<sup>18</sup> Stephen attributed the reluctance of the EIC to enact a treason statute to an unwillingness to openly adopt the position of sovereign:

During the rule of the East India Company there was always a reluctance on the part of the Company to behave and to legislate as unqualified sovereigns would naturally behave and legislate...<sup>19</sup>

In *Queen v Amiruddin*,<sup>20</sup> a leading case on ‘waging war’ under ‘The Penal Code’ (*Act XLV of 1860*), the Court confirmed that the English law of treason did not, and had never, applied in Bengal. In this case, the accused had argued, citing no cases to support his argument, that the English law of treason, which required two witnesses to an act of treason,<sup>21</sup> applied in India. As only one person had witnessed the alleged deed of the accused, the Prosecution had not proved its case, or so he argued. However, the Court held:

In taking upon itself the administration of criminal justice in Bengal, Behar, and Orissa,<sup>22</sup> the English Government, so far from abrogating the existing law of the land, and introducing English criminal law, undertook to administer the law as it stood, - that is the Mahomedan criminal law, subject to such modifications as might be found necessary. Accordingly, we find that crimes committed by Natives of India against the State, as by levying war against the Crown and the like, outside the town of Calcutta, were formerly [before the Penal Code] punished, not as treason under English law, but as offences against the law of the land, - ie. Mahomedan law, after taking the *fatwas* of the Mahomedan law officers.<sup>23</sup>

The question of how the law should treat rebellious conduct continued to be a live issue after the enactment of *Regulation X* in 1804. However, the Government of India introduced no further laws on rebellion into Bengal until the outbreak of rebellion in 1857.<sup>24</sup>

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<sup>18</sup> See also Macaulay’s Penal Code, drafted in 1838, Note C, 85-87, regarding the lack of competence of the EIC to enact laws affecting allegiance to the Crown.

<sup>19</sup> James Fitzjames Stephen, *A Digest of the Criminal Law* (1894), 308. See also **s3.2 The Mughal Emperors in the Eighteenth Century in Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>20</sup> VII Bengal Law Reports 63 (1871).

<sup>21</sup> The English law of treason required evidence of an ‘open deed’. Proof of any “act manifesting the criminal intention and tending towards the accomplishment of the criminal object”, for example, the written expression of a treasonous desire, was sufficient to establish an ‘open deed’: *Russell on Crime*, 131.

<sup>22</sup> The Court here is referring to the EIC’s assumption of the *diwani*, see discussion in **s3.2 The Decline of the Mughal Empire and the Acquisition of Territory by the EIC in Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>23</sup> per Norman J at 69–70.

<sup>24</sup> The Penal Code (noted above) included a section establishing “Offences Against the State”. However, an absence of political will to codify the whole of the criminal law in EIC territories led to the draft Code languishing until 1860. It was assented to on 6 October 1860 and came into force 1 January 1862. See further, for example, Atul Chandra Patra, “An Historical Introduction to the Penal Code”, 3 (1961) 351-366 *Journal of the Indian Law Institute*, 351, 364; David Skuy, “Macaulay and the Indian Penal Code of 1862:

In view of the clear legal position that no EIC regulation made “treason” a crime and that the English law of treason had no application in EIC territories, what is to be made of the term ‘treason’, as used by British officials in India during the Rebellion and in the third charge laid against Bahadur Shah?

Use of the terms ‘treason’, ‘treasonous’ and ‘traitorous’ was likely to have been a non-technical, generic short-hand for the new crimes created after May 1857 (discussed in the next chapter) - the essence of these crimes being opposition to the Government of India.

The descriptive use of the words ‘treason’ and ‘treasonable’ is illustrated in the debate of the Council on *Act XI of 1857*, creating the crimes of ‘rebellion’ and ‘waging war’.

Council Member Sir Arthur Buller having objected to the use of the term ‘treason’ in the body of the Act<sup>25</sup> then himself used the term in a descriptive sense in proposing that the bill extend to “accessories after the fact”, saying (my emphasis): “he need not point out how very grave was the offence of harbouring persons who had been guilty of *treasonable* practices”.<sup>26</sup>

Other examples of the non-technical use of the terms ‘traitorous’, ‘treasonous’ and ‘treasonable’ include Canning in correspondence to the Court of Directors (*Regulation X* penalises “rebellion and treason”),<sup>27</sup> the Advocate-General of Bengal in a legal opinion on liability under *Regulation X* (the Regulation extends to “open acts of the *treasonable* and rebellious” kind and to “*traitorous* and rebellious acts”)<sup>28</sup> and Stephen in his *Commentaries on the Laws of England* (the crime of exciting mutiny extends to “stirring up any persons to mutiny or other *traitorous* practices”).<sup>29</sup>

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The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India’s Legal System in the Nineteenth Century”, 32 *Modern Asian Studies* (1998) 513-557.

<sup>25</sup> See further **s9.2.1 Act XI of 1857**, below.

<sup>26</sup> *Proceedings of the Legislative Council of India*, III, 282.

<sup>27</sup> *Parliamentary Papers*, above n 14, para 10.

<sup>28</sup> William Hough, *Precedents in Military Law* (1855), 545.

<sup>29</sup> cited by Hough *ibid* 56-57.

## 9.2 Rebellion Legislation enacted after 10 May

The first legislative step to suppress the hostilities was to amend *Act XIX of 1848*.

### 9.2.1 *Act VIII of 1857*

*Act VIII of 1857* amended *Act XIX of 1848*, containing the Bengal Articles of War. *Act VIII* was passed on 16 May 1857, just six days after the outbreak of mutiny in Meerut. It was enacted to facilitate speedy courts-martial of offences punishable by the Articles of War by removing the requirement for a commanding officer to obtain the approval of the Commander-in-Chief before carrying out a sentence.<sup>30</sup> The Legal Member of the Legislative Council, the Hon (later Sir) Barnes Peacock,<sup>31</sup> explained that delay arising from the distance of the Commander-in-Chief would “detract from the effect of the punishment”.<sup>32</sup>

The Act reduced the number of officers on a GCM from thirteen to five members and reduced the number of votes required to sentence a prisoner to death from two thirds to a simple majority.<sup>33</sup> The Act also retrospectively validated the Order by the Governor-General published in the *Gazette* on 14 May 1857 which had established rules for speedy courts-martial.<sup>34</sup>

By the end of May, Canning had decided that the powers under *Regulation X* and the amendment to the Bengal Articles of War, were insufficient. In a justification of the legal measures taken to suppress the Rebellion, written in December 1857, Canning assured the Court of Directors that “measures of a far more stringent and effective character” than the establishment of martial law had been taken.<sup>35</sup>

Canning noted that the sole law before the Council’s enactments criminalising “rebellious or treasonous conduct” was *Regulation X*, which was inadequate for the circumstances of 1857. First, the Court could only be composed of military officers, yet few were available

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<sup>30</sup> Section I, *Act VIII. Act XIX of 1848* is contained in Richard Clarke, *The Regulations of the Government of Fort William* (1854), III.

<sup>31</sup> Sir Barnes Peacock delivered the opinion of the Judicial Committee of the Privy Council in *Saliqam*, see **Chapter 4 A Recognised King**, above.

<sup>32</sup> *Proceedings of the Legislative Council of India*, III, 260.

<sup>33</sup> Section II, *Act VIII*.

<sup>34</sup> Section III, *Act VIII*. See **Chapter 7 The Imprisonment of the King of Delhi in 1857**, above.

in the affected regions. Second, *Regulation X* stipulated that a person had to be taken in the actual commission of an act of rebellion. Accordingly, “the Government might have been much embarrassed had Indian martial law alone been relied on” and the Government “took a course much more effectual than the establishment of martial law”—namely, the passage of the Rebellion Laws.<sup>36</sup> Key elements of *Regulation X* were nonetheless reproduced in some of the new laws - viz. jurisdiction triggered by ‘allegiance’, a crime of ‘rebellion’, and the use of military commissions to administer justice to civilians.

### 9.2.2 *Act XI of 1857*

On 30 May, the Council passed *Act XI of 1857*, once “it was known that the mutiny of the sepoys had been followed by rebellion of the populace”.<sup>37</sup> This Act created rebellion offences and authorised the establishment of trials by civil commission of those accused of rebellion offences.<sup>38</sup>

*Act XI* created two key offences: “rebellion against the Queen or the Government of the East India Company”<sup>39</sup> and “waging war against the Queen or the Government of the East India Company”.<sup>40</sup> Like *Regulation X of 1804*, liability was confined to “[A]ll persons owing allegiance to the British Government”. Unlike *Regulation X*, *Act XI* extended to attempt, aiding and abetting and conspiracy. The offences were expressly prospective, applying only to acts committed “after the passing of this Act”.

It is not clear what was meant by the terms ‘rebellion’ and ‘waging war’. *Act XI* may have been importing the English notion of a species of treason. Under English law, rebellion was evidence of the treasonous crime of ‘waging war’ against the State<sup>41</sup> and was not a separate offence.<sup>42</sup> Stephen suggested that in English law:

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<sup>35</sup> *Parliamentary Papers*, above n 14, 2.

<sup>36</sup> *ibid* 3.

<sup>37</sup> *ibid* 3.

<sup>38</sup> The offences created by *Acts XI and XIV of 1857* are set out at *Appendix 7*.

<sup>39</sup> Section I, *Act XI*.

<sup>40</sup> Section I, *Act XI*.

<sup>41</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), II, 271-272.

<sup>42</sup> Joining with rebels was evidence of the crime of ‘levying of war against the King in his realm’ – one of the five distinct species of treason under the *Statute of Treasons 1352* (25 Edw. III st 5, c.2.). To constitute levying of war, it was sufficient: “to resist the King’s forces by defending a castle against them....or an insurrection with an avowed design to pull down all enclosures.....the universality of the design making it a rebellion against the State, an usurpation of the powers of government, and an insolent invasion of the King’s

Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other, and are not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely that the normal tranquillity of a civilised society is ...disturbed either by actual force or at least by the show and threat of it.<sup>43</sup>

As the preamble to *Act XI* did not illuminate the type of conduct prohibited, and as *Act XI* neither reproduced the wording of *Regulation X* nor purported to amend it, it is likely that ‘rebellion’ was meant to convey a general sense of opposing the authority of the Government of India.

The crime of ‘waging war’ was similarly not defined in *Act XI*. In English law, “levying war against the King” was one of the five branches of treason under the *Statute of Treasons 1352*.<sup>44</sup> Debate by the Legislative Council of India sheds little light on the intended meaning of the term, though it shows that the drafters did not intend to import the English offence of treason. Section I was initially drafted thus (*italics mine*):

All persons who, after the promulgation of this Act, shall be guilty of *treason or rebellion* within any part of the Territories in the possession and under the Government of the East India Company shall be liable, upon conviction, to the punishment of death...<sup>45</sup>

However, as noted above,<sup>46</sup> the term ‘treason’ was omitted from the Bill after Council debate. One member had objected to the whole section, proposing an amendment “the object of which was to get rid of any technical difficulties which the word Treason might possibly suggest”.<sup>47</sup> He did not elaborate on those difficulties.

*Act XI* also authorised the establishment of trials by civil commission of those accused of rebellion offences. Civil Commissions – staffed by government officials or “trustworthy gentlemen not connected with the Government”<sup>48</sup> – could be issued for those charged with these offences or with “any other crime against the state, or murder, arson, robbery or other heinous crime against person or property”.<sup>49</sup> Trials by civil commission were not

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authority”: Sir James Fitzjames Stephen, *Stephen’s New Commentaries on the Laws of England*, IV (1890), 168-169.

<sup>43</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), II, 242.

<sup>44</sup> 25 Edw. III st 5, c.2.

<sup>45</sup> *Proceedings of the Legislative Council of India*, III, 280.

<sup>46</sup> See above **s9.2.1 Act XI of 1857**.

<sup>47</sup> *Proceedings of the Legislative Council of India*, III, 280. While the “difficulties” were not elaborated, it is to be noted that ‘treason’ in its English legal sense admitted of no accessories and liability rested only on those owing allegiance to the British Sovereign.

<sup>48</sup> Canning, *Parliamentary Papers*, above n 14, 3-4.

<sup>49</sup> *Act XI*, Section III, clause I.



governed by the Bengal Articles of War. Civil commissioners were guided by *ad hoc* instructions issued by the Governor-General over the following months.<sup>50</sup>

In debate on the Bill, Peacock commented:

The very object of taking these cases out of the jurisdiction of the ordinary tribunals was to ensure speedy and exemplary punishment upon offenders, with the view of deterring others from following their example.<sup>51</sup>

### 9.2.3 *Act XIV of 1857*

On 6 June, the Governor-General in Council passed *Act XIV of 1857*.

*Act XIV* granted Military Commissions jurisdiction over civilians for any offence<sup>52</sup> under *Act XI* or *Act XIV* “or any other crime against the State, or murder, arson, robbery or other heinous crime against person or property”.<sup>53</sup> The Military Commission trying Bahadur Shah was established under this Act.

Unlike *Act XI*, *Act XIV* was not restricted to “persons owing allegiance”. The Act also created the offence, punishable by death, of exciting or assisting mutinous sepoys. The Act was passed as regiments mutinied one by one across Northern India.

### 9.2.4 *Act XVI of 1857*

*Act XVI of 1857* was passed on 13 June 1857.

The Act extended jurisdiction of commissions appointed under *Act XIV of 1857* to try those charged with “heinous crimes” or with murder. While it did not include the principal offences of ‘rebellion’ and ‘waging war’, which were caught by *Act XI*, it caught accessories to waging war. The Act was not limited to those who owed “allegiance”.

‘Heinous offences’ were made punishable by death, transportation or imprisonment, and by forfeiture of all property and effects. ‘Heinous crime’ had an inclusive definition:

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<sup>50</sup> For example, guidelines issued in July 1857 dealt with mutinous sepoys, those issued in August recommended that “full notes of the trial should be taken by the Commissioner in English and preserved for future reference”. See House of Commons, *Parliamentary Papers*, 1857-58, XLIV, Part II, 401-402.

<sup>51</sup> *Proceedings of the Legislative Council of India*, III, 284.

<sup>52</sup> The offences created by *Acts XI* and *XIV of 1857* are set out at *Appendix 7*.

<sup>53</sup> *Act XIV* section VII.

The words 'heinous offence' shall be deemed to include an attempt to murder, rape, maiming, dacoitry,<sup>54</sup> robbery, burglary, knowingly receiving property obtained by dacoitry, robbery or burglary, breaking and entering a dwelling-house and stealing therein, intentionally setting fire to a village, house or any public building, stealing or destroying any property provided for the conveyance or subsistence of Troops, and all crimes against person or property attended with great personal violence, and all crimes committed with the intention of assisting those who are waging war against the State or forwarding their designs.<sup>55</sup>

Although the Act appears to be a 'catch-all' for rebellious conduct, according to Council debate, the primary purpose of the Act was to make pre-existing crimes punishable by death. For example, robbery was ordinarily punishable only with life transportation or imprisonment with hard labour, unless attended with murder.<sup>56</sup> In debate in 1859 on extending the Act for a further year, one Member expressed concern that under the Act, any "midnight robber" might be hanged and that it rendered a simple burglary a capital offence - even breaking the spokes of a cartwheel.<sup>57</sup> Peacock argued that "the Authorities should be armed with the power of speedy and exemplary punishment".<sup>58</sup> He said: "[E]xtraordinary times required extraordinary measures".<sup>59</sup>

### 9.2.5 Other Legislation

On 15 June, *Act XV of 1857*, known as 'The Gagging Act', was passed by the Governor-General in Council. The Act censored the 'native' and 'European press', making it an offence to circulate, import or publish a publication which contained statements hostile to the Government. *Act XVII of 1857*, passed on 20 June 1857, empowered civil commissions to try mutineers and deserters, authorised arrest of suspected mutineers without warrant by police officers "or any other individual",<sup>60</sup> and authorised search warrants for deserters. The Act also made *zamindars*<sup>61</sup> criminally responsible for not giving early intelligence of persons suspected of mutiny or desertion.<sup>62</sup> *Act XXV of 1857*, passed on 8 August 1857, provided for forfeiture and seizure of property

<sup>54</sup> *Dacoitry*: Robbery by armed gang.

<sup>55</sup> Section II.

<sup>56</sup> *Proceedings of the Legislative Council of India*, III, 309.

<sup>57</sup> *ibid*, V, 1859, 816-7.

<sup>58</sup> *ibid*, III, 308.

<sup>59</sup> *ibid*.

<sup>60</sup> *ibid* 315.

<sup>61</sup> *Zamindar*: land-holder.

<sup>62</sup> *Parliamentary Papers*, above n 14, 4.

and effects of sepoys who were found guilty of mutiny,<sup>63</sup> bringing the punishment of sepoys into line with the punishment of civilians.<sup>64</sup> *Act XXVIII of 1857*, passed on 11 September 1857, regulated the “importation, manufacture, sale of arms and ammunition”.<sup>65</sup> *Act XXXV of 1857*, passed on 5 December 1857, amended the Articles of War to allow offenders to be marked permanently with the letter ‘D’ for desertion or ‘M’ for mutiny.<sup>66</sup>

Rebellion-specific law-making continued into 1858. *Act V of 1858* dealt with the escape of convicts during the Rebellion.<sup>67</sup> *Act X of 1858*, passed on 19 March 1858,<sup>68</sup> provided that “where a European was murdered or subjected to great personal violence in any village or district, and it was not proved that the inhabitants had used all the means in their power” to prevent the offence, or to apprehend the offender, the whole village or district was fined.<sup>69</sup>

Peacock commented:

it ought to be made known throughout the length and breadth of this land, that the murder of a European was an offence which never could be forgiven or forgotten....<sup>70</sup>

*Act XIII of 1858*, passed on 14 April 1858, criminalised possessing or concealing Government property.<sup>71</sup> The Rebellion Laws culminated in 1860 with an act indemnifying government officers and civilians for acts in breach of the law undertaken to suppress hostilities.<sup>72</sup>

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<sup>63</sup> *ibid.*

<sup>64</sup> *Proceedings of the Legislative Council of India*, III, 357-8.

<sup>65</sup> *ibid.* 374.

<sup>66</sup> *ibid.* 496, 513.

<sup>67</sup> Tapas Kumar Banerjee, *Background to Indian Criminal Law* (1963), 126–128.

<sup>68</sup> *Proceedings of the Legislative Council of India*, IV, 119.

<sup>69</sup> *ibid.* 37.

<sup>70</sup> *ibid.* 37.

<sup>71</sup> *ibid.* 181.

<sup>72</sup> *Proceedings of the Legislative Council of India*, V.

## 9.2.6 Key elements of the Rebellion Laws

### (i) Acts did not extend to “natural-born subjects born in Europe”

None of the Acts extended to “Her Majesty’s natural-born subjects born in Europe” or their children.<sup>73</sup> This was in accordance with the *Charter Act 1833*<sup>74</sup> – the Governor-General in Council could not without previous approval of the Court of Directors pass a law empowering its courts “to sentence to the punishment of death any of Her Majesty’s natural-born subjects born in Europe, or the children of such subjects”.<sup>75</sup>

### (ii) Extension of Acts XIV and XVI

*Act XI* was a permanent Act. However, Acts XIV and XVI had clauses limiting their operation to one year. They were extended by *Act XXII of 1858*.<sup>76</sup>

### (iii) Procedure in Courts-Martial authorised by the Rebellion Laws

As was noted in **Chapter 2 Overview of the Trial**,<sup>77</sup> *Act XIV of 1857* was silent on the procedure to be followed by the military commissions with jurisdiction over rebellion offences. Nor was any procedural law enacted. On construction of *Act XIV*, it appears that the Bengal Articles of War, enacted in 1848 and amended in May 1857,<sup>78</sup> applied to all trials conducted by military commission in Bengal. In British military practice of the time, Articles of War were supplemented by well-established military custom.<sup>79</sup>

*Act VIII of 1857*, which regulated the trial of ‘Native Officers and Soldiers’, authorised the establishment of courts-martial for offences under the Articles of War which were “required to be punished without delay”. The Act provided that officers could establish “General, District or Garrison Courts-Martial, as occasion may require”.<sup>80</sup> The Act specified that officers establishing a GCM had the full powers of a GCM as specified in the

<sup>73</sup> Section VI *Act XI of 1857*, section XI *Act XIV of 1857*.

<sup>74</sup> 3 & 4 Will IV, c 85.

<sup>75</sup> *Proceedings of the Legislative Council of India*, 294.

<sup>76</sup> Banerjee, above n 67, 128.

<sup>77</sup> See s2.1 **The General Court-Martial**, in **Chapter 2 Overview of the Trial**, above.

<sup>78</sup> *Act XIX of 1847*, amended by *Act VIII of 1857*.

<sup>79</sup> See discussion of **Sources in the Introduction** to this thesis and s2.1 **The General Court-Martial in Chapter 2 Overview of the Trial**, above.

<sup>80</sup> Section I, *Act VIII of 1857*.

75<sup>th</sup> Article of War.<sup>81</sup> *Act XI of 1857*, regulating the trial of civilians, authorised the establishment of Civil Commissions to try offences under that Act. The procedure to be followed in the Commissions was not set out in the Act. *Act XIV* gave Civil Commissioners jurisdiction over additional rebellion crimes - again, the legislation did not specify the applicable procedure. *Act XIV of 1857* extended the jurisdiction of military commissions to civilians, but specified the form of proceedings as a GCM.<sup>82</sup> Although the term ‘General Court-Martial’ was used in *Act XIV*, unlike *Act VIII*, the Act did not state that the officers establishing a GCM had the full powers of a GCM as specified in the 75<sup>th</sup> Article of War.

On the one hand, it can be argued that the specification of Article 75 in *Act VIII*, and its absence in *Act XIV*, suggests that the legislators did not intend Article 75 - or indeed any of the Bengal Articles of War - to extend to *Act XIV* trials.

On the other hand, *Regulation XLI of 1793* required that in the English drafts of Regulations “the same designations and terms were to be applied to the same descriptions of persons and things”. Accordingly, the term ‘General Court-Martial’ as used in *Act XIV of 1857* was required to have the same meaning as it had in other Bengal legislation.

It follows that use of the term ‘General Court-Martial’ in *Act XIV of 1857* incorporated by reference the rules regulating General Courts-Martial in the Bengal Articles of War, contained in *Act XIX of 1848*, as amended by *Act VIII of 1858*.<sup>83</sup>

Further support for the proposition that the procedure of courts-martial trying military personnel was intended to be followed in courts-martial of civilians lies in Sir Barnes Peacock’s comment during Council debate on *Act XIV*. Peacock said that the Act would (my emphasis)

render persons who were not amenable to the Articles of War, liable to be tried by Courts Martial for offences against the Act *in the same manner* as if they were amenable to them.<sup>84</sup>

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<sup>81</sup> Section II, *Act VIII of 1857*.

<sup>82</sup> Section III, *Act XIV of 1857*.

<sup>83</sup> *Regulation XIX of 1848* as amended by *Act VIII of 1857*.

<sup>84</sup> *Proceedings of the Legislative Council of India*, III, 291.

**(iv) Self-contained laws**

The 1857 trials were conducted under a new regime of tribunals, expressly independent from the existing court system in the *mofussil*.<sup>85</sup> The tribunals also operated outside the criminal courts established by the EIC in 1772 and the Supreme Court of Judicature at Calcutta, established by Royal Charter in 1774, for these courts had no jurisdiction in the *mofussil*.

The 1857 Acts did not override *Regulation X* of 1804. Under *Regulation XXI* of 1793, the reasons for repeal or modification of a regulation had to be mentioned in the preamble to the amending regulation.<sup>86</sup> None of the 1857 Acts referred to *Regulation X*.<sup>87</sup>

Under *Act XIV*, Commissioners had jurisdiction over crimes committed in districts whether or not they had been proclaimed as being in a state of rebellion.<sup>88</sup> Thus Commissioners had jurisdiction not by virtue of the proclamation of martial law under *Regulation X* but by virtue of the 1857 legislation. Similarly, *Act XIV* gave civilians the power to try rebels – this power did not derive from the proclamation or exercise of martial law, for *Regulation X* only authorised courts-martial. Accordingly, the military and civil commissions derived authority solely under the Rebellion legislation.

**(v) Jurisdiction under the Rebellion Laws**

The effect of this legislative package was as follows.

Once martial law was proclaimed, civilians who owed “allegiance” could be tried by military commission for acts against the State under *Regulation X of 1804*, but liability rested on being caught in the act.

After *Act XI* was passed on 30 May, civilians who owed “allegiance” could also be tried by civil commission and need not be caught in the actual commission of the offence.

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<sup>85</sup> Section IV, *Act XI*, Section IX, *Act XIV*.

<sup>86</sup> B K Acharyya, *Codification in British India, The Tagore Lectures 1912*, (1914), 157.

<sup>87</sup> *Regulation X* was relied on to suppress ‘disobedience campaigns’ in the Punjab in 1919: Akshaya K Ghose, *Laws Affecting the Rights and Liberties of the Indian People (from Early British Rule)* (1921) 11-13. It was repealed by *Act IV* of 1922: Aleem-al-Razee, *Constitutional Glimpses of Martial Law in India, Pakistan and Bangladesh* (1988), 9.

<sup>88</sup> Section VII *Act XIV*.

After *Act XIV* was passed on 6 June, any civilian could be tried by military or civil commission for rebellion offences and need not be caught in the commission of an offence, though liability for *Act XI* offences still rested on the existence of a duty of allegiance.

After *Act XVI* was passed on 13 June, any civilian could be tried by military or civil commission for heinous offences, such as rape, and would be subject to the death penalty for those offences.

### 9.3 Conclusions

This chapter has explained that the operation of the ordinary courts in affected areas was suspended within a week of the outbreak of mutiny in the Bengal Army under proclamations of ‘martial law’ authorised by *Regulation X*.

Over the following weeks, laws were passed by the Legislative Council establishing temporary military and civil commissions to try non-Europeans for conduct constituting ‘rebellion’ and ‘waging war’. Only those who owed “allegiance” to the Government of India could be tried for the new *Act XI* crimes of ‘rebellion’ and ‘waging war’. Jurisdiction over crimes under *Act XIV* (such as stirring up mutiny) and *Act XVI of 1857* (such as rape) was not so limited.

As was noted in **Chapter 2 Overview of the Trial**, Bahadur Shah was tried, *inter alia*, for the commission of *Act XI* crimes ‘rebellion’ and ‘waging war’. The Prosecutor would have had to prove that Bahadur Shah owed “allegiance” in order to meet the statutory requirements of these offences. As will be discussed in the next chapter, in establishing liability, the Prosecutor argued, and called evidence to prove, that Bahadur Shah owed “allegiance” because he was a “subject of the British Government in India”. In so doing, a basis for asserting jurisdiction over Bahadur Shah was laid before the Court.

## **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**

### **10.0 Introduction**

As noted in the **Introduction** to this thesis, the legal authority for exercising jurisdiction over Bahadur Shah was not discussed in pre-trial official correspondence.<sup>1</sup> Nor was it coherently expressed in the *Proceedings*. This chapter contends that jurisdiction was asserted on the basis of nationality.

The charges alleged that Bahadur Shah was “a subject of the British Government in India”. This was not a term of art. It was used in neither British legislation for the territories held by the EIC in India nor the Rebellion legislation. However, by its terms it signified that Bahadur Shah was viewed as being within the class of ‘British subject’ and was therefore one who owed allegiance to the Government of India. In the language of international law, he was alleged to be a British national.

The Prosecutor introduced evidence in an attempt to show that Bahadur Shah was born a “subject of the British Government in India”. He argued that a change in nationality of the Kings of Delhi had taken place in previous generations, effected by the extension of protection to the Kingdom of Delhi in 1803.<sup>2</sup>

The chapter assesses the Prosecutor’s argument against established principles of international law of the time. If this argument was well-founded in law, then, subject to the rule of sovereign immunity, the Military Commission would *prima facie* have jurisdiction over Bahadur Shah.<sup>3</sup>

### **10.1 The Basis for the Assertion of Jurisdiction: a British National**

There was no single, clear statement in the *Proceedings* setting out the basis for the assertion of jurisdiction of the Military Commission over Bahadur Shah. In British

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<sup>1</sup> The pre-trial correspondence on the treatment to be accorded to Bahadur Shah is reviewed in **Chapter 7 The Decision to Try the King of Delhi**, above.

<sup>2</sup> See also **Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>3</sup> See further **Chapter 11 The King of Delhi’s Entitlement to Sovereign Immunity**, below.



military law, the Court must pay attention to jurisdiction, whether or not it was raised by the accused.<sup>4</sup>

The Prosecutor addressed how Bahadur Shah came within the terms of the charges, which alleged that he held the status of a “subject of the British Government in India”, by calling evidence on how Bahadur Shah had acquired that status and by endorsing that evidence in his Closing Address.

### 10.1.1 Status of the King of Delhi: The Charges

The Charges alleged that Bahadur Shah held the status of “a pensioner of the British Government in India” and “a subject of the British Government in India”.<sup>5</sup>

Charge One provided (emphasis mine): “[F]or that he, being a *pensioner* of the British Government in India, did...”. Charge Three stated “[F]or that he, being a *subject* of the British Government in India, and not regarding his duty of allegiance, did....”.

Charges Two and Four did not allege that Bahadur Shah was a British subject. Rather, Charge Two alleged that Bahadur Shah encouraged his son, Mirza Mogal, “a subject of the British Government in India” and other residents of Delhi and the North-west provinces of India, also “subjects of the British Government in India” to rebel and wage war against the State. Charge Four, accessory to murder, described the victims as “women and children of European and mixed European descent”, “European Officers” and “other English subjects”, and “Christians”, but did not refer to the status of Bahadur Shah.

As was discussed in the previous chapter, the sole source of jurisdiction for Rebellion courts-martial was the Rebellion legislation. Neither the term “subject of the British Government in India”, nor “pensioner of the British Government in India” was used in the Rebellion legislation. The GCM trying Bahadur Shah was established under the authority of *Act XIV of 1857*. This Act gave military commissions jurisdiction over civilians - “any person” - charged with an offence under *Acts XI and XIV of 1857* or any other crime against

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<sup>4</sup> Charles Clode, *The Administration of Justice under Military Law* (1872), 116. See **s2.1 The General Court-Martial in Chapter 2 Overview of the Trial**, above.

<sup>5</sup> See also **s2.3 The Charges in Chapter 2 Overview of the Trial**, above. The charges are set out in *Appendix 1*.

the State.<sup>6</sup> Under *Act XI*, a person could be charged with offences created by that Act only if they were a person “owing allegiance to the British Government”.<sup>7</sup> While the category of person over which jurisdiction could be asserted for Act XIV offences<sup>8</sup> was not restricted, the military commission only had jurisdiction for Act XI offences over a person who owed “allegiance” to the “British Government in India”.

Act XI offences were made out in Charges One, Two and Three.<sup>9</sup> Accordingly, the Prosecutor had to show that Bahadur Shah owed “allegiance”. The allegation that Bahadur Shah was a ‘subject’ and a ‘pensioner’ would have been an attempt to satisfy the threshold requirements of *Act XI*.

### 10.1.2 Status of the King of Delhi: Testimony of a Government Official

The Prosecutor called the Acting Commissioner of Delhi, Charles Saunders, to testify on “the circumstances under which the Kings of Delhi became subjects and pensioners of the British Government in India”.

It is not apparent from the *Proceedings* whether Saunders - the most senior civil official in Delhi at that time - gave evidence on behalf of the Government of India or in a private capacity. His testimony was not subsequently repudiated by the Government.

As will be discussed further below, the Prosecutor relied exclusively on the testimony of Saunders to prove that Bahadur Shah and his immediate forebears were British subjects. Saunders’ testimony was not corroborated by testimony from other officials or by documents of the Government of India or Mughal archives. There is no indication that the Court informed itself as to the status of the King of Delhi from other sources.

Saunders was asked (my emphasis):<sup>10</sup>

<b>Question</b>	Can you give the Court any information as to the circumstances under which the Kings of Delhi became subjects and pensioners of the British Government in India?
<b>Answer</b>	Shah Alam, Emperor of Delhi, after having his eyes put out and having suffered every indignity from the hands of Ghulam Kadir, fell into the hands of the Mahrattas in the year 1788. The Emperor, although vested with <i>nominal authority over the city of Delhi</i> , was

<sup>6</sup> Section III, *Act XIV of 1857*.

<sup>7</sup> Section I, *Act XI of 1857*.

<sup>8</sup> See table of Rebellion offences in *Appendix 7*.

<sup>9</sup> See s2.3 **The Charges in Chapter 2 Overview of the Trial**, above.

<sup>10</sup> *Proceedings*, 94. Saunders’ testimony is set out at *Appendix 8*.

kept in confinement more or less rigorous, until the year 1803, when General Lake having seized Aligarh, marched with the British troops against Delhi. The Mahratta Army drawn out at Patpanganj, six miles from Delhi, was attacked by General Lake and utterly routed. The city and fort having been evacuated by the Mahrattas, the Emperor Shah Alam sent a message to General Lake, *applying for the protection of the British authorities*, and on the 14th of September, the date since rendered more memorable by the successful assault in 1857,<sup>11</sup> the *British troops entered Delhi: from that time the kings of Delhi have become pensioned subjects of the British Government*, and have exchanged the state of rigorous confinement in which they were held by the Mahrattas, to one of more lenient restraint *under British rule. The prisoner succeeded to the titular sovereignty of Delhi in 1837. He had no power whatever beyond the precincts of his own palace*; he had the power of conferring titles and dresses of honour upon his own immediate retainers but was prohibited from exercising that power on any others. He and the heir apparent alone were exempted from the jurisdiction of the Company's local courts, but were *under the orders of the Supreme Government*.<sup>12</sup>

These events as officially recorded by then Governor-General Lord Wellesley are outlined in **Chapter 3 The 'Titular' King of Delhi**, above.

According to Saunders, then, Bahadur Shah was a "subject of the British Government in India" on the basis of the "protection" afforded in 1803 by the EIC (constituted by the request for protection, the entry of British troops into Delhi and the grant of a pension) to Bahadur Shah's grandfather, Shah Alam II. Moreover, the Kings of Delhi possessing only "nominal authority" before 1803, possessed "titular sovereignty" by 1837.

Although invited to cross-examine, Bahadur Shah declined to do so – as noted earlier, his Defence Counsel Ghulam Abbas was not present that day in Court.<sup>13</sup>

### 10.1.3 Status of the King of Delhi: the Closing Address of the Prosecutor

The Prosecutor endorsed parts of and elaborated on Saunders' testimony in his Closing Address.

In the context of discussing Charge One, which alleged that Bahadur Shah was "a pensioner of the British Government in India", the Prosecutor summarised Saunders' explanation of the circumstances under which Bahadur Shah had acquired that status:

that his grandfather Shah Alam, after having been kept in rigorous confinement by the Mahrattas, on their defeat by the English in 1803, applied to the British Government for protection. This was

<sup>11</sup> The military campaign to capture Delhi commenced on 14 September 1857.

<sup>12</sup> 'The Supreme Government' was the term used by government officials to denote the Government of India in Calcutta. See s3.1 **The Decline of the Mughal Empire and the Acquisition of Territory by the EIC** in **Chapter 3 The 'Titular' King of Delhi**, above.

<sup>13</sup> See s2.9 **The 'Defence' in Chapter 2 Overview of the Trial**, above.

accorded, and from that moment the titular Kings of Delhi became pensioned subjects of the British.<sup>14</sup>

The Prosecutor commented: “It will be seen then, that as far as this family is concerned, there was no wrong to be complained of, and nothing but benefits to be remembered.”<sup>15</sup>

The basis of the status of Bahadur Shah as a ‘subject’ appears to rest here on the extension of the protection by the British Government.

The Prosecutor then appears to posit a second basis for the assertion that Bahadur Shah was a ‘subject’: the grant of a pension by the Government of India. He continued:

The prisoner’s grandfather Shah Alam had not only lost his throne, but had his eyes put out, and been subjected to every species of indignity, and was still kept in most rigorous confinement, when the English under Lord Lake, appeared as his deliverers, and, with generous sympathy for his misfortunes, bestowed on him rank<sup>16</sup> and pension which, continued to his successors, have maintained them in honour and in influence, till, like the snake in the fable, they have turned their fangs upon those to whom they owed the very means of their existence.<sup>17</sup>

The Prosecutor highlighted the pension as the basis of the continued existence of the throne of Delhi and suggested that the British themselves put Shah Alam on the throne.

Underlying his comments was the notion that the Kings of Delhi were obligated to the Government as a correlative of its protection of the Kingdom.

In the context of discussing Charge Three, which alleged that Bahadur Shah was a “subject of the British Government in India” and owed “a duty of allegiance”, he said:

That the prisoner was a pensioned subject of the British Government in India has been already shown in treating of the first charge; and as the British Government neither deprived him nor any member of his family of any sovereignty whatever, but, on the contrary, relieving them from misery and oppression, bestowed on them largesses and pensions aggregating many millions of pounds sterling, the duty of their allegiance will, I think, be readily admitted...<sup>18</sup>

The emphasis here was on a duty of allegiance as a co-relative of the privileges of the pension granted by the Government.

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<sup>14</sup> *Proceedings*, 139.

<sup>15</sup> *ibid* 139.

<sup>16</sup> Shah Alam himself bestowed a title on Lord Lake: Letter from General Lake to Marquis Wellesley, 21 September 1803, reproduced in Jatindra Kumar Majumdar, *Raja Rammohun Roy and the Last Moghuls, A Selection from Official Records (1803-1859)* (1939), 6. See also **Chapter 3 The ‘Titular’ King of Delhi**, below.

<sup>17</sup> *Proceedings*, 139.

<sup>18</sup> *ibid* 141.

The Prosecutor admitted here that the British Government did not deprive the Kings of Delhi of any 'sovereignty'. What did this mean? This was a significant concession which undermined his own argument that the Kings of Delhi were British subjects.<sup>19</sup>

The Prosecutor did not comment on Saunders' claim that the Kings of Delhi exchanged a "a state of rigorous confinement" under the Mahrattas for "lenient restraint under British rule". Nor did he refer to Saunders' claim that the Kings of Delhi were "under the orders of the Supreme Government".

The Military Commission was not limited to matters argued by the Prosecutor. The Commission could have found jurisdiction elsewhere in the evidence. However, consideration of the evidence reproduced in the *Proceedings* does not reveal any additional ground for the assertion of jurisdiction.

## 10.2 Assessment of the Prosecutor's Argument that Bahadur Shah was a British National

The Prosecutor, then, posited two possible bases for the acquisition of British nationality by the Kings of Delhi: the extension of protection in 1803; and, possibly as an element of the broader protection, the grant of a pension in 1803. Were these grounds sufficient at international and domestic law to bestow nationality on the Kings of Delhi?

### 10.2.1 Nationality Under International Law

The position at international law was that nationality - who was and who was not to be considered a national - was a matter for domestic law:

It follows from the independence of a state that it may grant or refuse the privileges of political membership...Primarily therefore, it is a question for municipal law to decide whether a given individual is to be considered a subject or citizen of a particular state.<sup>20</sup>

A State could only confer the quality of a citizen or subject "in virtue of its sovereignty as within its own jurisdiction".<sup>21</sup> The imposition of the "quality of a citizen or subject" on an 'acknowledged foreigner' would, as Hall notes, be "inconsistent with a due recognition of

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<sup>19</sup> See further **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>20</sup> W E Hall, *International Law* (1890), 220.

<sup>21</sup> *ibid* 225.

the independence of the state to which he belongs.”<sup>22</sup> The right at international law to grant nationality was an incident of sovereignty – the right of jurisdiction over all persons within a State’s territory.

In the case of acquisition of a new nationality, at issue was whether or not by a change in territory a State acquired or lost its “legal capacity to impose upon or to continue to assert their nationality” in respect of affected individuals.<sup>23</sup>

In practice, States recognised five modes of acquisition of nationality: birth, naturalisation, reintegration, subjugation after conquest, and cession of territory. In cases of conquest, the general principle was that residents of the conquered State who remained there after annexation became subjects of the conquered State: “[I]n the absence of any treaty stipulations on this point... the citizens of the conquered country owe absolute allegiance to the new State”.<sup>24</sup> This principle was recognised in British law, for Lord Mansfield stated in the leading case *Campbell v Hall* (1774):<sup>25</sup> “[T]he conquered inhabitants once received under the king’s protection become subjects, and were to be universally considered in this light, and not as enemies or aliens.” The position adopted by Britain was in line with the position at international law, for example, Martens stated “the conqueror” had “a right” to make the subjects of the subdued state “swear fealty to him.”<sup>26</sup> Similar principles applied in the case of cession.

The key point was that the question of a change in nationality arose on a change in territorial sovereignty.

### 10.2.2 Nationality Under British Law

Once territorial sovereignty has been acquired, nationality of the residents was a matter for the domestic law of the State acquiring sovereignty.

A British subject was one who owed ‘allegiance’ to the Crown of Great Britain.

Allegiance was “the tie or ligamen which binds the subject to the king, in return for that

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<sup>22</sup> Hall, above n 20, 220-221.

<sup>23</sup> Rudolf Graupner, “British Nationality and State Succession” [1945] 61 *Law Quarterly Review* 161, 162.

<sup>24</sup> J B Moore, *A Digest of International Law* (1906), III s379, 312.

<sup>25</sup> Cowp 204 at 208.

<sup>26</sup> F Von Martens, *The Law of Nations*, (4<sup>th</sup> Edition, 1829), Book IV, s8, 292.

protection which the king affords the subject”,<sup>27</sup> “the feudal obligation of fidelity and obedience due from a vassal to his lord, an obligation which has as its counter-part the duty of protection and guardianship which the lord owes to his vassal.”<sup>28</sup> The duty of allegiance was “correlative with the duty of protection constitutionally owed by the Sovereign” to his subjects: the protection extended by the Crown to its subjects: *protectio trahit subjectionem et subjectio protectionem*.<sup>29</sup> English law drew a distinction between a ‘natural subject’, being a subject who was also a citizen, and an ‘alien subject’, being a resident alien who was subject to the power and jurisdiction of the State.<sup>30</sup> Subjects, whether natural or alien, owed allegiance to the Crown. The allegiance owed by a natural subject was permanent and personal. A natural subject was permanently entitled to the King’s protection. The allegiance owed by an alien subject was temporary and local, lasting only as long as they were in the King’s dominions.<sup>31</sup> The obligation of a subject, whether natural or alien, was “to obey the king’s laws and submit himself to the royal government and jurisdiction”.<sup>32</sup>

There were three principal modes of acquisition of British nationality. First, a duty of allegiance could be acquired by birth within British territory (*jus soli*): “all persons born on English soil, no matter what their parentage, owed allegiance to, and were therefore subjects of, the King”.<sup>33</sup> Second, the duty could be acquired by descent from British subjects (*jus sanguinis*). Finally, it could be acquired by continued residence in a territory after it had been acquired by the Crown (‘allegiance by acquisition’). As noted above,<sup>34</sup> Lord Mansfield stated in *Campbell v Hall* (1774), “conquered inhabitants once received under the king’s protection become subjects” and are no longer enemies or aliens.<sup>35</sup>

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<sup>27</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Book I, Ch 10, 354.

<sup>28</sup> John W Salmond, “Citizenship and Allegiance”, [1902] *LXIX Law Quarterly Review* 49, 50.

<sup>29</sup> K Pollack, “The Defence of Act of State in Relation to Protectorates”, 26 *Modern Law Review* 138, 140, citing Chitty, *Prerogatives of the Crown* (1820).

<sup>30</sup> Salmond, above n 28, 49-50.

<sup>31</sup> *ibid* 50.

<sup>32</sup> *ibid* 50.

<sup>33</sup> Holdsworth, cited in J M Jones, *British Nationality Law and Practice* (1947), 65.

<sup>34</sup> **s2.2.1 Nationality under International Law**, above.

<sup>35</sup> Cowp 204 at 208.

Salmond explained:

The edge of the sword has cut the bond of allegiance which formerly subsisted between them and their sovereign. His former subjects no longer stand in his protection, they are no longer his men at all, therefore they are the liege men and natural subjects of their conqueror.<sup>36</sup>

The rule in *Campbell v Hall* was confirmed in *Mayor of Lyons v EIC* (1836),<sup>37</sup> where Lord Brougham said:

all the authorities lay it down that upon a conquest the inhabitants *ante nati*, as well as *post nati*, of the conquered country become denizens of the conquering country; and to maintain that the conquered people become aliens to their new sovereign upon his accession to the dominion over them, appears extremely absurd.<sup>38</sup>

That inhabitants of ceded territories also became British subjects was confirmed in *Mostyn v Fabriggas* (1774)<sup>39</sup> and *Donegani v Donegani* (1835).<sup>40</sup>

Were inhabitants of EIC territories 'British subjects'?

Their status in British law in the mid-nineteenth century was not clear.

Legislation of the British Parliament and the Government of India drew a distinction between 'European-born British subjects' and people native to India.<sup>41</sup> The classification of inhabitants of territorial acquisitions of Britain into different populations effectively formed different classes of 'British subject', what Westlake called - 'planes of rights'.<sup>42</sup> Westlake noted that while from the inside, they had different titles and rights, from the outside, residents of British territory were 'British subjects' and nationals.<sup>43</sup> Britain was not alone in so classifying residents of its territories; France and the United States of America did likewise - France with its populations in Africa and the United States with indigenous Americans and residents of the Philippines.<sup>44</sup> Such schema had no consequences in international law.<sup>45</sup>

<sup>36</sup> Salmond, above n 28, 55.

<sup>37</sup> (1836) 1 Moo PC 256.

<sup>38</sup> at 286.

<sup>39</sup> (1774) 1 Cowp. 161.

<sup>40</sup> (1835) 3 Knapp 63 at 85.

<sup>41</sup> Tapas Kumar Bannerjee, *Background to Indian Criminal Law*, 277.

<sup>42</sup> John Westlake, *International Law* (1910), 238. While Westlake discussed at length the position of residents in protected states as at 1910, his outline of the general principles was equally applicable in the mid-nineteenth century.

<sup>43</sup> *ibid* 238-40.

<sup>44</sup> *ibid* 205.

<sup>45</sup> *ibid* 206.



Ilbert suggested the question of who held the status of a 'British Subject' in EIC law was not settled before the passage of the *Government of India Act* in 1858.<sup>46</sup> He thought that the *Charter Acts* of 1813 and 1833 were passed at a time when it was doubtful how far British sovereignty extended in the *mofussil*.<sup>47</sup> Consequently, the term 'British subject' was to be construed narrowly in statutes passed before 1858 as extending to Europeans only. To illustrate the confusion, Ilbert quoted in full a note included in *Morely's Digest*, circa 1829.<sup>48</sup> Morely's note set out three different definitions of a 'British subject' in the Anglo-Indian context. First, that "all persons born within the Company's territories are British subjects" on the basis that such territory is in the same situation as any other 'colony' which has been "acquired by conquest or ceded by territory". Second, that "these persons are only British subjects who are natives or the legitimate descendants of natives, of the Crown or the United Kingdom or the colonies which are admitted to be annexed by the Crown". Third, that Christianity was the test of an individual being a British subject, "provided that the person was born in the Company's territories."<sup>49</sup>

The difference in opinion centered on the consequences under British law of being a non-European resident of EIC territory. Accordingly, the threshold test was whether the territory in question was EIC territory.

### 10.2.3 The Effect on Nationality of the Extension of Protection to the Kingdom of Delhi

The first of the bases posited by the Prosecutor for the acquisition of British nationality by the Kings of Delhi was the protection extended by Britain to the Kingdom of Delhi in 1803. As noted above, where sovereignty has been acquired by another State, the nationals of the acquired State become subject to the nationality laws of the annexing state. If sovereignty over the Kingdom of Delhi had been acquired by the EIC in 1803, then Shah Alam II and his descendants would be British nationals, "subjects of the British Government in India".

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<sup>46</sup> 21 and 22 Vict., C. 106. Sir Courtenay Ilbert, *The Government of India* (2<sup>nd</sup> ed, 1907), 381.

<sup>47</sup> *ibid* 381.

<sup>48</sup> Ilbert, above n 46, 382 note 1.

<sup>49</sup> *ibid*.

For Bahadur Shah to be a British national under international and British law, the Prosecutor would have had to establish that territorial sovereignty over the Kingdom of Delhi had been acquired in 1803, for example, through conquest. The Prosecutor did not raise this argument.

The Prosecutor could also have argued that from May to September 1857, Bahadur Shah was a belligerent enemy. As the Judicial Committee pointed out in *Saliqram*, during the Rebellion, he had renounced the protection of the British Government, attempted to re-gain his former absolute rights of sovereignty, and was taken as a prisoner of war.<sup>50</sup> It could have been argued that after the capture and occupation of Delhi, by virtue of a transfer in territorial sovereignty, Bahadur Shah became a British national, for nationality would have been within the domain of Britain as the annexing State.<sup>51</sup> This argument was also not raised by the Prosecutor.

Instead, the Prosecutor argued that the protection extended to the Kings of Delhi from 1803 had effected a change in nationality at that time.

At issue is the proper legal characterisation of the ‘protection’ extended to the Kingdom of Delhi in 1803. Did it protect or extinguish the Kingdom?

The suggestion that the ‘protection’ extended in 1803 resulted in the acquisition of British nationality by residents of Delhi is contrary to established legal principle on the consequences for sovereignty arising from the extension of protection. As noted above, it was well established at international law that nationality was acquired not through the extension of protection but through the acquisition of territorial sovereignty, for example, by the annexation of a State.<sup>52</sup> Once a State was extinguished, the status of its nationals was a matter for the domestic law of the successor State. As was discussed in **Chapter 6 A Sovereign in International Law**, above, that one State could be under the protection of another State without thereby losing its status as a State was established State practice in the nineteenth century. Some dependence was not inconsistent with sovereignty - absolute independence was not an essential attribute of sovereignty and in doubtful cases,

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<sup>50</sup> *Saliqram* at 184.

<sup>51</sup> Nonetheless, Bahadur Shah would still have retained an entitlement to sovereign immunity. See further **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**, below.

<sup>52</sup> See s10.2.1 **The Acquisition of Nationality under International Law**, above.

recognition was decisive. The territory of the protected State did not become territory of the protecting State. Nationals of the protected State did not acquire the nationality of the protecting State. These principles were part of English law and were consistent with its rules of nationality.

A separate but overlapping issue is that the Prosecutor's argument was contrary to the clear legal position of the Kings of Delhi, for they were recognised by Britain and treated as sovereigns until the deposition of Bahadur Shah in 1857 - sovereignty over the Kingdom of Delhi was not acquired before Delhi was conquered in September 1857. The view of the Government of India on the status of the King of Delhi, discussed in **Chapter 5 A Sovereign in English Law**, was recorded in the cases of *Doss* and *Saliqam*. These cases clearly show that the sovereignty of the Kingdom of Delhi was under the protection of the Government of India from 1803, that protection did not extinguish the Kingdom of Delhi, and that its sovereignty was not extinguished until 3 October 1857. Bahadur Shah was "treated and recognized by the British Government as a king".<sup>53</sup> Neither Bahadur Shah "nor any of his ancestors had ever been deposed by his own subjects, or by the British Government, or by any other power."<sup>54</sup> The continuing legal existence of the Kingdom of Delhi from 1803 to 1857, despite the extension of considerable protection, was consistent with established principles of international law - as was discussed in **Chapter 6 A Sovereign in International Law**.

The ground of the extension of protection to the Kingdom of Delhi in 1803 was accordingly insufficient at international and domestic law to bestow nationality on the Kings of Delhi.

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<sup>53</sup> *Saliqam* at 185.

<sup>54</sup> *ibid.*

### 10.2.4 The Effect on Nationality of the Grant of a ‘Pension’

As noted above, the second possible basis for the acquisition of British nationality by the Kings of Delhi posited by the Prosecutor was the grant of a ‘pension’.

The Rebellion legislation did not use the term ‘pensioner’. As jurisdiction over the three other charges was asserted on the basis simply that he was ‘a subject’, the use of the term ‘pensioner’ in Charge One was redundant unless it was a separate ground of jurisdiction. As the charges were leaked to the press before any decision to call on Bahadur Shah to plead against charges,<sup>55</sup> the language of the charges may have been chosen with the effect on the public in mind, rather than legal considerations.<sup>56</sup> The word ‘pensioner’ may have been an embellishment, underlining the perceived ingratitude of Bahadur Shah and may have been intended to convey the degree to which Bahadur Shah and his family were beholden to the British, a theme highlighted throughout the Prosecutor’s Closing Address.<sup>57</sup>

Could the grant of a ‘pension’ effect an acquisition of sovereignty such that the Kings of Delhi became British nationals?

As was discussed in **Chapter 3 The ‘Titular’ King of Delhi**, above, the 1805 Arrangement made provision for regular payments of revenue to the King of Delhi and his family. Under this Arrangement, a specified portion of the territories in the vicinity of Delhi was assigned to the King of Delhi “in part of the provision for the maintenance of the Royal family.” To provide for his immediate needs, Shah Alam was to receive rupees 60,000 and, if revenue from the assigned territory was sufficient, that sum would later be increased to one *lakh* of rupees per month for his “private expenses”.

Payments - known by 1857 as “the pensions of Stipendaries”<sup>58</sup> - were made throughout the first half of the nineteenth century. Revenue payments ceased during the Rebellion and

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<sup>55</sup> See s8.3 **The Decision to Try the King of Delhi by Military Commission** in **Chapter 8 The Decision to Try the King of Delhi**, above.

<sup>56</sup> See s2.3 **The Charges** in **Chapter 2 Overview of the Trial**, above.

<sup>57</sup> See also s2.10 **The Closing Address**, in **Chapter 2 Overview of the Trial**, above.

<sup>58</sup> Correspondence on the Budget estimates of the Government of India for 1857-58. Letter from Canning to Vernon Smith, 3 July 1857, cited in Michael Maclagan, *Clemency Canning* (1962), 111.

Canning noted in July 1857 that twelve *lakh* would therefore be saved from the previous Budget estimates.<sup>59</sup>

It is not clear whether the pension was posited by the Prosecutor as a separate ground for the acquisition of British nationality, or whether it was part of the overall protection which arguably effected a change in nationality.

(i) **The ‘Pension’ as a Separate Ground for the Acquisition of Nationality**

Was the grant of a pension presented by the Prosecutor as a separate ground for the acquisition of nationality? If so, could the grant of a pension effect a change in nationality?

The first charge laid against Bahadur Shah was based solely on Bahadur Shah’s status as “a pensioner of the British Government in India”. Saunders alleged that since British troops entered Delhi, the Kings of Delhi “have become pensioned subjects”.<sup>60</sup> The Prosecutor presented the grant of a pension as the reason for the continued “honour and influence” of the Kings of Delhi and as the basis of a duty of allegiance.<sup>61</sup> Since Act XI offences only applied to a person owing allegiance, and as one of the two counts in Charge One alleged an Act XI offence,<sup>62</sup> the purpose of the pension argument may have been simply to come within the terms of that Act, that is, to establish a duty of allegiance, rather than as a separate ground for jurisdiction.

No principle of international or British law of time suggests that the payment - regular or otherwise - of money to the Head of another State of itself leads to the acquisition of the nationality of the payer State or to a transfer of territorial sovereignty. Financial control of another State could be a particular form of protection, “the effect of which is to impose important limitations upon the capacity of the debtor State”<sup>63</sup> but the general principle that a protected State retained its sovereign status remained applicable, for the limitation arose out of the relationship of protection, and not from an aberration of sovereignty.<sup>64</sup>

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<sup>59</sup> *ibid* 111.

<sup>60</sup> *Proceedings*, 94. Saunders’ testimony is set out in *Appendix 8*.

<sup>61</sup> *ibid* 139.

<sup>62</sup> See s2.3 **The Charges in Chapter 2 Overview of the Trial**, above.

<sup>63</sup> E Dickinson, *The Equality of States in International Law* (1920), 256.

<sup>64</sup> *ibid* 221.

Accordingly, the grant of a pension could not, of itself, effect a change in nationality of the Kings of Delhi. Rather, as noted above, change in nationality was dependent on a change in territorial sovereignty.

**(ii) The ‘Pension’ as a Part of the Overall ‘Protection’**

Was the grant of a pension posited as a part of the ‘protection’ extended by Britain?

As was noted in **Chapter 4 A Recognised King** above, the Judicial Committee in *Saliqram* characterised the revenue paid to the Kings of Delhi (“the pension”) as a term of the arrangement between Shah Alam II and the EIC, concluded in 1805, and still on foot in 1857.<sup>65</sup> The revenue was assigned as an Act of State in 1804 and confiscated as an Act of State in 1857.<sup>66</sup> The purpose of the assignment was “a matter of political expediency”:<sup>67</sup> “the support of his royal dignity” and “the due maintenance of himself [Shah Alam II] and family in their high position”.<sup>68</sup>

The characterisation of payments to the Kings of Delhi as a non-justiciable term of a treaty between two sovereign powers was consistent with principle and precedent. British Courts had consistently held that courts could not adjudicate treaties between Sovereigns.<sup>69</sup>

For example, the Court of Appeal in the well-known case *Salaman v Secretary of State in Council of India* (1906)<sup>70</sup> characterised a ‘pension’ paid by the Government of India to a deposed sovereign as a non-justiciable term of a treaty. The Court considered the legal character of a “pension” granted by the Government of India to the Maharajah Duleep Singh, then infant ruler of the State of the Punjab, on the annexation of the Punjab in 1848. The Court held that the grant of a “pension” was an Act of State. The grant being derived from an agreement between sovereign States, the Courts had no jurisdiction to administer the terms of a treaty or to enforce the terms of the treaty of annexation. The grant of a

<sup>65</sup> *Saliqram* at 183-184. See **Chapter 4 A Recognised King**, above.

<sup>66</sup> *ibid* 184-186.

<sup>67</sup> *ibid* 183.

<sup>68</sup> *ibid* 186. See also s3.3.1 **The Extension of Protection to the Mughal Emperor in 1803**, in **Chapter 3 The ‘Titular’ King of Delhi**, above.

<sup>69</sup> Act of State cases are discussed in **Chapter 1 International Law and the Kingdom of Delhi**, and in **Chapter 5 A Sovereign in English Law**, above.

<sup>70</sup> 1 KB 613 (1906).

pension created neither contractual nor equitable rights, it was at most “an assurance”.<sup>71</sup> While this case was decided in 1906, it applied well-established principles of law.<sup>72</sup>

The proper interpretation in law of the grant of a pension to the Kings of Delhi is therefore that it was an unenforceable term of a treaty which formed a part of the overall arrangements for protection extended in 1803: the presence of British troops in Delhi, the provision of immediate financial assistance and a promise of future financial assistance. As noted above, this protection did not effect a change in nationality of the Kings of Delhi because territorial sovereignty was not acquired by Britain.

The Prosecutor’s argument appears to confuse the ‘protection’ extended by the King of England over inhabitants of newly-conquered territories, noted above,<sup>73</sup> which was a municipal constitutional law doctrine, with the protection extended by one State to another State, an international law concept of protection.<sup>74</sup> The municipal concept of protection was the protection extended by the Crown to its subjects: *protectio trahit subjectionem et subjectio protectionem*.<sup>75</sup> The completely different international law concept of “protection” concerned alliances between States in which the alliance could be characterised as a form of dependency. The protected State retained its identity as a ‘State’ for the purposes of international law.

The Prosecutor admitted that the Kings of Delhi retained sovereignty yet cast ‘allegiance’ and the associated duties of a British subject as the correlative of ‘protection’, whereas the position in international law of the time was that ‘protection’ knew no such correlative - to disregard the dictate of the protecting state could lead to loss of protection and perhaps to war, but it had no effect in law on sovereignty.<sup>76</sup>

<sup>71</sup> per Fletcher Moulton LJ, at 641.

<sup>72</sup> The Court followed *Secretary of State for India in Council v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476 in holding that municipal courts had no jurisdiction to question the validity of acts of the EIC done in exercise of supreme power as Acts of State.

<sup>73</sup> The municipal concept of protection is noted in **s10.2.2 Nationality under British Law**, above.

<sup>74</sup> The international concept of protection is discussed in **Chapter 5 A Sovereign in English Law** and **Chapter 6 A Sovereign in International Law**, above.

<sup>75</sup> As noted above in **s10.2.2 Nationality Under British Law**. An example of this municipal sense of “protection” can be found in *R v Joyce* (1946). In this case, the “protection” was extended by Britain to William Joyce (‘Lord Haw Haw’), by virtue of obtaining a British passport. The Court concluded, controversially, that protection, having once been extended, “required the continuance” of allegiance, triggering later liability for treason. This case was criticised for linking a continuing duty of allegiance to the acquisition of a passport – see for example, Alan Wharam, 41 *Modern Law Review* [1978] 681.

<sup>76</sup> See discussion on sovereignty under protection in **Chapter 6 A Sovereign in International Law**, above.

The receipt of a pension was not sufficient at international and domestic law to bestow British nationality on the Kings of Delhi. Accordingly, the assertion that Shah Alam became a subject on receipt of a pension - whether as a separate ground or as a part of the protection extended by Britain - does not hold up to scrutiny.

### 10.3 Conclusions

This chapter has suggested that the basis for the assumption of jurisdiction can be gleaned from the charges, Saunders' testimony, and the Prosecutor's Closing Address. These show that jurisdiction in respect of the *Act XI* charges was asserted on the ground that Bahadur Shah was "a subject of the British Government in India", that is, a British national.

The Prosecutor's argument in support of that assertion was that the protection accorded to the Kingdom of Delhi from 1803, including the grant of a pension, effected a change in nationality of the Kings of Delhi. The Prosecutor did not argue that Britain had acquired sovereignty over the Kingdom of Delhi by conquest or by cession.

The Prosecutor's argument was inconsistent with well-established principles of international and English law. Bahadur Shah was not, at the time of the alleged commission of the crimes, a British national. Neither the extension of protection nor the making of regular payments to a Head of State could effect a change in nationality. The continuing sovereign existence of the Kingdom of Delhi from 1803 to 1857, despite considerable protection, was consistent with established principles of international law. Moreover, notwithstanding the dependence of the Kings of Delhi on Britain's Government of India, the record is clear that Britain had never previously regarded or treated the Kings of Delhi as British nationals.



## **Chapter 11 The Entitlement of the King of Delhi to Sovereign Immunity**

### **11.0 Introduction**

The practice of States in the mid-nineteenth century was to accord Heads of State immunity from the jurisdiction of their courts. This chapter reviews sovereign immunity, including its particular rules of application, and asks whether Bahadur Shah was entitled to immunity from prosecution.

### **11.1 Sovereign Immunity under International Law: General Principles**

The absolute immunity of foreign sovereigns from the jurisdiction of another State's judicial system was a fundamental principle of international law accepted by the British Courts in the nineteenth century.<sup>1</sup> As Lopes LJ noted in *Mighell v Sultan of Johore* (1894), the principle was clearly articulated by Vattel in 1758:

what are the rights of a sovereign, who happens to be in a foreign country, and how is the master of that country to treat him? If that prince be come to negotiate, or to treat about some public affair, he is doubtless entitled, in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveler, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction.<sup>2</sup>

Wheaton observed “[T]he person of a foreign sovereign, going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction.”<sup>3</sup> Thus Hall could say:

It is universally agreed that sovereigns and the armies of a state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue...<sup>4</sup>

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<sup>1</sup> There is a question as to the position of Mary Queen of Scots, who was tried and executed in England: (1586) 1 ST 1161. However, there is little reference to this case in nineteenth century and contemporary literature. See Arnold McNair, *International Law Opinions* (1956), I, 104.

<sup>2</sup> (1894) 1 QB 149 at 160, citing Vattel, *Les droits des gens* (1834 ed, 485).

<sup>3</sup> Henry Wheaton, *Elements of International Law* (2<sup>nd</sup> ed, 1863), 188.

<sup>4</sup> W E Hall, *A Treatise on International Law* (3<sup>rd</sup> ed, 1890), 163.

As was noted in **Chapter 6 A Sovereign in International Law**,<sup>5</sup> in the nineteenth century, the Sovereign was identified with the State of which they were head. Accordingly, the immunities of foreign sovereigns were treated by the writers of international law as one and the same as that of foreign states.<sup>6</sup> Indeed, “the privileges” of a Sovereign “secure his freedom from all assertion of sovereignty over him or over anything or anybody attached to him in his sovereign capacity”.<sup>7</sup>

Sovereign immunity in international law was generally regarded at that time as based on notions of absolute respect for state sovereignty, courtesy and convenience,<sup>8</sup> and reciprocity, *comitas gentium*.<sup>9</sup> Wheaton, for example, suggested that the assertion of jurisdiction over a foreign sovereign would be “incompatible with his dignity and the dignity of his nation”.<sup>10</sup> Sir Baliol Brett suggested in *The Parlement Belge* (1880):

the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity - that is to say, with his absolute independence of every superior authority.<sup>11</sup>

However, there was little agreement on which ground constituted the true foundation for the principle. Lord Wright in a leading twentieth century case, *The Cristina* (1938),<sup>12</sup> outlined different bases for the rule:

The rule may be said to be based on the principle “*par in parem non habet imperium*” – no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal Court could not be enforced against a foreign sovereign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others.<sup>13</sup>

<sup>5</sup> See **s6.1 Sovereignty and Statehood at International Law**, above.

<sup>6</sup> Sompong Sucharitkul, *State Immunities and Trading Activities* (1959), 47.

<sup>7</sup> Hall, above n 4, 166.

<sup>8</sup> *ibid* 164.

<sup>9</sup> Sucharitkul argued, no sources cited, that the basis in English law, in addition to international comity, originally derived from “an extended application of English constitutional practice in which the domestic sovereign cannot be sued in his own courts”, above n 6, 47. Indeed, William Blackstone stated in his *Commentaries on the Laws of England* (1765) that “by law the person of the king is sacred; even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has the power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more”, 235.

<sup>10</sup> Wheaton above n 3, 193.

<sup>11</sup> 5 P D 197, at 207, quoted with approval by Lord Cave in *Duff v The Government of Kelantan* [1924] AC 797 at 831 and Lord McNaughton in *The Cristina* [1938] AC 485 at 516.

<sup>12</sup> [1938] AC 485.

<sup>13</sup> at 502 per Lord Wright.

While sometimes said to have only been a rule of comity, in the mid-nineteenth century, the rule of sovereign immunity was “fairly well and firmly established in the general practice of the majority of European States and the United States of America.”<sup>14</sup> The ultimate legal basis for the principle, as Sucharitkul points out, rested on the general practice of States.

An early enunciation of the principle in a decision of a court was that expressed by Chief Justice Marshall of the Supreme Court of the United States in *The Schooner Exchange v Mc Fadden* (1812). Marshall CJ said:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribution of every nation.<sup>15</sup>

This decision was first cited by an English Court in *The Prins Frederik* (1820).<sup>16</sup> The Court in that case declined jurisdiction on the ground that the foreign state, as personified by the foreign sovereign, was equally sovereign and independent and that to implead him would insult his “regal dignity”.<sup>17</sup>

In the *Duke of Brunswick v King of Hanover* (1848)<sup>18</sup> Lord Cottenham, with whom Lords Lyndhurst, Brougham and Campbell agreed, held that:

A foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad....No court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacity abroad.<sup>19</sup>

<sup>14</sup> Sucharitkul, above n 6, 12-13.

<sup>15</sup> (1812) 7 Cranch 117, at 137-138.

<sup>16</sup> (1820) 2 Dods 451, cited by Sucharitkul, above n 6, 52.

<sup>17</sup> *ibid.*

<sup>18</sup> (1848) 2 HL Cas. 1.

<sup>19</sup> at 17-18.

In *De Haber v The Queen of Portugal* (1851),<sup>20</sup> the Court held it to be “quite certain, upon general principles” and on the authority of the *Duke of Brunswick v King of Hanover* that

an action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English Court has jurisdiction to entertain any complaints against him in that capacity... To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.<sup>21</sup>

The legal position was clear. A Head of State could not be taken before the courts of another State.

Later nineteenth century decisions cast no doubt on the strength of the principle.

Celebrated cases in the 1880s and 1890s affirmed the principle as long-standing, consistent, and beyond challenge. For example, the principle was stated clearly in *The Parlement Belge* (1880):<sup>22</sup>

The principle to be adduced from all these cases is that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state ...<sup>23</sup>

In *Mighell v Sultan of Johore* (1894), the Court held that the courts had no jurisdiction over an independent sovereign unless he submitted to jurisdiction: “that a sovereign is entitled to immunity from the jurisdiction of our Courts is beyond all question.”<sup>24</sup>

As these cases demonstrate, it was the practice of Britain in the nineteenth century to grant to Heads of State immunity from the jurisdiction of British courts. Further, Lord Maugham in *The Cristina* noted that sovereign immunity had “been admitted in all civilized countries on similar principles and with nearly the same limits” and was part of the common law of England.<sup>25</sup> Indeed, the nineteenth century practice of European States was generally in line with the practice of Britain and the United States. Sucharitkul collected instances of the practice of France, Belgium, Italy and Germany, in the mid-nineteenth century

<sup>20</sup> (1851) 20 LJ (NS) QB 488.

<sup>21</sup> *ibid* per Lord Campbell CJ at 207.

<sup>22</sup> [1880] 5 PD 197.

<sup>23</sup> Approved in *Mighell v Sultan of Johore* [1894] 1 QB 149.

<sup>24</sup> per Lopes LJ at 160.

<sup>25</sup> *Compania Naviera Vascongado v S S Cristina* [1938] AC 485, at 516.

according immunity to foreign sovereigns.<sup>26</sup> He suggested however that immunity was not always absolute, for example, Italian and French courts did not accord immunity for acts undertaken in a private capacity.<sup>27</sup> A distinction between the ‘private’ acts and ‘official’ acts of a Head of State grew in importance in British practice in the twentieth century in the context of criminal proceedings, and was perhaps an emerging relevant factor in civil proceedings in the nineteenth century.<sup>28</sup>

Few cases had come before the British Courts perhaps because, as Brownlie observed, “the immunity of sovereigns would not be in issue often and must have been presumed to exist”.<sup>29</sup> All the cases reaching British Courts in the nineteenth century were civil proceedings. As will be discussed further below,<sup>30</sup> of those civil cases reaching the courts in the late nineteenth century, several of the leading cases concerned the status of Heads of protected States. In these cases, attempts were made to restrict sovereign immunity on the grounds that the sovereignty of protected sovereigns was impaired and insufficient to trigger immunity at international law. These efforts did not meet with success. No criminal prosecution by British courts of a foreign Head of State was even attempted.

The immutability of the rule of sovereign immunity diminished somewhat in the twentieth century, for example, through the development in State practice of the doctrine of restrictive immunity, which gave a qualified immunity in relation to the commercial activities of States.<sup>31</sup>

Later developments in jurisprudence and State practice are not material to the question of any entitlement to immunity held by the King of Delhi in 1858.<sup>32</sup> Moreover, new concepts in international law in the twentieth century, for example the notion of international crime

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<sup>26</sup> For example, a Belgian court held in 1840 that the Dutch Government and a Dutch public corporation were immune from Belgian courts on the basis of “la souveraineté des Nations” and “l’indépendance réciproque des États”. Prussian courts from the early nineteenth century adopted the view that “the exercise of jurisdiction against foreign government was not consonant with international law maxims”. In contrast, the courts of Scandinavia and Holland did not in the nineteenth century recognise the doctrine of State immunity. Suchatikul, above n 6, 10-12, 23-50.

<sup>27</sup> From the 1860s, Italy held foreign sovereigns subject to local jurisdiction in relation to their private activities: *ibid* 49-50.

<sup>28</sup> See further below **s11.2.4 Immunity of Former Heads of State**.

<sup>29</sup> Ian Brownlie, *Principles of Public International Law* (3<sup>rd</sup> ed, 1979), 326, note 2.

<sup>30</sup> See further below, **s12.3 Immunity of Protected Heads of State**.

<sup>31</sup> Michael Akehurst, *A Modern Introduction to International Law* (6<sup>th</sup> ed, 1986), 112-113.

<sup>32</sup> See discussion on the doctrine of inter-temporal law in the **Introduction** to this thesis, above.

and the development of universal jurisdiction, make direct comparison of contemporary sovereign immunity with nineteenth century immunity awkward.

Nonetheless, some current trends in relation to liability of a Head of State for criminal acts warrant mention for two reasons. First, contemporary difficulties in completely abrogating the effect of the doctrine of immunity underline the strength of the rule. Second, there are parallels between the trial of Bahadur Shah and contemporary developments in sovereign immunity. As will be discussed in the next chapter, an apparent ground for overriding the entitlement to sovereign immunity in Bahadur Shah's trial was the seriousness of his alleged crimes, in particular, the massacre of women and children in the Palace at Delhi in May 1857 (the first count of Charge Four).<sup>33</sup> This was contrary to the nineteenth century position – a Sovereign was not liable for his action, “whether it be an act right or wrong”.<sup>34</sup> However, the argument that the seriousness of the crime warrants the abrogation of sovereign immunity has, in modern times, found some support.

The first step in the softening of the doctrine of sovereign immunity was Article 227 of the *Treaty of Versailles* (1919),<sup>35</sup> concluded at the close of World War One, which stipulated that the Allied and Associated Powers “publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.” A Commission responsible for the enforcement of penalties<sup>36</sup> was split in proposing that liability be extended to the ex-Kaiser, who had abdicated by November 1918, with a spirited minority objecting to the unprecedented proposal as contrary to the rule of sovereign immunity.<sup>37</sup> In any event, the Government of the Netherlands, where the ex-Kaiser had taken refuge, refused to surrender him for trial and the political decision to override immunity was not acted upon.<sup>38</sup> Efforts to override the doctrine of sovereign immunity were revived after World War II. Liability was extended

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<sup>33</sup> See also s2.3 **The Charges**, in **Chapter 2 Overview of the Trial**, above.

<sup>34</sup> *King of Hanover v The Duke of Brunswick* (1848) 2 HL Cas 1.

<sup>35</sup> The Treaty of Peace between Germany and Allied and Associated Powers, signed at Versailles 28 June 1919.

<sup>36</sup> The Commission of Responsibilities relating to the War and the Enforcement of Penalties.

<sup>37</sup> J W Garner, “Punishment of Offenders against the Laws and Customs of War”, 14 *American Journal of International Law* (1925) 70, 88-93; Arnold McNair, *International Law Opinions* (1956), I, 110; Michael R Marrus, *The Nuremberg War Crimes Trial 1945-46, A Documentary History* (1997), 4.

<sup>38</sup> Sir Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers”, *Recueil des Cours* 1994 (111) 247, 82.

to Heads of State under the Charter of the International Military Tribunal at Nuremberg<sup>39</sup> and the Charter of the International Military Tribunal for the Far East.<sup>40</sup> Nonetheless, no Heads of State were tried under the Charters.

Developments in the immunity of Heads of State in the twentieth and twenty-first century can be divided into two classes: immunity before international courts; and immunity before national courts.<sup>41</sup> In the former case, instruments creating international criminal tribunals are clearly applicable to Heads of State<sup>42</sup> and, it has been noted, “practice has been consistent, in that no serving head of state has been recognised as being entitled to rely on jurisdictional immunities” in proceedings in international courts and tribunals.<sup>43</sup> The position of former and serving Heads of State claiming immunity before national courts is less clear.<sup>44</sup>

Even in 1998, it could be said:

Under conceptions of international law that [have] existed for centuries, the idea that a former Sovereign could be hauled up before the courts of another state and held accountable for gross violations of human rights was almost inconceivable.<sup>45</sup>

In that year, General Augusto Pinochet, former Head of State of Chile, was arrested by Britain in response to an extradition request from Spain for criminal offences allegedly committed while he was Head of State. His arrest, and consequent consideration of sovereign immunity by British courts, marked a further development in thinking on sovereign immunity. The Queens Bench unanimously held that Pinochet, as a former Head of State, enjoyed sovereign immunity for crimes committed while exercising the functions

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<sup>39</sup> Article 7 provides “[T]he official position of the defendants, whether heads of state or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.

<sup>40</sup> Article 6 provides “[N]either the position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged...”

<sup>41</sup> Philippe Sands, *Immunities before International Courts*, 18 November 2003, The Hague, Guest Lecture Series of the Office of the Prosecutor, ICC-OTP 2003.

<sup>42</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, Article 7; Statute of the International Criminal Tribunal for Rwanda, Article 6, Statute of the International Criminal Court, Article 27.

<sup>43</sup> Sands, above n 41, 4-5.

<sup>44</sup> Developments in Head of State immunity under international law since the 1990s have generated a vast literature. The section attempts to identify some key views only.

<sup>45</sup> Michael Byers, “The Law and Politics of the Pinochet Case”, 10 *Duke Journal of Comparative and International Law* 415 (2000), 418. See also **s11.2.4. Immunity of Former Heads of State**, below.

of office.<sup>46</sup> On appeal, a majority of the Judicial Committee of the House of Lords held that Pinochet was not entitled to immunity – sovereign immunity only extended to a Head of State exercising legitimate State functions, which did not include criminal acts condemned by international law.<sup>47</sup> That decision was set aside and in a fresh hearing, a majority held that Pinochet had no immunity from extradition proceedings relating to torture under the Torture Convention (1984).<sup>48</sup> In the event, the extradition was not pursued because of Pinochet’s ill health.

Lauded by human rights advocates as carving out an exception to the doctrine of sovereign immunity in the case of non-official criminal acts, *Pinochet* was not welcomed by all commentators. The *ratio decidendi* is difficult to identify, the final decision was based on interpretation of British legislation and “insofar as the Law Lords based their decision on international law, their arguments differed” and methodology was in some ways unorthodox.<sup>49</sup> One commentator warned that “inroads into the traditional immunities of foreign sovereigns might undermine the ability of states to interact”.<sup>50</sup> This concern appears to underlie the reasoning of the majority of the International Court of Justice in a recent opinion, *Democratic Republic of Congo v Belgium* (2002) (“*Yerodia*”),<sup>51</sup> on the issue of an arrest warrant for then incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo (“the Congo”) for alleged violations of international humanitarian law.

The long-term implications of *Pinochet* for the immunity of current and former Heads of State at international law are unclear. This is especially so in light of *Yerodia*, in which the Congo disputed Belgium’s contention that serious crimes under international law constituted an exception to immunity.<sup>52</sup> Likening the position of a Minister for Foreign

<sup>46</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [1999] 2 All ER 97.

<sup>47</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 AC 61 (House of Lords 1998).

<sup>48</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* [2000] 1 AC 147 (House of Lords 1999).

<sup>49</sup> Hazel Fox, *The Law of State Immunity* (2002), 69.

<sup>50</sup> Philippe Sands, “International Law Transformed? From Pinochet to Congo...?” *Leiden Journal of International Law* 16 (2003) 37-53, 47.

<sup>51</sup> *Democratic Republic of Congo v Belgium*, ICJ Rep 14 February 2002 (“*Yerodia*”).

<sup>52</sup> Paragraphs 47 and 56, *Yerodia*. Both parties relied on national decisions as evidence of State practice – the House of Lords in *Pinochet* and the Court of Cassation in France in *In re Ghaddafi, SOS Attentat and Castelnaud d’Esnault v Ghaddafi, Head of State of Libya, France, Court of Cassation, crim chamber*,



Affairs to a Head of State, a majority found in favour of the Congo, holding that incumbent ministers retained immunity for official acts while in office. The Court emphasised however that “immunity” did not mean “impunity”<sup>53</sup> and noted that after a person ceased to hold office, they would no longer enjoy all the immunities accorded by international law.<sup>54</sup>

*Yerodia* has been criticised, *inter alia*, for elevating the importance of the unhindered conduct of foreign relations over the interest of the international community in prosecuting international crimes; and for ignoring the evolution of the international legal order “in which individual criminal responsibility” is increasingly gaining “the upper hand over immunity”.<sup>55</sup> Equating a Foreign Affairs Minister with a Head of State has also drawn criticism.<sup>56</sup> By affirming, rather than denying, immunity, *Yerodia* has challenged some of those who saw *Pinochet* as a watershed in sovereign immunity. For example, on one view, *Yerodia* suggests the pendulum is being “pushed back toward a stronger assertion of the importance of sovereignty”.<sup>57</sup> *Yerodia* has also been interpreted as being consistent with *Pinochet*, with both cases affirming that a serving Head of State is entitled to absolute immunity from national jurisdiction.<sup>58</sup> It can also be argued that the two cases can be distinguished, since Senator Pinochet was not in office at the time the arrest warrant was issued.

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*N.00-87.21513, March 2000*. In *Yerodia*, Belgium argued that *Ghaddafi*, where the Court upheld the immunity of Libyan leader Mouammar Ghaddafi against a charge of complicity in a terrorist action, acknowledged that some crimes constituted exceptions to sovereign immunity: *Yerodia*, paragraph 56. See also Salvatore Zappala, “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour d Cassation”, 12 *European Journal of International Law* (2001), No 3, 595-612.

<sup>53</sup> Paragraph 60, *Yerodia*.

<sup>54</sup> *Ibid* paragraph 61.

<sup>55</sup> Jan Wouters, “The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks”, *Leiden Journal of International Law*, 16 (2003) 253-267, 261 and 267.

<sup>56</sup> For example, Adam Day, “Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ got Belgium v Congo Wrong”, 22 *Berkeley Journal of International Law*, 489, 498-499; Jan Wouters & Leen De Smet, *The ICJ's Judgment in the Case Concerning The Arrest Warrant of 11 April 2000: Some Critical Observations* (2003), 6.

<sup>57</sup> Sarah C Rispin, “Implications of Democratic Republic of the Congo v Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?”, 3 *Chicago Journal of International Law*, (2002), 535-6; see also Paul Toner, “Competing Concepts of Immunity: The (R)evolution of the Head of State Immunity Defense”, 108 *Pennsylvania State Law Review* 899, 911.

<sup>58</sup> Sands, “International Law Transformed?”, above n 50, 48.

With the House of Lords, eventually, refusing to grant immunity to a former Head of State, and the ICJ upholding an assertion of immunity by an incumbent minister for foreign affairs, and criticism having been levelled at both decisions, questions remain over the future direction of sovereign immunity of former and serving Heads of State. Nonetheless, these efforts suggest that, in the case of Head of State immunity, respect for human rights standards increasingly stands in competition with respect for State sovereignty. The underlying idea is that

sovereign equality should give way to prevailing notions of justice and morality and that individual leaders, by virtue of their behaviour, should be denied immunity from criminal proceedings.<sup>59</sup>

But as *Pinochet* and *Yerodia* demonstrate, even in the 2000s, the very notion of piercing the shield of sovereign immunity in the case of human rights atrocities is marked by controversy and opinion remains divided.

In contrast, in the nineteenth century, the general principle of sovereign immunity was absolutely clear and widely observed: the courts of one State could not stand in judgment of the Sovereign of another. The King of Delhi was *prima facie* entitled to immunity from British Courts.

## 11.2 Particular Rules of Application of Sovereign Immunity

A review of British cases of the nineteenth century shows that despite the clear position precluding the institution of proceedings, plaintiffs nonetheless attempted to limit this general rule.

Was Bahadur Shah, as a deposed Head of State, formerly under the protection of Britain, still entitled to immunity? Did his ‘engagement’ of Ghulam Abbas to assist him in the trial<sup>60</sup> constitute waiver of any entitlement to immunity? The following section considers particular rules of application of immunity.

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<sup>59</sup> Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, (2004), 87.

<sup>60</sup> See also s2.6 The Appointment of Defence Counsel and s2.9 The ‘Defence’ in Chapter 2 Overview of the Trial, above.

### 11.2.1 Immunity of Recognised Heads of State

In the leading authority *The Charkieh* (1873),<sup>61</sup> the Court held that the Khedive of Egypt was not entitled to sovereign immunity because he was not recognised by Britain as its Head of State.<sup>62</sup> No cases in the English courts before 1873 specifically addressed this issue, but the conclusion of the Court was consistent with the principle that only States accepted as being within the ‘community of nations’ were entitled to the privileges and immunities of international law.<sup>63</sup>

As was shown in **Chapter 4 A King Recognised by Britain**, above, Bahadur Shah held the status of a recognised king. Accordingly, he was *prima facie* entitled to immunity.

### 11.2.2 Immunity of Protected Heads of State

The late nineteenth and early twentieth century cases on the respective roles of the Executive and the Judiciary on recognition of foreign states, discussed in **Chapter 5 A Sovereign in English Law**, above, show that even Sovereigns under the protection of Britain were accorded immunity from the jurisdiction of British Courts.

These leading cases drew no distinction between the immunity accorded to the Sovereign of an ‘independent’ State and the immunity accorded to the Sovereign of a ‘protected State’ recognised by Britain. The reasoning appears to have been that as protection was not a derogation of sovereignty, the privileges and immunities of sovereignty continued to apply. That conclusion also seems to have been founded on the doctrine of the ‘Equality of States,’ for, regardless of variations surrounding the office of Head of State such as the internal distribution of power, differences between monarchies and republics, size of territory or power, international law required that “in matters affecting their substantive

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<sup>61</sup> *The Charkieh* (1873), LR 4 Adm & Ecc 59.

<sup>62</sup> This position was followed in *The Annette* [1919] P. 105 and *The Christina* [1938] AC 485. Although the judicial method adopted to determine if the Khedive of Egypt had been recognised was later disapproved (*Mighell v Sultan of Johore* (1894) 1 QB 149, the point of law that recognition was a pre-condition for immunity still stands.

<sup>63</sup> See **Chapter 6 A Sovereign in International Law**, above. The notion that a State must be recognised to enjoy immunity before the Courts of another state is still good law today. For example, the lack of recognition of General Noriega as Head of State was decisive in the rejection by US courts of his claim to immunity (*US v Noriega* (1990) 746 F Supp 1506), cited by Watts, above n 38, 34.

treatment all Heads of sovereign independent States” be “treated alike”.<sup>64</sup> Distinctions of rank and title were more “matters of protocol and ceremony” than international law.<sup>65</sup>

Some commentators argued however that these decisions accorded immunity on the basis of constitutional law, not international law, and that the possession of international personality could not be inferred from these decisions. McNair, for example, thought that the immunity of protected States in British practice rested on British constitutional law, and not on international law.<sup>66</sup> Fawcett suggested that these decisions were confined to relations between Britain and the protected States in question, and should not be read as suggesting that Britain acknowledged any international status of these States (though he recognised that such States did have international personality for some purposes).<sup>67</sup>

However, this view must be understood against the backdrop of turn of the century views that these States, being a part of the British Empire, did not hold a status at international law, discussed in **Chapter 1 International Law and the Kingdom of Delhi**.<sup>68</sup> A modern approach is illustrated in the highly regarded monograph on sovereign immunity by Sir Arthur Watts. He wrote in 1994 that these cases were “still relevant to the development and ascertainment of international law in this area” as “the Courts considered themselves to be giving effect to rules of international law regarding the treatment due to Heads of State”.<sup>69</sup>

The paucity of case-law illustrates that the rule of sovereign immunity was well-entrenched in the mid-nineteenth century. While these British cases on protected sovereignty date from 1894, and therefore do not govern jurisdiction in the trial of Bahadur Shah,<sup>70</sup> the principles applied in the judgments were not novel and were based entirely on established principles of international law. Their novelty lay in the attempt by plaintiffs to

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<sup>64</sup> Watts, above n 38, 26. See also **Chapter 1 International Law and the Kingdom of Delhi**, above.

<sup>65</sup> *ibid* 26.

<sup>66</sup> Arnold McNair, “Aspects of State Sovereignty”, 26 *British Year Book of International Law* (1949) 6, 37, Note 1.

<sup>67</sup> J E S Fawcett, “The Judicial Committee of the Privy Council and International Law” 42 *British Year Book of International Law* (1967) 229, 22.

<sup>68</sup> See s.1.2.2 **The ‘Indian Native States and International Law in Chapter 1 International Law and the Kingdom of Delhi**, above.

<sup>69</sup> Watt, above n 38, 37-38.

<sup>70</sup> See discussion of the doctrine of inter-temporal law in the **Introduction** to this thesis, above.

rollback sovereign immunity, reflecting an emerging jurisprudence that protected sovereignty in the colonial era was an anomaly.<sup>71</sup>

In the well-known case *Mighell v Sultan of Johore* (1894),<sup>72</sup> the plaintiff argued that the Sultan of Johore was not an independent ruling sovereign. The Court concluded that the Sultan exercised the attributes of a sovereign ruler, despite being under the protection of Britain, thus the ordinary principle of sovereign immunity applied. The rule of sovereign immunity was “laid down absolutely and without any qualification”.<sup>73</sup> In *Statham v Statham and the Gaekwar of Baroda* (1912), Bargaive Deane J re-stated the general principle: “There is no doubt that an independent reigning Sovereign cannot by the rules of international law be made against his will a party to proceedings in our courts.”<sup>74</sup> He found that the Gaekwar, recognised by Britain as a Sovereign Prince and under its suzerainty - was “by international law not capable of” being made a party to the proceedings.<sup>75</sup> Other twentieth century cases followed the same line of reasoning. For example, sovereign immunity was accorded to Kelantan (*Duff v The Government of Kelantan* (1924) - “it is beyond question that Kelantan as a sovereign State is entitled to immunity”<sup>76</sup> - and to the Ruler of Bahawalpure State (*Sayce of Bahawalpur State* (1952)).<sup>77</sup>

In all these cases, despite occasional judicial doubt as to the factual question of the degree of independence of the protected Sovereign, there was no doubt as to the legal issue of the applicability of sovereign immunity. The Courts consistently held that Sovereigns recognised by Britain and under its protection were entitled to immunity from the jurisdiction of British courts.<sup>78</sup> Accordingly, the status of Bahadur Shah as a protected Sovereign, with little independence, did not affect any entitlement to sovereign immunity.

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<sup>71</sup> See s6.2 Protected States at International Law in Chapter 6 A Recognised Sovereign at International Law, above.

<sup>72</sup> (1894) 1 QB 149.

<sup>73</sup> at 159, per Lord Esher MR.

<sup>74</sup> [1912] P. 92 (CA); 105 LT 991 at 992.

<sup>75</sup> at 992. See also s1.1.3 The Doctrine of the ‘Equality of States’ in Chapter 1 International Law and the Kingdom of Delhi, above.

<sup>76</sup> per Viscount Finlay, at 820.

<sup>77</sup> *Sayce of Bahawalpur State* [1952] 2 All ER 64.

<sup>78</sup> French Courts also granted immunity to dependant states, and likewise the courts of the United States granted immunity to Hawaii and the Philippines: J L Brierly, *The Law of Nations, An Introduction to the International Law of Peace* (6<sup>th</sup> ed, 1963), 246.

### 11.2.3 Immunity of Former Heads of State

Instances of nineteenth century or earlier State practice are few. All actions were civil proceedings.

The somewhat thin caselaw suggests a distinction between ‘official’ and ‘private’ transactions was an emerging factor in whether or not a former Head of State enjoyed absolute immunity in civil proceedings. For example, in the opinion of the Law Officers, Charles X of France, who had abdicated in 1830, was “upon the same footing as that of any other individual” foreign resident in England, and was therefore subject to arrest for debt.<sup>79</sup> In *Munden v the Duke of Brunswick* (1847),<sup>80</sup> proceedings were allowed to go ahead in respect of a private contract, even though it was entered whilst Head of State. According to Sucharitkul, the position in France was similar.<sup>81</sup> In the 1870s, French Courts permitted civil actions against the deposed Queen Isabella of Spain, then living in Paris, in respect of her private activities. For example, in *Mellerio v Isabelle de Bourbon* (1874),<sup>82</sup> the court held that it had jurisdiction on the ground that the former Queen no longer retained office and that a purchase of jewels was for her own private use. In *Empereur Maximilien du Mexique c Lemaitre* (1874),<sup>83</sup> the court held that as the Emperor was a reigning sovereign at the time of the act in dispute, he could not be sued for failure to pay for furniture to decorate his residence.

In a leading case *Hatch v Baez* (1876),<sup>84</sup> it was held that the former President of the Dominican Republic was entitled to immunity from jurisdiction of courts of the United States for his official acts. Gilbert J said:

the immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of the sovereignty thereof, is essential to preserve the peace and harmony of nations, and has the sanction of the most approved writers on international law. It is also recognised in all the judicial decisions on the subject that have come to my knowledge.<sup>85</sup>

<sup>79</sup> McNair, above n 2, I, 108.

<sup>80</sup> (1847) 10 QB 656.

<sup>81</sup> Sucharitkul, above n 6, 49-50.

<sup>82</sup> Clunet I (1874), 33.

<sup>83</sup> Clunet I (1874), 32.

<sup>84</sup> *Hatch v Baez* (1876) 7 Hun 596.

<sup>85</sup> per Gilbert J, 600.

Gilbert J qualified his statement with the following:

The fact that the defendant had ceased to be president of St Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.<sup>86</sup>

On Gilbert's reasoning, it follows that upon the loss of his status as Head of State, a sovereign might become amenable to jurisdiction in respect of subsequent transactions and private or commercial affairs undertaken during office.

There were no criminal prosecutions of former Heads of State.

Bahadur Shah was charged with having committed crimes between May and 1 October 1857.<sup>87</sup> As was discussed in **Chapter 4 A Recognised King**, above, he was not deposed until 3 October. The relevant conduct took place on his (then) territory and whilst he was Head of State. The conduct (assisting rebellion and mutiny, declaring himself reigning sovereign, and accessory to murder) could by no means be characterised as 'private'. There was no rule of international law which would justify subjecting a former Head of State to criminal prosecution for that conduct – the few precedents related to civil proceedings.

Subject to the rules set out in the next three sections, Bahadur Shah would enjoy immunity for the conduct alleged in the charges.

#### 11.2.4 Immunity of Heads of Extinguished States

Was the Head of an extinguished State (by definition, a 'former' Head of State) in the same position at international law as a former Head of an existing State?

No writers of international law, or judicial decisions, expressly addressed the issue of the immunity or otherwise of former heads of extinguished States. One precedent suggests that the position was the same in either case, for McNair notes that in 1795 Britain granted immunity to William V, Prince of Orange, who had "found refuge in England after his country had been overrun by the French".<sup>88</sup>

<sup>86</sup> *ibid.*

<sup>87</sup> See s2.3 **The Charges in Chapter 2 Overview of the Trial**, above.

<sup>88</sup> McNair, above n 2, 108. McNair doubted that the Prince was a Head of State. He did not indicate the conduct for which immunity lay.

As noted above, one basis for sovereign immunity was the protection of 'royal dignity'. However, this rationale for the extension of immunity would disappear with the disappearance of the State, for no dignity would remain to be offended. Similarly, if the basis of immunity was reciprocity, an unfriendly act could not be made in response because the State would no longer exist. On the other hand, as immunity attached to the person of the Sovereign as the embodiment of the State, it would also follow that the immunity would remain with the person even though the State no longer existed.

In any case, in the nineteenth century jurisdiction was never exercised over the Head of an extinguished State. No sub-category of former Heads of State was carved out by the practice of States, no exception to the shield of immunity was made out. At international law, all former Heads of State were entitled to immunity from jurisdiction of other States. The exercise of jurisdiction over Bahadur Shah, the deposed Head of an extinguished State was unprecedented.

### 11.2.5 Waiver of Immunity

There were few decisions of British courts in the nineteenth century or earlier concerning whether or not a Head of State could waive immunity, most likely because, following from the strength of sovereign immunity, few proceedings were instituted. Most of the later cases concerned prior contractual arrangements to waive jurisdiction.<sup>89</sup> There were no decisions in relation to criminal proceedings.

According to Hall, a State could waive its immunity by expressly submitting to jurisdiction of the Court:

If however a sovereign appeals to the courts of a foreign state or accepts their jurisdiction, he brings with him no privileges that can displace the practice as applying to other suitors.<sup>90</sup>

The issue was considered in *Mighell v Sultan of Johore* (1894).<sup>91</sup> In this case it was held that submission was "in the face of the Court",<sup>92</sup> that is, it took place with respect to the actual proceedings in which the question of immunity was raised and occurred when the

<sup>89</sup> E J Cohen, "Waiver of Immunity", 34 *British Year Book of International Law* (1958) 260.

<sup>90</sup> Hall, above n 4, 166-167, Note 1, citing *King of Spain v Hullet and Widder* (1838) 1 Clarke & Finelly 333.

<sup>91</sup> [1894] 1 QB 149.

<sup>92</sup> per Lopes LJ, at 161.



Court was about to or was being asked to exercise jurisdiction “and not any previous time”.<sup>93</sup> Again, in *Duff v The Government of Kelantan* (1924), it was said: “[A]ppearing as a defendant without objection” constituted submission to the Court.<sup>94</sup>

Assuming that under the law of the time, a Head of State could waive the right to immunity from criminal proceedings, could it be argued that Bahadur Shah submitted to the court-martial and therefore waived his immunity? Did he appear without objection?

Submission by Bahadur Shah to the jurisdiction of the Military Commission is *prima facie* suggested by entering a plea, participating in the proceedings, and by submitting a defence. However, the entering of a plea of ‘not guilty’ in a record of military proceedings signified only that no plea of ‘guilty’ was made an accused.<sup>95</sup> Further, the non-official records state that both Bahadur Shah and his Counsel separately disputed jurisdiction.<sup>96</sup> Whether the document, labelled in the *Proceedings* as a “written defence”, is properly to be described as a ‘defence’ to the prosecution is not certain. In view of Bahadur Shah’s at best feeble defence, and attempts to deny the authority of the Court, it is certainly arguable that Bahadur Shah and his counsel did attempt to assert, rather than waive, immunity from the Court.

On balance, the records do not establish submission by Bahadur Shah to the Military Commission.

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<sup>93</sup> per Esher LJ, at 159.

<sup>94</sup> *Duff v Kelantan* [1924] AC 797, per Lord Sumner at 822.

<sup>95</sup> See s2.4 **The Plea** in **Chapter 2 Overview of the Trial**, above.

<sup>96</sup> See s2.9 **The ‘Defence’** in **Chapter 2 Overview of the Trial**, above.

### 11.2.6 Immunity from Municipal Courts

The rule of sovereign immunity related to the immunity from jurisdiction of a Head of State from the municipal courts of another State. The rule did not apply to immunity from the national courts of the country headed by the Sovereign.

The Military Commission trying Bahadur Shah was a court of Britain.<sup>97</sup> The court-martial was convened under *Act XIV of 1857*, enacted by the Legislative Council of India, a body established by Britain.<sup>98</sup> Accordingly, the Military Commission was a municipal court of a foreign State.

### 11.3 Conclusions

The chapter has shown that under principles of international law prevailing in the 1850s, the Sovereign of a recognised State was entitled to immunity from prosecution in the Courts of another State, and that this immunity extended to former and protected Heads of State. As Britain regarded international law as a part of the law of England, it was obliged to accord immunity from the jurisdiction of its courts to current and former heads of state.<sup>99</sup> As a Sovereign recognised by Britain, Bahadur Shah held the status in international law of a former Sovereign. Accordingly, he was entitled to immunity from prosecution for acts committed whilst Head of State, right or wrong. On balance, it appears that he did not waive immunity. The criminal prosecution of a former Head of State was unprecedented and in stark violation of the laws prevailing in 1858.

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<sup>97</sup> See **Chapter 2 Overview of the Trial** and **Chapter 9 The Rebellion Laws**, above.

<sup>98</sup> The Legislative Council of India, which enacted *Act XIV of 1857*, the Act establishing trials by military commission of civilians for 'rebellion offences, was established by the *Government of India Act 1853 (UK)*, 16 & 17 Vic c.95, sXXII.

<sup>99</sup> See **s6.4 Consequences of International Law of Statehood** in **Chapter 6 A Sovereign in International Law**, above.

## **Chapter 12 Sovereign Immunity Overridden: Gravity of the Crimes and Titular Sovereignty**

### **12.0 Introduction**

Before the trial of Bahadur Shah, no criminal prosecution by a European State of a foreign Sovereign had ever been undertaken. As was discussed in the last chapter, the rule of sovereign immunity was impregnable. In the nineteenth century, courts repeatedly emphasised the strength of the principle and its importance in international relations.

This chapter contends that Bahadur Shah's entitlement to sovereign immunity was deliberately overridden on the grounds of either the gravity of the crimes, the form of his sovereignty or on both grounds. The decision not to extend sovereign immunity to Bahadur Shah was a calculated attempt to push the boundaries of the law.

### **12.1 Why was Immunity Not Accorded to the King of Delhi?**

Why, in view of the weight of legal authority and precedent, was no immunity from prosecution granted by the Government of India?

The official correspondence in the lead-up to the trial reveals no discussion of the sovereign status of Bahadur Shah being a bar to a criminal prosecution.<sup>1</sup> On this basis, it could be argued that sovereign immunity was not extended to Bahadur Shah because the Court failed to appreciate his standing as a sovereign recognised by Britain – a simple error of law.

However, statements by the Prosecutor in the *Proceedings* suggest Bahadur Shah's sovereign status was not totally overlooked. Rather, the consequences in law flowing from that status were deliberately overridden. This chapter suggests that the Prosecutor acknowledged that Bahadur Shah held some form of a sovereign status but considered that, in view of the gravity of the crimes, and/or the form of his sovereignty (titular), his status as King of Delhi would not generate an immunity from prosecution.

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<sup>1</sup> See Chapter 8 *The Decision to Try the King of Delhi*, above.

## 12.2 First Ground for Overriding Immunity: Gravity of the Crimes

The first ground for not granting immunity can be seen in express statements of the Prosecutor in his Closing Address to the effect that immunity should be overridden because of the gravity of the crimes.

The Prosecutor in two parts of his Closing Address acknowledged that Bahadur Shah held the status of a Sovereign at the time of the acts alleged in the charges.

First, the Prosecutor expressly acknowledged that Bahadur Shah held some form of sovereign status before the Rebellion. In his summing up of the evidence allegedly proving that Bahadur Shah was a “subject of the British Government in India” who owed “a duty of allegiance”, he said (*italics mine*):

as the British Government *neither deprived him nor any member of his family of any sovereignty whatever*, but, on the contrary, relieving them from misery and oppression, bestowed on them largesses and pensions aggregating many millions of pounds sterling, the duty of their allegiance will, I think, be readily admitted...<sup>2</sup>

Second, the Prosecutor explained that the “facts” elicited in the trial related both to the charges laid against Bahadur Shah and to establishing the causes of the Rebellion.<sup>3</sup> While a verdict would be important because of Bahadur Shah’s “former rank and royalty”, he thought establishing the causes of the Rebellion was of greater importance.<sup>4</sup> Again, this shows that the Court was not ignorant of Bahadur Shah’s status as a former Sovereign. As noted in **Chapter 3 The ‘Titular’ King of Delhi**, Bahadur Shah was styled in the *Proceedings*: “the King of Delhi,” the “Titular King of Delhi” and the “Ex-King of Delhi”. His kingly status was openly acknowledged.

The Prosecutor also acknowledged in his Closing Address that Sovereigns were entitled to immunity, for he noted “the respect due to deposed majesty”.<sup>5</sup> While this statement at first glance may merely be a reference to courtesies due to persons of previous royal rank, or a suggestion that Bahadur Shah might yet deserve respect if he was innocent, his following statements suggest otherwise: the Prosecutor then expressly invited the Military

<sup>2</sup> *Proceedings*, 141. See **Chapter 10 The Basis for the Assertion of Jurisdiction: Nationality**, above.

<sup>3</sup> The dual purpose of the trial is discussed in **s8.4 Factors in the Decision to Try the King of Delhi in Chapter 8 Decision to Try the King of Delhi**, above.

<sup>4</sup> *Proceedings*, 133-134.

<sup>5</sup> *ibid* 145.

Commission to override by its verdict this “respect due to deposed majesty” because of the nature of his acts: “in a verdict which shall record to this and to all ages that kings by crime are degraded to felons.”<sup>6</sup> This can be seen as an invitation to pierce the shield of sovereign immunity not only in the case of Bahadur Shah but in all cases of kings who commit crime, acknowledging that no previous verdict had achieved this (emphasis mine):

*I herewith conclude my observations on the charges, and it will now remain, gentlemen, for you by your verdict to determine whether the prisoner at your bar, in retirement and seclusion, may yet claim the respect due to deposed majesty, or whether he must henceforth rank merely as one of the great criminals of history. It will be for you to pronounce whether this last king of the imperial house of Taimur shall this day depart from his ancestral palace, bent down by age and by misfortune, but elevated, perhaps, by the dignity of his sufferings and the long-borne calamities of his race, or whether this magnificent hall of audience, this shrine of the higher majesty of justice, shall this day achieve its crowning triumph in a verdict which shall record to this and to all ages that kings by crime are degraded to felons, and that the long glories of a dynasty may be for ever effaced in a day.*<sup>7</sup>

Bahadur Shah was to be held personally accountable for his crimes, his status as a king discounted. He was not above the law.

Throughout the Closing Address, the Prosecutor had highlighted the barbaric nature of the atrocities in Delhi and Bahadur Shah’s responsibility for unspeakable crimes, especially the murder of 49 women and children in the Palace on 16 May (the first count of the fourth charge).<sup>8</sup>

For example, on the killing of two women in Delhi on 11 May:<sup>9</sup> “young and delicate women who could have given no offence; whose sex and age might have tamed any hearts less pitiless than those of the human demons who destroyed them” killed by Bahadur Shah’s “own special servants – in the very precincts of his palace” who had rushed “to imbrue their hands in the blood of every European”. Only the influences of “Mahomedan treachery” could explain how “education, the pride of royal ancestry, a life of tranquil ease and comparative refinement” did not exempt Bahadur Shah from “connexion with deeds which seem too barbarous for the very outcasts of humanity, or even for the untamed but

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<sup>6</sup> *ibid* 145.

<sup>7</sup> *ibid* 145.

<sup>8</sup> See s2.3 **The Charges in Chapter 2 Overview of the Trial**, above. The Charges are set out in *Appendix 1*.

<sup>9</sup> Bahadur Shah was not charged with this conduct, perhaps because the killing took place on 11 May, before the enactment of the Rebellion Legislation, and before the proclamation of Martial Law.

less savage denizens of the jungle”.<sup>10</sup> A “higher law” must “acquit him or condemn him, the law of conscience and of sense... a law fixed in the heart of man by his Maker...”.<sup>11</sup>

On the slaying of the forty-nine women and children in the Palace on 16 May (the subject of Charge Four), “this revolting butchery”,<sup>12</sup> “this most hideous deed of blood”,<sup>13</sup> the Prosecutor said: “[T]he cold-blooded hardened villainy that could revel in leading women and young children to the shambles” is “something so inhuman that the mind might well refuse to accept it as truth...”.<sup>14</sup>

According to the documentary and oral evidence in the *Proceedings*, around 50 women and children who had sought refuge in the Palace on the outbreak of rioting in the city, were kept locked in a room in the Palace until 16 May, when they were taken to a public area of the Palace, the *Naqqar Khana*, and killed by several swordsmen in front of a large crowd and under the eye of Bahadur Shah’s son, Mirza Moghal. The Prosecutor argued that Mirza Moghal, who was seen visiting Bahadur Shah shortly before the killing commenced, had sought and obtained his approval before ordering the execution.<sup>15</sup>

The emphasis on the barbarous crimes allegedly committed by Bahadur Shah reflected the abhorrence of atrocities committed during the Rebellion. Concerns about rape of women prisoners in the Palace at Delhi before their death also underlay British outrage and determination to allocate responsibility.<sup>16</sup> A photograph by Felice Beato, c1858, of the site of the massacre in the Palace is overleaf (**Figure XIV**).

<sup>10</sup> *Proceedings*, 137.

<sup>11</sup> *ibid* 138.

<sup>12</sup> *ibid* 143.

<sup>13</sup> *ibid* 144.

<sup>14</sup> *ibid* 143.

<sup>15</sup> Mirza Mogal was killed by Captain Hodson on the capture of Bahadur Shah – see **Chapter 7 The Imprisonment of the King of Delhi in 1857**, above.

<sup>16</sup> Indira Ghose comments that as no evidence of rape ever emerged officially, it was “left to the world of fiction to produce salacious stories about the abuse of British women by lascivious natives”, *Memsahibs Abroad, Writings by Women Travellers in Nineteenth Century India* (1998), 9. For example, an 1868 novel *First Love and Last Love: A Tale of the Indian Mutiny* gave a lurid account of the prisoners in Delhi: the King, the Princes and the leaders seized “forty-eight females kept for the base purposes of the leaders of the insurrection for a whole week”, cited by Patrick Brantlinger, *Rule of Darkness, British Literature and Imperialism* (1988), 209. Recent writings exploring race, gender and fear of sexual violation of women in the Rebellion include Nancy L Paxton, “Mobilizing Chivalry: Rape in British Novels about the Indian Uprising of 1857”, 36 *Victorian Studies*, No 1, Fall, 1992; Penelope Tuson, “Mutiny Narratives and the Imperial Feminine: European Women’s Accounts of the Rebellion in India in 1857”, in *Women’s Studies International Forum*, 21 (1998) 291-303; and Alison Blunt, “Embodying War: British Women and Domestic Defilement in the Indian Mutiny 1857-8”, *Journal of Historical Geography*, 26, 3 (2000) 403-428.

Figure XIV: Photograph of the site of the massacre in the Palace, Delhi, c1858.



The British press reported many accounts of atrocities perpetrated against British women in Delhi and elsewhere. For example, the *News of the World* reported on 19 July 1857:

We know little of the exact scenes which transpired, and imagination hesitates to lift the veil from them. We hear, however, about 50 helpless women and children who had hid themselves in the palace on the outbreak were subsequently discovered, and the whole murdered in cold blood.<sup>17</sup>

A rumour reported in *The Times* on 27 August 1857 was that “forty-eight females, mostly girls aged ten to fourteen years, were said to have been paraded naked in the streets of Delhi, ravished in broad daylight and then cruelly murdered”.<sup>18</sup> The brother of one of the 11 May victims, a Miss Clifford, was reported to have heard that his sister was “stripped naked at the Palace, tied up in that condition to the wheels of gun-carriages, dragged up the Chandni Chauk, or silver street of Delhi, and there, in the presence of the King’s sons, cut to pieces”.<sup>19</sup> Allegations of the rape of women in Delhi (included the rumoured treatment of Miss Clifford) and elsewhere were investigated at the behest of the Governor-General one month before the trial of Bahadur Shah.<sup>20</sup> The investigation into the “alleged Dishonour of European Females” was conducted at the height of the Rebellion and “tied up much manpower” which the British could ill-afford.<sup>21</sup> The enquiry found that the “massacre of European ladies and girls” in Delhi was “not preceded by dishonour”, although women of British and Indian parentage “may have been obliged to sacrifice their honour”.<sup>22</sup>

However, doubts clearly lingered, for the issue was raised in the trial of Bahadur Shah, perhaps to corroborate the conclusions of the report. No documentary evidence was introduced into evidence suggesting the women prisoners had been tortured or raped. Bahadur Shah was not charged with rape.<sup>23</sup>

<sup>17</sup> Cited by Jenny Sharpe, “The Unspeakable Limits of Rape: Colonial Violence and Counter-Insurgency,” *Genders*, Number 10, Spring, 1991, 32.

<sup>18</sup> Charles Ball, *The History of the Indian Mutiny*, (n.d. 1859), 103.

<sup>19</sup> Surendra Nath Sen, *Eighteen Fifty-Seven* (1957), 414.

<sup>20</sup> “Memorandum drawn up at the request of the Governor-General, of Enquiries into the alleged Dishonour of European Females at the Time of the Mutinies – submitted 30<sup>th</sup> December 1857”, reproduced in full in W Coldstream, (Ed), *Records of the Intelligence Department of the Government of the North-West Provinces of India during the Mutiny of 1857* (1902), I, 367-379. [Hereinafter “*Intelligence Records*”].

<sup>21</sup> C A Bayly, *Empire and Information, Intelligence Gathering and Social Communication in India, 1780-1870* (1999 [1996]), 326.

<sup>22</sup> *Intelligence Records*, above n 20, 376.

<sup>23</sup> Rebellion military commissions had jurisdiction over the crime of rape under *Act XVI of 1857* – see **s9.2.4 Act XIV of 1857** in **Chapter 9 The Rebellion Laws**, above.



However, the witness Mrs Aldwell was asked:

<b>Question</b>	From what has come to your knowledge, do you believe that any European females were treated with great insult and indignity, either by the native soldiery or populace of Delhi?
<b>Answer</b>	Yes.

According to the *Proceedings*, Mrs Aldwell was not questioned further and withdrew.<sup>24</sup>

The Delhi massacre was regarded by the British as a monstrosity second only to the massacre of around two hundred women and children at Cawnpore on 15 July 1857.<sup>25</sup>

However, as the Delhi massacre happened first, and was widely thought to have been committed under the authority of Bahadur Shah, the massacre became an infamous element of the history of the Rebellion.

Charging Bahadur Shah with responsibility for the Delhi massacre was a singular opportunity for high level accountability. The King of Delhi's crimes demanded punishment and he would not be allowed to hide behind the shield of sovereign immunity.

Recognising Bahadur Shah's sovereignty, only to override it because of the gravity of his crimes, was without precedent in international relations in the 1850s. The notion that "kings by crime are degraded to felons" was entirely novel. The only precedents were in national law: the trials of King Charles I of England in 1649 and of King Louis XVI of France in 1792-3, tried by their own subjects. They were not foreign sovereigns. Treating a foreign king as a felon and subjecting him to a criminal prosecution contravened long-established prevailing law.

As was discussed in the last chapter, a former Head of State, though protected, possessed complete immunity from the jurisdiction of the courts of another State. New thinking on criminal accountability would emerge in the twentieth century, reflecting a new respect for human rights, but in 1858, the shield of sovereignty was impregnable and under the law of the time no crimes were serious enough to override it.

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<sup>24</sup> *Proceedings*, 94.

<sup>25</sup> See further Andrew Ward, *Our Bones are Scattered, The Cawnpore Massacres and the Indian Mutiny of 1857* (1996); Rudrangshu Mukherjee, "'Satan Let Loose Upon Earth': The Kanpur Massacres in India in the Revolt", 128 *Past and Present* (1990). See also **Chapter 7 The Imprisonment of the King of Delhi in 1857**, above. The alleged perpetrator of the Cawnpore massacre, the Nana Sahib (Dhondu Pant), was never captured.

### 12.3 Second Ground for Overriding Immunity: Titular Sovereignty

The decision not to accord immunity may also have flowed from the view espoused by many officials at the time that Bahadur Shah held the status of a ‘titular’ king.<sup>26</sup>

Bahadur Shah’s historic status as a ‘king’ should have triggered an extension of immunity. The fact that his kingly status was openly acknowledged throughout the trial, but downgraded as “merely nominal”, suggests that his status as the ‘titular’ King of Delhi was not regarded as entitling him to the privileges and immunities under international law enjoyed by ‘regular’ Sovereigns. In short, that sovereign immunity did not attach to the form of sovereignty possessed by Bahadur Shah.

#### 12.3.1 ‘Titular Sovereignty’ in the *Proceedings*

That Bahadur Shah’s sovereignty was *merely* ‘titular’ was emphasised in the very conduct of the trial. The *Proceedings* are entitled “The Trial of Muhammad Bahadur Shah, Titular King of Delhi”.<sup>27</sup> The word ‘titular’ was not part of Bahadur Shah’s title. The *Proceedings* thus drew a distinction between a ‘titular’ Sovereign and a ‘regular’ Sovereign.

The third charge laid against Bahadur Shah, alleging he was a “false traitor against the State”, charged him with “proclaiming and declaring himself the reigning king and sovereign of India”.<sup>28</sup> This suggests that a distinction was drawn between ‘titular’ kingship and ‘reigning’ kingship.

The terminology of ‘titular sovereignty’ can also be traced in the Prosecutor’s Addresses. As noted in **Chapter 3 The ‘Titular’ King of Delhi**, above, Bahadur Shah’s status as the King of Delhi was characterised by the Prosecutor as the “titular majesty of Delhi”<sup>29</sup> and as “mere nominal royalty”.<sup>30</sup> He stated that on the extension of protection by Britain, “the titular Kings of Delhi became pensioned subjects of the British”.<sup>31</sup>

<sup>26</sup> See s3.6 The ‘Titular’ King in Chapter 3 The ‘Titular’ King of Delhi’, above.

<sup>27</sup> *Proceedings*, 1.

<sup>28</sup> See s2.3 The Charges in Chapter 2 Overview of the Trial, above.

<sup>29</sup> *Proceedings*, 136.

<sup>30</sup> *ibid* 134.

<sup>31</sup> *ibid* 139.

The view that Bahadur Shah was a ‘titular’ sovereign is also apparent in the evidence relied upon by the Prosecutor to prove that Bahadur Shah was a British national. Saunders had stated that Bahadur Shah succeeded to “titular sovereignty”. He said that Shah Alam II was “vested with nominal authority over the city of Delhi” before the extension of protection by the British in 1803 and that in 1837 Bahadur Shah “succeeded to the titular sovereignty of Delhi”.<sup>32</sup>

### 12.3.2 ‘Titular Sovereignty’ in Law

The emphasis in the trial on Bahadur Shah’s ‘titular’ status suggests that his status as a Sovereign was not regarded in the same light as other Sovereigns. If his sovereign status was merely a title, the question of immunity would not arise - immunity would be immaterial because he was not a ‘regular’ Sovereign.

The basis for such a view is not clear.

The view that the sovereignty held by Bahadur Shah did not entitle him to immunity seems to have flowed from the Prosecutor’s argument in support of jurisdiction, that the protection accorded to the Kingdom of Delhi effected a change in nationality, effectively extinguishing its sovereignty. It would follow from that argument that sovereignty having passed to Britain, Bahadur Shah’s status as ‘king’ was in name only – as if bearing a courtesy title rather than a descriptor of his status.

Another basis of the distinction between ‘titular’ and ‘regular’ Sovereignty may have been a view that the EIC had acquired the “substance, though not the name, of territorial power” through the grant by the Mughal Emperor of the *diwani* in 1765.<sup>33</sup> However, the Prosecutor spoke only of the effect of protection extended in 1803 and did not raise this point.

Finally, while ‘titular’ sovereignty appears to have derived from the protection extended by Britain, it is also possible that, more generally, underlying British perceptions of ‘titular’

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<sup>32</sup> *ibid* 94. Saunders’ testimony is set out at *Appendix 8*.

<sup>33</sup> See s3.1 **The Decline of the Mughal Empire and Acquisition of Territory by the EIC** in **Chapter 3 The ‘Titular’ King of Delhi**, above.

sovereignty was a view that Mughal kingship did not equate with, or equal, European notions of kingship.<sup>34</sup>

However, the law knew no category of 'titular' sovereignty - it drew no distinction between 'titular' or 'nominal' kingship on the one hand and 'regular' or 'regular' kingship on the other.

As was noted in **Chapter 1 International Law and the Kingdom of Delhi** and **Chapter 5 A Sovereign in English Law**, above, under the international law of the time, a recognised Sovereign was the equal, in law, of any other. If recognised, a Sovereign was entitled to the privileges and immunities of international law, including immunity from jurisdiction of another State. Recognition was a political decision for the government of the day and it was accorded to States notwithstanding that they were 'protected' or had little power.

If the basis of the distinction between 'titular' and 'real' Sovereignty was a lack of effective power, that deficiency was irrelevant to the law. 'Titular sovereignty' may have been an apt political description of the Kings of Delhi in the nineteenth century - reflecting the diminution of power of the Kings of Delhi and their heavy dependence on the Government of India - but it was a political description, not legal. As Sir Robert Phillimore commented in *The Charkieh* in 1873:

International law has no concern with the form, character or power of a state; if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states.<sup>35</sup>

If the basis of the distinction between 'titular' and 'regular' sovereignty was that protection had been extended to the former, that too was irrelevant to international law. Protection of one State by another left the protected State's sovereignty intact, as was explained in **Chapter 6 A Sovereign in International Law**, above.

The view that Bahadur Shah's sovereignty was 'titular' and of no legal effect was therefore not sustainable in light of the international law on sovereignty. It was also not sustainable in light of acts and statements by the Government of India, discussed in **Chapter 4 A Recognised King** and **Chapter 5 A Sovereign in English Law**. The King of Delhi was

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<sup>34</sup> On Mughal kingship, see for example R B Barnett, *North India Between Empires* (1980).

recognised as a Sovereign by Britain and under its protection until the Kingdom of Delhi was extinguished in October 1857 and was accordingly entitled to immunity from jurisdiction.

Any view that ‘titular’ sovereignty did not of itself found an immunity from prosecution may have been a simple error of law, for the law knew no category of ‘titular’ kingship.

However, such a view can also be seen as an attempt to develop the law, to override sovereign immunity in cases of protected sovereigns. Any view that no immunity attached to ‘titular’ sovereignty anticipated the arguments vainly raised by plaintiffs in the protected sovereign immunity cases brought before British courts from the 1890s to the 1920s, mirroring the disquiet of international lawyers with the notion of ‘protected’ sovereignty.<sup>36</sup> Despite these misgivings that protected States were accorded too high a standing in international law, the practice of States did not falter and they remained States at law.

#### 12.4 Conclusions

It was shown in the previous chapter that the King of Delhi, as a former Sovereign recognised by Britain, was entitled to immunity from its Courts for his acts, right or wrong, committed whilst Head of State. Despite the clear legal position, Bahadur Shah’s status as a deposed Sovereign, with its attendant privileges and immunities at international law, was disregarded in 1858 – charges were laid, a Military Commission convened, and a verdict delivered. He appears not to have submitted to jurisdiction.

It is not certain why the prosecution went ahead. The Court simply may not have appreciated Bahadur Shah’s standing as a Sovereign recognised by Britain. But such a conclusion would be speculative. This chapter has suggested, on analysis of the *Proceedings*, that the Court deliberately overrode sovereign immunity in an attempt to develop new law. The Prosecutor in his Closing Address belittled the sovereign status of the Kings of Delhi as “mere nominal royalty” and posed the question for the Court as being

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<sup>35</sup> (1873) LR 4 Adm & Ecc 59. Although *The Charkieh* was strongly criticised by Lord Esher MR in *Mighell v Sultan of Johore* [1894] 1 QB 149 for not treating the Foreign Office Certificate as conclusive, Sir Robert’s assessment of the law in this regard has not been disapproved.

<sup>36</sup> See **Chapter 6 A Sovereign in International Law** and **Chapter 11 The King of Delhi’s Entitlement to Sovereign Immunity**, above.

a choice between granting Bahadur Shah “the respect due to deposed majesty” or allowing him to rank as “one of the great criminals of history”. On balance, a deliberate attempt to override sovereign immunity on the grounds of the gravity of the crimes or the ‘titular’ nature of his sovereignty seems the most likely explanation for the trial of Bahadur Shah going ahead against weighty authority and precedent. Either ground would constitute a significant development of international law.

## Conclusion

The central problem addressed in this thesis was whether the exercise of jurisdiction over the King of Delhi in his trial in 1858 was sustainable under the international law of the time. This question was answered through the analysis and application of well-established rules of nineteenth century international law, identified at the start of this thesis, relating to recognition, protection, acquisition of nationality and sovereign immunity. No study has previously analysed the trial against international law.

This thesis has demonstrated, through the application of then prevailing rules of international law, that the Court did not have jurisdiction over the deposed and protected King of Delhi, Bahadur Shah. Bahadur Shah was recognised by Britain as the Head of State of the Kingdom of Delhi. His historic status as the King of Delhi, which, according to the long-established rule of sovereign immunity, precluded prosecution by courts established by another State, should have been considered sufficient by the Government of India to entitle him to immunity from prosecution. Any evidence mounted against him was simply irrelevant. His status, even as a protected and then deposed Head of State, was a complete bar to proceedings; the prosecution was an astonishing breach of prevailing standards of international law. It was an invalid trial by his triers' own standards.

This thesis has assessed the trial against the prevailing rules of international law and not against British military law. However, it is to be noted that under British military law, want of jurisdiction made a court-martial unlawful, obliging the government to quash the proceedings.<sup>1</sup> Further, jurisdiction could not be conferred by consent.<sup>2</sup> It would follow that the trial of Bahadur Shah must have been null and void according to British military law and his subsequent detention unlawful. The conclusion that the trial was invalid at international law therefore has implications for its validity according to British military law; these warrant close investigation but fall outside the scope of this thesis.

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<sup>1</sup> William Hough, *Precedents in Military Law* (1855), 48.

<sup>2</sup> Charles M Clode, *The Administration of Justice under Military and Martial Law* (1872), 117.

This thesis has also found that the basis for the assertion of jurisdiction over Bahadur Shah was misconceived. Bahadur Shah was not born “a subject of the British Government in India”; the extension of protection to his grandfather Shah Alam II did not effect a transfer of nationality under international law. Under international law, nationality was a matter for the domestic law of the State with territorial sovereignty. Sovereignty was not acquired over the Kingdom of Delhi, for the Kingdom was merely under the protection of the British Government in India, leaving its sovereignty intact. Even if Bahadur Shah had become a British national after the annexation of the Kingdom in October 1857, an argument not raised in the trial, his status as a former Sovereign would still have precluded prosecution.

This thesis has suggested that immunity was deliberately overridden on the grounds of his protected status, viz. ‘titular sovereignty’, or of the gravity of the crimes or on both grounds. The *Proceedings* was approved by the British Government in 1858.<sup>3</sup> The trial of Bahadur Shah, an unprecedented prosecution of a recognised Sovereign, is then an example of State practice in piercing the immunity of a former Head of State.

There was an inconsistency in claiming on the one hand that Bahadur Shah’s kingship was degraded by his crimes and on the other that he had no real sovereignty anyway. Was the Prosecutor grasping at straws, throwing in every conceivable justification to break with precedent?

Unprecedented in 1858, these grounds in fact formed separate bases for later challenges to sovereign immunity by plaintiffs in Britain from the 1890s onwards, seen for example in *Mighell v Sultan of Johore*<sup>4</sup> in 1894 (protected sovereignty) and one hundred years later in *Pinochet*<sup>5</sup> in 1999 (*inter alia*, gravity of the crime).

The trial of Bahadur Shah is therefore a good illustration of a new appetite to pierce the shield of sovereign immunity. The late nineteenth century saw a number of such attempts on the grounds that the sovereignty of protected sovereigns was ‘hollow’ and did not found all the rights and duties of a sovereign status at international law. The plaintiffs in this line of cases were not successful in changing the established law on immunity. On the contrary,

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<sup>3</sup> See s2.11 **The Finding in Chapter 2 Overview of the Trial**, above.

<sup>4</sup> [1894] 1 QB 149.

<sup>5</sup> The *Pinochet Decisions*.

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the decisions of the British courts on the consequences of “protected sovereignty” became leading authorities upholding the doctrine of sovereign immunity – demonstrating the supremacy of the sovereign State and the doctrine of sovereign immunity in the nineteenth century, in cases of even the flimsiest sovereignty. This argument was not pursued in later cases or jurisprudence on sovereign immunity. Further, the argument that the seriousness of the crimes warranted prosecution, also untenable under the law of the time, signalled a fresh approach to sovereign immunity. The prosecution of Bahadur Shah suggests a growing consciousness in the mid-nineteenth century that atrocities, especially those committed in times of war, should be dealt with judicially. The notion of Head of State liability for violations of human rights only gradually gained acceptance in the twentieth century, starting with the decision in 1919 to place the ex-Kaiser Wilhem II on trial and seen in recent attempts to punish Pinochet and Yorodia.

More broadly, this study has shown how questions of international law in the nineteenth century, such as the aptness in the colonial era of the doctrine of the ‘Equality of States’ and the logic of sovereignty existing under protection, were not just of theoretical interest but exercised those charged with administering new empires. This can be seen in then-Governor of Madras Sir Charles Trevelyan’s admonishment of the Judicial Committee of the Privy Council for acknowledging the sovereign status of the Rajah of Tanjore<sup>6</sup> and in Major Harriott’s disparagement of the sovereign status of the King of Delhi.

The challenge mounted against nineteenth century international law was: why should international law extend the privileges and immunities of statehood to protected States; and why should the law protect individuals in high office who commit gross crimes?

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<sup>6</sup> See s1.1.3 The Doctrine of the ‘Equality of States’ in Chapter 1 International Law and the Kingdom of Delhi, above.

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Indeed, this frustration with established principles of international law can be seen in the fact that a trial went forward at all, at odds with all precedent, against all established legal principle. The trial was an attempt to fashion legal principle to reflect new conditions. As the Judicial Committee pointed out in 1934, “[I]nternational law was not crystallised in the seventeenth century, but is a living and expanding code”.<sup>7</sup> The overriding of “the respect due to deposed majesty”, though unsustainable in the law of the time and rendering the trial invalid, finds resonance in today’s notion that Head of State immunity should yield to the principle of individual accountability for serious crimes.

This study has attempted to stand in the place of a Defence Counsel in 1858, cognizant of local circumstances and versed in British and international law of the time. The thesis has attempted a strictly legal analysis of jurisdiction and has not assessed the trial as a political event or the use of law to further political objectives – questions which deserve further investigation in light of its findings. Rather, the aim of this thesis was to solve the puzzle of a King on trial: to understand the legal basis of the trial – if any; and to assess whether the assertion of jurisdiction had a sound basis in law.

The rhetoric of shadow, ‘titular’ kingship, so dominant in British writing on the late Mughals, and a tendency to view the status of the kingdoms of the Indian subcontinent in the early to mid nineteenth century through a later imperial lens, has obscured the sovereign status of the Kings of Delhi, extant until October 1857, and the flimsy legal basis for the criminal prosecution of Bahadur Shah. In determining the proper legal status of Bahadur Shah and the validity of his trial, the thesis has examined primary sources not previously analysed in relation to the demise of the Mughals: the proceedings of the trial of Bahadur Shah; the laws passed in 1857 to try ‘rebels’ and ‘mutineers’; the writers of international law; and decisions of British civil courts on legal consequences of British territorial expansion on the sub-continent. Much of the British case-law derives from actions against the Government of India and is a rich source of discourse on the sovereign status of the kingdoms of the sub-continent before 1858. It is ironic that these cases proved so important in demonstrating the international status of these kingdoms, in particular the Kingdom of Delhi, for in every case, the ruler had been deposed, sovereignty

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<sup>7</sup> *re Piracy jure gentium* [1934] AC 572.

acquired by Britain, and the kingdom had disappeared from the international stage. The last word belongs to the exiled-Bahadur Shah himself, the King of Delhi, *Zafar*, in an Urdu *ghazal* penned after his trial:

*Every place – it is a terrible mourning!*  
*How shall I say it?*  
*It is the turn of fortune.*  
*Neither is there that crown, nor is there that throne*  
*Neither is there that emperor, nor is there that land*<sup>8</sup>

۱۔ سبھی جا۔ وہ ماتمِ سخت ہے کہوں کیسی گردشِ بخت ہے  
 نہ وہ تاج ہے نہ وہ تخت ہے نہ وہ شاہ ہونہ دیار ہے

<sup>8</sup> M Barker, S Salam, A Siddiqi, *A Reader of Classical Urdu Poetry* (1977), II, 359.

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#### 4. Figures and Maps

*Figure I: Detail of panel of the diwan-i-khas, Delhi*

Photograph by Christina Gascoigne

Reproduced from B Gascoigne, *The Great Moghuls* 1987 [1961]

*Figure II: Sketch of the diwan-i-khas, Delhi, c1858*

'Easy Times', Sketch by Major Turnbull, Gerald Sattin Collection

Reproduced from A Sattin (ed), *An Englishwoman in India: The Memoirs of Harriet Tytler 1828-1858* (1986)

*Figure III Photograph of Bahadur Shah, c1858*

Attributed to PH Egerton, British Museum Collection

Reproduced from C Worswick and A Embree, *The Last Empire, Photography in British India, 1855-1911* (1976)

*Figure IV: Map of the Mughal Empire c1690*

Clive Hilliker, Australian National University

*Figure V: Map of the Indian subcontinent showing British Control c1798*

Clive Hilliker, Australian National University

*Figure VI: Map of the Indian subcontinent showing British Control c1856*

Clive Hilliker, Australian National University

*Figure VII: The King of Delhi, Akbar Shah II, c1825*

Victoria and Albert Museum

Reproduced from M Archer, *Company Paintings, Indian Paintings of the British Period* (1992)

*Figure VIII: The King of Delhi, Bahadur Shah II, c1838*

Private Collection

Reproduced from S C Welch and N Patnaik, *A Second Paradise, Indian Courtly Life 1590-1947* (1985)

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*Figure IX: The Red Fort, Delhi, c1780-90*

British Library Collection

Reproduced from L Nicholson, *The Red Fort, Delhi*, (1989)

*Figure X: Map of Area Affected by the Rebellion*

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*Figure XI: Sketch of the City of Delhi, c1856*

British Museum Collection

Reproduced from Ministry of Information and Broadcasting, India, *1857 A Pictorial Representation* (1957)

*Figure XII: Photograph of Humayun's Tomb, c1858*

Photograph by Robert and Harriet Tytler, British Library Collection

Reproduced from A Sattin (ed), *An Englishwoman in India: The Memoirs of Harriet Tytler 1828-1858* (1986)

*Figure XIII: The Emperor Jahangir, with King James I of England on the Left, c1620*

Freer Gallery of Art

Reproduced from B Gascoigne, *The Great Moghuls* (1987 [1971])

*Figure XIV: Photograph of the Site of the Massacre in the Palace, Delhi, c1858*

Photograph by Felice Beato, Private Collection, Sydney

Reproduced from J Masselos and N Gupta, *Beato's Delhi, 1857-1987* (2000)

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# APPENDIX

### *Appendix I*    **The Charges**<sup>1</sup>

**1st.**    For that he, being a pensioner of the British Government in India, did, at Delhi, at various times between the 10th of May and 1st of October 1857, encourage, aid and abet Muhammad Bakht Khan, subadar of the regiment of the Artillery, and divers others, native commissioned officers and soldiers unknown, of the East India Company's army, in the crimes of mutiny and rebellion against the State.

**2nd.**    For having at Delhi, at various times between the 10th of May and 1st of October 1857, encouraged, aided and abetted Mirza Moghal, his own son, a subject of the British Government in India, and others unknown, inhabitants of Delhi, and of the North-west provinces of India, also subjects of the British Government, to rebel and wage war against the State.

**3rd.**    For that he, being a subject of the British Government in India, and not regarding the duty of his allegiance, did, at Delhi, on the 11th of May 1857 or thereabouts, as a false traitor against the State, proclaim and declare himself the reigning king and sovereign of India, and did then and there traitorously seize and take unlawful possession of the city of Delhi, and did moreover, at various times between the 10th of May and 1st of October 1857, as such false traitor aforesaid, treasonably conspire, consult, and agree with Mirza Mughal, his own son, and with Muhammad Bakht Khan, subadar of the regiment of Artillery, and divers other false traitors unknown, to raise, levy, and make insurrection, rebellion and war against the State, and further to fulfil and perfect his treasonable design of overthrowing and destroying the British Government in India, did assemble armed forces at Delhi, and send them forth to fight and wage war against the said British Government.

**4th.**    For that he, at Delhi, on the 16th of May 1857, or thereabouts, did, within the precincts of the palace at Delhi, feloniously cause, and become accessory to the murder of 49 persons, chiefly women and children of European and mixed European descent; and did moreover, between 10th of May and 1st of October 1857, encourage and abet divers soldiers and others in murdering European officers, and other English subjects, including women and children, both by giving and promising such murderers service, advancement, and distinctions; and further, that he issued orders to different native rulers having local authority in India, to slay and murder Christians and English people, whenever and wherever found on their territories; the whole or any part of such conduct being an heinous offence under Act XVI. of 1857 of the Legislative Council in India.

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<sup>1</sup> *Proceedings, 2.*

**Appendix 2 Court Personnel**

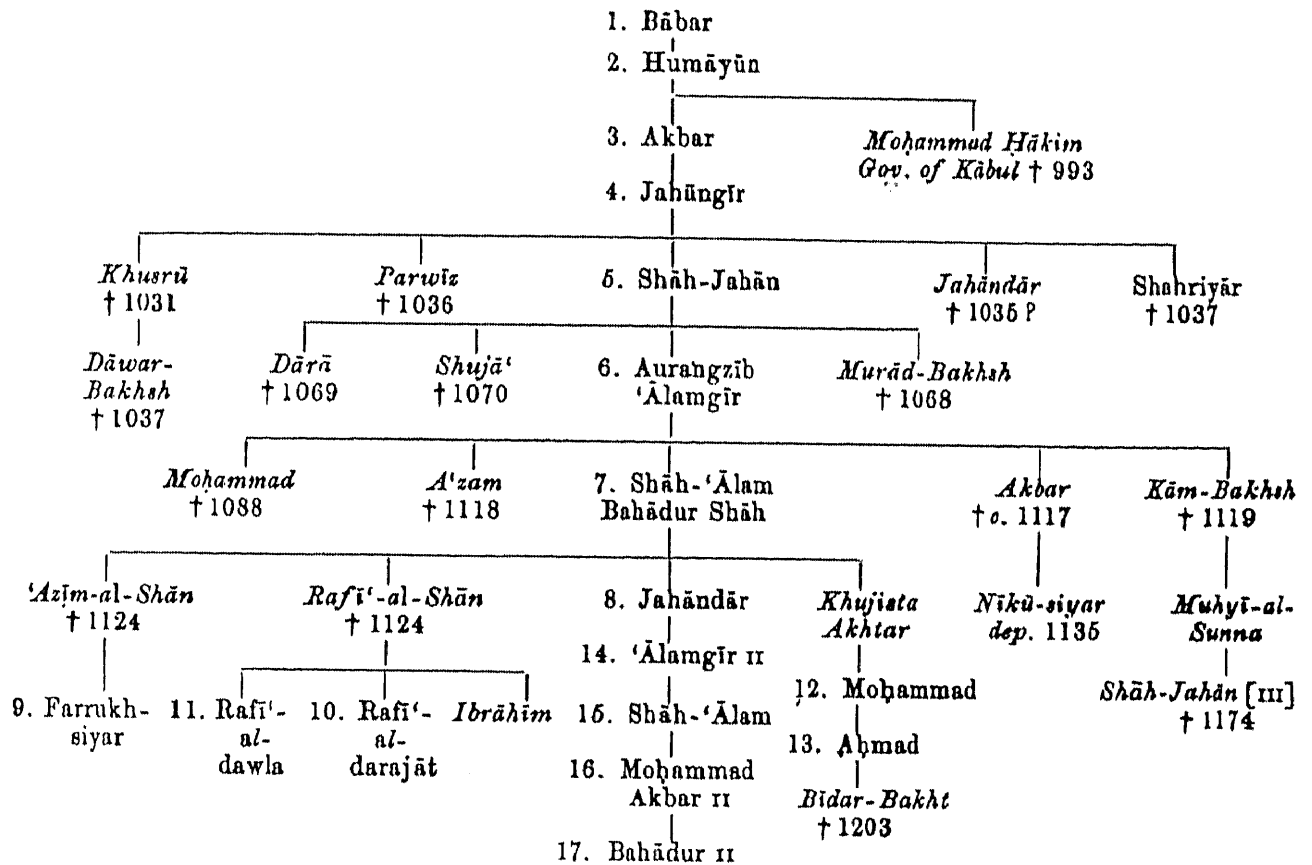
<b>President of the Court</b>	Lt-Colonel Dawes
<b>Member of the Court</b>	Major Palmer, HM 60 <sup>th</sup> Regiment of Foot
<b>Member of the Court</b>	Major Redmond, HM 61 <sup>st</sup> Regiment of Foot,
<b>Member of the Court</b>	Major Sawyers, 6 <sup>th</sup> Carabineers
<b>Member of the Court</b>	Captain Rothney, 4 <sup>th</sup> Seikh Infantry
<b>Deputy Advocate-General</b>	Major F H Harriott
<b>Interpreter</b>	Mr James Murphy, (Collector of Customs, Delhi)

### Appendix 3 Witnesses<sup>1</sup>

1. Ahsan Ulla Khan, late Physician to the ex-King
2. Ghulam Abbas, counsel for the defence
3. Jat Mall, formerly newswriter to the Lieutenant-governor at Agra
4. Captain Forrest, Assistant Commissary of Ordnance
5. Makhan, a Mace Bearer of Captain Douglas
6. Sir Theophilus Metcalf, the Resident /Chief Magistrate at Delhi
7. Hasan Askari, Pirzada
8. Bakhtawar Singh, Chuprassy in the service of the Government
9. Kishan Singh, Chuprassy in the service of the Government
10. Chuni, News-writer for the Public
11. Chuni Lal, Pedlar
12. Gulab, a Messenger
13. Mrs Aldwell, wife of Alexander Aldwell, a government pensioner
14. Mr C B Saunders, officiating commissioner and agent to the  
Lieutenant-governor
15. Major Paterson, 54th Native Infantry
16. Mukund Lal Secretary to the ex-King of Delhi
17. Captain Tytler, 38th Native Infantry
18. Serjeant Fleming, late Bazar Serjeant at Delhi
19. Captain Martineau, 10th Native Infantry
20. Mrs Fleming, wife of Serjeant Fleming
21. Mr John Everett, late of the 14th Regiment of Irregular Cavalry, and now of  
the Constabulary Force

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<sup>1</sup> The name and title of witnesses follows the form adopted in the *Proceedings*.

Appendix 4 Genealogy of Bahadur Shah<sup>1</sup>

<sup>1</sup> Reproduced from Stanley Lane-Poole, *The Mohammadan Dynasties, Chronological and Genealogical Tables with Historical Introductions*, Federick Ungar Publishing Co, New York, 1893 (1963).

**Appendix 5 Key Government of India and Military Officers 1857-58**

<b>I Calcutta</b>	
Canning, Charles John Viscount	(1812-1862) Governor-General (later Viceroy of India). Responsible to the Court of Directors, London. Approved the proceedings of the trial of Bahadur Shah.
Edmonstone, Sir George Frederick	(1813-1864) Foreign Secretary to the Governor-General. (later Lieutenant-Governor of North West Provinces).
Beadon, Sir Cecil	(1816-1880) Home Secretary to the Governor-General. (later Lieutenant-Governor of Bengal)
Peacock, Sir Barnes, QC	(1810 - 1890) Legal Member of the Legislative Council of India (1852 – 1859). Chief architect of 1857 Rebellion Laws. (Later Chief Justice of the Supreme Court at Calcutta, 1859-62 and of the High Court from 1862 - 1870). Appointed a paid member of the Judicial Committee of the Privy Council in 1872.) Member of the Judicial Committee giving judgment in <i>Rajah Saliq Ram v Secretary of State for India in Council</i> .
<b>II Agra</b>	
Colvin, Sir John Russell	(1807-1857) Lieutenant-Governor of North West Provinces 1853-1857. Issued proclamations of Martial Law under <i>Regulation X of 1804</i> in May 1857.
Muir, Sir William KCB	(1819-1905) Head of the Intelligence Department, Agra, 1857-8.

<b>III Delhi</b>	
Greathed, Hervey	(?-1857) Agent to the Lieutenant-Governor of the North West Provinces. Chief Political and Civil officer with the 'Delhi Field Force' (the British military forces which besieged and captured the city of Delhi). Recipient of instructions from Calcutta prohibiting negotiation with Bahadur Shah. Died during the assault on Delhi, September 1857.
Saunders, Charles Burslem	Acting Agent to the Lieutenant-Governor of the North West Provinces and Acting Chief Commissioner of Delhi. Prepared the case against Bahadur Shah. Testified on the status of the Kings of Delhi at the trial of Bahadur Shah.
Wilson, (Sir) General Archdale	(1803-1874) Commanding at Meerut in 1857, commanded at the Siege of Delhi from 17 July. Held responsible, in part, for authorising the capture of Bahadur Shah in September 1857.
Penny, General Nicholas	(1790-1858) Commander of the Delhi Field Force after the capture of Delhi. Authorised the appointment of the court-martial of Bahadur Shah.
Harriott, Major Frederick J	(?_ 1859) Deputy Judge Advocate General, attached to the Bengal Army's Third Light Cavalry. Prosecutor at Bahadur Shah's trial.
Hodson, Captain William Stephen Raikes	(1821-1858) Commanded an irregular cavalry named Hodson's Horse in 1857. Captured Bahadur Shah in September 1857.

<b>IV Punjab</b>	
Lawrence, Sir John	(1811-1879) Chief Commissioner of the Punjab 1853-57. (Later Viceroy of India 1863-69). Approved the proceedings of the trial of Bahadur Shah.
Temple, Sir Richard	(1826-1902) Secretary to the Punjab Government 1857-58.



### Appendix 6 Shah Alam's firman of 12 August 1765<sup>1</sup>

“At this happy time, our royal Firman, indispensibly requiring obedience, is issued; that, whereas, in consideration of the attachment and services of the high and mighty, the nobles of exalted nobles, the chief of illustrious warriors, our faithful servants and sincere well-wishers, worthy of our royal favours, the English Company, *we have granted them the Dewanny of of the Provinces of Bengal, Behar and Orissa from the beginning of the Fasal Rabi of the Bengal year 1172, as a free gift and ulumgan*, without the association of any other person, and with an exemption from the payment of the customs of the Dewanny which used to be paid by the Court; *it is requisite that the said company engage to be security for the sum of 26 lakhs a year for our royal revenue*, which sum has been appointed from the Nawab Nudjamut-dowla Bahadur, and regularly remit the same to the royal sircar; and in this case, *as the said company are obliged to keep up a large army for the protection of the Provinces of Bengal etc, we have granted to them whatsoever may remain out of the revenues of the said provinces, after remitting the sum of 26 lakhs to the royal sircar, and providing for the expenses of the Nizamut.*

It is requisite that our royal descendants the Viziers, the bestowers of dignity, the Omrahs high in rank, the great officers, the Muggaseddes of the Dewanny, the manager of the business of the Sultanat, the Jaghirdars and croories, as well the future as the present, using their constant endeavours for the establishment of this our royal command, *leave the said office in possession of the said Company, from generation to generation, for ever and ever.*

Looking upon them to be assured from dismissal or removal, they must, on no account whatsoever, given them any interruption, and they must regard them as executed and exempt from the payment of all the customs of the Dewanny and royal demands.

Knowing our orders on the subject to be the most strict and positive, let them not deviate therefrom.”

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<sup>1</sup> In Panchanandas Mukherjee, *Indian Constitutional Documents (1600 – 1918)*, (2<sup>nd</sup> ed 1918), X, XI.

**Appendix 7 Rebellion Offences**

<b>Act XI Offences</b>	<b>Application</b>
1. rebel against the Queen or the Government of the EIC	All persons owing allegiance to the British Government except natural-born British subjects or their children.
2. instigate rebellion;	
3. abet rebellion;	
4. conspire to rebel;	
5. wage war against the Queen or the Government of the EIC;	
6. attempt to wage war;	
7. instigate war;	
8. conspire to wage war; or	
9. harbour or conceal a person guilty of the above offences.	

<b>Act XIV Offences</b>	<b>Application</b>
1. intentionally seduce any officer or soldier in the service or pay of the EIC from his allegiance to the British Government or his duty to the EIC;	Any person except natural-born British subjects or their children.
2. endeavour to seduce such officer or soldier to commit any act of mutiny or sedition;	
3. intentionally excite or stir up the above to commit any act of mutiny or sedition;	
4. intentionally cause any other person to commit any such offence;	
5. knowingly harbour or conceal any person who has been found guilty of any of the above offences.	

**Appendix 8 Testimony of Charles Saunders, Acting Commissioner of Delhi<sup>1</sup>**

**Question** Can you give the Court any information as to the circumstances under which the Kings of Delhi became subjects and pensioners of the British Government in India?

**Answer** Shah Alam, Emperor of Delhi, after having his eyes put out and having suffered every indignity from the hands of Ghulam Kadir, fell into the hands of the Mahrattas in the year 1788. The Emperor, although vested with nominal authority over the city of Delhi, was kept in confinement more or less rigorous, until the year 1803, when General Lake having seized Aligarh, marched with the British troops against Delhi. The Mahratta Army drawn out at Patpanganj, six miles from Delhi, was attacked by General Lake and utterly routed. The city and fort having been evacuated by the Mahrattas, the Emperor Shah Alam sent a message to General Lake, applying for the protection of the British authorities, and on the 14<sup>th</sup> of September, the date since rendered more memorable by the successful assault in 1857, the British troops entered Delhi: from that time the kings of Delhi have become pensioned subjects of the British Government, and have exchanged the state of rigorous confinement in which they were held by the Mahrattas, to one of more lenient restraint under British rule.

The prisoner succeeded to the titular sovereignty of Delhi in 1837. He had no power whatever beyond the precincts of his own palace; he had the power of conferring titles and dresses of honour upon his own immediate retainers but was prohibited from exercising that power on any others. He and the heir apparent alone were exempted from the jurisdiction of the Company's local courts, but were under the orders of the Supreme Government.

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<sup>1</sup> Testimony of Charles Saunders, *Proceedings*, 94.

## Appendix 9 Glossary

<i>akhbar</i>	An Urdu or Hindi newsletter.
<i>bltamgha</i>	A royal grant under the seal of the native princes, recognised by the British Government as conferring a hereditary and transferable title to rent-free land in perpetuity.
<i>bna</i>	A coin.
<i>begum</i>	A princess or Muslim lady of rank.
<i>bhugawut</i>	Rebellion.
<i>chappati</i>	Unleavened bread.
<i>charpoy</i>	An Indian bedstead.
<i>chowk</i>	A square or an open place in a city where markets are held and the chief of police is generally stationed.
<i>chaprassy</i>	An orderly, peon or office messenger.
<i>dacoitry</i>	Robbery by armed gang.
<i>diwan</i>	The holder of the <i>diwani</i> . The chief financial minister of the State and of a province; in the latter charged with revenue and invested with wide judicial powers in all civil and financial causes.
<i>diwani</i>	A right to collect revenue and administer civil justice on behalf of the Mughal Emperor.
<i>fatwa</i>	The written opinion of the Muslim Law Officer of a court on a question of Islamic law.
<i>firman</i>	A mandate or order.
<i>ghazal</i>	A poem in Urdu.
<i>hakim</i>	A sage, a physician.

<i>haidari</i>	Of or belonging to Haidar (a name of Muhammad's son-in-law Ali).
<i>haveli</i>	A mansion.
<i>jagir</i>	A tenure under Mughal rule, in which the collection of the revenues of a given tract of land along with the power of government were made over to a servant of the State. The assignment could be conditional (for example, requiring some public service such as the levy and maintenance of troops) or unconditional. The assignment was usually for life, lapsing on the holder's death to the State, though often renewed to the holder's heir on payment.
<i>jagirdar</i>	Holder of a <i>jagir</i> .
<i>khas mahal</i>	Private apartments of a Palace.
<i>khilat</i>	Ceremonial Robe.
<i>Kotwal/ie</i>	A police officer, superintendent of police.
<i>lakh</i>	A numeric classifier - one hundred thousand.
<i>Mirza</i>	Honorific Title.
<i>mofussil</i>	In Bengal, the country as distinct from Calcutta.
<i>Munshi</i>	A writer, a secretary; a teacher or interpreter of Persian and Hindustani.
<i>Muslim Law Officer</i>	A person appointed by the Court in criminal law cases to give a <i>fatwa</i> on a point at issue according to Islamic Law
<i>musnud</i>	A throne.
<i>Nawab</i>	A title of rank.
<i>nazar</i>	A ceremonial present, properly an offering from an inferior to a superior.
<i>Nazim</i>	An administrator, governor or viceroy.

#### Appendix

<i>Nizamat</i>	Administration of criminal law under the Mughal system.
<i>sanad</i>	A grant, a charter.
<i>sepoy</i>	In Anglo-Indian use, an Indian soldier.
<i>Shahzada</i>	A prince.
<i>shroff</i>	A money-changer, a banker.
<i>sicca</i>	Coined money.
<i>sowar</i>	A native cavalry soldier.
<i>vakeel</i>	A person vested with authority to act for another, an ambassador, a representative, an agent, an attorney; in India, an authorised public pleader in a court of justice.
<i>zamindar</i>	Landholder.

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