

THE HISTORY AND THEORY OF INTERNATIONAL LAW



# THE LAW OF NATIONS IN GLOBAL HISTORY

C. H. Alexandrowicz

Edited by David Armitage and Jennifer Pitts

OXFORD



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*General Editors*

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In the past few decades the understanding of the relationship between nations has undergone a radical transformation. The role of the traditional nation-state is diminishing, along with many of the traditional vocabularies which were once used to describe what has been called, ever since Jeremy Bentham coined the phrase in 1780, 'international law'. The older boundaries between states are growing ever more fluid, new conceptions and new languages have emerged which are slowly coming to replace the image of a world of sovereign independent nation states which has dominated the study of international relations since the early nineteenth century. This redefinition of the international arena demands a new understanding of classical and contemporary questions in international and legal theory. It is the editors' conviction that the best way to achieve this is by bridging the traditional divide between international legal theory, intellectual history, and legal and political history. The aim of the series, therefore, is to provide a forum for historical studies, from classical antiquity to the twenty-first century, that are theoretically-informed and for philosophical work that is historically conscious, in the hope that a new vision of the rapidly evolving international world, its past and its possible future, may emerge.

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C. H. Alexandrowicz, Madras, November 1960

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## *Series Editors' Preface*

The historian of international law Charles Henry Alexandrowicz (1902–75) is today largely forgotten, but, as the present volume shows, his scholarship was in many ways prescient and offers a refreshing view with a deep historical perspective. The underlying picture of world history in many ways anticipates more recent scholarship in world and economic history. The weight Alexandrowicz attributes to Asian and African polities in their political, legal, and commercial relations with early modern Europe contradicts earlier, more Eurocentric, accounts, but it resonates very well with the work of the late Christopher Bayly, or Kenneth Pomeranz, or John Darwin, to name but a few prominent examples. Indeed, Alexandrowicz might be said to have pioneered, from the angle of the history of what he called the ‘classic law of nations,’ much that is being written under the label of global history today.

The following elements of Alexandrowicz’s underlying picture of world history deserve mention. Alexandrowicz wrote many of his most original essays and articles during his tenure at the University of Madras in newly independent India. For him, historical study was emphatically neither antiquarian nor historicist, but assumed political and normative urgency. As a result of his historical scholarship he thought that he was in a position to claim that there had existed, before 1800, a long-standing universal international order that had included as a matter of course non-European empires and states, among them newly independent states such as India. It followed for Alexandrowicz that world-historically speaking colonialism was but a blip—‘ideological cataclysm’ in the early nineteenth century had introduced a parochial period of European colonial states that acknowledged only each other as sovereigns. In the bigger historical picture, however, this was the exception rather than the rule, Alexandrowicz thought. Nineteenth- and twentieth-century colonialism emerges in Alexandrowicz’s thought in lockstep with what he considered a pernicious jurisprudential doctrine, positivism. Interestingly, it might even be said that colonialism for him appeared more intimately connected with this jurisprudential outlook than with either empire or even Eurocentrism. As David Armitage and Jennifer Pitts point out in their learned introduction, Alexandrowicz did not conceive of colonialism in terms of empire, and he did not think colonialism was exclusive to non-European continents. An Austro-Hungarian citizen by birth and of Polish background, Alexandrowicz saw the partitions of Poland in a similar light as European colonialism in Asia and Africa. There was continuity to Poland’s statehood from the partitions in the eighteenth century to 1918 (whether conceived along Roman lines in terms of *postliminium* or simply as reversion to sovereignty) as there was continuity to Ceylon’s or Madagascar’s statehood during colonial rule, and there were important parallels between the normative orders associated with the Holy Roman Empire and the Mughal Empire.

While Alexandrowicz was almost certainly wrong to claim that Asian state practice had shaped the early modern law of nations in any direct way (his example was Grotius, whose early work he thought was influenced by what he knew of East Indian norms and practice, but we now know that Grotius was not in fact so influenced), he was certainly correct in the overall picture he drew of Asian and African empires and states interacting as sovereigns with European empires and states. He was also right in giving the appropriate weight to the commercial character of these relationships, and their normative consequences. The contribution of East Indian trade and the treaty-regimes with various Asian commercial states to the development of an early modern international order was crucial to Alexandrowicz not least because of its universalist implications. What he termed the classic law of nations, that is to say the global normative order that prevailed in the centuries before the Congress of Vienna (1815), was in his view based on universal natural law, while the parochial, Eurocentric order afterward was governed by a normatively arbitrary positivism based exclusively on power politics.

Alexandrowicz's assessment of the earlier law of nations was overly nostalgic and represented the projection of a normative ideal. What he perceived as a system of reciprocity and equal sovereignty of states constrained and held together by a classic law of nations was in reality no such thing. Rather, to the extent that European states accepted reciprocity and equality in their dealings with extra-European polities they did so because they were simply not in a position to subdue these polities. They accepted reciprocity, in other words, simply because they had to, lacking the power for legal or informal subordination. Sometimes, as was the case for the Dutch in Japan from the seventeenth century deep into the nineteenth, Europeans had to accept humiliating terms simply to maintain trading relationships. Whenever there was equality and reciprocity it existed as the outcome of equilibrium or, at best, as the result of commercial sociability and enlightened self-interest. Nor was there of course ever a perfectly reciprocal 'Westphalian' *ius publicum Europaeum* even in Europe, as Alexandrowicz would have been the first to admit.

When Alexandrowicz's vision of a universal law of nations did at last become a reality of sorts, after decolonization, this universalization of international law paradoxically came about, as Jörg Fisch has pointed out, as the result of European weakness, not strength. According to Fisch, the decline of European power brought about a normative system of universal sovereign equality and reciprocity which, albeit—*pace* Alexandrowicz—recognizably European in origin, had even in Europe only ever been accepted reluctantly, if that. While European states had power, they prevented this normative order from having any force in their dealings with the outside world, but once they were sufficiently weakened, it was a normative order that seemed very attractive to the newly decolonized states. 'International society has become a worldwide system not due to European power, but in consequence of European decline', according to Fisch. To the extent that this system represents a universal ideal of inherent normative attraction that is not inherently or specifically European it is very much congenial to the universal order at once described and aimed at by Alexandrowicz: his classic law of



nations. The present collection of Alexandrowicz's little known essays and articles complete with a scholarly introduction will undermine our deeply ingrained positivist myopia and will make us see the very category of Eurocentrism from a fresh, cosmopolitan Central European angle.

Benjamin Straumann

*New York City*  
*August 2016*



## *Preface*

In recent years there has been a growing awareness of the need to write a global history of law of nations that disengages from parochial national and regional histories. It is hoped that these developments will bring centre-stage the work of Charles Henry Alexandrowicz, a scholar who was among the first to conceptualize the history of international law as that of intersecting histories of different regions of the world. Alexandrowicz was aware that, while the idea of writing a global history of law of nations is liberating, there is no guarantee that it will not become the handmaiden of contemporary and future imperial projects. What were needed were critical global histories that provincialize established Eurocentric historiographies and read them alongside other regional histories.

Alexandrowicz began writing on the history of law of nations in Asia during a decade-long stay in India (1951–61). He arrived there a mere four years after India had attained independence from British rule. These were early and crucial years in the life of the nation. At the time, there was some churning going on in the infant Indian discipline of international law. While there were only a handful of ‘international lawyers’ it was felt there was a need to decolonize the history of international law through writing about the prevalence of rules of international law in pre-colonial India. The move was important in three different contexts. First, by describing a common corpus of inter-state rules of conduct in pre-colonial India, international law scholars could affirm the civilizational unity of India. Second, such an effort helped demonstrate that pre-colonial Indian states dealt with European nations on an equal footing, thereby sustaining the growing view that independent India and other Asian states should play a central role in world affairs. (This sentiment received a fillip when India, along with Indonesia, played a leadership role in the 1955 Bandung Conference.) Third, there was the ongoing debate as to whether newly independent states should subscribe to an international law that was colonial in origin. In this respect the claim that Asian states contributed to the development of international law lent coherence to the proposed dualistic approach—accepting international law but simultaneously striving to transform it for the benefit of peoples of third world nations. It also gelled with the view that the problem with modern international law was its colonial content and not its inherent nature and character. The significance of the work of Alexandrowicz lies in the fact that he addressed all these issues through his pioneering scholarship.

Alexandrowicz was sensitive not only to the postcolonial context in which he found himself but more generally to the fate of weak nations derived from the history of his native country of Poland. The combination of parallel situations and converging biography gave him a unique vantage point from which to offer a distinctive history of international law. By the time he started working on the history of the law of nations, the standard narrative of international law as a product of



European Christian civilization had long been part of western textbooks such as Lassa Oppenheim's *International Law* (1905, and later editions). The first edition of Arthur Nussbaum's well known but Eurocentric *A Concise History of the Law of Nations* (1947) had also just been published. These texts contained what may be called monologic histories of international law, which continue to be written even today, underline the continuing significance of his work.

Against such unilateral histories, Alexandrowicz proceeded to write a dialogic history of international law. He spent time researching unpublished archives of the Record Office in Madras, where he resided, and in other cities, to understand the engagement of India and Asia with international law and the role it had played in the relationship with European nations. In the years that Alexandrowicz was writing, contributions were being made by Indian researchers such as K. A. N. Shastri, Hiralal Chatterjee, M. K. Nawaz, and C. J. Chacko, the last of whom delivered the Hague Academy lectures in 1958 on the subject of 'India's Contribution to the Field of International Law Concepts'. His own theses were validated during his lifetime by the International Court of Justice in the *Right of Passage over Indian Territory* case (Portugal–India) (1960) which *inter alia* treated as valid a treaty concluded in 1779 between Portugal and Maratha rulers.

Alexandrowicz distinctively recognized that colonialism did not influence the evolution and development of international law in a singular way. The colonizers encountered different situations in different regions and responded to them accordingly. While colonialism and imperialism are necessarily central to all accounts of histories of modern international law written from a non-western perspective, these often conflate different encounters that have distinct trajectories. It is however important not to flatten out what is a rugged field. For instance, the history of the law of nations in what Alexandrowicz called the 'East Indies' assumed a different course from that in sixteenth-century Spanish America. In the circumstances, he was not interested in fashioning a general theory but narrated a regional history of international law that needed to be taken into account in telling the global history of the law of nations. He documented and evidenced the view that Asian states were active participants in the shaping of the law of nations in the pre-colonial period. This claim was not about Asia having international law in the manner of Europe, as it is sometimes interpreted; it was instead a necessary corrective to narrow and apologist histories.

The historian Eric Hobsbawm observed that in the non-western world academic history was either absent or did not come of age till the last quarter of the twentieth century. Today, as non-western histories mark their presence, there is for the first time the possibility of writing an authentic global history of law of nations as these histories address crucial absences and silences in the official history written in the western world. It is therefore ironic that just as the turn to history has come about in the field of international law the interest in it has waned in Asia and Africa. The perception is that while attempts to retrieve pre-colonial history had a certain role to play in the initial years after independence there are more urgent issues to attend to today. Such a view is myopic as the need for retrieving pre-colonial histories is necessary in order to shape a

transcivilizational approach to international law. For this we need to undertake detailed excavation of the culture, practices, and rules which over the centuries constituted law of nations in different civilizations of the world. The recovery of regional histories of international law must therefore be an ongoing exercise as professional historians make new materials available on the pre-colonial history of African and Asian nations. It hardly needs to be added that a transcivilizational approach will greatly strengthen the fabric of contemporary international law. A glimpse of such an effort can be seen in Sri Lankan Judge Christopher Weeramantry's opinions on the International Court of Justice in the *Legality of Nuclear Weapons* (1996) and the *Gabčíkovo-Nagymaros Project* (1997) cases.

Alexandrowicz's work profoundly complements new non-western histories of international law that reveal continuity in the conceptual and doctrinal apparatus of the discipline in the colonial and postcolonial worlds. The two histories—of the existence of international legal practices in the pre-colonial world and the continuing reproduction of imperial doctrines and concepts in the present—have the common objective of displacing a provincial history of international law, the one through recording past practices in the non-western world and the other by examining how European international law came to be constituted through its engagement with the colonial project. Alexandrowicz's history provides an important corrective to an over-elaborated thesis about imperialism that denies agency to both the pre-colonial and postcolonial states. In short, anyone interested in the history of international law, or in understanding how contemporary international law can play a progressive role, cannot afford to neglect his writings. Any history of the writing of a dialogic, plural, and democratic history of international law must give Alexandrowicz pride of place. It is worth recalling here that his work had a profound impact on Indian scholars like R. P. Anand who carried forward his legacy even as he made his own distinctive contribution to the telling of the story of international law.

It is hoped that this collection will make Alexandrowicz's writings more widely available and read. David Armitage and Jennifer Pitts have rendered a great service to the community of historians and international lawyers by reprinting his seminal essays. Their perceptive introduction succinctly sums up the context, issues, problems, and questions that engaged Alexandrowicz, as well as some of his central theses. His writings are a gold mine waiting to be explored: it is surprising that this work has not received, from international lawyers, the kind of attention that the writings of other distinguished European scholars, Hersch Lauterpacht or Hans Kelsen for instance, have gained for their reflections on the function of law in the international community. Alexandrowicz contributed to the effort of promoting the idea of international rule of law by rejecting a Eurocentric history and theory of international law. It is particularly disappointing that the non-western world has not yet paid the tribute it should have to this extraordinary scholar who inspired so many Asians and Africans to write the history of international law in their respective regions. We cannot afford to forget his trailblazing contributions.

B. S. Chimni

