

Violence, Sovereignty, and the Making of Colonial Criminal Law in India, 1857-1914

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Abstract

This thesis explores the relationship between law, sovereignty and violence in colonial India in the period 1857-1914. From murder, to corporal punishment, to jubilee amnesty, this thesis highlights two gaps within the scholarship of nineteenth-century Indian legal and political history. Firstly, that histories of colonial law have been reluctant to provide a political analysis of the relationship between crime, sovereignty and identity in the everyday. Secondly, the much-noted shift in political discourse from East India Company to British Crown rule in histories of imperial political philosophy has left unexplained the relationship between liberalism, the codification of criminal law, and the production of colonial legal-political subjectivity. This lacuna in scholarship has resulted in the construction of a limited theoretical framework for understanding the underlying politics at play in the histories of crime, law, and punishment. Ultimately this work provides such framework, allowing the writing of law and the act of crime to be brought into histories of political philosophy and colonial sovereignty. As a revisionist history of colonial politics and law the thesis therefore breaks new ground in respect to our broader understandings of colonial sovereignty and politics, the practice of colonial law, and the constitution of the colonial state in India.

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the most stressful stages of writing, she selflessly made the hardest parts of this process easier. I promise to return the favour next year.

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Notes on Citation and Sources

For secondary literature, I have followed the style guide for the Modern Humanities Research Association.

Records from the Allahabad High Court were located in the Criminal Records Room, and mainly contained judgements offered in response to criminal appeals lodged at the Court. Given the condition of the sources, and the variable information from record to record, I have attempted to provide as much information as possible concerning individual cases. Where feasible I have included the title of the case, the appeal number, and the date of the decision.

For published case records I have followed the standard citation format. To offer an example:

Queen-Empress v Mohan, ILR 7 All 626 (1886).

Case name, Name of Series, Volume Number, Court Name, Page Number, (Year of Publication).

Abbreviations

AB	Agra Branch
ALB	Allahabad Branch
AHCCRR	Allahabad High Court Criminal Records Room
BL	British Library
IOR	India Office Records
LB	Lucknow Branch
LCLA	Liverpool Central Library Archives
NAI	National Archives of India
NMML Nehru	Nehru Memorial Museum and Library
UPSA	Uttar Pradesh State Archives
VB	Varanasi Branch
AWN	Allahabad Weekly Notes
CrPC	Code of Criminal Procedure
ILR All	Indian Law Reports, Allahabad Series
ILR Bom	Indian Law Reports, Bombay Series
ILR Cal	Indian Law Reports, Calcutta Series
IPC	Indian Penal Code
<i>Hansard</i>	Hansard Parliamentary Debates

Glossary

adalat- court of law

Azad- free

badmaash- person of bad character

chapati- roti bread

chaukidar- local watchman

diwan- title of Mughal officer of revenues and finance.

dhoobi- washerman or washerwoman

gandasa- sharp weapon

khatia- pole of a husking machine

kulhari- axe

mofussil- interior of the country

mofussil faujdari adalat- lower criminal court for Bengal interior

panchayat – an arbitrative assembly

sadar nizamat adalat- superior criminal court of Bengal interior

sati- widow immolation

Swatantra- independent

tashir- punishment involving public humiliation

thuggee- organised gang of professional criminals, usually associated with robbery and murder.

vakil- lawyer, native authorised pleader

zamindar- a hereditary landholder

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Introduction

Law within very broad limits is whatever you please to make it.
James Fitzjames Stephen, Minute on the Administration of Justice, 1870¹

This thesis is a study of colonial sovereignty and criminal law in colonial India between the period 1857 to 1914. Taking with critical caution James Fitzjames Stephen's confident assertion that law could be made as one pleased, it was undoubtedly true that imperial lawmakers, particularly after the rebellion of 1857-58, were afforded legislative opportunity which they were denied in the metropole.² Empowered by a newly assembled administrative apparatus and energised by a shifting imperial political landscape, this period witnessed a complete overhaul in the function, structure, and operation of criminal law in India. At the heart of this transformation, and central to this thesis, were two key moments.

Firstly, following the quelling of the rebellion, the colonial state organised the transfer of sovereignty from the Mughal King to Queen Victoria. This was instigated by the effectual show trial of the King, and concluded by the Queen's Proclamation, both in 1858. Secondly, and in response to this change, the colonial state remodelled the colonial legal subject in relation to a newly framed, and legally measured, idea of loyalty. This was achieved through the implementation of the Indian Penal Code (IPC) between 1860-62, and was premised on the fulfilment of earlier promises made by the imperial sovereign to Indian society.³ Rising from the ashes of violent rebellion was thus a new legal subject, a new sovereign, and a peculiarly colonial idea of social contract binding the two together. Understanding the evolution of this legal relationship across the late nineteenth and early twentieth century, and the nature and constitution of the colonial sovereignty which supported it, is the purpose of this study.

Where this thesis begins unpacking this question is in an incipient logic located between these two seemingly antagonistic moments of law outlined above. The first event, the transfer of sovereignty from Mughal to British, was dependent on an exceptional form of legality, possible only in the violent political milieu of the rebellion and emergency law. The second, the codification of penal law, was posited as the modern antidote to arbitrary and violent justice, replacing uncertainty with uniformity. Though various attempts have been made to understand colonial law, sovereignty, and violence in the period after the rebellion, this thesis argues that this history must be understood as a direct product of these two foundational and reciprocal moments. This is not to simply state that the excessive violence of the rebellion paved the way for the subsequent declaration of peace and codification of law, although

¹ James Fitzjames Stephen, 'Minute on Administration of Justice' 13 September 187, British Library (Hereafter BL), India Office Records (Hereafter IOR), L/PJ/5/437, p. 63

² James Fitzjames Stephen, jurist and legal member of the Legislative Council in India while successfully codifying significant amounts of Indian law, failed in his attempt to codify the English penal code. See James A. Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (London: Macmillan Press, 1983), pp. 199-205.

³ The IPC was first enacted by Act No XLV of 1860, however it didn't come into full operation across India until 1 January 1862.

this is undoubtedly true. It is more importantly to argue that from these two events, a recursive logic between legal norm and exception, created through violence, was inserted into the foundation of the modern colonial legal regime.⁴ The construction of a legal universe of standardised rules and norms in the shape of the IPC was therefore never about reducing the role of discretion and violence in colonial law. Rather, the codification of law was primarily about the colonial state more carefully structuring the spaces of exception where violence and discretion could function.

To do this, the thesis seeks to move beyond the two dominant approaches traditionally employed to analyse the period. The first of these has been to situate penal legal codification and post-rebellion colonial politics within a deeper political and intellectual history of imperial liberalism. Positioned in the context of a series of mid-century imperial crises, this scholarship plots an imperial intellectual trajectory across a rough nineteenth century arc, charting an increasingly conservative brand of liberalism.⁵ As this strain of politics travelled through the imperial world, scholars have noted that the language of liberal inclusion was often only possible through simultaneous practices of exclusion, varying across time and space.⁶

The second approach has been inspired by postcolonial theory. Focusing upon the production of colonial knowledge and discourse analysis, this scholarship has argued that imperial liberalism and the colonial state were dependent upon the sustained production of racial difference.⁷ In many ways colonial law acted as the example *par excellence* here. Justified as a pedagogical tool guiding colonial society towards modern political citizenry, colonial law simultaneously acted as the very instrument maintaining the racial ceiling which prohibited the realization of this modern political society. Law was thus the archetypal colonial trap, promising with one hand as it created the conditions for denial on the other.⁸

While both positions have offered key insights into the political rationalities that underpin colonial law and its wider governance, neither pay credence to the capacious yet simultaneously contingent nature of colonial sovereignty and law which emerged in this period. In the case of

⁴ For the relationship between norm and exception see Giorgio Agamben, *State of Exception*, trans. by Kevin Attell, (Chicago: University of Chicago, 2003). Though Agamben posits the state of an exception represents ‘an emptiness of law’ this thesis suggests that there was a more complicated and overlapping relationship between law and norm with sovereignty and exception. For a useful critique see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, (Cambridge: Cambridge University Press, 2010), pp. 279-299.

⁵ C. A. Bayly, ‘Maine and Change in Nineteenth-Century India’ in *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, ed. by Alan Diamond (Cambridge: Cambridge University Press, 1991), pp. 389-399.

⁶ See Duncan Bell, *Reordering the World: Essays on Liberalism and Empire*, (Princeton: Princeton University Press, 2016), pp. 19-61; Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Imperial Liberalism* (Princeton: Princeton University Press, 2010); Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999); Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005).

⁷ See Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

⁸ For the most famous elucidation of this tactic of perpetual deferral see Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2007).

intellectual histories, the prioritisation of political theory and text often fails to accommodate the diverse and complicated ways these ideas translated into legal practice. Similarly, the postcolonial critique of law frequently concludes by confirming the notion that race and orientalism were at the centre of colonialism, but fails to cogently trace the multiple, and at times conflictual, articulations of difference that were produced. Moreover, in both these positions it is possible to draw out an implication that the discourses of colonial knowledge, many of its corresponding legal and political practices, and the overarching logic of colonial sovereignty, were produced in response to a relatively passive and dislocated Indian social.

To avoid simply parroting the conclusions reached by these other frameworks, and to accommodate the Indian social into this history more appropriately, this thesis compares a number of different frames of penal law. Traversing a range of legal settings, the juxtaposition of these varied forms of law is an approach, to some degree, influenced by the methodological insights of legal pluralism.

Currently being profitably applied in global legal history and within historical scholarship on South Asia, legal pluralism, in short, is the recognition of multiple legal orders which operate outside, and at times in relationship with, the laws of the state.⁹ Amongst other things, this methodology has been most effective in de-centring the general primacy given to statist conceptions of law in historical research. While this thesis is itself concerned with the production of state law, the notion that the law can be broken down into a plurality of normative orders, even when thinking through the legal system produced by the nineteenth-century colonial state, can be a useful lesson. In this case for instance, the thesis compares legislation making, case-law, and the routinisation of royal clemency, and positions these frames of state-centred criminal law as a combination of interacting legal practices acting under the overarching umbrella of the state.¹⁰

Breaking the colonial criminal law down into these various layers presents the possibility of locating constants which may exist across different practices of law and punishment. In the context of an enthusiastic drive towards legal codification, the one constant which permeated this cross-section of law was a regular recourse to discretionary forms of legal authority. At the key junctures analysed in this thesis, colonial law and punishment would remain guided by interpretations of ambiguous and unstable legal concepts, centred on colonial ideas of allegiance, loyalty, and the spirit of law. Whether in forgiving and punishing rebels, sentencing murderers, or corporally punishing criminals, the colonial

⁹ The embrace of legal pluralism on a global scale, and the myth of the simplification of legal orders into the nineteenth century on the basis of civilization has been forwarded in the work of Lauren Benton. See Lauren Benton, 'Historical Perspectives on Legal Pluralism', *Hague Journal on the Rule of Law*, 3 (2011), pp. 64-65 and, Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2004), pp. 6-12; For the application of the insights of legal pluralism in South Asia see Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947* (Cambridge: Cambridge University Press, 2014), pp. 6-7, 41-44.

¹⁰ See Margaret Davies on state law being made up of plural elements, but not reflecting an example of legal pluralism, Margaret Davies, 'Legal Pluralism' in *The Oxford Handbook of Empirical Legal Research* ed. by Peter Cane and Herbert M. Kritzer, (Oxford: Oxford University Press, 2012), pp. 817-818.

penal law systematically transgressed its regulated norms in order to judge subjects along these fuzzy and ultimately uncodifiable lines.

Mapping these pockets of discretionary legal authority across the period, the thesis therefore uses this recursive colonial relationship between the norm and the exception to examine a new form of colonial sovereignty emerging at this juncture. Built upon a legal scaffold, the thesis argues that this sovereignty targeted the Indian population, seeking to more precisely structure violence and secure colonial power in India. However, while this new post-rebellion framework for law and governance enabled the colonial state greater penetration in its attempts to manage Indian society, as this thesis will also show, these discretionary fault lines became contestable points from which portions of Indian society could begin co-opting the legal system, piercing this structure of sovereignty. In chapters three and four this is shown to have had tangible implications for the gendered construction of colonial legal subjects, while chapters five and six explore its centrality for ideologies of anti-colonialism and nationalism.

To elucidate this argument further, this introduction will offer a critical overview of the key related literature, focusing primarily upon colonial violence and its relationship to law. It is followed by an explanation of the methodological framework employed, and concludes with a brief introduction of the chapters.

Colonial Law and Violence: The Historiography

The relationship between law, politics, and society in historical studies was productively opened up by E. P. Thompson in his seminal study of the Black Act in eighteenth-century England. Tracking the ways in which law could be employed as an instrument to further the interests of a property-owning political class, Thompson effectively demonstrated that the law can only be meaningfully understood when the wider social and political context of its history is properly considered.¹¹ This work, however, holds an ambiguous position in the historiography of colonial India. On the one hand, the study provided a formative framework to help understand the political rationale guiding ideas of emergency, the production of anxiety, and the state's legal response which often followed. Moreover, writing from a Marxist position, Thompson's nuanced concern with the history of class drew out the deeper connections between the production of a modern legal structure and the perpetuation of finely engrained unequal social relations.¹²

Nonetheless, with the body of his analysis complete, Thompson's postscript remarks on the rule of law described what he recognised as an 'unqualified good' which had been delivered to society through the construction of modern English law.¹³ Representing to many a seemingly redemptive

¹¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Penguin, 1990).

¹² Id., pp. 190-218.

¹³ Id., p. 266.

historical vindication to the wider story he had traced, and referencing the spread of this system across the imperial world, his comments irked scholars of colonialism. Rather than recognising this ‘unqualified good’ in the historical narrative produced, critics saw shades of a liberal discourse in Thompson’s conclusion that seemed unerringly similar to the imperial liberalism of the previous century.¹⁴ As part of an effort to re-orientate the historical lens from what Ranajit Guha called the ‘hallucinatory effects’ of ideology which he felt guided Thompson’s remarks, recent scholarship has more forcefully highlighted the violence underpinning the implementation and maintenance of colonial legal structures.¹⁵

In what is now a significant body of scholarship on colonial violence and criminal legal history, significant contributions have been made to our wider understanding of colonial rule.¹⁶ This has been particularly the case in attempts to historicize the blurry boundaries used to differentiate the legitimate and illegitimate use of force in colonial society. While some historians have taken a broader perspective on law and crime, a large bulk of this work consists of biographical investigations of an individual colonial legislation, outlining the politics behind its production and practice.¹⁷ In relation to punishment and violence many such histories have focused on laws which expose tensions between a liberal political discourse of colonial rule, and a number of its jarring practices. Amongst these the Criminal Tribes Act of 1871 is often considered a key example, formalising into law the idea of the inborn criminal.¹⁸ Other studies have traced a similarly orientalist logic which underpinned legislations and penal efforts, ranging from earlier attempts to eliminate *thuggee*, the codification of the idea of dangerousness (located in the habitual figure of bad-livelihood), to the crime of female infanticide.¹⁹

Connecting these histories is a method which takes a single piece of legislation as an acute analytical entry point into the relationship between society, law, and politics, later zooming out to offer

¹⁴ See Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India*, (Cambridge: Harvard University Press, 1997) p. 67. For a more sympathetic discussion of Thompson’s analysis, and a critical review of Ranajit Guha’s own critique, see Benton, *Law and Colonial Cultures*, pp. 253-265.

¹⁵ Guha, *Dominance without Hegemony*, p. 67.

¹⁶ For a recent overview of the wider field of South Asian legal history see, Mitra Sharafi, ‘South Asian Legal History’, *Annual Review of Law and Social Science*, 11:1 (2015), pp. 309-336. For a thorough historiographical survey of colonial punishment see Taylor Sherman, ‘Tensions of Colonial Punishment: Perspectives on Recent Developments in the Study of Coercive Networks in Asia, Africa and the Caribbean’, *History Compass* 7:3 (2009), pp. 659-677.

¹⁷ What remains the most important example of this broader perspective is Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998).

¹⁸ See Sanjay Nigam, ‘Disciplining and policing the ‘criminals by birth’, Part 1: The Making of a Colonial Stereotype- The Criminal Tribes and Castes of North India’, *The Indian Economic and Social History Review*, 27:2 (1990), pp. 131-164; Sanjay Nigam, ‘Disciplining and policing the ‘criminals by birth’, Part 2: The development of a disciplinary system, 1871-1900’, *The Indian Economic and Social History Review*, 27:3 (1990), pp. 257-287.

¹⁹ For *thuggee* see Kim Wagner, ‘The Deconstructed Stranglers: A Reassessment of Thuggee’, *Modern Asian Studies*, 38:4 (Oct, 2004), pp. 931-963; Radhika Singha, ‘“Providential” Circumstances: The Thuggee Campaign of the 1830s and Legal Innovation’, *Modern Asian Studies*, 27:1 (1998) pp. 83-146; For bad livelihood see Radhika Singha, ‘Punished by Surveillance: Policing “dangerousness” in colonial India, 1872-1918’, *Modern Asian Studies*, 49 (2014), pp. 1-29; For female infanticide see Padma Anagol, ‘The Emergence of the Female Criminal in India: Infanticide and Survival under the Raj’, *History Workshop Journal*, 53 (2002), pp. 73-93.

commentary on the wider nature of colonial law.²⁰ This scholarship, premised upon what we might consider an ‘in to out’ methodology, has proven useful in exploring the various legal innovations fashioned during colonial rule. Taken as a collective, this body of work has also been vital in sketching out the larger contours of a complex colonial legal regime, giving us a better picture of its constitution, underlying logics, and evolution over time. Nonetheless, overestimating the importance of legislation in the history of law, a result of what Mitra Sharafi has termed a ‘codification fallacy’, can constrain the way we approach the role and history of law in South Asia.²¹ It will be argued in this thesis that another consequence of this methodology is a tendency towards creating echo chambers within sub-sets of legal history. This is most visible in a reoccurring tendency to foreground one category of historical analysis, be that class, caste, race, gender, or age, at the expense of first seeking a more integrated determining logic which may be present across these different histories. This thesis suggests that to offer productive balance to this literature, a new framework to engage with the question of law and colonial violence can bear fruit.

To clarify this methodological concern, and to stress the particular framework this thesis seeks to employ, a critical comparison of the contributions and arguments offered in two recent monographs can act as a useful springboard.

The first, Elizabeth Kolsky’s *Colonial Justice in British India*, sheds light on the extensive historical record of European violence in colonial India. Following decision after decision in the colonial courtroom the study reveals the virtual impunity offered to Europeans guilty of violent acts directed towards Indian bodies.²² Taking the wayward community of non-official Europeans in colonial India as her case study, this impunity is shown to cut through class, leading Kolsky to conclude that ‘the tension between the promise and practice of colonial law snapped around trials of violent Britons’.²³

This acutely legalistic engagement with Partha Chatterjee’s instructive ‘rule of colonial difference’ offers a number of useful insights that we might build upon.²⁴ Firstly, by dragging the pervasive violence of Europeans from the peripheries of imperial historiography, the work ensures that these ‘micro-moments’ are not imagined as tangential or marginal episodes in the history of colonial governance.²⁵ Following the legal procedures that made the informal sanctioning of unofficial violence possible, the study suggests that this quotidian racialised violence was instead a constitutive component

²⁰ For an overview of the various categories of criminals, see Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andamans* (New Delhi, Oxford University Press, 2000), pp. 37-85.

²¹ Sharafi, *Law and Identity in Colonial South Asia*, pp. 9-10. For the pervasiveness of law and the restricted ways in which scholars often engage with it in historical perspective see Upendra Baxi’s early analysis of the Subaltern Studies. Upendra Baxi, ‘Discussion- ‘The State’s Emissary’: The Place of Law in Subaltern Studies’, in *Subaltern Studies VII: Writings on South Asian History and Society*, ed. by Partha Chatterjee & Gyanendra Pandey, (New Delhi: Oxford University Press, 1993), pp. 247-264.

²² It is relevant to also note the work of Jordanna Bailkin who offered earlier insight on this theme. Jordanna Bailkin, ‘The Boot and the Spleen: When was Murder Possible in British India?’, *Studies in Society and History*, 48 (2006), pp. 462-493.

²³ Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010), p. 210.

²⁴ Chatterjee, *The Nation and its Fragments*, pp. 14-34.

²⁵ Kolsky, *Colonial Justice in British India*, p. 3.

of colonial rule, simultaneously sustaining empire as it undermined it.²⁶ Here the violence of this community, originating from outside the formal confines of the colonial state, is located within the broader structure of colonial law, and by implication, representative of colonial violence. In doing so the work effectively blurs the lines used to demarcate state from society in colonial conditions.

Yet putting aside the significant and timely nature of this research, the scope of the material at times feels too narrow for the holistic claims on colonial law and violence being made. Symptomatic of this, and as chapter two of this thesis will argue, the assertion that the codification of criminal law predominantly served to regulate one form of racialised violence underestimates the context of codification, and the concerns of managing a wider population.

We can similarly question whether this useful rethinking of the category of ‘colonial violence’ has been employed to its full potential by focusing upon a single class of violence. In this case, if we begin by immediately accepting Partha Chatterjee’s broad position, that race marked the limit point of colonial modernity, Kolsky’s study successfully historicizes the policing of that threshold at the coalface of racial difference. Yet if, as is posited, a history of violence cannot be fully comprehended by jumping ‘from one cataclysmic event to the next’, we may ask if that same history is served considerably better when the principal focus is another critical breaking point between the colonial discourse of a ‘rule of law’, and its practice.²⁷ In prioritising this race-based discourse analysis of legal practice, I would argue the danger here is not merely in downplaying the way colonial law regulated manifold and concurrent forms of violence, but also, the possible implication that the maintenance of this racial limit was detached from a thicker social context. In sum, extrapolating the logic tying together colonial violence, law, and racial difference from this singular category of crimes inadvertently restricts our ability to expose the more insidious structuring of violence and exception occurring along multiple and intersecting axes of power asymmetries.²⁸

One approach to begin accommodating this wider story within the category of ‘colonial violence’ and the history of colonial law is to redeploy the argument Kolsky herself makes, but consciously broadening the breadth of its scope first. For Kolsky, positioning tacitly legitimised nonofficial race-based violence within the colonial order is justified by the various ways this violence supported the overarching political sovereignty of the British in India. Yet what is also revealed is the Weberian model of a sovereign state, one that seeks to monopolize the legitimate use of physical force within society, is often in practice reliant upon outsourcing its sovereign violence to those beyond its formal control, informally legitimizing their ad hoc transgressions.²⁹ If we understand this set of

²⁶ Id., p. 229.

²⁷ Id., p. 4.

²⁸ These insights draw on the work of intersectional legal scholarship. See for instance, Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (London: Routledge, 2000) p.18: See also Catherine A. Mackinnon, ‘Intersectionality as Method: A Note’, *Signs*, 38:4 (2013), pp. 1019-1030.

²⁹ See Max Weber, ‘Politics as Vocation’, in *The Vocation Lectures*, trans. by Rodney Livingstone, (Indiana: Hackett Publishing, 2004), p. 33.

compromises and negotiations as a process of nesting sovereignty in individuals, communities, and ideas to protect the state's paramount sovereignty (what will be unpacked in this thesis as an aggregated form of sovereignty), informal European violence was legitimised by the colonial state to protect the race based ideologies of colonialism. In practical terms, this supported the community in their role in the informal administration of colonial governance.

Nonetheless if this outsourcing of sovereignty was palpably obvious in the case of European violence, a quasi-tolerance of other forms of non-state violence was, if in lesser degrees, visible across a wide range of criminal transgressions. Alongside and in association with colonial ideas of race, colonial law was also intensely responsive to identity markers which included the aforementioned class, caste, gender, and age. With this in mind, we may take a wider variety of legal cases which reflect subtler or limited informal legal sanctioning, to be also informed by this wider political rationality guiding the colonial legal order, and in turn, under the umbrella of 'colonial violence'. This nesting process then becomes a strategic and relative investment of political capital and sovereignty across society, heightening and restricting the capacity of individuals to co-opt the colonial legal machinery at various points. This was shaped in large part to reinforce predetermined ideas of colonial knowledge, but could also represent entry points for certain sections of the Indian social to begin negotiating the colonial law for other purposes.

In these terms, if we can recognize a permanent investment of political capital in the identity of the white nonofficial, allowing their violence to go unpunished in colonial India, we should look at other legal practices which recognised, reaffirmed and redistributed an uneven economy of political capital through the varied cultures of punishment in criminal law. With colonial law providing the state's primary infrastructure and instrument to organize and police society, colonial violence can here be reframed beyond singular examples of physical or epistemic violence, and positioned as an interwoven matrix of actions and discourses, collectively structured to sustain colonial sovereignty in India.

Placing sovereignty at the heart of this analysis brings the thesis to another set of literature. Renewed attention to the question of sovereignty in Indian history has been developing at this burgeoning intersection connecting law with a wider reassessment of the role of colonial violence. Pointing to the regular suspensions of the 'rule of law' in the colony, various violent episodes have been positioned as corollaries to the contradictions inherent to imperial liberalism, and the manifestation of anxieties deeply embedded in colonial rule.³⁰ The ease with which the colonial state designated subjects as killable has been used to thus stress the essential violence its rule was premised upon. Mark Condos for instance has shown that the Murderous Outrages Act, a law which allowed the summary execution of the 'fanatic', was no anomalous legislation but represented a more ubiquitous violence constituting

³⁰ For colonial governance and anxiety see, Jon Wilson, *The Domination of Strangers: Modern Governance in Eastern India, 1780-1835*. (New York: Palgrave Macmillan, 2010). See also the important earlier article by Ranajit Guha, 'Not at Home in Empire', *Critical Inquiry*, 23:3 (1997), pp. 482-493

colonial law.³¹ Similar arguments have also been made connecting sovereignty to earlier laws and punishment practices related to thuggee.³² While these histories have again focused upon a single legislation, Nasser Hussain's *Jurisprudence of Emergency* remains the most sustained and far-reaching engagement with the topic.

Hussain's study is an intellectual and legal history of the law of emergency, with a predominant focus on colonial India. In a theoretical tradition stretching back to Carl Schmitt, Hussain recognizes sovereignty in the 'points of necessity' where the normative legal procedure was suspended. Using the fraught application of *habeas corpus* and a study of the violence of the Amritsar massacre, Hussain lucidly argues that numerous racial, cultural and political discourses were employed, what Karuna Mantena may term 'alibis of empire', which allowed for the regular suspension of legal norms.³³ Importantly, if the regularity of these suspensions ostensibly undermined the language of liberal politics which colonial rule was justified with, the importance of these norms were never 'summarily extinguished' in colonial political discourse.³⁴ Here the study reaches a critical quandary within legal history that has also reverberated through political theories of empire and liberalism more broadly. Namely, whether the violence enacted in imperial regimes to defend broadly defined liberal projects were internal to that politics, or a warped reincarnation of that ideology scarred by a series of episodic aberrations.

From the standpoint of law, Hussain concludes by positioning the state of emergency and the suspension of legal norms as internal to the function and constitution of the colonial 'rule of law'. Returning us to the question of sovereignty, martial law is thus described as 'not the punishment of the guilty, not the end to specific transgressions, but the restoration of a general condition.'³⁵ Though his primary focus remains extraordinary colonial violence, Hussain importantly stresses that this sovereign logic transcended any distinctive sphere of exceptionality and should instead be read as a circular arrangement between the norm and the exception, reflective of an 'arrhythmic register of sorts'.³⁶ While in broad agreement, if we were to ask for further explanation of any point of this research, it would be levelled at the historical functioning of this vital relationship. In particular, with the analytical focus squarely placed upon emergency and unequivocal legal suspension, the material consequences of

³¹ For the Murderous Outrages Act and colonial sovereignty see Mark Condos, 'License to Kill: The Murderous Outrages Act and the rule of law in colonial India, 1867-1925', *Modern Asian Studies* 50:2 (2015), pp. 1-39; See also, Elizabeth Kolsky, 'The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India', *American Historical Review*, 120:4 (2015), pp. 1218-1246.

³² Tom Lloyd, 'Bandits, Bureaucrats and Bahadur Shah Zafar: Articulating Sovereignty and Seeing the Modern State Effect in the Margins of Colonial India, c. 1757-1858' in *Mutiny at the Margins: New Perspectives on the Indian Uprising of 1857, Volume I: Anticipations and Experiences in the Locality*, ed. by Crispin Bates, (New Delhi: Sage Publications, 2013), pp. 1-24.

³³ Mantena, *Alibis of Empire*.

³⁴ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), p. 91.

³⁵ Hussain, *Jurisprudence of Emergency*, p. 128.

³⁶ Id., p. 20.

this recursive legal circular are left comparatively undertheorized in respect to the space of the everyday colonial penal regime.

Approaching law and violence from the opposing poles of the quotidian and the emergency, in some respects these two monographs are joined by a shared exercise, namely, the expansion of the spaces in which either colonial violence or colonial sovereignty, structured through law, is to be recognized. Yet in bringing the two studies together we are left at a certain analytical and historical impasse. If the conceptualization of colonial law and violence in its quotidian form is restricted by an isolated focus upon one form of violence, what we earlier termed the ‘in to out’ methodology, an alternate focus upon violence and emergency struggles to draw this colonial sovereign logic neatly into the practices of the everyday legal regime. This thesis attempts to tackle this problem, demonstrating how this logic of exceptionality was inserted into every layer of colonial penal law in this period, carrying serious and varied consequences for colonial subjects across society.

One approach to begin bridging the two histories can be garnered from legal scholarship which productively complicates the historical relationship between the law and the state, often taking seriously the idea that colonial power was itself dependent on the production of legal and political ambiguity.³⁷ Helpfully describing law as ‘an irreducible bricolage of practice and institutions’, Jonathan Saha’s study of everyday illegality in Burma is one example.³⁸ Moving deeper into the mundane to capture a series of poignantly banal criminal cases, Saha argues that a ‘tacit toleration of subordinate-level misconduct’ reflected a dysfunction between higher and lower colonial legal worlds that was characteristic of the colonial disciplinary regime.³⁹ Alternatively focusing upon violent historical flashpoints in the late colonial period, Taylor Sherman has explored the relationship between law and state as a complex system of checks and controls. Envisioned as a ‘coercive network’ it is argued here that as this system became more pervasive towards decolonization, it did not become less violent.⁴⁰

While representing significant contributions in their own right, we again return to the same central problematic in which historical studies of crime, law, and violence begin their analysis from the binary standpoint of either the everyday or the exceptional.⁴¹ It is suggested here that rather than restrict our analysis to these binaries, acute ‘snapping’ points, or histories of particular laws, a broader and gradated approach to the interplay between law, violence, and colonial sovereignty can produce a more

³⁷ Benton, *A Search for Sovereignty*; See also a series of essays on the colonial and postcolonial subject/citizen which have placed the perpetually unstable legal subject at the centre of their analysis. Gunnar Cederlöf, ‘Becoming and being a subject: an introduction’, in Gunnar Cederlöf and Sanjuta Das Gupta, *Subjects, Citizens and Law: Colonial and Independent India* (London: Routledge, 2017), pp. 1-17.

³⁸ Jonathan Saha, ‘A Mockery of Justice? Colonial Law and the Everyday State and Village Politics in the Burma Delta, c.1890-1910’, *Past and Present*, 217:1 (2012), p. 190.

³⁹ Id., p. 211.

⁴⁰ Taylor Sherman, *State Violence and Punishment in India* (London: Routledge, 2009).

⁴¹ We could add a final comparison here of the work of Vinay Lal and Shahid Amin who thoughtfully positioned criminal law as the imagined guard dog of colonial difference. Taking the everyday criminal and the Chaura Chauri violence respectively, both show how law rewrote the political into the criminal in order to deny the colonial subject a political subjectivity. See Vinay Lal, ‘Everyday Crime, Native Mendacity and the Cultural Psychology of Justice in Colonial India’, *Studies in History*, 15:1 (1999), pp. 145-166; Shahid Amin, *Event, Metaphor, Memory: Chauri Chaura* (New Delhi: Oxford University Press, 1995).

nuanced historical picture. Tracing a logic that existed through various forms of colonial law, positioned across an interconnected spectrum of relative exceptionality and banality, will be a central feature of this thesis.

Theory and Methodology

Moving with this shift towards a looser conceptualization of where and how we should locate colonial law and power in society, the thesis attempts to offer a general reading which reconsiders Ranajit Guha's famous description of law as 'the state's emissary', embracing more critically the historically organised spaces of ambiguity and uncertainty in colonial legal orders.⁴² With this in mind, two important questions remain. Firstly, how do we historicize the systematic ways in which colonial legal practice acted as a conduit for the political exigencies of colonial sovereignty? And secondly, what exactly did that political rationality, channelled through law, look to achieve?

Building upon this historiographical overview the thesis attempts to begin answering these questions through an analysis of a series of case studies, bound by two related features. Whether in the trial of Bahadur Shah Zafar, the release of prisoners at jubilee amnesty, the use of corporal punishment, or the decision to punish in cases of murder, all examples were firstly reliant on a discretionary authority operating underneath the broad umbrella of colonial law. Though the period under study witnessed a flurry of legal codification, colonial penal law never managed a uniform demarcation of the legal and the illegal, translated from static ideas of the licit and illicit. Instead, a fluid colonial legal subjectivity was maintained throughout the codification process. As such, the lacing of discretionary authority across various legal practices remained a persistent and crucial function of colonial law.

Secondly, in chiselling these discretionary legal pockets into the colonial penal architecture, all of these examples saw the law employ various explanations to justify its constant transgression from universal ideas of justice and equal legal subjectivity. Whether affecting large numbers of society or individual members, these legal innovations perpetually shifted colonial bodies across unstable legal boundaries as part of a larger political process of managing population. The Queen's Proclamation, for instance, divided society into forgivable rebels, unforgiveable rebels, and loyalists. Similarly, punishment for murder saw the courtroom distinguish culpability, innocence, and guilt, along gradated lines partly constructed by the letter of the law, and partly defined by culturally conditioned ideas circulating at that historical moment. Legislation would similarly be produced along comparable lines. In thinking about law as an instrument to redistribute political capital, creating these unequal legal subjects, the practice of moving subjects across these porous and evolving legal hierarchies will be returned to periodically. It is the creation and concurrent transgression of legal norms, in this fashion,

⁴² Ranajit Guha, 'Chandra's Death', in *Subaltern Studies V: Writings on South Asian History and Society*, ed. by Ranajit Guha (New Delhi: Oxford University Press, 1987), pp. 135-165.

that will be understood as the site in which legal practice and colonial sovereign expression most visibly intersected.

This approach to both law, sovereignty, and colonial power has been informed by various theoretical and methodological traditions. Although earlier critiques of Michel Foucault have argued that his scholarship undervalued the importance of law in modernity, his conception of modern power and the state have provided a useful analytical frame for this period of colonial rule.⁴³ The thesis begins with the response to the rebellion and the construction of the Indian Penal Code (IPC). In both moments, the colonial state expanded the terrain it operated across to fully embrace the Indian population, while simultaneously enforcing more carefully defined rules and norms for the colonial legal subject. This resonates with Foucault's own definition of modern power, posited as a 'double-bind' that expanded and totalised across a population, as it individualized at the level of the subject.⁴⁴ Moreover, framing criminal law and punishment as an instrument to manage an economy of political capital similarly takes much from Foucault's triangular model of sovereignty, discipline, and government.⁴⁵ Though this thesis does not attempt to produce the thorough reformulation of a 'colonial governmentality' that other scholarship has helpfully begun, a conscious stress upon the heightened and persistent presence of physical violence within and outside of the law signals a key rupture in its colonial iteration.⁴⁶

With Foucault's important insights helping to sketch the terrain upon which law and power operated in this period, the thesis leans on recent theoretical work to conceptualize the relationship between law and sovereignty. One important argument has been made by the political theorist Achille Mbembe. For Mbembe, colonial sovereignty is depicted as an unrestrained violence in which 'the sovereign right to kill is not subject to any rule'.⁴⁷ Though this work has offered significant insights into the centrality of violence in colonial spaces, the implication that colonial sovereignty was limitless and uninhibited is at odds with the events analysed in this thesis. Placed within the context of post-rebellion India, this study of colonial law and violence instead suggests that an awareness of colonial fragility subjected its sovereignty to certain restrictions.

⁴³ The charge that Foucault 'expelled' the role of law in his modern regime of power has been led by Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994). Work since however has attempted to revise this notion, see Ben Golder & Peter Fitzpatrick, *Foucault's Law* (London: Routledge, 2009).

⁴⁴ See particularly Michel Foucault, 'The Subject and Power' in *Michel Foucault Power: Essential Works of Foucault, 1954-1984, Volume Three*, ed. by James D. Faubion, trans. by Robert Hurley and others, (London: Penguin, 2002), p. 336.

⁴⁵ Michel Foucault, 'Governmentality', in *Power: Essential Works of Foucault, 1954-1984, Volume Three*, ed. by James D. Faubion, trans. by Robert Hurley and others, (London: Penguin, 2002), pp. 201-222.

⁴⁶ For more attempts to reframe governmentality for colonial spaces see Mark Brown, *Penal Power and Colonial Rule* (New York: Routledge, 2014), pp. 17-46; Deanna Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge: Cambridge University Press, 2010), pp. 8-34; David Scott, 'Colonial Governmentality', *Social Text*, 43, (Autumn, 1995), pp. 191-220.

⁴⁷ Achille Mbembe, 'Necropolitics', *Public Culture* 15:1 (2003), p. 24. In another study Mbembe dismissed the presence of rules and norms in colonies, writing colonialism 'involved no reciprocity of legally codified obligations between the state, powerholders, society, and individuals'. Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001), p. 42.

This thesis has therefore taken its framing from scholarship which has actively separated sovereignty as an abstract conceptual form, usually theorised in absolute terms, with sovereignty in political practice, which is understood as circumscribed and dependent on negotiation.⁴⁸ Key here is the work of Ann Laura Stoler. Arguing that empires are fundamentally unsteady formations, Stoler suggests that imperial governance is dependent upon ‘degrees of sovereignty’ which constantly produce new strategies of exclusion and inclusion. The results of this is the perpetual movement of subjects across unstable and minutely divided legal and political taxonomies, what she describes as ‘sliding scales of basic rights’.⁴⁹ With this in mind, Stoler contends:

Some political theorists have defined sovereign power not as the monopoly to sanction or to rule but as the right to decide when laws are suspended and when they are not. One could argue that the formation and redistribution of zones of ambiguity just as accurately describes a long history of imperial contest and expansion.⁵⁰

While the two are in fact not mutually antagonistic, as the explicit suspension of law often also resulted in the redistribution of these ‘zones of ambiguity’, it is the principal and persistent role of colonial law in this incessant redistribution of limited legal and political rights which will be taken forward across this study. These moments display both the sovereign authority to decide and transgress, and yet reveal the various demands on that sovereignty which necessitate this transgression. Though Stoler’s erudite theory of imperial sovereignty is largely a conceptual note, this thesis attempts to transplant this model into an empirical study of law in colonial India. In doing so it asks how these taxonomies were built, what legal strategies were used to distinguish subjects, and what political rationalities guided this set of legal innovations that shifted these subjects across such boundaries.

With the thesis built upon a framework indebted to theoretical debates in history and law, it attempts to contribute to these questions through a deeply archival and empirical approach. The argument is composed from research completed in archives across the United Kingdom and India. The records maintained in the National Archives of India in New Delhi and the India Office Records in the British Library offer rich insights into the colonial state, and particularly the mechanics of legislation production. These records have been supplemented by material gathered at the regional level in India from the four state archives of Uttar Pradesh, namely Agra, Allahabad, Lucknow, and Varanasi.

To move beyond the process of codified legislation, the second set of consulted sources were case law. The published collections of Indian Law Reports and Weekly Notes are available in various courtroom and legal libraries in India and the United Kingdom. These reflect cases compiled for

⁴⁸ For sovereignty in these terms see Benton, *Search for Sovereignty*; James Sheehan, ‘The Problem of Sovereignty in European History’, *American Historical Review*, 17:3 (2006), pp. 1-15.

⁴⁹ See Ann Laura Stoler, *Duress: Imperial Durabilities in Our Times* (Durham: Duke University Press, 2016), p. 197. This important chapter is a slightly amended of an earlier essay. See Ann Laura Stoler, ‘On Degrees of Imperial Sovereignty’, *Public Culture*, 18:1 (2006), pp. 125-146.

⁵⁰ Stoler, *Duress*, p. 197.

publication on the advice of judges, usually suggested due to the perceived significance of that decision to the wider practice of law. Published sources were then complemented by unpublished cases retrieved from the Allahabad High Court Criminal Appeals Record Room. Unlike those cases handpicked for publication, these difficult to access uncatalogued records offer a more organic insight into the day to day functioning of the High Court, opening up histories that elude the published reports.

The final set of sources accessed were newspapers, private papers, memoirs, and the collected writings of key figures both within and outside of the colonial legal system. These have been used to offer insight into the reception of colonial law in wider society, to trace the intellectual currents of those producing colonial law, and finally to analyse law as a growing site for anti-colonial thought.

It is important to lastly clarify the remit of the study being proposed. While the thesis makes claims to being an all India project, the majority of the fieldwork pertains to archival research completed in north India. It is therefore certainly true that peculiarities particular to regional authorities and legal cultural traditions from other parts of India will lack the focus provided in relation to the North-Western Provinces. Nonetheless the legislations, codes, and royal spectacles examined were explicitly all-India in their application. Moreover, if almost all of the case-law is discernibly north Indian, given the transfer of people, legal precedents and ideas across an all-India codified penal law, these cases were continuously being knitted into an all-India colonial legal fabric.

The timeframe that sets the parameters for this thesis is 1857-1914. This was determined by the questions guiding much of the project. Most pertinent amongst these, the thesis seeks to trace the process through which the violent logic embedded in the colonial response to the rebellion seeped into the production and practice of a new colonial legal and political order. While significant historical change occurred across this period, the central questions posed by colonial rule and anti-colonial nationalism, whether the relative rights of colonial subjects, the legitimacy of colonialism as a form of governance, or the appropriate limits of state power, shift dramatically following the outbreak of World War One.

Establishing a very different domestic and global historical context, this was most notably encapsulated by laws such as the Defence of India Act in 1915, an emergency legislation that widely expanded the intrusive capabilities of the colonial state.⁵¹ More broadly, the pervasive violence of the World War, the Rowlatt Act of 1919, and the Amritsar Massacre similarly contributed to the changing discourses and tactics of Indian nationalism and anti-colonial thought in the later period. In different ways, the collective effect of these events was the provision of substantial evidence for those building critiques of the colonial civilising mission narrative.⁵² In part an outcome of this, the emergence of Gandhian nationalism after the War then presented the colonial order with a fresh series of challenges

⁵¹ There is a relative dearth of published scholarship that has engaged with the construction of the World War One colonial legal apparatus, particularly the 1915 Defence of India Act and the subsequent 1919 Rowlatt Act. For recent research see Joseph McQuade, ‘Terrorism, Law, and Sovereignty in India and the League of Nations,’ unpublished thesis, University of Cambridge (2017).

⁵² See Carolien Stolte & Harald Fisher-Tine, ‘Imagining Asia in India: Nationalism and Internationalism (ca. 1905-1940), *Comparative Studies in Society and History*, 54:1 (2012), pp. 65-92.

to both the discursive framework it propagated, and in material terms, to the practical function of its legal and political regime.⁵³ Given the complexity and importance of these issues, the thesis has not attempted to widen the nature of this study into the post-1914 period. Similarly, the fairly large period already covered requires significant analysis in order to do justice to the various historical developments of the late nineteenth and early twentieth century. This, however, is not to deny the usefulness of future work which would take this history into the late colonial period, which is alluded to in a brief analysis of Gandhi's 1922 trial for sedition in the concluding remarks.

Thesis Overview

The thesis can be separated into three broad sections which provide the underlying chronological and thematic structure to this study. While significant continuity connects the chapters, for simplicity the primary objectives of these sections can be divided into the following themes: making colonial law and sovereignty, practicing colonial law and sovereignty, and contesting colonial law and sovereignty.

The first of these sections concentrates on the period between 1857 to 1862, examining three key events from which the remit of colonial sovereignty and the production of the modern legal colonial order would be built upon.

Situated in the aftermath of the largest rebellion in nineteenth century imperial history, the response to this outbreak saw numerous legal norms suspended. Within this period of political and legal flux, the first chapter offers a close reading of two events which would fashion the ground for the making of criminal law and the legal subject in this study. While the pre-rebellion structure of political sovereignty had maintained the Mughal King as the titular ruler of India, the rebellion instigated a process which saw Queen Victoria installed as India's undisputed sovereign figurehead. For this to be possible the colonial state placed King Bahadur Shah Zafar on trial for murder, treason, and rebellion. The chapter argues that this legal spectacle was organized to both re-write the violent narrative of the rebellion, but also to make claims on a new form of colonial sovereignty in India.

With Bahadur Shah Zafar transported to Burma the chapter then unpacks Queen Victoria's Proclamation of 1858 as the first expression of this new sovereignty to carry legal effect. Comparing the rhetoric of amnesty in the Proclamation with the practice of forgiveness across the North-Western Provinces, the chapter reveals a more gradated system of punishment and reward. The chapter argues that the political rationality guiding the penal law of the later period was forged at this juncture. This expressed itself in a developing and recursive relationship between a discourse of universal justice, and a series of contradictory discretionary practices functioning beneath this rhetoric. Finally, and notably,

⁵³ For research which explores the way Gandhian politics represented a shift in the anti-colonial nationalist discourse in India, see Mithi Mukherjee, *India in the Shadows: A Legal and Political History 1774-1950* (New Delhi: Oxford University Press, 2010), pp. 164-180.

in both events the idea of governing India as a population crystallised in the practices of the colonial state.

Chapter two explores the implementation of the Indian Penal Code as the third formative moment in this process. Representing a watershed imperial event in criminal legal history, the IPC is posited here as the nominal conclusion to this period of legal instability following the rebellion. Signalling the end of emergency legal measures, the chapter locates the spaces of discretion which were etched into the structure of a purportedly universal and uniform IPC. More specifically, the chapter argues that the language and ideology at the heart of this codified legal document still measured the legal subject through ambiguous ideas of ‘allegiance’ and ‘faith’, which had been central in punishing rebels in chapter one. Importantly, it was upon this ill-defined discursive ground, routinely aggravated by a colonial racism that instinctively mistrusted the Indian legal subject, that every discretionary, draconian, and violent legal practice would be subsequently justified by the colonial state.

In tackling this circular colonial relationship between discourses of uniformity and practices of discretion, the chapter then unpacks the legal philosophy of Thomas Macaulay, Henry Maine, and James Fitzjames Stephen, the three most significant codifiers and intellectual influences on colonial law in this period. This section contextualises the imprecision at the centre of the IPC by exploring the evolving ideas and politics of these key figures across the nineteenth century. It argues that while all men were keen codifiers in theory, a constant laxity in their definitions of ideas at the heart of law, combined with conceptualisations of India as a land of imminent war, built the intellectual bridge which allowed wartime logic to seep into the everyday legal regime.

Moving from this transitional period between 1857-1862, the second section traces how these formative events translated into practice. Instead of focusing singularly on the exceptional or the mundane, this section cuts across three different forms of law and punishment, namely case-law, legislation, and spectacles, following this sovereign logic into the newly constructed structure of law.

Chapter three analyses a number of cases from the Allahabad High Court which fell under the umbrella of life-taking crimes. With its tangible relationship to modern sovereignty and the monopoly of violence, the punishment for murder was constructed in a surprisingly ambiguous fashion, investing a wider degree of discretion in the judge than most other crimes. Criticised by many at the time, this resulted in significant discrepancies in punishment. Tracing these discrepancies across the period, the chapter shows that the nature of the criminal act was often not the primary determinant justifying lenient or severe sentences. Instead, it was the position of the individual in society, and the way that criminal event corresponded to dominant colonial discourses, which swung courtroom judgements. What was being rewarded or punished during these trials was a subjective measurement of the subject’s ‘loyalty’ to the stability of colonial sovereignty, rather than the letter of the law in the IPC. Focusing primarily on crimes committed in the everyday, and within the domestic sphere, the chapter begins to unpick the colonial strategies employed to police the Indian social through penal law. With particular focus on the different ways the female and male colonial legal subject were treated through these trials, the colonial

state is shown to have nested significant sovereignty in the legitimacy of the male subject's recourse to violence in the domestic arena.

Chapter four shifts from case-law to legislation, and from the legal response to violence in society, to the state's own judicial violence in the form of corporal punishment. Positioned within the paradoxes of colonial modernity, the chapter outlines the reintroduction of this violent and often public judicial violence within the broader frame of a codified penal order which had made claims on modern principles of law. Tracking the evolution of the legislation for this punishment, the chapter considers this law at three different points, 1864, 1900, and 1909. From its inception, the law refused to make explicit distinctions on the basis of caste or race, yet importantly, the punishment was left solely to the discretion of the judge. With the natural inclinations of judges combined with a slowly evolving legislation shaped to target crimes understood as prevalent amongst the lower classes, the chapter shows how a functional relationship between formal legislation and informal legal practice ensured those in the upper echelons of society avoided this punishment. Positioned at the intersection of colonial ideas of gender, age, race and class, the form and practice of this punishment are used to reveal how colonial ideas of difference, exposed through the physical application of violence, found new ways to articulate themselves over time.

Chapter five moves from these moments of quotidian legal procedures to the spectacle of the sovereign and the legal mechanism of mass-pardons. Following the Queen's Proclamation in 1858 the symbolic figure of the sovereign re-emerged in the Indian public space for royal celebrations. Occurring cyclically at jubilees and durbars throughout the period of study, part of these celebrations included granting ten per cent of the prison population royal clemency. Taking the occasions of 1877, 1887, 1897, and 1903 as the points of study, the chapter positions these moments of forgiveness as transient covers to reassert ideas of state sovereignty and positive ideas of 'British justice' in the minds of the Indian public. Arranging these occasions of forgiveness within the wider context of the everyday criminal law, the rationale determining those offered legal forgiveness is shown to act in direct conflict with the tendencies regulating everyday law, particularly in reference to gender and race. With this in mind, the chapter situates these events of alleged colonial grace within this structure of law and colonial sovereignty, actively supporting the wider violence of colonial rule.

In bringing chapter five to a close, a moment of spectacular violence in the midst of the 1897 jubilee celebration will be used to commence the third section of the thesis, the contestation of colonial sovereignty. With the jubilee organised amongst widespread famine and plague, increasing criticism of colonial rule was being espoused from various sections of Indian society. As the jubilee celebrations went ahead, a Hindu nationalist, angered especially by the intrusive Epidemic Diseases Act, assassinated the plague commissioner of Bombay as his carriage travelled through the celebrations. Quickly engaging its legal apparatus, the state arrested the nationalist leader B.G. Tilak under the law for sedition, accusing him of motivating this violence through provocative speeches and writings. While previously a dead letter crime, the trial and conviction of Tilak brought about huge protest and resistance

from across colonial society. Examining the assassin's motives, the colonial state's reaction, and the extensive Indian rebuke to that response, the chapter reveals the series of obstacles, built at the fault lines of this structure of colonial sovereignty, that were making the quiet production of colonial discourse and colonial violence increasingly difficult.

Offering a wider lens approach to this question of the contested nature of colonial sovereignty, the final chapter seeks to narrate the various strands of anti-colonial nationalist legal thought which emerged across this period. To do so the chapter focuses primarily upon the critiques employed in the parallel campaigns that rejected both the law for corporal punishment and the assortment of legislations created around ideas of sedition. From the moment of its reintroduction in 1864, corporal punishment faced a consistent backlash from a series of reformist lawyers and middle-class political organisations in India. Noted as an example of barbaric physical violence, these figures called for either reform, or often total abolition. Alternatively, a series of legislations that sought to increase the state's ability to punish for crimes related to sedition had been met with hostility by Indian lawyers since the 1870s. In this instance, the law was criticised by making regular references to the broken promises of the 1858 Proclamation. As this chapter will show, these critiques did not take the shape of reactionary politics which has historically dominated impressions of early moderate nationalism, but instead represented a persistent and sharp recognition of the interconnected and plural forms of colonial violence which existed across society and were legitimised by law. The chapter concludes by disaggregating how some of the key themes of the thesis, ideas of sovereignty, the duty of the subject, and violence, were similarly destabilised by this increasingly vocal anti-colonial Indian legal community.

Chapter One

From Sovereign to Subject: A Re-Written Colonial Social Contract, 1857-1862

Introduction

Violent societal breakdowns at times of civil war, rebellion, and revolution have often been identified as historical ruptures from which new sovereign orders can emerge.¹ The drastic reordering of sovereignty and law that occurred after the 1857-58 rebellion in colonial India can be interpreted as one such example. Acting as the catalyst for the replacement of the East India Company with Crown rule, the constitutional, legal, and political grounds upon which India was governed were dramatically transformed in response to this period of pervasive violence. This chapter argues that following the rebellion, the emerging colonial state was able to make claims on a deeper form of sovereignty from which a new colonial legal order would later develop. It is during this period of post-rebellion flux in which the chapter locates the formation of the original subject of this new legal order, while also beginning to sketch out the limits and logics of this nascent colonial sovereignty. In order to do so, two key events are examined.

The first of these events is the 1858 trial of King Bahadur Shah Zafar II. Performed in exceptional circumstances, the trial represented the site where Mughal sovereignty was pilfered by the colonial state. Offering a close reading of this trial, this chapter shows that the narrative fashioned in the courtroom attempted to transcribe the history of rebellion into a religiously inspired outburst of violence. As legal and political boundaries were being redrawn by the colonial state during this extended period of emergency law, the chapter pinpoints the sentencing of the King as a disloyal subject as the foundational example of a new type of colonial subject making. Importantly, as the colonial state made these wider claims on sovereignty, anxieties expressed by the prosecution concerning the causes of the rebellion simultaneously revealed the limits within which colonial sovereignty would later operate.

The second formative event of this chapter, the Queen's Proclamation, moves the analysis from this moment of subject making from above, to examine the making of legal subjects across society. Examining the Proclamation as a quasi-social contract between sovereign and subject, of particular importance at this juncture was the re-introduction of the colonial norm. This was epitomised by the universal language of amnesty, forgiveness, and equal legal status, all of which were offered in this declaration. Pertinently, as the chapter explores this offer of amnesty in practice, a considerably more varied picture of punishment begins to appear. Rather than producing a uniform society of equal

¹ For a useful theoretical model to explore the way flows of power are disrupted and redistributed at these occasions see Giorgio Agamben, *Stasis: Civil War as a Political Paradigm, (Homo Sacer II)* trans. by Nicholas Heron, (Stanford: Stanford University Press, 2015), pp. 1-24.

colonial subjects, individuals were instead positioned across a gradated social and legal hierarchy, organised around the subject's perceived loyalty during the rebellion.

Juxtaposing these two events, the chapter considers examples of extreme and violent punishment alongside offers of amnesty and forgiveness. It argues that what emerged during this process was the organisation of an uneven distribution of political capital across the state-society divide, arranging subjects within an incrementally divided social and legal taxonomy of relative colonial rights. This, as will be explored across the thesis, was dependent on a circular arrangement operating between legal norms, embodied in liberal languages of universalism and uniformity, and the concurrent proliferation of legal exceptions, visible through practices of punishment.

To foreground the shift which occurs through these two events, the chapter begins with an overview of colonial law and sovereignty before Crown rule.

Disorderly Sovereignty and the East India Company

In the eighteenth and early nineteenth centuries, preceding the insertion of sovereignty into the figure of Queen Victoria and the consolidation of criminal law into the IPC, the provision of criminal justice and the organisation of political sovereignty had remained loosely organised in India. In the midst of this system of plural sovereign authorities and legal orders, over time the East India Company slowly increased its power in the subcontinent by engaging in a series of military campaigns and imposing aggressive political treaties. Two major events had been crucial here. Firstly, the victory at the Battle of Plassey in 1757 had resulted in the Mughal sovereign Shah Alam II installing the Company as *diwan*, in effect giving the Company the authority to rule across Bengal, Bihar and Orissa. Secondly, in the early-modern period the Company had been one amongst numerous competing European imperial powers in India. With their victory in the Seven Years War in 1763 however, the British had ousted the French to become the only substantial foreign presence in India.²

Though in theory the Company always governed under the auspices of Mughal sovereignty, as its power grew in India this arrangement became more reflective of political convenience rather than an orthodox sovereign-subject relationship. Symptomatic of this asymmetry of power was the gradual neglect of rituals acknowledging Mughal sovereignty. These included instances such as the Governor-General Francis Hastings refusing to offer Akbar II the usual ceremonial presents, and the symbolic abolition of the rupee with the imprint of the emperor's face in 1835.³

This history of an expanding Company did not, however, result in the growth of a sure-footed approach to colonial governance, Indian society, or confidence in its own security. After receiving the status of *diwan* Robert Travers has shown that efforts to impose Company authority were constantly

² Some residual enclaves of other European empires however did exist into the twentieth century. Examples include the French enclaves of Pondicherry and Chandernagor, and the Danish enclave of Tranquebar.

³ A.B. Keith, *A Constitutional History of India, 1600-1935* (Allahabad: Central Book Depot, 1961), pp. 117-121.

challenged and undermined by negotiations with local magnates.⁴ While earlier attempts to reform law and government had been structured around ideas of ‘ancient constitutionalism’, a variety of difficulties which included the accumulation of significant debt by the Company, had necessitated a change of policy.⁵ The advent of Lord Cornwallis and his 1793 Code for instance marked a shift characterised by attempts to establish a more uniform revenue settlement system. This, it was hoped, would solidify British power in India by creating a class of loyal Indian landowners.⁶ Yet even as more solid institutional and governmental structures were built in the early nineteenth century, pervasive anxieties and crises remained at the heart of governmental practices.⁷

These persistent concerns seemed to be at least partially a natural by-product of the confusing basis of governance and authority. The rise of the Company had seen a corresponding complication of the sovereignty question in the imperial world. Preceding the 1858 transfer of power to the Crown, the accumulation of *de facto* sovereign practices by the Company, whether in trade, administration of law, territorial control, or taxation, had become part of an increasingly contested and entangled story. This was partly a result of the foundations upon which Company Rule was founded. While the Company’s sovereignty was contingent upon the support it had been granted from the metropole, its power and authority in India had been shaped through treaties made with local rulers.

From the standpoint of Parliament, the political ambiguity inherent in the Company, as well as the scandals it periodically got embroiled in, were deemed threatening to the wider imperial fabric. Thus, as the Company began accumulating power and territory in India, this unclear ideological and constitutional foundation began to draw closer scrutiny. Chief amongst these concerns was the relative lack of Parliamentary oversight held over the Company, the Company’s competency as a governing authority, and the economic value of Crown sponsored monopolies. These critiques were rooted in developments in both India, as well as changing currents in the political and intellectual culture in Britain. The relative merits of the trading monopoly for instance came under attack as a wider shift saw dominant British economic thought move away from mercantilism and towards a laissez-faire model of free trade.⁸ Thus, in *The Wealth of Nations*, a founding economic text for free-trade ideology, Adam Smith openly criticised the Company, writing, ‘by a strange absurdity (the EIC) regarded the character of the sovereign as but an appendix to that of the merchant’.⁹ Moreover its competency and lack of parliamentary oversight were regularly condemned from various sections of British society who felt that corruption and misrule were rife components of this form of governance. This came to a head most

⁴ Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* (Cambridge: Cambridge University Press, 2007).

⁵ This had amounted to three million pounds by 1784. Wilson, *The Domination of Strangers*, p. 48.

⁶ See Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham: Duke University Press, 1996).

⁷ See Wilson *The Domination of Strangers*; Guha, ‘Not at Home in Empire’.

⁸ C.A. Bayly, *The Birth of the Modern World: 1780-1914, Global Connections and Comparisons* (Oxford: Blackwell Publishing, 2004), pp. 300-301.

⁹ Adam Smith, *The Wealth of Nations*, vol. 2, (1776), ed. by R.H. Campbell and Skinner (Indianapolis: Liberty Fund, 1981), p. 638.

dramatically in the attempted impeachment of Warren Hastings, and the vociferous criticism of the East India Company offered by Edmund Burke.¹⁰

With political and legal sovereignty remaining suspended across these overlapping authorities, over time a mounting degree of oversight from Parliament seemed to accompany any expansion of Company power. Though criticism towards the Company from Parliament had been prevalent since the seventeenth century, by the 1770s material and institutional changes had begun to occur.¹¹ This saw a spate of acts and the revision of charters consolidate the authority of the Company in India, while simultaneously allowing the metropole to gradually encroach upon the sovereignty of the Company. The most significant early example of this was the 1773 Regulating Act which established the Supreme Court in Calcutta, which drew its authority not from the Company, but directly from Parliament. As subsequent acts reduced the Company's monopoly over trade and eased the restrictions on the access British subjects had to India, the consequence was a growing community existing in a legal jurisdiction outside of Company authority.¹²

The Charter Act of 1833 was a later example of this process. On one hand this had invested the Governor General with complete authority of law-making within Company's territories, conclusively proclaiming the Company's right to make laws for 'all persons, whether British or native, foreigners or others. And for all courts of justice'.¹³ Yet as the Act expanded Company authority in law-making, Parliament concurrently invested in itself the sovereign authority to override any of these laws. This included the proviso that the Governor-General could make no law that would remove the sole role of the Supreme Court in sentencing 'European British subjects' to death.¹⁴

Resulting from this unstable system of rule, and the unclear boundaries distinguishing jurisdictional zones, was a vague and complicated system of legal orders. In these circumstances, the basic legal question of who had the authority to do what, and to who, was a constant source of confusion. The example of criminal law is perhaps most illustrative of this complexity. Until 1860 the administration of criminal justice had been an evolving system with its roots in Muslim criminal law for Indian subjects in the *mofussil* (interior), and English criminal law for those residing in the Presidency towns. In 1772, a year before the Supreme Court was set up, Warren Hastings reorganised the structure of criminal justice in Bengal for Indian subjects. This now included a lower local court

¹⁰ Uday Mehta, *Liberalism and Empire*, pp. 153-189; Mithi Mukherjee, 'Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings', *Law and History Review*, 23:3 (2005), pp. 589-630.

¹¹ Amongst other moments, Phillip Stern shows how the political spirit of the parliamentary authority that resulted from the Glorious Revolution translated into the early roots of a growing critique of the East India Company, a body rooted in the power of the Crown. Phillip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011), pp. 142-163.

¹² Most relevant to this was the 1813 Charter which while renewing the Company's monopoly over tea and trade from China, opened up other trade to any British subject, and the 1833 Act which allowed British subjects to buy property in India. See 'The Charter Act of 1833', in *Indian Constitutional Documents, 1773-1915*, ed. by Panchanandas Mukherji (Calcutta: Thacker Spink & Co, 1915) pp. 40-59

¹³ 'Charter Act of 1833', in *Indian Constitutional Documents, 1773-1915*, p. 44.

¹⁴ Id., p. 46

(*mofussil faujdari adalat*) for the country interior, and a higher court of appeal based in Calcutta (*sadar nizamat adalat*).¹⁵ The procedure for criminal law not only differed between the *mofussil* and Presidency town, but also carried unique procedures region to region.¹⁶ While the criminal law in Madras broadly resembled the Bengal system, in Bombay a series of regulations in 1827, known as the Elphinstone Code, attempted to apply criminal law relative to the religion of the subject. This distinguished the law administered for Hindus, Muslims, and Christians.¹⁷

The question of race most dramatically drew out the distinctive legal positions held by those residing in India. Since the arrival of ‘European British subjects’ in India this group had been given privileged access to a legal system which rarely punished their misdemeanours. While Indians could be punished in any of the aforementioned courts, European British subjects could only be charged in the Supreme Court. The logistics of an Indian who lived in the *mofussil* attempting to take a European to court in reality provided this community with almost total legal impunity for their crimes.¹⁸ With an increasing number of Europeans entering India in the late eighteenth and early nineteenth century, legislative attempts to bring these communities under a simpler legal procedure constantly failed in the face of strong opposition. Thus, as Elizabeth Kolsky has shown, the gradual shift towards a colonially run legal system in the early nineteenth century did not reflect a transition from legislative chaos to order. Rather, it represented the continuation of complicated legal orders in which the centrality of racial difference was preserved.¹⁹ Under these circumstances in which the sovereignty to govern and punish was nested across various bodies, and varied in relation to an individual’s residence, religious belief, financial capacity, and race, the route to justice often remained unstable in this convoluted legal landscape.

In light of these unsteady and overlapping legal orders which drew authority from various regional, religious, and imperial sources of sovereignty, the post-rebellion shift towards a single sovereign and a codified penal law represented a sea change in the structure of law and authority in India. With the quelling of the rebellion and the later implementation of the IPC, a uniform law which connected all subjects to the sovereign, and invested the state with the authority to punish on that basis, had been introduced. Though the piecemeal basis for these ideas can be located across the previous systems of law, or in decades old commissions which had failed to be implemented, the remainder of the chapter will argue that it was the colonial response to the violence of the rebellion which forced this fundamental change. Amongst other things, this required a considerable shift in the tone of imperial

¹⁵ M. P. Jain, *Outlines of Indian Legal History* (Bombay: N.M. Tripathi Private Ltd, 1981), pp. 55-66.

¹⁶ See Radhika Singha who shows how the sovereign right to dispense criminal justice was being wrested from Mughal authority in late eighteenth century Bengal. See Singha, *Despotism of Law*, pp. 1-35. See also Jörg Fish, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817*, (Wiesbaden: Steiner, 1983), pp. 31-48.

¹⁷ A.C. Banerjee, *English Law in India* (New Delhi: Abhinav Publications, 1984), pp. 72-74.

¹⁸ Kolsky, *Colonial Justice in British India*, p. 33.

¹⁹ Id., pp. 27-68.

politics, and the re-imagination of India as a collective population, processes achieved through two key events which the chapter will now turn to.

Sovereign to Subject: The Trial of Bahadur Shah Zafar

With two thirds of the Bengal army as well as significant portions of local society taking up arms against the East India Company during the rebellion of 1857-58, unforeseen violence and disorder had spread across northern India in an unprecedented fashion. Having rejected the colonial state's monopoly over the lives of its subjects, brutally murdering Europeans, releasing thousands of prisoners from jails, and installing the Mughal King Bahadur Shah Zafar as its leader, the rebellion challenged the legitimacy of colonial rule and its sovereignty on a number of different fronts.²⁰ This section will argue that colonial sovereignty was both restored and expanded in India by harnessing the violence of this rebellion and channelling it into a logic of organised legal exception. This concluded climatically in what A. G. Noorani described as 'the first of the victor's trials in modern history', which saw the King unceremoniously banished to Burma for murder and treason.²¹ It is in the trial and punishment of a sovereign, transformed into a lowly subject, that we can begin to trace the emergence of this new logic of colonial sovereign exception.

When considering this trial within the ambit of law and sovereignty, previous scholarship has lent upon Giorgio Agamben's tempting model of the figure of *Homo Sacer*.²² Here the logic and paradoxes of sovereignty are understood beyond the moment in which the state decides whether life should be given or taken, and invested in the creation of a liminal character. *Homo Sacer*, in brief, was a figure from Roman law who had been wholly emptied of any claim to citizenship. Through this process, all protection from either divine law or human law had been severed. This created a subject beyond sacrifice, which all citizens were invested with the legal impunity to kill. The creation of what Agamben termed 'bare life', reflected sovereignty's existence both inside and outside of the law, providing it force in its operation, while also retaining the ability to declare its suspension. For Agamben, the creation of this figure represented a foundational moment of sovereignty, revealing a process in which, 'human life is included in the juridical order solely in the form of its exclusion (that is, of its capacity to be killed)'.²³ In contrast, in this chapter it will be argued that this framework, reflecting the location of an absolute form of sovereignty, cannot be uncritically placed onto the historical record here. In this case, as colonial sovereignty was expanded we can also begin to notice new limits to the colonial state's reach, revealed during both the rebellion and at the King's trial.

²⁰ For the impact of the rebellion on prisons see Clare Anderson, *The Indian Uprising of 1857-58: Prisons, Prisoners and Rebellion* (New York: Anthem Press, 2007).

²¹ Noorani, *Indian Political Trials*, p. 77.

²² Lloyd, 'Bandits, Bureaucrats'; Nayar, 'Introduction' in *Trial of Bahadur Shah Zafar*, pp. lxv-lxix.

²³ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 12.

The trial itself had been organised between January and February of 1858, as the rebellion had raged on across much of India. The response to the rebellion had been to very quickly define it as a war, enabling the colonial state to suspend legal norms and enact indiscriminate amounts of retributive violence across society.²⁴ The raft of emergency laws passed at this stage hugely expanded the state's ability to punish offenders. This had collapsed boundaries separating previously distinct legal categories and groups. Act XI of 1858 for instance, targeting escaped prisoners, was careful to ensure that the law treated rebels, criminals, and thugs collectively.²⁵ Act X of 1858 alternatively dissolved the idea of the rebel into the villager, empowering magistrates to punish whole villages with fines, or to confiscate villages if they were deemed collectively complicit in rebellion.²⁶ This removal of the shackles usually restraining colonial legal procedure was most visible in the State Offences Act XI and Act XIV of 1857. These allowed provinces in a state of rebellion to set up court-martials and charge all subjects, excluding Europeans, of anything loosely conceived as 'any crimes against the state', without recourse to appeal.²⁷

The narratives which emerged from soldiers involved in these martial law courts depict the arbitrary and vindictive form punishment could take in accordance with these Acts. The army leader Sir Colin Campbell, for instance, described how in an effort to strike fear into Indian rebels, every third man from one condemned regiment was shot out of a cannon.²⁸ Sir William Russell alternatively wrote of 'non-Christian atrocities such as sewing Mohammedans in pig skins, smearing them with pork fat before execution and burning their bodies and forcing Hindus to defile themselves.'²⁹ In order to regain control of public spaces and to punish these challenges to colonial sovereignty, the lines between rebel and civilian had been blurred, and an alternate space was created where the normative value placed on life had been significantly diminished. In doing so, it became part of a long list of imperial events that had made visible the extreme ends which the colonial state was willing to act to reassert authority.

However, the scale of the rejection of previous rule which the rebellion had represented meant that the outbreak could not be quelled through sheer brute strength alone. In response to this event the empire was forced into straddling a number of competing and contradictory positions to reassert control. Revealing its potential for extreme violence through the punishment of rebels under court-martials, British rule meanwhile had to re-legitimise itself as a civilising and progressive force. While it needed to create distance from Company rule to disassociate itself from the unpopular policies of the past, it

²⁴ There are numerous references to the rebellion as a war in the correspondence between key officials in the 1857-58 period including the Queen. One example can be found in particular reference to the outbreak in Oudh which is described by the Court of Directors of the East India Company as reflecting 'the character of legitimate War, than that of Rebellion'. BL, IOR, MSS Eur/F87/141.

²⁵ Act No. X of 1857, BL, IOR, V/8/35.

²⁶ Act No. V of 1857, BL, IOR, V/8/35; For the making of whole villages culpable in cases of heinous crimes see also, 'Minute by the Hon'ble B. Peacock, No.58, Proclamation of Pardon after Mutiny, 24th November 1858', BL, IOR, V/886.

²⁷ Act No. XI of 1857, Act No. XIV of 1857, BL, IOR, V/8/35.

²⁸ Sir Colin Campbell, *Narrative of the Indian Revolt From its Outbreak to the Capture of Lucknow* (London: George Vickers, 1858), p. 36.

²⁹ Anan Swarup Misra, *Nana Saheb Peswa and The Fight for Freedom* (Lucknow: Uttar Pradesh Information Department, 1961), p. 421.

had to maintain enough connection to not completely undermine the legitimacy of the idea of Britishness as a paternal force for good. As argued by Homi Bhabha, the task of making comprehensible and consumable the intrinsically paradoxical nature of colonial rule, or to allow oneself in Thomas Macaulay's words to be 'the father and the oppressor, just and unjust, moderate and rapacious' remained at the crux of colonial governance.³⁰ In order to more carefully manage this ambivalent doubleness which had disintegrated into violence under the previous structure of rule, the colonial state required a hegemonic master narrative that could justify the causes of the rebellion, while producing a new conciliatory political language to shield the state from its own violence in response. The trial of the *de jure* leader of this rebellion would represent the first channel in which these manoeuvres were attempted.³¹

A reluctant figurehead for the rebellion, King Bahadur Shah Zafar was physically and politically weak when he was coerced into heading the movement. With the rebellion ongoing, the King had been trapped in Humayun's tomb in Delhi after escaping from his own palace. Controversially promised his own life by Captain Hodson, alongside the lives of his wife and son, he surrendered in September 1857 and was imprisoned to await trial.³² While confined in his Delhi palace he was kept in humiliatingly dirty conditions, described by the visiting British politician Henry Layard as being 'a miserable hole of a palace – lying on a bedstead, with nothing to cover him but a miserable tattered coverlet.'³³ Though the other remaining members of his family were killed in cold blood or hanged after trial, the King underwent an extended examination. The trial, lasting for twenty-one days, was situated symbolically in the *Diwan-e-Khas* of the Red Fort (Hall of Private Audience). This, poignantly, was the place his throne had been located during the revolt.

The King was accused and found guilty of four charges; mutiny and rebellion, encouraging his son to rebel, claiming himself reigning King and sovereign of India, and abetting the murder of forty-nine people, mostly European women and children.³⁴ As a legal procedure the trial was a sham in which British officials wilfully circumvented all sorts of legal norms to reach their guilty verdict.³⁵ The accused, with whom there was a significant language barrier through much of the trial, reportedly

³⁰ Homi Bhabha, *Location of Culture* (London: Routledge, 1994), p. 96.

³¹ Mithi Mukherjee has described the revolt as resulting in 'major discursive and institutional realignments to put the empire on a new foundation and remove any possibility of similar upheavals in the future.' Mithi Mukherjee, *India in the Shadows*, p. 76.

³² This promise was criticised by Lord Canning and was scrutinised by others who suggested it was given under bribe, see T. Rice Holmes, *A History of the Indian Mutiny and of The Disturbances Which Accompanied It Among the Civil Population* (London: Macmillan & Co, 1904), pp. 614-616.

³³ Charles Ball, *The History of the Indian Mutiny, Vol. II*, (London: London Printing and Publishing, 1858), p. 179; For an extended narrative on the treatment of the King before trial see, William Dalrymple, *The Last Mughal* (London: Bloomsbury, 2006), pp. 406-411.

³⁴ Pramod K. Nayar, ed., *Trial of Bahadur Shah Zafar* (Hyderabad: Orient Longman, 2007), p. 4.

³⁵ On the trial as a breach in international law and the King's sovereign status, see Lucinda Downes Bell, 'The 1858 Trial of the Mughal Emperor Bahadur Shah II 'Zafar' for 'Crimes Against the State', unpublished thesis, University of Melbourne, (2004).

showed little interest in the proceedings.³⁶ While the details of the trial are well versed in other historical accounts, its ambitions and a few of its legal exceptionalisms are important to revisit.³⁷

The most important controversy surrounding the case was the very legality on which the trial was founded. The Company had defined and charged the King as a pensioner and a British subject. Though he was receiving a pension, the King had remained a sovereign in his own right, and thus could not legally be tried for treason or as a subject. As a legal scholar from Cambridge argued as early as 1932, under the circumstances, it would have been more correct to understand the East India Company as the ‘disloyal vassal’ of the Mughal King.³⁸ What quickly became clear was that for the colonial state, the trial was not organised to impress a commitment to prevailing legal norms, but to forge a new relationship with Indian society.

The King’s position in trial, that he was a mere instrument manipulated by the rebels, was the narrative that needed to be struck from the record. In his written defence, the King described himself as a helpless prisoner scared for his life. He said he was ignorant of the rebellion before it happened, and remained ignorant even after he had become its leader. The little agency he did give himself was to explain his loyal rather than mutinous intent. He declared, ‘I did all that I was able. I did not go out on procession of my own free will. I was in the power of the soldiery; and the rebellious troops.’³⁹ While in reference to the slaughter of Europeans, he argued that he had saved their lives on three earlier occasions, and their murder on the fourth attempt had been without his consent.⁴⁰

The colonial view was that their ‘prisoner’ had been fully aware of the rebellion, and had coordinated a military campaign against the British. Through the trial the prosecution dismissed any claim to sovereignty that the King might hold. This, in their mind, made the uprising illegitimate by international legal standards.⁴¹ With four different charges laid at the feet of the King, the prosecution carefully built their case on issues most likely to tug upon wider imperial anxieties. The slaughter of European women and children for instance was regularly returned to, even though his exact role in this

³⁶ Reports describe the King only intermittently engaging with the trial, at times laughing during the proceedings. See Charles Ball, *The History of the Indian Mutiny, Vol II*, (London: London Printing and Publishing, 1858), p. 177.

³⁷ For extended commentary on the trial see, A.G. Noorani, *Indian Political Trials, 1775-1947*, (Oxford: Oxford University Press, 2005), pp. 77-92. See Nayar’s introduction, *The Trial of Bahadur Shah Zafar*, pp. xi-lxxvi.

³⁸ The earliest critical commentary on the legal contradiction of the trial was written by a legal scholar in the 1920s. See F.W. Buckler, ‘Political theories of the Indian Mutiny’, *Transactions of the Royal Historical Society*, 5 (1922), p. 74.

³⁹ Nayar, *The Trial of Bahadur Shah Zafar*, p. 137. The King also made complaints about being mistreated and disrespected by the Rebels. See for instance the complaint made that rebels used to wear shoes in the hall of special audience, Nayar, *The Trial of Bahadur Shah Zafar*, p. 136.

⁴⁰ Id. p. 136.

⁴¹ The King was described in the following terms: ‘That the Prisoner was a pensioned subject of the British Government in India has already shown in treating of the first charge; and as the British Government neither showed him nor any member of his family of any sovereignty whatever, but on the contrast believing them from misery and oppression, bestowed on them largesses and pensions aggregating many millions of pounds sterling’. Id., p. 152.

was disputed.⁴² The role of Muslims, or what was described as the ‘restless spirit of Mahommaden fanaticism’, represented another significant line of questioning.⁴³ This included a reoccurring concern that a transnational pan-Islamic movement had been involved in the organisation of the rebellion.⁴⁴ A great deal of attention was for instance placed on the King’s priest and his interpretations of the King’s dreams. This courted controversy as, in one of these interpretations, the priest had allegedly envisioned the end of English rule. Another example had been the considerable interest given to the rumour that a proclamation had been posted in the Jumma Musjid in Delhi. This had purportedly declared the coming of the Persian empire.⁴⁵

Yet not all of the evidence at trial supported the prosecution’s position. The King and various witnesses had rejected the idea of a trans-regional Muslim coup, claiming that the simplistic notion of a homogeneous Muslim unity disregarded significant sectarian differences that divided communities within India and abroad.⁴⁶ Secondly the prosecution’s case was built on the premise that Muslims and Hindus, though collectively involved in the revolt, were relatively discrete groups. In contrast, there had been significant evidence of broad Hindu-Muslim unity during the rebellion, with witness describing the suspension of both cow and pig slaughter as a symbol of shared respect.⁴⁷ These were also supported by some European witnesses who similarly placed little weight on such differences from their own experiences.⁴⁸

To ensure conviction the trial therefore proceeded under extraordinary circumstances, not as an orthodox court martial or in an established court of law, but in what was termed a European Military Commission. This format, the court claimed, allowed the prosecution to consider any information concerning the King or the rebellion as relevant evidence. Under these circumstances it was stated that proceedings were, ‘not in any way confined by the observance of technicalities, such as belong to a more formal and to a regular trial.’⁴⁹ Furthermore the evidence used did not need to meet normative legal standards. As the prosecution argued when providing evidence which they could often not fully authenticate:

In such cases the Court will bear in mind that a full investigation is the great desideratum, and that such cannot be perfected, if evidence, credible in itself, be rejected merely because some unimportant formula cannot be complied with.⁵⁰

⁴² The prosecution built his active role in this on a series of circumstantial arguments which were then proven by the fact the King did not keep the murderers under his employment. If the King’s own position is taken seriously, that he felt threatened, then this argument is of course less compelling. Id., p. 145.

⁴³ Id., p. 172.

⁴⁴ Lloyd, ‘Bandits, Bureaucrats and Bahadur Shah Zafar’ in *Mutiny at the Margins*, p. 5.

⁴⁵ Nayar, *The Trial of Bahadur Shah Zafar*, pp. 42-44.

⁴⁶ Id., p. 21.

⁴⁷ Id., p. 70.

⁴⁸ Ibid.

⁴⁹ Id., p. 5.

⁵⁰ Id., p. 7.

By significantly lowering the requirements for acceptable evidence in the trial, the colonial state gave itself a huge net of information to handpick from when re-writing the history of rebellion and the King's involvement.

In these circumstances, the final guilty judgement and the punishment of transportation to Burma, were carefully justified to align primarily within the overarching colonial political project taking shape at this juncture. In this instance, by defining the rebellion as a war and a military battle that the British had won, the dismantling of Mughal authority and the entrance of Queen Victoria could be legitimised. By disregarding the considerable evidence of Hindu-Muslim unity in the rebellion, depicting it instead as a Muslim conspiracy, the colonial state could undermine the perception that this was a serious, all-India rejection of the colonial political project under Company rule. Finally, the mercy offered to the figure of the exiled King, punished but not killed, provided the colonial state the political capital to lay claims to a discourse of liberal forgiveness, one it would later extend across the full population in the subsequent Queen's Proclamation.

Important beyond the immediate suppression of the rebellion, this judgement should be considered formative for the new colonial legal order which would emerge with the coming of the IPC. As subsequent chapters will explore in greater detail, colonial sovereignty was most visibly expressed at moments in which legal norms were transgressed to summarily offer or retract certain rights from subjects. In this trial, and through the dramatic transgressions of legal boundaries and historic ideas of competing sovereignty, the emerging colonial state had expanded its sovereign reach by violently displacing the King, transforming him from a sovereign to a punishable subject. This not only turned a King into a criminal, but in an extraordinary and foundational expression of a colonial sovereignty, had created the first legal subject of this nascent legal order. Performed in this peculiar legal setting, and punished for crimes to a sovereign that the King had no legal requirement to recognise, the logic of a new colonial exceptionality was revealed at this trial. In this instance, the colonial state determined the relative illegality of the King in relation to a subjective notion of loyalty, premised not upon any legal norms actually in operation, but measured relative to the subject's contribution to the overarching colonial script used to justify the British presence in India.

Nonetheless, though the result of this trial allowed the colonial state to assume an unrivalled sovereignty in India, limits to the colonial position also became visible alongside this expansion. In particular, it is worth further considering the range of meanings that the decision to increase the scope of permissible evidence to '*all the circumstances* connected with the late rebellion, even though not in direct relation to the indictment, may be here *appropriately recorded*' could carry.⁵¹ On one level, the wider grounds to collect and present evidence was indicative of an increased force of colonial sovereignty, channelled to guarantee the conviction needed. However, the trial was also reflective of an effectual post-mortem in which the colonial system of information and security had failed to anticipate

⁵¹ Id., p. 4.

this outbreak.⁵² Taking advantage of the extended remit of evidence deemed relevant to trial, the prosecution constantly returned to questions relating to the presence of underground and religious networks, or the content and meaning of information distributed through vernacular writings. This form of anxious evidence gathering in the courtroom was representative of a reactionary and uneasy attempt to begin bridging gaps existing across the Indian social which the colonial state now realised operated beyond its surveillance apparatus.⁵³ The trial had thus not been merely about the King, but through the King's body, an attempt to engage with wider society.

Perhaps more important still was the choice of punishment. Displaced and disgraced by this decision, the King was not capitally punished but transported to Burma to live in exile until his death in 1862. Positioned amongst the seemingly unrelenting violence that surrounded the trial, including that directed towards his own family, the historical record is underpinned by the fact that the colonial state honoured the King's exemption from capital punishment. For all the state's willingness to redraw historical narrative, narcissistically stage-manage the performance of the trial, indulge in legal contradictions, and brutally murder and hang huge number of rebels, the King was not killed but sent to Rangoon. This decision was taken despite considerable pressure from various sections of the British press calling for a more vengeful response.⁵⁴

The irony of this courtroom narrative and punishment was that in the intertwined history of colonial legal practice and the language of the imperial civilising mission, political agency and consciousness were regularly written out of crimes through the colonial legal process.⁵⁵ The King, in reality a reluctant and agentless rebel, was protected by the necessity of his agency actively being written into the narrative.⁵⁶ It was this that gave the colonial state the required defeated figurehead, while his residual symbolic importance was enough to ensure that the colonial state's legitimacy as future rulers would be tainted if he had been unceremoniously killed. As a Mughal King and head of the rebellion, however empty this symbolism may have been, his identity gave him value as a political actor that could not be completely undermined by the colonial state, nor discounted by the sheer will of colonialism. This was made clear by the role now played by an imagined public in the courtroom. As the trial unfolded it had markedly been stated that the sentence 'will be looked for by thousands with feelings such as are seldom awakened by the proceedings of a Court of Criminal jurisdiction.'⁵⁷ The

⁵² C.A. Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780-1870*, (Cambridge: Cambridge University Press, 1997), pp. 315-337.

⁵³ Frequent reference to the meaning of the *chapati* and whether that carried specifically Hindu or Muslim customary importance arose during the trial, Nayar, *The Trial of Bahadur Shah Zafar*, p. 30.

⁵⁴ Rebecca Merritt, 'Public Perceptions of 1857: An Overview of British Press Responses to the Indian Uprising' in *Mutiny at the Margins: New Perspectives on the Indian Uprising of 1857, Volume 2: Britain and the Uprising*, ed. by Andrea Major and Crispin Bates, (London: Sage, 2013), p. 11.

⁵⁵ See Shahid Amin's seminal analysis of the Chauri Chaura violence, Shahid Amin, *Event, Metaphor, Memory: Chauri Chaura* (New Delhi: Oxford University Press, 1995)

⁵⁶ As Faisal Devji argues the Bahadur Shah Zafar behaved not the least like an emperor enforcing his authority by 'pleading and cajoling, threatening to abdicate his throne, become an ascetic and even commit suicide.', Faisal Devji, *The Impossible Indian: Gandhi and the Temptation of Violence* (Cambridge: Harvard University Press, 2012), p. 37.

⁵⁷ Nayar, *Trial of Bahadur Shah Zafar*, p. 6.

colonial state's mercy was thus not one rooted in humanitarianism, benevolence or faithfulness to lawful promises, but in part a response to a recognition of its own fallibility, exposed by the collective violence of the rebellion. Placed in the backdrop of a rebellion unparalleled across the empire, it is useful to think about this decision not in terms of colonial choice, but necessity.

Therefore, to return to Agamben's inclusion-exclusion model of sovereignty and law, the decision to keep the King alive should not be read as indicative of the spectacular and absolute form of sovereign authority that had successfully created a zone of indistinction between life and death. Instead, it should be considered a moment in which the terrain of colonial sovereignty was radically expanded as more rigid limits were simultaneously realised. This did not merely represent the transportation of the previous Mughal King of India, but also of the imagined category of a collective and politicised Indian society, both coercively banished to the geographical and political peripheries of India, and yet neither able to be summarily killed.

What the trial represented in sum was thus a model for the logic of colonial exceptionality which we can take forward across the latter case studies of this thesis. In this instance, the rebellion had violently exposed the norms and rules governing law and authority under Company Rule as incapable of protecting the political sovereignty of the British in India. Forcing the colonial state into producing a new site for its sovereignty, the King was not punished in relation to any governing legal principle that had existed prior to the rebellion. Instead, he had been sentenced on the supposition that he had been disloyal to a colonial script purposefully produced for such a conviction.⁵⁸ With the discursive basis for colonial rule re-written during this trial, what had also been confirmed was the notion that the colonial norm could be transgressed when the needs of this overarching colonial script exceeded the framework which that norm could offer.

The trial had been the site where the exigencies of this colonial script could be measured, and the logic for declaring the suspension of law fashioned. However, future rule in India would require this logic of exceptionality to be inserted into a framework for colonial law that could operate outside of these periods of emergency. With the trial representing the point at which Mughal sovereignty had been enfolded into the imperial, it was the Queen's first gesture as sovereign that saw a reformulated language of rules and norms re-enter colonial discourse.

The Queen's Proclamation of 1858: A Reformulated Political Relationship

Unlike the make-shift courtroom organised to oust the sovereign at the top of society, the Queen's Proclamation of 1858 represented a concerted attempt to engage with wider Indian society. After the extraordinary levels of violence committed during the uprising, those involved in the transfer of power were keen to use the entrance of the Queen to demonstrate colonial mercy, forgiveness, and

⁵⁸ This to some degree echoes Lauren Benton's argument that sites of exception became grounds for 'experiments in new kinds of law'. Benton, *Search for Sovereignty*, p. 290.

reward. While the immediate impact of the dissolution of the East India Company offered very little administrative change, the careful employment of the image of the Queen was used to generate an idea of rupture in the minds of the Indian public.⁵⁹

The organisation of public declarations in response to societal breakdown were not unusual in this period. As argued by David Armitage, events of a similar nature had been planned after the various wars of independence in the late eighteenth and nineteenth centuries. At these events, the public entrance of a new sovereign ruler, often alongside an acknowledgement of the political nature of the communities now being ruled over, regularly acted to conclude moments of imperial reconstruction or collapse.⁶⁰ The remainder of the chapter will unpack the Queen's Proclamation as one of these occasions, in this case representing the blueprint through which legal subjects were to be re-made in colonial India.

Published and distributed in the major cities across the subcontinent on the 1 November 1858, the declaration was described by the British politician Spencer Walpole as 'one of the most important state papers ever issued by a minister of the Crown'.⁶¹ The content of the Proclamation took the form of a social contract which defined the role of the state, while outlining the expected duties of the subject. In describing the role of the post-rebellion colonial government, sections included pledges of religious tolerance, the withdrawal of aggressive policies towards princely India, the practice of fair and just law, and the stimulation of industry.⁶² Within a larger imperial context, the Proclamation has been understood by some scholars as the ideological charter initiating the shift towards 'indirect rule' and non-interventionist colonial policy across the imperial world.⁶³ Alongside these promises for future governance and shifts in imperial ideology, the Proclamation notably offered amnesty to all but a small group of rebels.

Those involved in drafting the Proclamation were the major players of British politics at the time, receiving input from the Prime Minister Lord Derby, Disraeli, Lord Canning, and Queen Victoria. Amongst those drafting the document, many leading politicians were aware that the outbreak of the rebellion demanded a necessary shift in the relationship required between state and society. Perhaps most famous was Disraeli's speech in the Houses of Parliament in which he argued that the underlying cause for the rebellion was not a spontaneous reaction to a religious slight from greased cartridges, but a legitimate response to the intrusive politics of East India Company rule.⁶⁴ In less critical terms, but

⁵⁹ For instance, most of the East India Company Board of Control simply took up positions in the reformed Council of India, See Hutchinson, *The Illusion of Permanence: British Imperialism in India* (Princeton: Princeton University Press, 1967), p. 87.

⁶⁰ David Armitage, *Foundations of Modern International Thought* (Cambridge, Cambridge University Press, 2013), p. 227.

⁶¹ Walpole to Lord Stanley, 14 August 1858, Liverpool Central Library Archives (Hereafter LCLA) 920/DER(15)/5/1.

⁶² 'Queen Victoria's Proclamation' in *Indian Constitutional Documents*, pp. 355-358.

⁶³ For the Queen's role as the figure of imperial justice after the rebellion, see Mukherjee, *India in the Shadows*, pp. 79-104. For the Proclamation as the charter for 'indirect rule' see Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge: Harvard University Press, 2012), pp. 26-31.

⁶⁴ Benjamin Disraeli 27 July 1857, *Hansard Parliamentary Debates* (Hereafter Hansard), cc. 440-546.

still expressing the need for change, Stanley admitted to Canning, ‘It is beginning to be felt that the country cannot be held by force, or except with the goodwill of its inhabitants’.⁶⁵ Though certain phrasings in the Proclamation had been kept to appease communities at home, particularly the use of ‘Defender of the Faith’, the Indian public were notably considered throughout.⁶⁶

The Queen was also active in this process, and when ordering revisions from the first draft, wrote the Proclamation needed to reflect:

that it is a female sovereign who speaks to more than a hundred million Eastern people, on assuming the direct Gov over them and after a bloody war, giving them pledges, which her future reign is to redeem, and explaining the principles of her Government. Such a document should breathe feelings of generosity, benevolence and religious tolerance, and point out the privileges which the Indians will receive in being placed on an equality with the subjects of the British Crown, and the prosperity following in the train of civilization.⁶⁷

Expressed in all their comments, Stanley, Disraeli, and Queen Victoria understood that if colonial rule was to survive in India, the feelings of the Indian public would need to be more publicly and cautiously taken into account than they had been during the period of Company rule. These various promises offered in the Proclamation were representative of this, endeavouring to project a more conciliatory approach towards Indian society.

A key tool used to attempt to engage Indian society, and also seen as a convenient method to distinguish Crown rule from Company rule, was the central role given to the Queen in this transition. Lord Derby had emphasised her importance early on, stating, ‘I think it is of importance that it should be said by the Queen, even when it only recites what has been already provided by Acts of Parliament’.⁶⁸ Reaffirming the imperial belief that colonial societies reacted more positively to less modern forms of government, Derby wrote a week later that active sovereign figureheads were, ‘much more consonant to Eastern ideas’.⁶⁹ With this in mind, it was quickly concluded that the expression ‘the British Government’ should be omitted from an earlier draft to ensure the Proclamation was understood as, ‘the Queen’s individual and personal act, not that of her secretary of state; and all it contains must be in her name’.⁷⁰

If the document had been carefully worded in order to guarantee its meaning was clear, the public nature of the Queen’s entry, and the comprehensibility of her message, were also seen as vital. When it was suggested that the Proclamation should be read within a hall to an exclusive audience, Lord Canning sharply rejected this proposition and explained that it would be read ‘in both languages,

⁶⁵ Stanley to Canning, 2 August 1858, BL, IOR, MSS Eur/477.

⁶⁶ Disraeli to Derby, 13 August 1858, *Benjamin Disraeli Letters, Vol 7: 1857-1859*, ed. by M.G. Wiebe and others, (Toronto: University of Toronto Press, 2004), pp. 229-230. For further discussion of the consideration of religious communities in England see the footnote on this page.

⁶⁷ G.S. Chhabra, *Advanced Study of History in India, Volume II (1813-1919)* (New Delhi, Sterling Publishers, 1971), p. 189

⁶⁸ Derby to Stanley, 6 August 1858. LCLA, 920/DER(15)/5/1.

⁶⁹ Derby to Stanley, 13 August 1858, LCLA, 920/DER(15)/5/1.

⁷⁰ Ibid.

from the steps, and in the open air'.⁷¹ Inaugurating the Victorian tradition of public spectacle and display in India, major cities were decorated in the manner of a festival, and the readings staged in front of huge crowds. In Bombay flags were raised, fireworks let off, and important spots in the city such as the Jumma Musjid and the Marwaree Bazar were carefully ornamented.⁷² In Poona, a city in western India, a journalist described a scene in which 'the whole of the available troops at Poona and Kirkee, the whole of the European population, and thousands of Natives', assembled to hear the Acting Judge of Poona read the Proclamation.⁷³ The rebellion had, in a way that was unequalled in the colonial history of India, challenged the ruling powers monopoly over both the use of violence and the control over the public space. The performative element of the Proclamation through the manipulation of public urban environments, the symbolic use of the Queen, and the carefulness to ensure this was publicly read, saw the new state spread itself through society, impressing the reach of its power into the everyday.

As with the trial of Bahadur Shah Zafar, in extending the reach of colonial sovereignty certain new limits simultaneously surfaced. The rebellion had fatally undermined the legitimacy of the Company as rulers, and had made clear the prerequisite of at least minimal political dialogue between ruler and ruled. Attempting to publicise a break from the now discredited Company, and in line with other legislation such as the Act for the Better Government of India in 1858 and India's Council Act in 1861, the Proclamation signalled new efforts made by the colonial state to pay lip service to an idea of governmental accountability.⁷⁴ Pertinently, and as later chapters will show, this channel forged between sovereign and subject would become a substantive target for later expressions of disappointment or anger with colonial rule. From this point onwards minorities, protestors, and reformers would often circumvent the government and petition the Queen directly.⁷⁵

These promises of religious non-interference, investment in industry, or the respect for the historic sovereignty of princely India were all important symbolic gestures that began making up the skeletal framework for a new set of rules and norms that colonial governance would declare itself tied to. Nonetheless the section of the Proclamation which had the most tangible and immediate impact was the offer of amnesty. Though the implementation of this pardon was theoretically based upon uniform terms declared in the Proclamation, the reality of a more gradated system of relative forgiveness and relative punishment saw all individuals judged in relation to the exact role in the rebellion. It is at the intersection of a declaration of a uniform standard and the reality of varied practices ridden with

⁷¹ Canning to Stanley, 20 October 1858, BL, IOR, MSS Eur/474.

⁷² *The Bombay Times and Journal of Commerce*, 3 November 1858, p. 692.

⁷³ *The Bombay Times and Journal of Commerce*, 6 November, 1858, p. 702.

⁷⁴ C.A. Bayly has called these legislations 'safety valves' for public opinion. C. A. Bayly, *Indian Society and the Making of the British Empire* (Cambridge: Cambridge University Press, 1998), p. 195.

⁷⁵ An important example of this can be seen in Rukhambai's petitioning to the Queen as a child bride, see Antoinette Burton, 'From Child Bride to "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain', *The American Historical Review*, 103:4 (Oct, 1998), pp. 1119-1146. Another example of this in the realm of foreign policy saw groups of Indian Muslims petition the Queen to continue her policy of support towards the Turkish Empire in the late nineteenth century, BL, IOR, A/1/115.

transgressions from that standard, where this circular relationship between norm and exception can begin to be located.

Gradients of Forgiveness and Contingent Rights: Proclamation Amnesty in 1858

Amnesty under Crown rule was partially justified by its organisers as an Indian tradition and therefore fell into a larger colonial effort to fasten the British presence in India onto deeper lineages of pre-colonial rule.⁷⁶ As with the trial of Bahadur Shah Zafar, what this amnesty predominantly represented was a second opportunity to re-write the history of the rebellion, this time justifying the involvement of large numbers of Indian society. Before exploring this in greater detail, it is necessary to quote the offer of pardon at length:

We deeply lament the evils and misery which have been brought upon India by the acts of ambitious Men, who have deceived their Countrymen by false reports, and led them into open Rebellion. Our Power has been shewn by the Suppression of that Rebellion in the field; We desire to shew Our Mercy, by pardoning the Offences of those who have been thus misled, but who desire to return to the path of Duty....

Our Clemency will be extended to all Offenders, save and except those who have been, or shall be, convicted of having directly taken part in the Murder of British Subjects. With regard to such, the Demands of Justice forbid the exercise of mercy. To those who have willingly given asylum to murderers, knowing them to be such, or who may have acted as leaders or instigators in Revolt, their lives alone can be guaranteed...

To all others in Arms against the Government, We hereby promise unconditional Pardon, Amnesty, and Oblivion of all Offence against Ourselves, Our Crown and Dignity, on their return to their homes and peaceful pursuits. It is Our Royal Pleasure that these Terms of Grace and Amnesty should be extended to all those who comply with their Conditions before the First Day of January next.⁷⁷

Etched into this offer of pardon, the narrative rationalising the rebellion divided society into three broad categories on the basis of their role in the event. Roughly correlating to loyal subjects, impressionable rebels, or ringleaders and murderers, all Indian subjects were in some way marked by their relationship to the rebellion.

Though the Proclamation claimed to offer an unconditional pardon that would allow all but this small group of ringleaders to ‘return to their homes and peaceful pursuits’, there was in practice no blanket forgiveness.⁷⁸ Instead the government tailored relative societal re-entry, creating a fluid spectrum of legal subjectivity in which individuals were assigned limited rights and liberties determined

⁷⁶ Viscount Cross, Secretary State for India, Feb 18 1887, *Hansard*, cc. 45-46; For an extended analysis of this attempt to naturalise colonial rule in India, see David Cannadine, *Ornamentalism: How the British saw their Empire* (London: Allen Lane, 2001).

⁷⁷ ‘Queen Victoria’s Proclamation’ in *Indian Constitutional Documents*, pp. 357-358.

⁷⁸ *Id.*, p. 358.

by colonial investigation. While identities of class, caste, and religion remained important factors in this process of investigation and societal reconstruction, the individual's behaviour in the rebellion, particularly the careful measurement of their loyalty and fidelity to the state as sovereign, became the governing factor determining the individual's final position.

One example of this was the partial re-entry of the Mahikannas. A group of fairly serious rebels from the Aligarh district, the Mahikannas were not pro-actively punished. Instead they were denied access to work on their previous land which, after they had left it for a year, had been passed on. The collector of that district, aware of their troublemaking past, asked the Government to reconsider their policy in order to reduce the group's chances of re-offending. He wrote:

The Mahikannas if turned out of their present holdings in the village, he must wander forth to find employment elsewhere; but as these are hard times to do so in, it is a questionable policy allowing them to become vagabonds, the more so, when I know of no other place I could create them in.⁷⁹

The rebels were still refused, the government arguing that they had forfeited their hereditary rights in 1857 and that it would be 'most impolite to oust the men whom the zemindar with an eye on the preservation of his estate had leased the land to and placed in the vacant houses'.⁸⁰ Amongst a number of factors, discussions concerning the causes of the rebellion had led to criticism that a misunderstanding of the importance of land to Indian society had been a key factor in the outbreak.⁸¹ In light of this, land distribution became an important reward for those who had been loyal in the rebellion, while dispossession a pertinent punishment for those who had not. Among other examples indicative of this attitude, in a letter from Lord Stanley to Lord Canning on August 2 1858, Stanley stated 'I hope you will not be sparing of rewards, especially in land, to those native allies who have really stood by us. It is full time to show we can recompense as well as punish'.⁸² For the colonial state, the likelihood of turning a group of rebels into a group of problematic vagabonds was an outcome that could be justified if it meant remaining consistent to this policy of connecting land ownership to respectability and loyalty.

Large scale confiscation of property punished not only those directly involved in the rebellion, but often family members who had not participated. There were numerous petitions from the wives of capitally punished rebels whose family properties had been taken away, pleading for them to be returned. Rai Kour had petitioned for her rebel husband's estate to be passed on to her as rightful heir. She detailed her poverty and argued that she was not in a position to have supported the government, writing 'as a helpless widow...it was the duty of the male sex to supply the Government Officers with

⁷⁹ Collector Allygurh to Commissioner Meerut, 13 April 1861, UPSA, ALB, Agra Division Commissioners Office 1858-1874/Serial No. 57/File 6/Box No. 68.

⁸⁰ Collector Allygurh to Commissioner Meerut, 10 October 1861, Agra Division Commissioners Office, UPSA, ALB, Agra Division Commissioners Office 1858-1874/Serial No. 57/File 6/Box No. 68.

⁸¹ For efforts at wooing a landowning class after the rebellion see S. Gopal, *British Policy in India 1858-1905*, (Cambridge: Cambridge University Press, 1965), pp. 10-14.

⁸² Stanley to Canning, 2 August 1858, BL, IOR, MSS Eur/477.

any important intelligence'. The petition however was dismissed on the grounds 'a female must suffer for the misdeeds of her co-partners'.⁸³ A second widow, Nidhee Beebee, had her request refused on the grounds that she was a member of a village deemed collectively complicit in the uprising. In refusing her petition the government official wrote, 'All were I have no doubt guilty- Every house in the villages, every well, contained some portion of European property- and for this the villages were confiscated.'⁸⁴ Due to their conjugal or communal connection to the rebellion, these widows were punished by association and thus had limited re-entry to civil society. As in the case of the Mahikannas, the state's endorsement of what these individuals felt to be their rightful property rights did not match the colonial state's reassigned legal status based on their social history.

Property denial was part of a wide array of strategies by which the forgiveness of repentant rebels was tempered on their return to 'peaceful pursuits'. Rebels were also entered onto an extensive register compiling detailed physical and personal information.⁸⁵ The condition of registration and collective punishments, implemented during the rebellion, was part of a shift in which numbers, ethnography, and colonial science were to effect colonial subjects' relationship with the law. The British would for instance later implement legislation to register other perceived troublesome groups such as infanticidal women, criminal tribes, eunuchs, and *badmaashes*.⁸⁶

If those who maintained relationships with rebels were punished on the basis of suspected disloyalty through association, groups that had more tangible connections to the colonial state before the rebellion were also punished on the absence of expected loyalty. Thus, men receiving pensions directly from the state were interrogated, not so that they could prove their loyalty through non-involvement, but so that they could prove active loyalty in opposition to the rebellion. In an enquiry about the conduct of male pensioners Major F.D. Atkinson stated the pensioners who had 'done nothing loyal' or had 'shown no loyalty' were to lose their pension and that 'the intention is to throw the burden of establishing reasonable ground of belief in his loyalty upon the pensioner'.⁸⁷ The pension was contractual, necessitating a certain political position. In the same way, the disloyal would be attached to the colonial state through registration and increased surveillance, the pensioner's beneficial financial relationship with the state was contingent on proof of consistent and vigorous loyalty to state sovereignty.

⁸³ Petition, No. 108 of 1859, UPSA, ALB, Post Mutiny Records Meerut/Serial No. 61/File 25/059/Box No. 9.

⁸⁴ Magistrate and Collector of Allahabad to Offg. Commissioner of Allahabad, 1860, UPSA, ALB, Allahabad Commissioners Office/Serial No. 6/File 5/Box 295.

⁸⁵ Sec to Govt. North-Western Provinces (Hereafter NWP) to Commissioners, Judges, Special Commissioners, and Magistrates in NWP, 5 November 1858, Agra Division Commissioners Office 1858-1874, 13 April 1861', UPSA, ALB, Serial No. 1/ File 450/I, Box No. 38.

⁸⁶ For the example of the *badmaash*, see Singha, 'Punished by Surveillance'. For recent work on the eunuch in the nineteenth century see Jessica Hincy, 'The Sexual Politics of Imperial Expansion: Eunuchs and Indirect Colonial Rule in Mid-Nineteenth-Century North India', *Gender & History*, 26:3 (2014) pp. 414-437. Little work has however explored the 1870s-registration process for eunuchs in northern India.

⁸⁷ Offg. Secretary to the Gov. of India in the Military Department to Adjutant General of the Army, 25 June 1858, UPSA, AB, Agra Division Commissioners Office/Post Mutiny 1858-1874/Serial No. 55/File 113/1/Box No. 4.

This judgemental process of labelling colonial subjects after the rebellion was thus based on whether the subject's behaviour and character induced the newly forming colonial state to trust their ability to respect its sovereignty. Property ownership, access to hereditary rights, good employment, and state pensions were often provided not on a presumed notion of loyalty, but on the individual's ability to actively disprove the presumption of disloyalty. Family and community ties were just some of the ways in which the ability of the individual to respect the script underpinning colonial sovereignty were questioned.

With those drafting the Proclamation particularly keen to use the opportunity to promote a more merciful image of colonial rule, in conjunction with amnesty, the colonial state also offered a number of rewards. These were reserved for those who had proven themselves wholly loyal during the rebellion. These saw subjects compensated in a variety of ways and positioned strategically through society. The army was now filled with faithful Punjabi Sikh soldiers, who were rewarded with promotions.⁸⁸ Others would receive financial payment, watches, trinkets, swords, or letters of merit.⁸⁹ Yet those who became significant benefactors of this restructuring process reflected a particular combination of loyalty and local influence. This group were rewarded financially, but also provided certain exclusive rights to reflect their higher and now colonially sponsored position in society. One example of this was the right to carry arms.

During the rebellion, the colonial state had passed emergency acts to disarm the population. In the North-Western Provinces this led to invasive searches of property and stipulated that every gun-owner had to carry a license. These laws were then made permanent in 1859, with certain changes added.⁹⁰ One of the important alterations made was the grant of an exemption to certain individuals, including all Europeans. While compounding the racial basis of colonial rule, the local men who were exempted followed this formula of loyalty and influence. In reference to this disarming act in the Agra division the Secretary to the Government of the North-Western Provinces scolded a district officer for failing to understand this, stating,

I am directed to state that exemption from the operation of Section 26 and 32 of Act XXXI of 1860, was intended not to be conferred as a reward of loyalty, but to be a concession to Rank, and to social position as evidenced by marked respectability, personal character and social influences. The District Officers of Muttra has entirely misapprehended the intention of the order and so, though in a lesser degree, has the Magistrate of Furruckabad in nominating Zemindars, Bunnias, and others of no social status, simply because they "bear good character or are "respectable persons" or "remained loyal".⁹¹

⁸⁸ Thomas Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley: University of California Press, 2008), pp. 71-78.

⁸⁹ NAI, Home(A)/Public/29 April 1859/Nos. Nos. 61-67.

⁹⁰ Thomas Metcalf, *The Aftermath of Revolt India, 1857-1870* (Princeton: Princeton University Press, 1965), p. 293.

⁹¹ Secretary to Gov of the NWP to Commissioner of the Agra Division, 11 May 1861, UPSA, ALB, Agra Division Commissioners Office/Post Mutiny 1858-1874/Serial No. 8/File 94/IV Box No. 47.

In an effort to build stronger ties with loyal families of influence these exemptions from legislation were concessionary measures. As C.A. Bayly wrote of a ‘tilt’ towards the landlord class following the rebellion, this group were also offered ownership of confiscated villages, and increased government pensions, often to be passed down the family in perpetuity.⁹²

These connections were strengthened with institutionalised gift-giving. Shortly after the rebellion the first imperial honours were awarded to Indians and British alike. Importantly these gift and pensions were contingent on continued loyalty and were, ‘liable to resumption in case of any violation of this condition.’⁹³ The government had thus begun to attempt to blend forms of traditional custom and authority with its own, connecting ideas of British sovereignty to the historic make-up of Indian society. In an effort to gain the legitimacy as rulers that they had failed to achieve before the rebellion, this included repositioning trusted individuals in places of authority within this new legal and social order.

Through the intertwining of reward, mercy or punishment, and the reassignment of relative rights, an effort was clearly made to more closely monitor and organise power relations in society as the post-rebellion social order was built. State resources such as pensions, promotions and land redistribution, alongside the giving of gifts such as titles and the right to bear arms, were all made into tangible but conditional markers of position within this new order. The process was part of rebuilding a carefully chosen and trustworthy traditional elite that was now visibly and financially connected to the government, acting as buffers to prevent future rebellion. While pre-standing identities and the political potential of the individual may have provided certain limits to the repositioning of an individual after the rebellion, it was loyalty or disloyalty to the colonial script which determined where the individual would be placed within these limits. This was a rationale that measured loyalty by the extent to which conscious actors accepted the legitimacy and sovereignty of the colonial state. While it measured political potential by the capacity an individual had to reject this legitimacy, and make the colonial state appear unsovereign.

‘Beyond the Reach of Forgiveness’: Punishment and Proclamation

Central to the functioning of this script, and running alongside this provision of forgiveness, was the sentencing of the small group of rebels, defined as ‘beyond the reach of forgiveness’, to social death.⁹⁴ This group were originally made up of either murderers of British subjects or instigators and leaders. Consolidating liability for the outbreak in this group described as ‘ambitious Men who had deceived their Countrymen’, the rebellion was pronounced a trick of deception in which these rebels had ‘misled’ a gullible majority.⁹⁵ In what was pronounced a ‘season of anarchy’, the ring-fencing of

⁹² Bayly, *Indian Society and the Making of the British Empire*, p. 198.

⁹³ Secretary to the Gov. of India to Sec. Gov NWP, 8 June, 1858, UPSA, ALB, Agra Division Commissioners Office, Post Mutiny 1858-1914/File 80/I/Serial No. 19/Box No. 2.

⁹⁴ ‘Queen Victoria’s Proclamation’ in *Indian Constitutional Documents*, p. 357.

⁹⁵ Ibid.

this group who were deemed conscious rebels by implication depoliticised the involvement of the larger majority.⁹⁶

The importance of both race and colonial doublespeak was central to the creation of this group. While the identity of ‘British subject’ was left fairly ambiguous in official legal terms, and various officials were keen to not see the Crown publicly recognise a difference between subjects premised on race, in practice a clear distinction was made. The Governor-General Canning thus wrote in 1858:

It has appeared to me impossible to lay down, that this term does not include Indian as well as European subjects of the Crown, although, if this could be done, it would have made the operation of the amnesty accord exactly with the spirit of the proclamation issued at Lucknow...In those instances, the crime which has been declared from mercy, has been the murder of Europeans⁹⁷

Moving beyond the initial distinction of race to clarify the exact definition of the term ‘Leader’ further, William Muir, the Secretary to the Government of North-Western Provinces, explained that this was not to be defined by the social hierarchy of the individual, but their conscious involvement in the rebellion. In these circumstances, ‘a Fakeer, who had preached a holy war against the English, though invested with no declared authority, would be more of a “leader”, than any Jemadar or Ressaldar considered simply as such.’⁹⁸ What was important in the colonial mind when defining this figure was locating individuals with clear ideological motivations, who had actively helped to organise this collective violence which rejected the fundamental tenets of colonial rule.

The response to many of those labelled as murderers or instigators, their very mindful rejection of the sovereign right of the colonial state, their organisation of a competing authority for rule, and their targeting of European bodies, was very often summary capital punishment.⁹⁹ For those rebels who had not been arrested, large rewards were offered for information concerning the capture of these rebels.¹⁰⁰ While more prolonged efforts to find these rebels even played a significant part in the early functioning of the first formal extradition treaties between Nepal and British India, as rebels fled across the

⁹⁶ Sec. to Gov. for NWP to the Commissioner and District Officers, dated Allahabad, 6 November 1858, Uttar Pradesh State Archives, Agra Branch (Hereafter AB), Agra Collectorate Records/Judicial/File 8/1858, Box No 258.

⁹⁷ Minute by His Excellency the Right Hon’ble the Governor General of India, Allahabad 4 December 1858, BL, IOR, PJ/3/1064, File 20.

The racial implication of ‘British Subjects’ was also confirmed by Canning in a letter to Stanley writing, ‘I have unceasingly resisted and discouraged all attempts to draw invidious distinction between black and white and I cannot deny that in strictness it is as much murder to kill one as the other. But there is a difference in spirit, spirit in law, between the two offences and there must be a difference in dealing with them or we shall never come to the end of our work.’ Canning to Stanley, Oct 19th 1858, BL, IOR, MSS Eur/474.

⁹⁸ National Archives of India (Hereafter NAI), Home/Judicial (A)/20th August 1858/Nos. 1-2.

⁹⁹ For those rebels who were not executed the alternative punishment was transportation to the Andaman Islands. See Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi: Oxford University Press, 2000), pp. 61-65.

¹⁰⁰ Rewards ranged from anything from 100 rupees upwards. For one file, which discusses the provision of rewards see UPSA, Allahabad Branch (Hereafter ALB), Agra Division Commissioners Office 1858-1874/Serial No. 11A/File 274II/Box No. 40.

Himalayas to escape punishment.¹⁰¹ This expression of modern colonial sovereign power, labelling a group as outside of political society to justify an extraordinary degree of violence, can be traced to histories before the rebellion, the legislation for *thuggee* for one.¹⁰² Yet this was certainly the first time the population as a whole, through one historical moment, was separated into those that explicitly belonged within and outside of these parameters.

Significantly, committing murderous acts on British subjects and coordinating the rebellion were not the only ways through which the state could confirm this social death. The Proclamation, while offering amnesty to all not guilty of treasonable offences, also demanded that rebels gave up their arms and return to their previously peaceful lives by 1 January 1859. Clemency and forgiveness here was attached to the proviso that the individual accepted this story of deception as truth, that they had been guilty of a ‘too credulous acceptance of the false reports circulated by designing men’.¹⁰³ Without submission to this historical narrative by the January deadline, those guilty of lesser offences would still be equated with the murderers of European subjects and deemed worthy of the same degree of punishment.

Thus, to be disqualified from re-entry into colonial society and labelled as incapable of conforming to this modern idea of contract did not solely rely on the rejection of racial hierarchy, but was grounded in the conscious and active rejection of the political sovereignty of the state. In response to a rebel refusing to return to their previous lifestyle, such rejection could not be explained away through a depoliticising narrative, or repaired through moderated punishment, and therefore necessitated total extraction from society.¹⁰⁴ Accepting clemency and the truth of this dominant historical narrative was thus a plea bargain, where in return for social life, agency and consciousness as a political actor had to be relinquished.

Consequently, while in theory the Proclamation was to be applied uniformly, in practice the state behaved with significant pragmatism. Whether in loyalty or in revolt, all Indian subjects were to be marked by their role in the rebellion, and accordingly assigned a contract within this rewritten political and legal structure. Labelling individuals in certain ways has been shown to be central to the political practice of liberalism in empire. As Uday Mehta argues, particular impulses within liberalism sought to constantly create and maintain classificatory schemes based on the marking of subjects. He explains that these markings created limits which dictated membership into, or exclusion from, political

¹⁰¹ Alastair McClure, ‘State Building and Problematic Geo-Political Spaces in South Asia: the Himalayas and the extradition treaty of 1855’ in *Transnational Frontiers of Asia and Latin America since 1800*, ed. by Jaime Moreno Tejada and Bradley Tatar (New York: Routledge, 2017), pp. 98-110.

¹⁰² Lloyd, ‘Bandits, Bureaucrats and Bahadur Shah Zafar’, p. 18.

¹⁰³ ‘Queen Victoria’s Proclamation’, in *Indian Constitutional Documents*, p. 358.

¹⁰⁴ In Foucault’s work on psychiatry he makes a similar point about madness, arguing that it was when an action is shown to be psychologically determined that the actor can be considered legally responsible, ‘the more the act is, so to speak, gratuitous and undetermined, the more it will tend to be excused.’ Michel Foucault, ‘About the Concept of the “Dangerous Individual” in Nineteenth Century Legal Psychiatry’, in *Michel Foucault Power: Essential Works of Foucault, 1954-1984, Volume Three*, ed. by James D. Faubion, trans. by Robert Hurley and others, (London: Penguin, 2002), p. 190.

society. These he argues are to be found ‘in the dense minutiae of social and cultural description’.¹⁰⁵ The rebellion can be seen as a central locus in which these minutiae could be unpacked, and pertinently the logic determining that relative entry uncovered. In response to the rebellion, it was the political capital already carried by that individual, combined with the individual’s measured ability to display loyalty to colonial sovereignty moving forward, that would determine membership to colonial society. Crucially, it was the spaces of discretionary authority quietly carved into the universal declaration of forgiveness and punishment that allowed this procedure to function.

Hence, if the rebellion was the cumulative manifestation of long-standing colonial anxieties, it resulted in the colonial state effectively putting the whole population on trial in a rather frantic attempt to restore authority, redrawing the limits of its sovereign capacity. The political rationality of governance at this formative stage of the modern colonial state had created a system that emphasised the contingent and provisional basis of membership to colonial society, primarily dependent on a subjective notion of loyalty which was bound to an unstable script sustaining colonial sovereignty. It was in the relationship between a language of equal provision of mercy, entangled with a policy that created unequal and porous categories of legal membership to society, that this logic of colonial sovereignty could operate. This logic was recognisable both in the limit figure of the rebel, but equally laced through the relative and conditional societal re-entry created by forgiveness and reward.

Conclusion

Before the rebellion in India the authority to govern and legislate had varied across region and community. In examining both the colonial victor trial of the Mughal King, and the subsequent Queen’s Proclamation, this chapter has pinpointed the response to the rebellion as the key catalyst for the colonial state to assume the singular sovereign authority to both govern and legislate for India as a population. Crucially taking the period that preceded the codification of penal law, this chapter has suggested that the foundation and logic of the later colonial legal order can be found at this juncture of emergency governance and political instability. Central to this was an emerging and recursive relationship between exception and norm which saw the colonial state’s claims on sovereignty expand as it was simultaneously forced to acknowledge new limits.

In these examples, both spectacles reflected platforms constructed to ensure that the narratives of the rebellion could be managed, and the damage done to colonial authority comprehended and responded to. The trial re-wrote the historical role of the King of Delhi to that of a disgruntled and violent pensioner, necessitating the intervention of the graceful Queen. The Proclamation alternatively re-wrote wider involvement in the rebellion as the actions of a recalcitrant minority that had hoodwinked the majority into revolt. These examples exposed the hugely oppressive and domineering power of colonialism, yet also present here was a noticeable pragmatism that signified at least an awareness of

¹⁰⁵ Mehta, *Liberalism and Empire*, p. 58.

certain restrictive rules imposed upon the state's relationship with society. This had resulted in a system in which all colonial subjects were placed within a hierarchical taxonomy of contingent and relative rights, conditional on their loyalty and societal importance. At the heart of this system of societal organisation was the attempt to maintain an aggregated, if never absolute, quantity of political capital in the state, while concurrently managing the remaining political capital distributed across society. With this logic in mind, while the King was marked as a murderous traitor, positioned in the wider brutality of the rebellion, he was not hung like his aides. Though the Proclamation declared either full amnesty or total punishment, the state instead offered a much wider range of relative punishments, rewards, and forgiveness. These were often made as deliberate deals with power structures already in place in local society.

This new form of colonial sovereign power, while projected as total, was thus in practice contingent upon the appeasement and management of the political potential of the society the colonial state now ruled over. As the next chapter will show, the indelible memories, anxieties, and practices employed in response to the violence of the rebellion did not dissipate with the formal end of what Giorgio Agamben would term, the 'state of exception'.¹⁰⁶ Once this fluid hierarchy of relative rights had been created, the habitual practise of creating, offering, and denying rights would become the key task of colonial penal law.¹⁰⁷ This earlier system, dependent on the careful organisation of spaces for legal discretion and exception, and overlaid by a universal language of rules and norms, would therefore be strengthened, rather than weakened, by the codification of the penal law.

¹⁰⁶ Agamben, *State of Exception*. For the returning memories of the rebellion see Kim Wagner, ‘“Treading Upon Fires”: The ‘Mutiny’-Motif and Colonial Anxieties in British India’, *Past & Present*, 218, (Feb, 2013), pp. 159-197.

¹⁰⁷ This returns the analysis to Ann Stoler’s framework for locating the expression of sovereignty. Stoler, *Duress*, p. 197.

Chapter Two

Imperial Political Thought and the Indian Penal Code

Introduction

In an attempt to create the perception of an ordered sovereign world of legal authority, just three years after the Queen's Proclamation the process and provision of criminal justice in India had been fully codified. The IPC, passed in law in 1860 and fully enacted across India by 1 January 1862, had been the product of over twenty years of Law Commissions, complicated drafting procedures, and fierce legal and political debates. As various legal scholars have noted, the codification of criminal law had wider targets than criminality, representing politicised moments which were quasi-constitutional in character.¹ Such was the importance of this event in the imperial context that by the 1870s versions of the IPC had been adopted across far-reaching parts of the wider Indian Ocean world, from Zanzibar to Singapore.² As the imperial epicentre of this legal revolution, India had represented the model colony for codification. In the years following the introduction of the IPC, India thus underwent a rapid codifying drive in a number of areas of law. Legislation, including the Code of Civil Procedure, the Code of Criminal Procedure, the Succession Act, the Contract Act, and the Evidence Act, were all introduced in this period. James Fitzjames Stephen, the Law Member in the Government of India from 1869 to 1872, went as far as commenting that, 'between 1859 and 1872, the law of India may be said, without exaggeration, to have been all but completely codified'.³

Following from the trial of Bahadur Shah Zafar and the Queen's Proclamation, this chapter positions the implementation of the Indian Penal Code (IPC) as the third moment in this formative and transitional period of colonial law and sovereignty in India. Though legal codification was regularly understood as the crowning achievement for positivist legal aspirations of a uniform law, free from the discretionary whims of judges, this chapter seeks to draw out a different story. Prioritising the residual but central role that ambiguity played in the IPC, this chapter instead foregrounds the Code's fundamental instabilities which inserted uncertainty into the definitions of the colonial legal subject, and of legality and illegality more broadly. While the response to the rebellion saw a fluid and subjective notion of 'loyalty' translate into the production of unequal colonial subjects, the IPC absorbed this logic, with a new focus upon ideas of faith and allegiance. Therefore, if the previous chapter argued that the violent suspension of law created a space in which a new form of modern colonial sovereignty could

¹ Barry Wright, 'Indian Penal Code: Historical Context and Originating Principles', in *Codification, Macaulay and the IPC: The Legacies and Modern Challenges of Criminal Law Reform*, ed. by Wing-Cheong Chan, Barry Wright and Stanley Yeo, (Farnham: Ashgate, 2011), p. 24.

² Virtual copies of the Indian Penal Code were implemented across the Indian Ocean. These included Zanzibar in 1867, the Straits Settlements in 1871, and Aden in 1872.

³ James Fitzjames Stephen, 'Codification in India and England', *The Law Magazine and Review*, No XI, December 1872, p. 970.

be made, this chapter argues that the reinstitution of the ‘rule of law’ embraced this logic at the very foundation of its structure. The codification of law was thus not about ridding colonial law of discretion and spontaneity, but instead about more carefully organising when it could be resorted to, and who could employ it.

This chapter is broadly split into two sections. The opening section offers a close reading of the Indian Penal Code (IPC) and its contribution to the making of colonial legal subjectivity. The relatively small amount of historical scholarship that has analysed the IPC has focused on why penal codification occurred in India. Convincing arguments have shown how long-standing concerns with a disobedient non-official white community, and the legal cultures in England, contributed to its implementation.⁴ Yet emphasis on these motivations for codification have overshadowed the deep material impact codification had for Indian society, and for the developing historical relationship between law, politics, and colonial sovereignty.

The second section situates this code and its ambiguous foundations within a wider imperial intellectual context. Focusing upon the writings, speeches, and legislative activity of Thomas Macaulay, Henry Maine, and James Fitzjames Stephen, the section seeks to re-position their legal thought within a broader history of legal exceptionality. Though all figures were legal positivists who openly denounced natural legal theory, the section will locate a vagueness in their definitions of key legal concepts. Placing their ideas of law and society in conversation with developing theories of international law, war, and sovereignty, the section locates the various ways codification emerged in the colony in conjunction with an intellectual rationale for exception.

The chapter begins by briefly outlining the historical and intellectual context from which the codification of penal law in India developed.

Contextualising the Indian Penal Code

The nineteenth century move towards codification was the result of changes in the intellectual world of English, European, and international law, roughly framed around a transition from the predominance of natural legal theory to positivist legal thought. In the English and imperial context this has in large part been understood as a response to the scholarship of legal philosophers such as Jeremy Bentham and John Austin. The positivist school, unlike their predecessors, saw the creation of the state as the founding moment for law and the sole location of sovereignty. Disregarding earlier traditions which connected law more directly to morality and religion, positivist theory was framed in scientific terms.⁵ Seen particularly in Bentham’s work, the idea of codification carried with it a notion of

⁴ This includes David Skuy, ‘Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System compared to India’s Legal System in the Nineteenth Century’, *Modern Asian Studies*, 32:3 (1998), pp. 513-557; Elizabeth Kolsky, ‘Codification and the Rule of Colonial Difference: Criminal Procedure in British India’, *Law and History Review*, 23:2 (2005), pp. 631-683.

⁵ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press), pp. 32-48.

liberating individuals and communities from the despotic grip of confusing and muddled law. In Bentham's idealised legal universe, the simple application of codified law would eventually make 'every man his own lawyer.'⁶ Though Bentham had endorsed a wider suffrage and heightened representative institutions in governance, over the course of the nineteenth century the sense that a codified penal law would empower government saw these legal ideas take root most strongly in the colonies. In arenas where representation was most distant, and ideas of universalism increasingly critiqued, codification had become an attractive proposition for imperial legislators with authoritarian tendencies and anxious interpretations of the contemporary state of colonial societies.⁷

While codification in the colonies had picked up speed, concurring attempts in the metropole remained thwarted. Reformers keen on codification in Britain had failed due to a number of reasons, most prominent amongst these being the prevailing engrained conservatism in British political and legal culture which was attached to the defence of the common law.⁸ The possibility of codification in the empire had emerged directly from the political and administrative idiosyncrasies of colonial rule. Supported by the dissonant functionalism intrinsic to the marriage of imperialism and liberalism, the colony had been morphed into a space where many colonial legislators and politicians assumed a wider remit for legitimate intervention. This had created a political environment that allowed for, and existed upon, the coexistence and coherence of paradoxes. Chief amongst these had been the expansion of the violent capacity of the colonial state and a dismissal of the suitability of representative governance, alongside a higher tolerance for certain liberal policies in other spheres.⁹ Drawn out from the earlier ideas of Jeremy Bentham, and supported by liberal stalwarts such as John Stuart Mill, codification of penal law in India was produced from this bedrock of contradictions buttressing colonial praxis.

When placed in the wider imperial intellectual milieu of the nineteenth century the codification of penal law had, however, raised a set of uncomfortable questions concerning the idea of modernity and the justificatory premise of colonialism as a mode of governance. After Napoleon's Code in France in the early nineteenth century, discussions surrounding codification had increased in tenor, taking a decidedly transnational turn in legal circles across Europe, America, and through imperial networks.¹⁰ These debates concerning codification had failed to conclusively label what codified law represented, and who it suited. For some, it was a legal structure predominately applicable in pre-modern societies which recognised and reacted to the clarity of despotic rule, and were as yet unable to respond to the

⁶ Jeremy Bentham, 'Bentham's Draught for the Organization of Judicial Establishments' in *The Works of Jeremy Bentham Vol IV*, ed. by John Bowring, (Edinburgh: William Tait, 1843), p. 32.

⁷ Jennifer Pitts has notably argued that Bentham would not have recognised, or probably have even wished for, the forceful imposition of codified law and the imperial project that his utilitarian heirs produced, Pitts, *A Turn to Empire*, pp. 103-123.

⁸ Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45', *Law and History Review*, 18:2 (2000), pp. 397-425. Michael Lobban, 'How Benthamite Was the Criminal Law Commission?', *Law and History Review*, 18:2, (2000), pp. 427-432.

⁹ Jennifer Pitts explores the shift towards liberal imperialism after 1830 in her key study. Pitts, *A Turn to Empire*.

¹⁰ See Sandra Otter, "'A legislating empire' Victorian political theorists, codes of law, and empire', in *Victorian Visions of Global Order*, ed. by Duncan Bell, (Cambridge: Cambridge University Press, 2007), pp. 89-112.

intricacies of common law. For others, codified law was a progression from common law, a decidedly modern legal structure appropriate for universal governance.¹¹ The latter argument skewered the imperial hierarchy of civilisation in which India was ruled under a penal law more modern than in the metropole.¹² James Fitzjames Stephen, who later tried to introduce a codified penal law in Britain, epitomised this position. He commented that a comparison between the post-codified Indian penal law and its British equivalent equated to 'comparing cosmos with chaos'.¹³ The former position however remained vulnerable to critiques of the common law which pointed to its tendency to become cumbersome and inexact.

Within the politics of colonial India, the codification of penal law also sat at the apex of another apparent contradiction. The aftermath of the rebellion was supposed to have heralded a shift towards 'indirect rule' and a more self-reflective and distant colonial state. Yet this same state had here quickly embarked on the establishment of a totalising penal code which proudly renounced any local influence.¹⁴

Perhaps the most visible difference that can be pointed to in the absence of codification in the metropole and its proliferation across the colonial world was the experience of violent revolt. Paralleling a wider pattern which often saw constitutional documents produced following periods of large-scale rupture, the immediate motivation for codification across the empire were major and violent societal breakdowns.¹⁵ Whereas for India it was the rebellion of 1857, similar events prompted codification in Jamaica and the settler colonies of Canada and New Zealand.¹⁶ Cycles of rebellion, the implementation of martial law, and the employment of the military, represented expensive and inefficient forms of governance. More than just the practicalities of these teetering cycles of contestation, patterns of extensive and often spectacular violence also provided ammunition for Victorian critics of empire in both metropole and colony.¹⁷ With particular relevance to the perceived mismanagement of Company rule in India, codification offered the promise of a colonial state reliant on a more measured rule of law, which could manage colonial societies with greater accountability. In the installation of a modern legal structure based on the idea of a symmetrical relationship between state and subject, the reform of penal

¹¹ Farmer, 'Reconstructing the English Codification Debate', pp. 399-400.

¹² H.L. Adam, typical of those who praised codification and the clarity it brought, wrote of the Code. 'What an excellent system this is, and how much we are in need of it in this country! Think of the outrageous inequalities of sentences inflicted by judges in England, dictated by nothing higher or more just than their own sweet will or sour prejudice.' H.L. Adam, *The Indian Criminal* (London: John Milne, 1909), pp. 20-21.

¹³ James Fitzjames Stephen, 'Codification in India and England', *The Law Magazine and Review*, No XI, December 1872, p. 974.

¹⁴ Thomas Macaulay 'Introductory Report upon the Indian Penal Code', in *Speeches and Poems with the Report and Notes on the Indian Penal Code, vol II*, (New York: Hurd and Houghton, 1867), p. 315.

¹⁵ For the relationship between violence, law, and constitutional documents see Robert Cover, 'Violence and the Word', *Yale Law Journal*, 95:8 (1986), pp. 1607-1608.

¹⁶ The Morant Bay Rebellion led to the drafting of the Jamaica Code, whereas the North-West Rebellion in Canada and increasing resistance in New Zealand were the immediate catalysts in these contexts. See Wright, 'Indian Penal Code: Historical Context and Originating Principles', p. 34.

¹⁷ For the relatively few, but coherent late nineteenth century critiques of empire see, Gregory Claeys, 'The 'left' and the critique of empire c. 1865-1900: three roots of humanitarian foreign policy', in *Victorian Visions of Global Order*, ed. by Duncan Bell (Cambridge: Cambridge University Press, 2007), pp. 240-265.

law was also understood by many as a progressive and cooperative political step in the governance of Indian society, presenting tangible legislation for imperialists looking to defend their colonial project on lines of benevolent paternalism and ideas of progress.¹⁸

Yet if the reality was that the IPC had been forcibly imposed without dialogue or cooperation with Indian society, emerging from the embers of violent rebellion the state's suspicions with regard to the possibility of substantive future dialogue with society had also been markedly amplified. As later sections of this chapter will argue, the IPC was popular in the period primarily because it successfully disguised a shift towards conservative governance in a liberal cloak. As these ideas had travelled from the metropole, and were strained through a post-rebellion imperial filter, what was left was an authoritarian legal model that consolidated sovereignty in the colonial state, and more carefully organised the spaces for exception in the everyday legal regime.

Making Legal Subjects

The IPC's first job was to define the relationship between the subject and the sovereign through law. Resonating with the model outlined in the Proclamation earlier, this was articulated through an imagined idea of colonial contract. Splitting crimes into their relative degrees of severity, the idea of this contractual arrangement undergirding the subject's relationship to the sovereign was articulated most clearly in serious offences. The punishment for crimes deemed 'Offences against the Queen and her Government', for instance were described in the following terms:

It is necessary to punish with severity those offences which threaten to destroy or injure the whole fabric of political society. The subversion of the Government, with the consequent dissolution of the bonds of civil society, is commonly regarded as the highest crime a member of a community can perpetrate. It is a duty which every subject owes to the Government under which he lives not to attempt its overthrow, and to give to the State and its Rulers, in return for that protection which the State affords to him, a true and faithful obedience. The tie which thus binds the subject to the State is called allegiance.*¹⁹

Left to a footnote in the Code, the asterisk concluding this description directly connected this idea of 'allegiance' to the Queen's Proclamation, where the subject had been asked to 'bear true allegiance to us'.²⁰ Described in fuller detail in a later section of the IPC, allegiance was understood as 'the tie which binds the subject to the State in return for the protection he receives'.²¹ While at another point it was defined as 'natural...arising from birth under the protection of the Government'.²² For these crimes,

¹⁸ Barry Wright, 'Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s', *Legal History*, 12 (2008), p. 26.

¹⁹ W. Morgan and A.G. Macpherson ed. *Indian Penal Code (Act XLV. of 1860) With Notes* (Hereafter IPC), (Calcutta: G.C. Hay & Co, 1863), Chapter VI, p. 99.

²⁰ 'Queen Victoria's Proclamation', *Indian Constitutional Documents*, p. 356.

²¹ IPC, Chapter VI, p. 100

²² IPC, Chapter VI, pp. 100-101. It is interesting to note that while all those born in India were deemed to automatically fall within this remit, the foreigner fell into this category after 'dwelling' for a period of six

representing offences in which an individual or group had taken a directly antagonistic position to the sovereign, the punishment was the most severe. These were the only crimes in the IPC which carried a default additional punishment of the forfeiture of the criminal's property.²³

Although ostensibly representing a new set of laws, and ordered in relation to a new sovereign, the naturalisation of this relationship through the idea of allegiance, directly drawn from the earlier Proclamation, was meant to instil the law with a sense of legitimacy in India. This sense of naturalness also meant it was to be effective immediately, and across the population. Tied into shifting political ideas of the role and duty of the imperial subject, codification was believed to have simplified laws to the point that 'every intelligent man may with little trouble be able to understand'.²⁴ As explained in the IPC itself, once implemented 'the law is administered upon the principle that every one knows it, as he is bound to know it'.²⁵

With this in mind, allegiance in the Code, or being a dutiful legal subject, was not just an abstract arrangement between state and individual. The IPC was instead premised on quantifiable acts of good subjecthood, where the individual was to be seen as consciously maintaining himself or herself within this newly demarcated realm of legality. This relationship between allegiance and the distinction between legality and illegality was expressed in the Code's definition of an illegal act. This stated the following:

The word "illegal" is applicable to every thing which is an offence or which is prohibited by law, or which furnishes ground for civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.²⁶

By making subjects 'legally bound' to duties and obligations in exchange for the protection of law, the realm of legality in this definition was not the passive binary of illegality, but an activated identity constantly to be reaffirmed by the conscious omission of illegal acts. Providing the law a wide and subjective power to define its authority, the IPC had assumed a pervasive presence in society, theoretically determining every act as legal or illegal.

Drawing a comparison with earlier ideas of loyalty and disloyalty and the wider ideological basis of 'indirect rule' can serve to usefully elucidate the significance of this legal logic. In reference to the Queen's Proclamation and the incongruities in this imperial ideology, Mahmood Mamdani has argued:

The doctrine of non-interference turned into a charter for all interference for one reason: the occupying power gave itself the

months. This is described as a conscious acceptance of the terms of this state, law, subject arrangement. See IPC, Chapter I, p. 6.

²³ Whereas for other serious crimes the forfeiture of property was at the discretion of the court, for offences against the state this was a mandatory punishment. IPC, Chapter VI, Sections 121-122, pp. 101-103.

²⁴ B.K. Acharyya, *Tagore Law Lectures, 1912: Codification in British India* (Calcutta: Banerji & Sons, 1914), p. 2

²⁵ IPC, Chapter IV, Section 84, p. 62.

²⁶ IPC, Chapter II, Section 43, p. 30

prerogative to define the boundaries of that in which it will *not* interfere²⁷

Similarly, codification had set the boundaries in which the state declared its legitimate authority to interfere, and by implication, the areas in which the social realm had autonomy to act free from intrusion. In claiming the authority to define the boundaries between legality and illegality, the assumption of the definitional ‘prerogative’ therefore also rings true in relation to the IPC.²⁸ By binding subjects to duties and obligations through this coercively imposed contract, the law maintained a presence even when no law was being broken. Given the implications of this legal doctrine, it is no coincidence that Jeremy Bentham was famous as the intellectual heir of codified law, but also for the idea of the panopticon prison structure.²⁹

Again following the Queen’s Proclamation, the IPC continued to utilise the full populace as the domain upon which it acted, while also nominally drawing a language of equal justice for which ‘every person is liable to punishment, without distinction of nation, rank, caste, or creed’.³⁰ Spanning twenty-three chapters with five-hundred and eleven sections, the IPC outlined legal subjecthood, provided definitions for specific categories of criminal behaviour, and delivered fixed punishments for offences. From this point, and presuming its immediate percolation into the consciousness of the Queen’s newly assumed subjects, the IPC’s layering of offences acted to define crime and punishment in terms of the measured distance a subject had transgressed from this construct of an ideal dutiful subject.

The Code first distinguished between the seriousness of offences by splitting crimes across six tiers of punishment. Offences which were understood as gravest in nature were treated with death, while those deemed most petty were punished by an arbitrary fine. The group of crimes for which capital punishment was sanctioned were waging war against the Queen, abetting mutiny, murder, and giving or fabricating false evidence which caused the execution of an innocent person. These crimes directly targeted threats to the idea of abstract imperial sovereignty, the legitimate authority of the Crown, or the state’s monopoly over taking life. Lying at the very core of this contractual duty was the subject’s responsibility to sacrifice their own life for the sake of the upkeep of this imagined contract. The IPC stated at one point; ‘The law says that a man ought rather to die himself than escape death by the murder of an innocent person or by committing an offence against the State.³¹ With the Queen as sovereign the central pillar in the enforcement of law, the lives of the individual were declared to be secondary in their primary task of protecting imperial sovereignty.

The more precise descriptive term that was to measure the distinction between the severity of punishment was the ‘criminal quality’ of the act. In measuring this ‘quality’ in a system of laws understood as universally intelligible, the Code placed a premium on intention, consciousness, and most

²⁷ Mamdani, *Define and Rule*, p. 26.

²⁸ Ibid.

²⁹ Jeremy Bentham, *Panopticon; or, The Inspection-House* (Dublin: T. Payne, 1791), pp. 1-4.

³⁰ IPC, Chapter I, p. 4.

³¹ IPC, Chapter IV, p. 71.

importantly knowledge. Children between the ages of seven and twelve were for instance to be ineligible for punishment on the basis that though they may be cognisant of their act, ‘understanding does not reach to the consciousness of that act being an offence...criminality depends not upon the consciousness of an act but upon the knowledge of its quality.’³² With a focus upon intention and understanding, crimes such as criminal intimidation, insults and annoyances were now all punishable regardless of whether physical injury occurred.³³ When a large group of actors committed the same crime the judge distinguished punishment between individuals again in relation to the criminal intention of the individual.³⁴ With law written under the presumption it had been made comprehensible to the wider public, and its sharper ends pointed towards consciousness, knowledge, and intent, as the Code had widened the projected terrain of colonial legal authority onto the Indian population, it had made its target the mindful rejection of colonially framed rules.

Yet if the law was using this imagined figure of the dutiful colonial subject as the centre of its moral and legal universe, while also claiming to be committed to an idea equal justice, neither of these ideas were fixed in the IPC. Running alongside this language of uniformity, the IPC was littered with justifications for dividing subjects along more crude lines, forming variegated legal contracts for different groups. To list the more prominent examples, the IPC immediately distinguished influential families, pandered to on the premise of ‘The peculiar state of public feeling in this country’.³⁵ Europeans, on a shared if inverted logic, were provided different sentences after committing the same crime as Indians.³⁶ While from a different angle, and similar to the situation in Victorian Britain, the legal category of the wife was slowly collapsed underneath the primary agency of the husband.³⁷ The force of these earlier distinctions would only be strengthened as the criminal law developed across the century.

Alongside the creation of varied legal subjects along lines of class, gender, and race, the power of law was distributed unevenly across society. As the colonial state was being formed as a more recognisable and central administrative structure following the rebellion, its legal powers were not tightly held within these bounded markers. The Code did not make a clear distinction between the state and subject but instead empowered various groups or individuals to varying degrees to enact legal redress on their own. In describing the category of ‘Public Servants’, the Code made the following distinction: ‘The line drawn between public servants and the great mass of the community will be found to include in the former class a numerous body, comprehending not only all persons in the Government service, but other persons who come under any public obligation or any duty to serve the public.’³⁸ This

³² IPC, Chapter IV, Section 83, p. 60.

³³ Wright, ‘Indian Penal Code: Historical Context and Originating Principles’, p. 24.

³⁴ The IPC states, ‘if several persons join in an act, each having a different intention or knowledge from the others, each is liable according to his own criminal intention or knowledge, and he is not liable further.’ IPC, Chapter II, Section 35, p. 26.

³⁵ IPC, Chapter I, p. 4.

³⁶ IPC, Chapter III, Section 56, p. 43.

³⁷ IPC, Chapter IV, Section 94, p 71; IPC, Chapter VII, Section 136, p. 115.

³⁸ IPC, Chapter IX, p. 134.

loosely defined notion of public servant allowed for fairly fluid roles held by those in position of authority, whether that be the landholders accruing the power of the police or the collector that of the judge. As will be explored later this had particularly serious legal ramifications for the interpretation of the role of the European community.

‘Faith’, ‘Spirit’ and Legality

In combination with the various strategies employed by the IPC to explicitly distinguish between subjects, the primary metrics used to determine a law abiding colonial subject in the Code represented a more abstract path for transgression from legal uniformity and equality.

The possibility of the idea of loyalty being translated into a measurable notion of allegiance to the state, and then recorded by law through codification, was never posited as totally effective in the IPC. Instead, its legislators believed the ‘spirit’ of the law could not be exactly defined, and at times could be actively obfuscated by the Code’s ‘imperfection of language’.³⁹ In response to this, a number of general exceptions were written into the law to protect the delivery of its true intentions. This section in the Code in essence created a justification for circumventing the IPC in order to recognise occasions when a subject, ostensibly acting in contravention to the law, should be considered within the bounds of legality. The most significant justification for such a move was when a subject was understood to have been acting in ‘good faith’.

As section seventy-six of the IPC states, ‘Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.’⁴⁰ Whereas positioned in opposition to ‘absurd belief’ in another section good faith is defined as ‘what is done in *good faith* for a man’s benefit, though in fact causes harm to him, is not an offence.’⁴¹ An emphasis on the importance of faith had significant ramifications not just for those who were accused of committing crimes, but also for those in charge of distributing justice. Acting in their judicial capacity, the judge, for instance remained unimpeachable if their actions were similarly committed on powers that, ‘in good faith he believes to be, given to him by law.’⁴² In this instance, the judge’s ‘good faith’ could allow him to not just act ‘irregularly in the exercise of a power’ but can also allow pardon ‘where he in good faith exceeds his jurisdiction and has no lawful powers.’⁴³ This fraught balance between faith and rules in the IPC was a significant part of a wider discursive process of shoehorning a discretionary logic into this legal apparatus from its inception. It is

³⁹ IPC, Chapter IV, Section 95, p. 72.

⁴⁰ IPC, Chapter IV, Section 76, p. 54.

⁴¹ IPC, Chapter II, Section 52, p. 31.

⁴² IPC, Chapter IV, Section 77, p. 55.

⁴³ It is important to note that the figure of the ‘judge’ is defined fairly widely in the Code as, ‘If the proceeding is one authorized by law, and the person before whom it is taken is empowered to decide, as stated in the explanation, he is, it seems, “a judge” within its meaning, whatever may be his official designation’. This could include collectors or a member of a panchayat for example. IPC, Chapter II, Section 19, p. 17.

noteworthy that by placing the notion of ‘good faith’ at the core of the search for loyal subjects the colonial state had built an infrastructure premised not on the adherence to the substance of law, but on the consciously maintained idea of submission to the law.

It is similarly worth noting the implications this language carried for the wider legal and political transition occurring at this historical juncture. In replacing the religiously informed penal law that preceded the IPC, the Code claimed a greater degree of religious neutrality, traditionally attributed to a post-rebellion shift in colonial priorities. As more recent scholarship has pointed out however, this shift is perhaps best interpreted as a discursive rupture, rather than one that saw genuine colonial distance from questions of Indian religion and custom.⁴⁴ Demonstrated in this period of immediate post-rebellion governance, a blurring of religious and legal languages had been noticeable across the quasi-constitutional documents so far examined. The Queen’s Proclamation had described the return to peace after the rebellion as being delivered on the ‘Blessing of Providence’, whereas the foundational obligation of the new imperial subject in the IPC was to remain ‘faithful’ to the sovereign.⁴⁵ If we can notice a redirection in the specific target of colonial legal intervention from the religious and the private to the secular and the public, this was indicative of the widening rather than the shrinking terrain for the performance of colonial governmentality.⁴⁶

Following the rebellion, religion itself was placed under the protection of the IPC and a premium given to the protection of religious practices. Chapter XV specifically focused on safeguarding freedom of religious expression and positioned religious protection as of equal importance to that of offences to person, property or character.⁴⁷ With more than a cursory nod at both the Queen’s Proclamation, and the idea that the rebellion was a coup organised by religious fanatics, insulting religions was deemed dangerous as it:

seldom have any other effect than to fix those opinions deeper, and to give a character of peculiar ferocity to theological dissension. Instead of eliciting truth they only inflame fanaticism.⁴⁸

In first shifting religion under the protection of the rule of colonial law, the changing model of governance after the rebellion represented an attempt to consume Indian religious authority within this new sovereign legal order. This in part endeavoured to displace the position of religion as a competing authority for the primary loyalty of the subject. Measuring legality on an idea of faithfulness, the

⁴⁴ For the relative lack of change in governance for personal and religious law see: Subhasri Ghosh, ‘Nineteenth Century Colonial Ideology and Social-Legal Reforms: Continuity or Break, *Institute of Development Studies Kolkata Occasional Paper* (June, 2011), pp. 1-50.

⁴⁵ ‘Queen Victoria’s Proclamation’, *Indian Constitutional Documents*, p. 358.

⁴⁶ Legal historical critiques of the one-sided view produced by Weberian analyses that do not appreciate the ‘interdependence between schemes of rationalization and schemes of ritualization’ have been produced in relation to other histories. See, Shahi J. Lavi, ‘Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany, *U.C. Irvine L. Review*, 813 (2011), p. 841.

⁴⁷ It is written, ‘It is often, as the most superficial observation may convince us, as real a pain, and as acute a pain, as is caused by almost any offence against the person, against property, or against character.’ Indian Penal Code, IPC, Chapter XV, p. 217.

⁴⁸ IPC, Chapter XV, p. 217-218.

codification of penal law thus attempted to incorporate roles traditionally occupied by religion within the process of binding colonial subjects to legal duties.

It is thus relevant to think about two key features that the Code provided for the legal structure in this post-rebellion period. Firstly, the IPC and its makers regularly railed against the notion of concepts such as ‘judge-made law’, or the provision of visibly unequal justice. With the explicit aim of reducing the discretionary potential through which an individual judge could insert themselves into the legal process, the IPC provided a normative and supposedly universal framework through which legality and illegality were to be understood, and produced a procedural script through which injury to forms of colonial sovereignty could be redressed. Creating these measurable scales of criminal severity, the IPC acted to quantify the distance an individual had deviated from loyal subjecthood when a crime had been committed. Produced on the assumption that the populace was fully aware of this system, this was achieved by producing a hierarchy of criminal offences which connected the relative ‘quality’ of offence with the severity of punishment. It was not just the category of the criminal that was being fashioned through this process of codification, but through the silences and stresses embedded in the IPC, also the idea of the dutiful subject.

Importantly, as distinctions were made between subjects, this idea would remain unstably defined in law. Thus, as the vocabulary of uniformity and equality became central features of imperial language, it simultaneously produced two spaces for immediate transgressions from these weakly instituted ideas of universality. The first, instituted clearly in law through the very explicit idea of legal difference across lines of gender, race, caste and class. The second, underwriting the wider operation of the Code itself, was located in the inherently ambiguous and subjective ideas of ‘spirit’, ‘good faith’, and ‘allegiance’.

In relation to this uniformity-exception relationship, as the ideas of a functioning and dutiful legal subject and a political contract emerged within the IPC, so did barriers precluding its full realisation in the colonial mind. Given the post-rebellion imperial intellectual environment where hardening ideas of racial difference were visible both outside of the IPC and within it, Indian society was positioned in the classic civilising mission quandary where the law, posited as a pedagogical tool for citizenship on one hand, was simultaneously equipped to reject the universality of its subjects on the other. It was through this that the impossible but central condition of equal political contract in colonial society was articulated.

As Keally McBride has recently argued in reference specifically to James Fitzjames Stephen, codification was successful in India not because it offered to foster the democratic impulses which Jeremy Bentham had initially hoped it would instil, but in part due to the ‘implicit accusation of the colonial subject’ which it imbibed.⁴⁹ For McBride the IPC subtly recognised in law what the post-rebellion colonial state tacitly believed in private, that a very thin line separated the Indian subject from

⁴⁹ Keally McBride, *Mr Mothercountry: The Man Who Made the Rule of Law* (Oxford: Oxford University Press, 2016), p. 118.

the criminal subject.⁵⁰ This section has traced this thin line to a locatable instability and ambiguity used to make and judge the legal subject in this foundational text. In this example, an increasingly sophisticated apparatus fashioned to support exclusionary legal politics was quietly inserted into the IPC underneath the more vocal and dominant espousal of legal uniformity and modernity. Operating across the populace and through the IPC, this in effect nested spaces in which discretion and exception could continue to function, empowering certain groups and creating formal and informal legal inequalities across society. As the next chapter will show, this would have serious ramifications when taken into the courtroom.

The next section will move from the instability built into the IPC, to a deeper and consistent ambiguity that pervaded imperial legal thought across the nineteenth century. Thinking more critically about the legal positivism of the colonial legislators who had produced this legal regime, the section will draw out an emerging intellectual rationale used to justify legal exceptionality in its various guises.

Thomas Macaulay: Framing the Legal Landscape and Producing the IPC

In the history of legal codification, it is fair to say that Thomas Macaulay, Henry Maine, and James Fitzjames Stephen were the most important figures in nineteenth century British India. As the head of the first Law Commission, Macaulay is widely regarded as the key architect of the original draft in 1837. Maine and Fitzjames Stephen meanwhile acted as consecutive legal members of the Council of India from 1863-1872, overseeing the largest implementation of codified legislation in the nineteenth century. Notably, the IPC was drafted and implemented in very different historical and intellectual milieus. Prominent amongst the intellectual seeds which gave birth to the colonial ambition of legal codification in the 1830s had been universalist ideas of society, the recent abolition of slavery, and broad enthusiasm for social reform.⁵¹ These however were in their death throes by the 1860s, the very moment the IPC and the wider codification project took off. This shift away from this earlier and explicitly intrusive form of colonial rule had in fact been a process led by the two later figures, who represented a steady political transition towards a more conservative brand of imperial liberalism.⁵² Maine, located by Karuna Mantena as the key imperial thinker of ‘indirect rule’, produced a series of comparative legal histories which represented early sociological theories on the distinctions separating traditional and modern societies.⁵³ In comparison to both, Fitzjames Stephen’s more belligerent ideas of difference characterised an even deeper shade of imperial conservative thinking. Stephen, unlike

⁵⁰ For how fragile borders separated the common and political criminal in colonial India, see John Pincience ‘De-centering Carl Schmitt: The Colonial State of Exception and the Criminalization of the Political in British India, 1905-1920’, Volume 5, 2014, [<https://quod.lib.umich.edu/p/pc/1232227.0005.006/--centering-carl-schmitt-colonial-state-of-exception?rgn=main;view=fulltext>].

⁵¹ See the classic study by Eric Stokes, *The English Utilitarians and India*, (New Delhi: Oxford University Press, 1959); For the changing ideas of freedom and labour in the 1830s see Gyan Prakash, ‘Colonialism, Capitalism and the Discourse of Freedom’, *International Review of Social History*, 41 (1996), pp. 9-25.

⁵² Bayly, ‘Maine and Change in Nineteenth-Century India’, pp. 389-399.

⁵³ Mantena, *Alibis of Empire*.

Maine, believed the strands of liberalism invested in ideas of humanitarianism and secularism disingenuously refused to concede the force and violence these ideas were themselves built upon.⁵⁴

Nonetheless, though considerable differences separated these legislators' politics, all three lawyers were invested professionally and intellectually in the project of codification. With these ideological differences in mind, the remaining sections of the chapter seek to locate a shared mode of thinking about law and society that was consistent across this period and through these thinkers. Given their collective embrace of positivist law and dislike of natural legal theory, it was ironically the monopoly over undefined legal concepts that drove much of these figures legal politics. Pertinently, it was this ambiguity central to their ideas of law and society which would provide the justification for transgression from the normative legal framework they would themselves build. This first section considers the ideas of Thomas Macaulay, with a particular emphasis on his notion of justice and truth.

When drawing new legislation, the first prerogative of each colonial lawmaker was the production of a historical narrative of the past condition of that law, necessary for the justification for change from the status quo. These legislators therefore often acted as lawyers-cum-historians, using historical ethnographies of law in comparative historical contexts to defend their projects.⁵⁵ Their work often became reading material for those trained in the Indian Civil Service, and had a material influence on colonial policy.⁵⁶ For all these legislators, India's recent history was a combination of either a malfunctioning and unjust legal structure, or otherwise a complete absence of law. Leaning on Mill's *History of India*, Macaulay in many places denigrated the civilisational virtues of Indian society, and argued for the replacement of Indian institutions with British, or newly created modern alternatives. His philosophy towards the role of the British in governing India was most clearly expressed in his minute on education. Reinforcing in forthright terms a belief in the ignorance and backwardness of India and its culture, Macaulay described Sanskrit and Arabic forms of learning as 'giving artificial encouragement to absurd history, absurd metaphysics, absurd physics, absurd theology'.⁵⁷ In response to this Macaulay set about proposing the complete overhaul of education in India. The logic ran parallel to late eighteenth and nineteenth century justifications for territorial imperial conquest over unmapped geographical space. Through what David Armitage has argued was a mishandling of John Locke's theory of property rights, the supposed emptiness of land was equated to an absence of sovereign

⁵⁴ For a comparison of Maine and Fitzjames Stephen see Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law, and Women's Rights* (Cambridge: Cambridge University Press, 2012), pp. 18-24. See also Metcalf, *Ideologies of the Raj*, pp. 57-59.

⁵⁵ All three lawyers wrote prolifically about history. Thomas Macaulay wrote on historical topics ranging from, whereas both Maine and Stephen were prolific writers of legal history. Maine's most

⁵⁶ For a word of caution concerning the tangible impact of the intellectual pursuits of these imperial thinkers see Douglas Peers, 'Review: Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform, edited by Wing-Cheong Chan, Barry Wright, and Stanley Yeo', *Victorian Studies*, 55:4 (2013), pp. 748-750.

⁵⁷ Thomas Macaulay, 'Minute on Education (2 February 1835)', in *Macaulay Prose and Poetry*, ed. by G.M. Young, (London: Rupert Hart-Davis, 1952), p. 730.

ownership, and therefore, claiming this land was not deemed an act of war.⁵⁸ The presumption of an emptiness in the colonial world of abstract concepts such as truth and justice offered a similar imperial reasoning for the wholesale imposition of educational and legal reforms.

What is most relevant to Macaulay's position on education in relation to his later attempts of penal law reform was his argument in connection to 'public faith'. Macaulay's Orientalist opponents had reasoned that the government had a duty to its Indian population to preserve Indian culture and learning. In paraphrasing his own critics, Macaulay stated that his opponents believed, 'public faith is pledged to the present system'.⁵⁹ Furthermore, containing the sacred works and literature for what represented millions of the world's population, his opponents argued that these texts had serious historical significance which demanded protection.⁶⁰ In response to this, and in an almost nihilistic form of utilitarianism, Macaulay argued that the government was under no compulsion to protect history or culture if it was proven to be without value. Instead, Macaulay placed a focus solely on what he termed 'useful knowledge'.⁶¹ In his complete dismissal of such methods of learning, when framing his imperial modernising policy Macaulay wrote that the government was 'not fettered by any pledge expressed or implied'.⁶² To add a rhetorical flourish to his position, he commented, 'We commence the erection of a pier. Is it a violation of the public faith to stop the works, if we afterwards see reason to believe that the building will be useless?'.⁶³ The negation of any value to India's 'public faith' allowed imperialist thinkers to not only ignore the relevance of an Indian past, but also to dismiss its capabilities for self-reform in the present. For Macaulay, while India could produce systems of education, those systems could not offer 'the propagation of truth'.⁶⁴ It was the abstract concepts of truth and progress, which in Macaulay's mind were only understood in the metropole, that overrode any obligation to the 'public faith' of Indian society. The increasing importance of lawmakers' claims to a monopoly over such concepts provided the intellectual bridge for nineteenth century liberals to become imperialists, justifying their unmediated intrusions into colonial societies.

For the reform of law, Macaulay relied on a similar rationale. Recognising the presence of pre-existing legal structures in India, he argued that as in the case of education, Indian law failed at its key task, the provision of justice. With this critique Macaulay defended his draft Indian Penal Code for its

⁵⁸ For Locke as a dubious theorist of empire see, David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013), pp. 114-131. The notion of 'empty' space is taken from D. Graham Burnet, *Masters of All They Surveyed: Exploration, Geography and a British El Dorado* (Chicago: University of Chicago Press, 2000).

⁵⁹ Macaulay, 'Minute on Education', in *Macaulay Prose and Poetry*, p. 720.

⁶⁰ Amongst those who disagreed with the Anglicist position, John Stuart Mill and H.H. Wilson both wrote critical pieces, See Martin Moir & Lynn Zastoupil, *The Great Indian Education Debate: Documents Relating to the Orientalist-Anglicist Controversy, 1781-1843* (New York: Routledge, 1999).

⁶¹ This notion of 'useful knowledge', alongside 'moral improvement' is seen as a secular shift from an earlier agenda which placed an importance on 'religious improvement'. See Michael Hancher, 'Reading and Writing the Law: Macaulay in India', ed. by Michael Freeman and Fiona Smith in *Law and Language: Current Legal Issues, Volume 15*, (Oxford: Oxford University Press, 2013), pp. 187-200.

⁶² Macaulay, 'Minute on Education', in *Macaulay Prose and Poetry*, p. 728.

⁶³ Id., p. 720.

⁶⁴ Id., p. 727.

explicit absence of any intellectual debt to the previous legal systems in India.⁶⁵ Writing in the 1830s, Company Law operated differently in the Bombay, Bengal and Madras Presidencies, while parallel Hindu and Muslim laws were also still in use. His critique for all such law centred on the potential for ‘injustice’ and ‘evil’ which resulted from a lack of uniformity and the over-empowerment of individual interpretations. This was epitomised in the discretionary power of the judge.

In reviewing these laws Macaulay was particularly critical of Hindu law and the Bombay Presidency system. Hindu law was disparagingly described as ‘not law, but a kind of rude and capricious equity’, its decisions representative of a ‘complete lottery’.⁶⁶ For Company Law, Macaulay’s choice of Bombay was pertinent. In comparison to the Bengal and Madras Presidencies, the laws of Bombay were more fixed under the Bombay Regulation Act of 1827. These therefore came closest to the fully codified law Macaulay craved.

Even in Bombay though, the remaining degree of discretion was the point of criticism. Macaulay argued:

We have said enough to show that it is owing not at all to the law, but solely to the discretion and humanity of judges, that great cruelty and injustice is not daily perpetrated in the Criminal Courts of the Bombay Presidency.⁶⁷

The extensive and complicated Company Law and its Hindu and Muslim counterparts left Macaulay to conclude that in India there were only malfunctioning legal systems, such as was evident in the case of Bombay, or religious orders masquerading as law. In his interpretation, however, what was markedly absent across India was what he would consider a modern ‘Rule of Law’. In his critique of the Bombay system, what is made explicit is that the protection of ‘humanity’ and the provision of ‘justice’ should not be left to the individual, but to the production of good laws. For Macaulay, justice was a transient but pre-existent truth present in the world. Laws were to act as a neutral apparatus that uniformly promoted and protected this idea of justice, while removing and punishing examples of injustice. The fact that the ‘humanity’ of Bombay judges allowed for the temporary provision of justice in certain cases was no replacement for a system of law that did not rely on such agency. The role of law was therefore to provide the most refined tools to help the judge in this task of recognising justice, in the process removing their independence as an actor.⁶⁸

Acting as a key pillar in the justification for unmediated governance, justice was being posited almost as a natural right, but not one that was necessarily recognisable by the colonial subject. Declaring the governing status quo as incapable of delivering justice, imperialism was by implication posited as a

⁶⁵ Thomas Macaulay writes that ‘it appears to us that none of the systems of penal law established in British India has any claim to our attention’ ‘Introductory Report Upon the Indian Penal Code’, p. 315.

⁶⁶ Macaulay, ‘The East-India Company’s Charter Bill, July 10 1833’, in *Speeches*, p. 275.

⁶⁷ Macaulay, ‘Introductory Report upon the Indian Penal Code’, in *Speeches and Poems*, p. 319.

⁶⁸ The foreword to the 1837 IPC draft sent to the Governor General of India for instance commented ‘it is owing not at all to the law, but solely to the discretion and humanity of the Judges, that great cruelty and injustice is not daily perpetrated in the Criminal Courts of the Bombay Presidency.’ Indian Law Commission, 14 October 1837, BL, IOR, V/27/144/1, p. 5.

morally sound basis for rule. Referencing James Mill in an earlier defence of the function of the East India Company in 1833, Thomas Macaulay unpacked this logic in relation to taxation as follows:

I hope and believe that India will have to pay nothing. But on the most unfavourable supposition that can be made, she will not have to pay so much to the Company as she now pays annually to a single state pageant, to the titular Nabob of Bengal, for example, or the titular King of Delhi. What she pays to these nominal princes, who, while they did anything, did mischief, and who now do nothing, she may well consent to pay to her real rulers, if she receives from them, in return, efficient protection and good legislation.⁶⁹

The argument put forward was one premised on legitimacy. Though the rulers in Bengal and Delhi may have represented an older historical lineage in India, without offering ‘efficient protection and good legislation’, Macaulay refused to recognise them as ‘her real rulers’. Similarly, when offering a biographical account on the life of Warren Hastings it was Hastings shift towards despotism and away from the promotion of justice that he centres his most damning critique. He writes:

The gravest offence of which Hastings was guilty did not affect his popularity with the people of Bengal; for those offences were committed against neighbouring states. The rules of justice, the sentiments of humanity, the plighted faith of treaties, were in his view as nothing, when opposed to the immediate interest of the State.⁷⁰

What was important is that for Macaulay, it was not an inherent faith in law or even necessarily a racially prejudiced belief in the innate kindness of the Englishman through which he justified the imperialist project. Instead the legitimacy of imperial governance was located in his own subjective understandings of ‘*efficient* protection’, ‘*good* legislation’, ‘rules of *justice*’, and ‘sentiments of *humanity*’.⁷¹ For such a staunch utilitarian and codifier of law, the value placed on this subjective terminology in the imperial context is noteworthy.

Significant in this logic, and indebted to the rise of positivism as the dominant legal movement of the early nineteenth century, was the effort to separate law from morality, and an emphasis on decoupling law and justice as necessarily connected ideas.⁷² While a cross-pollination of legal traditions had occurred in the Anglo-Indian legal system which had preceded the IPC, the separation of law and justice in this tradition was a useful tool in divorcing the new laws from the older socio-moral orders. For Macaulay, justice was not to be found internal to good individuals, cultures, or even in codified

⁶⁹ Macaulay, ‘The East-India Company’s Charter Bill’, in *Speeches*, p. 247.

⁷⁰ Thomas Macaulay, ‘Warren Hastings’, *The Edinburgh Review*, Vol 40, October 1841, p. 225.

⁷¹ Emphasis added.

⁷² As Stephen Utz comments, the ‘first tenet is the basis of all forms of legal positivism, that whether a norm is a law is a matter of fact distinct from whether it should be the law.’ Stephen Utz, ‘Maine’s Ancient Law and Legal Theory’, *Faculty Articles and Papers*, 69 (1984), p. 845. See for instance the English jurist John Austin who commented in 1832: ‘The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.’ John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832), p. 278.

law, but existed as a free-standing and recognisable concept. The sign of modern society was its ability to recognise this concept. Placed within an imperial context which had claimed its position in India was limited to the point at which that society reached this modern threshold, distinguishing the idea of justice from law and leaving it suspended in abstract terminology, represented a key strategy sustaining imperial ideology.

In a speech to the House of Commons concerning the extension of copyright in Britain, Macaulay elaborated on this in a telling way. Arguing against the longer extension of copyright, he contended that the proposed law would restrict the access of important literary works to large numbers of the population. In making his argument he warned that the imposition of an unfair copyright law would force many into illegal activities in which ‘the whole nation will be in the plot.’⁷³ For Britain, a modern nation in the eyes of Macaulay, the production of an unjust law would instigate the public to legitimately reject and circumvent that law. This was because, in his view, the British public were capable of recognising the provision and absence of justice. In this sense, Macaulay’s idea of justice acted as an arbitrating force between society and law. In a perfectly modern society with perfectly modern law, the relationship between the two would be harmonious and symmetrical. If the legislators refused to respect justice, society would in turn recognise this and reject the imposition of unjust law, undoing this imbalance.

When producing law and writing history however Macaulay distinguished the position of Britain from the colonies.⁷⁴ As seen from his minute on education and in his notes on the IPC, Macaulay argued that the Indian public in its current state was incapable of recognising justice, humanity, or truth. Given this perception of a pre-modern state of society, he claimed India needed an especially sharp and refined apparatus for the provision of justice. Thus, the codification of law was deemed essential.⁷⁵ Yet given Macaulay’s emphasis on subjective terminology his logic also strengthened British rule’s route to extra-legal action in the pursuit of these slippery ideals. The result was an increasing emphasis being placed on two antagonistic imperial discourses. On the one hand the uniform production of objective, simple, and modern law was encouraged; on the other, the prominence of subjective notions of modernity, ‘justice’ and ‘humanity’ were highlighted. Theorising law and justice in these two ways represented the basis upon which the modern colonial relationship between norm and exception would later function.

In acknowledging that Macaulay positioned the protection of justice above the value he placed on the production of good law in a hierarchy of governmental prerogatives, the notion that the standardisation of legal decision-making was at the centre of Macaulay’s thought must also be re-

⁷³ Thomas Macaulay, ‘Copyright Bill, February 5, 1841’, in *Speeches by The Rt. Hon. Thomas Macaulay Babington Macaulay, Vol I* (New York: Bedfield, 1853), p. 402.

⁷⁴ Catherine Hall has described Macaulay’s vision of nation and empire as ‘the homely and the unhomely’, Catherine Hall, ‘Macaulay’s Nation’, *Victorian Studies*, 51:3 (2009), p. 521.

⁷⁵ Macaulay commented that: ‘I believe that no country ever stood so much in need of a code of laws as India; and I believe also that there never was a country in which the want might so easily be supplied.’ Thomas Macaulay, ‘East-India Company’s Charter Bill’, in *Speeches*, p. 274

examined. Concluding his speech on copyright Macaulay argued, ‘The question of copyright, Sir, like most questions of civil prudence, is neither black nor white, but grey.’⁷⁶ Macaulay has often been defined by his declared search for uniformity in front of the law, usually with reference to his widely quoted mantra for the Penal Code, ‘uniformity when you can have it; diversity when you must have it; but in all cases certainty’.⁷⁷ The admission that law could emerge from a conceptual grey space, alongside this decoupling of law from justice, is a good starting point to shed light on a more pragmatic element of Macaulay’s legal philosophy.⁷⁸

Discretion and exception, both departures from the stringent provision of codified law, were on numerous occasions described as an ‘evil’ that must be rooted out by codification.⁷⁹ Though Macaulay’s career was undoubtedly one committed to the production of a more uniform looking legal system, the utility of anomaly and exception did not escape him.⁸⁰ Returning to his defence of the Company’s position, Macaulay understood the imperial presence in India as itself an embodiment of exception, stating:

General rules are useless where the whole is one vast exception. The Company is an anomaly; but it is part of a system where every thing is anomaly. It is the strangest of all governments; but it is designed for the strangest of all empires.⁸¹

The necessity for such exceptions was also noticeable in the production of his draft Indian Penal Code. Laying the legal groundwork for the continued institutional leniency towards European violence, Macaulay skirted the issue of uniformity when the punishment of Englishman was under discussion. Describing the intrinsic importance embedded in English character for colonial rule, Macaulay argued in favour of distinctive treatment on racial grounds. He wrote:

our national character should stand high in the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations, stigmatised by the courts of justice, and engaged in the ignominious labour of a gaol.⁸²

While the law in reality both acted and was premised upon a fundamentally racial bias, Macaulay attempted to distance the idea that his law was based on coarse racism. He instead argued that, ‘Every

⁷⁶ Macaulay, ‘Copyright Bill, February 5, 1841’, p. 389.

⁷⁷ Macaulay, ‘The East-India Company’s Charter Bill’, in *Speeches*, p. 276.

⁷⁸ For an early acknowledgement of the relationship between natural and positive law Hans Kelsen aptly commented in 1932, ‘Just as natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-object, namely the mutual relationships of men – so both also have in common the universal form of this governance, namely *obligation*.’, Hans Kelsen, ‘The Idea of Natural Law’, in *Essays in Legal and Moral Philosophy*, ed. by Ota Weinberger, trans. by Peter Heath (Dordrecht: Reidel, 1973), p. 34.

⁷⁹ Macaulay, ‘Introductory Report upon the Indian Penal Code’ in *Speeches and Poems*, p. 327.

⁸⁰ Otter has also noted this tension in Macaulay’s thought see, ‘A legislating empire’, pp. 99-101. The article also traces a deeper imperial tension between universalism and cultural sensitivity from Bentham through to Stephen.

⁸¹ Macaulay, ‘The East-India Company’s Charter Bill’ in *Speeches*, p. 247.

⁸² Macaulay, ‘Introductory Report upon the Indian Penal Code’, in *Speeches and Poems*, p. 334.

Englishman participates in the power of Government, though he holds no office.⁸³ Rather than face regular punishment, Macaulay recommended that serious criminal offences equating to two years simple imprisonment or one year of rigorous imprisonment should be substituted with ‘banishment from the territories of the East India Company’.⁸⁴

As discussed earlier, the IPC had inserted exceptions for various individuals and communities to protect important segments of society. Amongst these, public officials were provided a wider scope and a more lenient hearing in criminal cases to reflect their role in maintaining order in society.⁸⁵ By blurring the distinction between government and society for the whole English community, Macaulay tried to disavowal this ostensibly racial distinction by making a loose connection to the broader principles of law he had positioned at the core of his Code. Such logic strikes deep into Macaulay’s understanding of the role of government and its relationship to law. His form of imperialism was defended as a scientific system that could root out injustice and replace it with justice, with law as the primary tool. Yet this system was pitched as fundamentally dependent on the cultural and intellectual qualities of post-Enlightenment culture and learning which were to be delivered to colonial societies by imperial governance more broadly. These, as argued by Macaulay, were the fundamental tools needed to secure the higher goal of the protecting and recognising justice. Therefore, in turn, deviance from any law was warranted if British rule itself was under threat.

Macaulay’s introduction of a uniform penal code and his aggressive dismissal of oriental learning have long since dominated historical discussions concerning his contribution to imperial political thought. Shifting the focus towards his quieter and more practical legal logic which buttressed his more prominent interventions show that Macaulay was not just a theorist of codified law, but was also building the imperial vocabulary which would justify the point of exception. This was most noticeable in Macaulay’s attempt to claim an intellectual monopoly over two key facets of rule, firstly modern law, and secondly the ability to recognise justice. Consciously decoupling justice from codified law, Macaulay had started, if only tentatively at this stage, to insert a key justificatory displacement into the landscape of imperial political thought. Though modern law was promulgated as an effective tool to protect justice, it was also contingent upon the modernity of those underneath it to recognise what ‘justice’ meant.

Therefore, if discretion was theoretically being reduced through codification, this idea of justice, raised above such reform, would be a constant pretext for imperial politicians and lawmakers to defend transgressions from their own laws and values. The net result of this logic was the attempt to

⁸³ Id., p. 334.

⁸⁴ Id., p. 335.

⁸⁵ See Exception 3 for murder for instance. This states, ‘This Exception extenuates certain acts of public servants in excess of their lawful powers. Death caused by such acts- done in good faith and without ill-will, for the advancement of public justice- is excused because it would be unjust to hold that those persons upon whom the law imposes certain duties which they are bound to discharge, are to be punished as murderers because they may have undesignedly or incautiously overstepped the limits of their authority’. IPC, Chapter XVI, Section 300, p. 258.

allow conflicting practices to be subsumed under a vision for governance, and express this as a coherent form of legal politics. The imperial lawmaker could simultaneously criticise discretion and judicial agency, while also actively inserting it into legislation.

Post-Rebellion Continuities in Legal Thought

I believe that the real foundation upon which the British Empire in this country rests is neither military force alone, as some persons cynically suggest ... nor even that affectionate sympathy with the native population ... I believe that the real foundation of our power will be found to be an inflexible adherence to broad principles of justice common to all persons in all countries and all ages.

James Fitzjames Stephen, *The Life of Sir James Fitzjames Stephen*⁸⁶

Macaulay returned to Britain with his draft code unimplemented. It would take a number of revisions, the rebellion of 1857, and the construction of a newly centralised colonial state for the Indian Penal Code to finally be fully introduced in 1862. Enshrined in the minds of the colonial government after the rebellion was the particular form that the outbreak had taken. This was not rooted in its violence alone, but in the concerted attempt by rebels to connect this violence to a coherent rejection of the legitimacy of British sovereignty in India. As shown by Nupur Chaudhuri and Rajat Kanta Ray, the proclamations and speeches of the rebel leaders were premised on an assortment of loyalties to racial, religious, regional, and nascent national collectives.⁸⁷ All of these ‘felt communities’ were united by the perceived injustices of British Rule.⁸⁸ The narratives recorded during this period were not just posited as threats to India’s religious and cultural values, but were also pointed criticism of poor, and therefore illegitimate governance. As mentioned in chapter one, in the House of Commons, Disraeli had sympathised with the rebellion, describing it as a result of the ‘destruction of Native authority’ which he felt represented ‘adequate causes’ for rebellion.⁸⁹

These narratives threatened to strike at the heart of the discourse of ‘justice’ that Macaulay was using to defend British rule. When writing the codification of penal law in the 1830s Macaulay had understood the unique danger that self-declared rebels who justified their position on legitimacy and sovereignty posed for imperial government. He wrote on the matter:

The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel,

⁸⁶ James Fitzjames Stephen quoted in, Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (London: Smith, Elder & Co, 1895), p. 263.

⁸⁷ For an analysis of the speeches and proclamations of the various rebels see, Nupur Chaudhuri and Rajat Kanta Ray, ‘‘We’ and ‘They’ in an Altered Ecumene’, in *Mutiny at the Margins: New Perspectives of the Indian Uprising of 1857, Volume V: Muslim, Dalit and Subaltern Narratives*, ed. by Crispin Bates, (New Delhi: Sage Publications, 2014), pp. 37-49.

⁸⁸ I employ ‘felt’ as a reference to the work of Rajat Kanta Ray, *The Felt Community: Commonality and Mentality Before the Emergence of Indian Nationalism* (New Delhi: Oxford University Press, 2007).

⁸⁹ Disraeli, 27 July 1857, *Hansard*, cc. 440-546.

it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations.⁹⁰

This logic would be symptomatic of the deep fear that rebellion would later place on colonial rule. While the petty criminal could be sentenced and punished, the figure of the rebel represented a much deeper political problem for imperial rule, their actions legitimised by their success.

Such was the impact of the rebellion and the threat of an emerging counter-narrative to the legitimacy of British presence in India, the following period saw the complete transformation of colonialism's legal structures as well as the production of a new corpus of colonial knowledge.⁹¹ With the basis for colonial rule reset after Proclamation, the work of Maine and Stephen attempted to reinsert a notion of 'justice' into a more carefully organised legal structure, premised upon a newly drawn political and sociological landscape. With this abstract notion of justice still a key trope, a more cynical idea of progress would be added to this ambiguous imperial liberal vocabulary.

Conflicting with the notion of a distant colonial state which had fully embraced the supposed tenets of 'indirect rule', penal law reform in this period was justified on the basis of its interventionist and progressive potential in society. In a statement that demonstrated his Benthamite heritage to not just codification, but also to his belief in the panopticon like quality of the legal reformation, James Fitzjames Stephen wrote that the new laws in India represented:

the establishment of a system of law which regulates the most important part of the daily life of a people constitutes in itself a moral conquest, more striking, more durable, and far more solid than the physical conquest which renders it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion.⁹²

Rather, than illustrating a disinterested distancing from society, Stephen imagined colonial law as enabling a subtle, yet marked, deepening of sovereign legal capacity into the everyday. Instead of the symbolic and direct legal interventions that had occurred previously, the most recent example being the Widow Remarriage Act of 1856, law in various forms came to embody a trickle-down civilising-mission model. Thus, for these legislators the shift to 'indirect' governance did not represent the relinquishing of control over Indian society, but rather, the chance to construct a more efficient grip over discourses of progress and legitimacy.

The law under such governance maintained its deeply political bent. When questioned about the rapid codification of law in India, Maine argued; 'If British rule is doing nothing else, it is steadily communicating to the native the consciousness of positive rights, not dependent on opinion or usage, but capable of being actively enforced.'⁹³ Writing in *The Law Magazine and Review*, Stephen continued

⁹⁰ Macaulay, 'Notes on the Indian Penal Code', in *Speeches and Poems*, p. 373.

⁹¹ Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

⁹² James Fitzjames Stephen quoted in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* p. 286.

⁹³ Henry Maine, 'Over-Legislation, 1 October 1868', BL, IOR, V/27/100/3.

this defence of the imperial legal-political project. He argued that his readers should consider the constitution United States of America, the Bible, and the Westminster Confession, as other examples of codification integral to nation-building. Furthermore, he stated that he believed ‘every educated man’ could learn the law as part of the presumed path to political enlightenment.⁹⁴ The provision of law was posited here as a safe replacement for political enfranchisement.

The trope of absence and societal stagnation similarly remained prominent in imperial discourse. As keen codifiers of law, both Maine and Fitzjames Stephen reviewed Indian society and its historic provision of justice in language reminiscent of Macaulay’s earlier criticisms. Maine argued that, ‘The authoritative native treatise on law are so vague that, from many of the dieta embodied in them, almost any conclusion can be drawn...there are subjects on which no rules exist.’⁹⁵ Stephen meanwhile described the simple provision of peace and law as a ‘social revolution...By merely suppressing violence and intestine war, you produce such a revolution in a country, which has for centuries been the theatre of disorder and war’.⁹⁶ In Maine’s lectures on international law he struck a similar tone, arguing ‘It is not peace which was natural and primitive and old, but rather war.’⁹⁷ With this more aggressive emphasis on a historic past determined by violence, Maine and Stephen rejected the faith shown by earlier utilitarians in the uniform and universal historical march towards civilisation and progress, and instead offered new interpretations on the issue.⁹⁸

In what has been described as a shift from a universalist to a culturalist vision of global society, Maine explained in *Ancient Laws* that progress had been stunted and stationary in various parts of the world.⁹⁹ He argued that this had been the result of an irrational hold that certain religions possessed over society. The early colonial fervour for reform had been justified by what he felt was an uncritical idea of this capacity for progress, and it was here where Maine placed blame for the outbreak of the rebellion. He believed that the naivety of earlier reformers had misunderstood the nuances of societal progress, and had placed too much weight on a Brahminical vision of Indian society. This group, in Maine’s view, did not represent the feelings of wider India, which were still loyal to traditional institutions.¹⁰⁰

Politics was thus instead mapped in comparative fashion, and depicted as growing under different conditions in diverse places. Modern liberalism was not understood as a universally enjoyed

⁹⁴ James Fitzjames Stephen, ‘Codification in India and England’, *The Law Magazine and Review*, No XI, December 1872, p. 981.

⁹⁵ Henry Maine, ‘Over-Legislation, 1st October 1868’, BL, IOR, V/27/100/3.

⁹⁶ James Fitzjames Stephen quoted in, Leslie Stephen, *The Life of Sir James Fitzjames Stephen*, p. 287.

⁹⁷ Henry Maine, *International Law: The Whewell Lectures* (London: John Murray, 1890), p. 8.

⁹⁸ In his critique of progress Stephen wrote animatedly, ‘That men really passed through six thousand years of trial and suffering in order that there might be at last a perpetual succession of comfortable shopkeepers, is a supposition so revolting to the moral sense that it would be difficult to reconcile it with any belief at all in a Divine Providence.’ See James Fitzjames Stephen, ‘The End of the World, 14 April 1860’, in *Essays by a Barrister: Reprinted from the Saturday Review*, (London: Smith, Elder and Co, 1862), p. 139.

⁹⁹ Mantena. *Alibis of Empire*.

¹⁰⁰ Henry Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (1861) (London: John Murray, 1908).

political reality, but was restricted to small portions of the world. In *Ancient Laws* Maine thus wrote extensively on the exceptionalism of British political maturity, reasserting his belief that nations which had non-Christian origins had suffered a stunted civilisational growth. In one section, he wrote:

In spite of overwhelming evidence, it is most difficult for a citizen of Western Europe to bring thoroughly home to himself the truth that the civilisation which surround him is a rare exception in the history of the world.¹⁰¹

Such a view was carried through in Stephen's writings. In his *History of the English Criminal Law* he similarly wrote:

It is characteristic of English people to consider their modern liberalism as not only true but self-evident, and certain to be popular at all places and in all times. In fact, it is a very modern growth, and extends over a small part of the world.¹⁰²

Though this critique of the uniform march to progress marks a break distinguishing these later figures from those writing in Macaulay's era, the importance placed on the recognition of ambiguously-defined terms meant to characterise their conceptions of modernity remained central. The charting of various genealogies of progress across deep historical time and geographical space, was the key theme of Maine's *Ancient Laws*. Yet if Maine severely challenged older constructs of progress, his own theory of development, from fiction to equity to legislation, was left without substantial explanation. As Raymond Cocks has shown, the actual process of progress remained somewhat of a cryptic historical motor in Maine's thesis.¹⁰³ In his essay on the influence of Indian thought on European institutions, Maine explained in his essay on that 'progress' can be located in Greek culture. Though he observes that 'nothing can be more certain than that, when a society is once touched by it', its constitution is left described as 'Whatever be the nature and value of that bundle of influences which we call Progress'.¹⁰⁴ In Maine's own critique of customary law, he described the unaccountable possession and determination of legal knowledge in as a 'juristical oligarchy'.¹⁰⁵ It is perhaps germane to ask whether these legislators self-assumed monopoly over the terms of an undefined progress is the production of a similar imperial legal-political oligarchy.

For Stephen, like Maine and Macaulay before him, effective modern law relied upon an educated modern society. What qualified as an acceptable definition of such a society was again dependent upon the subjective judgement of the individual. Stephen described this abstract quality as

¹⁰¹ Maine, *Ancient Law*, p. 20.

¹⁰² James Fitzjames Stephen, *A History of the English Criminal Law*, vol. III (London: Macmillan and Co, 1883), p. 313.

¹⁰³ See Raymond Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge: Cambridge University Press, 1988), pp. 58-63.

¹⁰⁴ Henry Maine, *Village Communities in the East and West*, (London, John Murray 7th ed., 1913), p. 237. The first edition was published in 1871.

¹⁰⁵ Utz, 'Maine's Ancient Law', p. 826.

‘moderation’, the ability of citizens to self-reflect on the fallibility of their beliefs and opinions.¹⁰⁶ Therefore, if the definition of the pre-modern and anarchic was carefully elucidated by these writers, the binary of progress and modernity was left to their own loosely defined interpretations. In the fashion of Macaulay, both legislators would continue to build upon earlier pushes towards codification, but also upon a certain slackness in the tangible foundations for their imperial legal thought. As this ambiguity remained, the necessity of enshrining difference into law and a reinvigorated importance placed on force was implanted into the overarching codification project. As the colonial state’s constant search to enhance its ability to protect itself against these ‘first beginnings of rebellion’, these ambiguous terms would repeatedly arise in justifying exceptional legislative measures.¹⁰⁷

As imperial liberalism developed across the nineteenth century its dominant proponents underwent a fairly thorough transformation in their views upon history, society, and politics. The constant that stayed throughout this process was a consistent production of ideas justifying colonialism which its leading legislators would claim a unique insight upon. Persistently shying away from any attempt to define the nature of these concepts, whether they be justice, progress, or moderation, the loyalty towards a positivist programme of codifying law in India was built upon a foundation of abstract ideas of modernity.

The chapter will now examine the changing nature of two further concepts which would be key to abetting the regular colonial recourse to exceptional legal measures, war and sovereignty.

War and Peace: Blurred Colonial Ideas

This intellectual and governmental transition embodied in the thought of Henry Maine and James Fitzjames Stephen was a result of the historical context of the 1860s and the 1870s. Though the rebellion had been the catalyst for the shift towards a discourse of non-interference, the outbreak had not been foiled by a distancing of the colonial state from society, but amongst other things, by the imposition of martial law and the widespread use of violence. What martial law allows, often in its most brutal manifestation, is the discretionary provision of ‘justice’ by an increased number of state actors. The state, in effect, swells its net for sovereign practice, diluting the uniformity of its delivery to extinguish a perceived intensified threat to sovereign authority. Pertinently both Henry Maine and Fitzjames Stephen had considered this issue at length.¹⁰⁸

¹⁰⁶ Greg Conti describes this as ‘an attitude of studied awareness of one’s own intellectual limitations’, Greg Conti, ‘James Fitzjames Stephen, John Stuart Mill, and the Victorian Theory of Toleration’, *History of European Ideas*, 42:3 (2016), p. 373.

¹⁰⁷ Macaulay, ‘Notes on the Indian Penal Code’, in *Speeches and Poems*, p. 373.

¹⁰⁸ Fitzjames Stephen was heavily involved in the trial of Governor Eyre. He disagreed with the major theorist of martial law in the period W.F. Finlason, and called for Eyre’s conviction. Though more critical of the enactment of the law, he still conceded that the Crown had ‘an undoubted prerogative to carry on war against an army of rebels, as it would against an invading army, and to inflict upon them such punishment as might be necessary to suppress the rebellion, and restore the peace, and to permit the common law to take effect.’ See Edward James and James Fitzjames Stephen, Jamaica Committee: Opinion, 13 January 1866’, in ‘Facts and

From another context, alongside this legal and political response to violent uprisings ran a parallel move to informally codify Indian society through enumeration, science, and sociology. With the explosion of ethnography and anthropometry in the 1860s, law would begin to be practiced with reference to this developing triangular relationship between politics, colonial science and colonial history.¹⁰⁹ These ideas of modernity, of India as a space of war, and the role of law intersected with material consequences for the provision of law.

Stephen's analysis of the function of law in the Regulation and Non-Regulation Provinces was one example of this. Unlike the Regulation Provinces, regions labelled Non-Regulation Provinces were judged by laws of discretion, which were based on the executive power of the local government. In analysing this system of law, Stephen fully conceded the necessity of discretionary governance in places outside of 'a civilized town like Calcutta'.¹¹⁰ In one reference, the direct collapse of the laws of war with everyday governance was made when justifying this alternative provision of justice in reference to certain communities. He wrote:

It seems to me that to apply the Code of Criminal Procedure, for instance, to such a population as that of Agror, or to a horde of Ghonds or Bheels, would be as absurd as to apply it to an invading army.¹¹¹

If the innate warlike nature the Ghonds or Bheels made them comparable to an invading army, Stephen's minute was used to criticise the distinctive forms of law in the two types of Provinces, and called for the abolition the Non-Regulation provisions in Punjab. His reasoning however did not reflect an unease with the arbitrary nature of executive law. Rather, he was concerned about the restraints that the present form of executive legislation had placed upon the law in Punjab. Stephen adjudged that a process had occurred in which the judicial functions had infected the Non-Regulation legislature, preventing any true adherence to the principles of despotic executive governance. Stephen therefore believed that the original form of 'rough justice' which had been effective in these regions had been replaced by slow decisions burdened by over-complicated legal technicalities.¹¹² In what seemed a contradiction in terms, his call for the abolishment of Non-Regulation law was not to weaken the executive, but instead, to strengthen it. In making these arguments, Maine tentatively, and Stephen more forcibly, defended their legal reforms by pointing towards its modernising impact in the successfully industrialising, 'civilised' urban centres. However, by concurrently emphasising deep societal differences that separated

Documents Relating to the Alleged Rebellion in Jamaica: and the Measures of Repression: Including notes of the trial of Mr. Gordon', *Bristol Selected Pamphlets*, 1866, p. 74.

For Henry Maine's approach see Maine, *International Law*, p. 181.

¹⁰⁹ For the relationship between science and colonial power see Gyan Prakash, *Another Reason: Science and the Imagination of Modern India* (Princeton: Princeton University Press, 1999), pp. 159-200.

¹¹⁰ James Fitzjames Stephen, 'Minute on Administration of Justice' 13 September 1870, BL, IOR, L/PJ/5/437, p. 8.

¹¹¹ Id., p. 9.

¹¹² For instance, he writes, 'the consequence is, what is now notorious, that our officers pay much more attention to their Courts than they do to the outdoor portion of their duties, and the result is exceedingly injurious to the interests of the people and the Government.' Id., p. 19.

communities, they continuously justified a strengthening of executive authority and an increasing diversity of legislation in different provinces.¹¹³

These portrayals of India as a space in which the possibility of war was never distant, combined with a renewed language of civilisational backwardness, had real and tangible consequences for the production of colonial law.¹¹⁴ The bleeding of the logic of martial law into the colonial jurisprudence of the everyday was visible in the creeping arbitrariness inserted through various pieces of legislations produced in the period.¹¹⁵ Flogging for instance, a regular imperial punishment administered in response to the rebellions in India and Jamaica in the 1860s, was reintroduced into everyday law in 1864.¹¹⁶ Collective punishment, a key practice during these phases of martial law, was another frequently used colonial legal adaptation prevalent in the 1870s. Most well-known were laws created for the colonial legal category of the criminal tribe in 1871, but comparable legal exceptions were organised for eunuchs, and groups inhabiting the frontiers.

The targets of these laws were all those located on the boundaries of the normative legal sovereign order the colonial state was attempting to build. Corporal punishment, as chapter four will show, targeted sexually deviant men or thieves connected to class. The criminal tribes represented an itinerant community averse to the creation of sedentary tax paying groups, while the eunuch was positioned between heteronormative ideas of gender and sexuality. Finally, those residing on frontiers, the geographical border of the nation, were deemed ‘fanatics’.¹¹⁷

Thus, if during the rebellion all of society could potentially be placed under martial law, a different process began with the codification of the penal law.¹¹⁸ As noted by Maine in his lectures on international law, in the return of war in the mid-nineteenth he saw for the first time, ‘The whole population of a country’ pass through ‘the ranks of armies’. What alarmed him more than the mere return of war was ‘the intrusion of war into peace’.¹¹⁹ Whereas earlier, civilians had been easily distinguishable from combatants, with the coming of colonial modernity, such distinctions had become increasingly difficult to make.

On the international stage, humanitarian principles in the various military and international law conventions of the mid-century represented seemingly benevolent attempts at controlling the

¹¹³ While legislation such as the Indian Penal Code acted across India, Local and Special laws could operate in response to specific communities and in regions.

¹¹⁴ Nasser Hussain, *Jurisprudence of Emergency*.

¹¹⁵ The notion of a bleeding of exceptionality has been borrowed from Lauren Benton. See Benton, *Search for Sovereignty*, p. 285.

¹¹⁶ During the Morant Bay Rebellion some estimates stated that up to six hundred people were summarily flogged, including two hundred women. See Gad Heuman, *Killing Time: The Morant Bay Rebellion in Jamaica*, (London: Macmillan, 1994), pp. 134-136.

¹¹⁷ Condos, ‘License to Kill’.

¹¹⁸ Sir D. Dundas Judge Advocate General before a Committee of Inquiry for martial law in Ceylon in 1850 for instance argued: ‘The effect of the proclamation of martial law is to put *all* the inhabitants generally under martial law, and that is quite different from ordinary law, and even from ordinary military law or the Mutiny Act and Statutes of War.’ see W.F. Finlason ‘Martial Law, Part I’, *The Law Magazine and Review*, No IV, 1 May 1872, p. 295.

¹¹⁹ Maine, *International Law*, p. 5.

increasingly violent capacity of states by placing restrictions upon state violence and defining the legal subjectivity of humans in relation to their involvement of war.¹²⁰ Yet as the just limits of war were being elaborated during these conferences and in the emerging sphere of international law, the memories of rebellion combined with colonial forms of knowledge would instigate perceptions that whole colonial populations were potential combatants. Rather than creating two distinctive legal apparatuses, one for war and another for peace, in colonial conditions the two were built at such a proximity that lines were easily blurred. Pertinently, while in the earlier period of the 1860s and 1870s, the intersection of a martial law logic and an everyday colonial legal regime resulted in the targeting of mainly geographical spaces and itinerant communities, the same logic would later expand into laws for sedition and collective political action.

Limits of Sovereignty

The final imperial intellectual manoeuvre to be discussed here will be a reconceptualisation of the idea of sovereignty itself. As the question of political sovereignty in colonial India was attempted to be resolved with the figure of the Queen, contemporary understandings of sovereignty had become contingent and limited over the course of the nineteenth century. The shift to a limited understanding of sovereignty marked a transition from the canon of early modern political theorists and brought with it certain benefits for an imperial regime.

Philosophers like Thomas Hobbes and John Austin had understood sovereignty as a limitless force, a command and sanction that the locatable dominant political force could impose onto society through law.¹²¹ The movement to larger empires and the more complex political arrangements that followed challenged these earlier simpler definitions. For Macaulay writing before the rebellion, the woes of sovereignty in the Company period and the problems in its legal structure came from uncertainty.¹²² In his analysis of the rise to power of the East India Company, it wasn't the notion of shared power that Macaulay understood as problematic, but the supposition that sovereignty could only be understood as absolute. This for him had led to a lack of clarity over where power exactly lay. In his history of the Company he instead charted a process in which sovereign practices were adopted on slowly. He writes;

¹²⁰ The newly developing basis of imperial law arose at the same time as the emerging international legal community were reframing the laws of war. Francis Lieber's code for army discipline in relation to the American Civil War, published in 1863, provided the foundation for new limits to war time behaviour on the basis of humanitarian principles. See James Johnson, *Just War Tradition and Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1984), pp. 305-307. Another important moment was the Geneva Convention of 1864 which attempted to improve the treatment of injured soldiers.

¹²¹ Hobbes and Austin's sovereignty is most clearly joined by their shared, sovereignty as command, thesis. It is important to note that much separates their overarching jurisprudence, see Mark C. Murphy, 'Hobbes (and Austin, and Aquinas) on Law as Command of the Sovereign', in *The Oxford Handbook of Hobbes*, ed. by Al. P. Martinich and Kinch Hoekstra, (Oxford: Oxford University Press, 2016), pp. 339- 357.

¹²² The double government of the late eighteenth century was disparagingly described by Macaulay a 'political monster' Macaulay, 'The East-India Company's Charter Bill', in *Speeches*, p. 247.

Thus the transformation of the Company from a trading body, which possessed some sovereign prerogatives for the purposes of trade, into a sovereign body, the trade of which was auxiliary to its sovereignty, was effected by degrees and under disguise.¹²³

Like his interpretation of ‘justice’ and ‘humanity’, the premise that sovereignty could be dealt with in ‘degrees’ would be a recognisable basis for the post-rebellion work of both Maine and Stephen.

Of the three figures, Maine was the most prolific writer on the topic of sovereignty. In similarly rejecting the absolutist forms of sovereignty that previous theorists had promoted, Maine understood sovereignty as a divisible concept. He believed that Hobbes, Austin, and Bentham had reached their conclusions by confining their analysis to Europe and America. This had led them to wrongly locate sovereignty ultimately in the formation of the state.¹²⁴ In refuting this, Maine instead drew on examples from various empires past and present to argue that sovereignty could lie in smaller communities and localities that existed outside of the state structure.¹²⁵ Focusing particularly on village custom, he stated that the state’s absorption of local life had not ‘decayed everywhere in the same degree’.¹²⁶ Maine’s critique of these earlier works was directed towards their inability to help understand society and history. In criticising Austin’s notion of sovereignty, for instance, he denied its practicality in real terms, labelling it a ‘result of Abstraction’.¹²⁷ Heavily critical of these theorists’ loose grip on historical and geographical differences, Maine argued that these conceptions of sovereignty were only ‘a working rule of legislation’, which after being put through his comparative legal historical method often became untenable.

The practical thrust of Maine’s theory of sovereignty was most visibly unpacked in the forging of a revised legal basis for the relationship between British India and the princely states. In his analysis of the British relationship with the princely state Kattywar he re-wrote earlier policy on the basis of quasi-sovereignty.¹²⁸ Here Maine argued that sovereignty should be understood as a ‘well-ascertained assemblage of separate powers or privileges’, and that sovereignty had ‘always been regarded as divisible’.¹²⁹ In inheriting a system of convoluted sovereignty, Maine’s efforts to produce a model of divisible sovereignty attempted to ease tensions between British and princely India. Maine posited ‘there may be found in India every shade and variety of sovereignty, but there is only one independent

¹²³ Ibid.

¹²⁴ In a damning critique of their ahistoricity he wrote, ‘No geniuses of an equally high order so completely divorced themselves from history as Hobbes and Bentham’, Henry Maine, *Lectures on the Early History of Institutions* (New York: Henry Holt and Company, 1875), p. 396.

¹²⁵ He argues that the Median and Persian Empires for instance were mainly tax-taking empires, not as interested in what Austin described as use of law as the sovereign command. Maine, *Early History of Institutions*, p. 384.

¹²⁶ Id., p. 387.

¹²⁷ Id., p. 359.

¹²⁸ Lauren Benton discusses this case and the emergence of ‘quasi-sovereignty’ in greater detail, Benton, *Search for Sovereignty*, pp. 245-250.

¹²⁹ Henry Maine, ‘In Kattywar States: Sovereignty’, 22 March 1864, BL, IOR, V/27/100/3.

sovereign, the British Government.¹³⁰ By making this argument British rule could be positioned as the hegemonic ruling force, while not needing to actually possess total hegemonic power.¹³¹

Though Stephen did not posit sovereignty as divisible like Maine, he was also critical of earlier theorists. In his analysis of Thomas Hobbes, Stephen was praiseworthy of many of his underpinning principles. He agreed for instance that it was the sovereign that distinguishes anarchy from society.¹³² Stephen however reiterated Maine's concern with any attempts to graft abstract ideas of Hobbesian absolute sovereignty onto the historical record.¹³³ Instead, Stephen argued that the sovereign must be understood as fallible and limited by human nature. As he writes:

The schoolmaster can flog the pupil, the judge can sentence the schoolmaster, the King and Parliament can punish the judge, and the Pope (we will suppose) can cause them all to be damned. Consequently, the Pope is sovereign. But remove the Pope, and the King and parliament are sovereign. Apart from them, the Judge is sovereign; and apart from him, the schoolmaster is sovereign over the little boy's desire to lie in bed in the morning.¹³⁴

Rebellion and the other imperial crises which had occurred in the mid-century had provided strong evidence that the empire was built upon unsteady grounds. Once the fallibility of empire had been proven, any strict adherence to absolutist sovereignty only made the empire more vulnerable to future sovereign challenges.

The contradictions in sovereignty in the Company period had been understood as contributing factors to the rebellion. Even after the dissolution of the East India Company, the anointment of the Queen, and the restructuring of the colonial state, British sovereignty in India was continued to be propped up by a number of tensions. Empire had brought with it large spaces that were difficult to manage under the form of political liberalism espoused in the metropole. Relations with princely Indian states were still varied and often convoluted, while colonial governance remained a limited state structure reliant on large numbers of Indian interlocutors. As has been seen, to maintain political control over these areas executive illiberal laws were regularly relied upon to pacify difficult to govern regions. As Shaunnagh Dorset has argued in another context, ‘The precise configuration of sovereignty at any time or location is in part a pragmatic decision of the dictates and capacities of governance.’¹³⁵ This is

¹³⁰ Ibid.

¹³¹ This represented a large shift from the pre-Rebellion Doctrine of Lapse policy that had engulfed princely state sovereignty at a rapid pace.

¹³² James Fitzjames Stephen, ‘Sovereignty’, in *Horae Sabbaticae: Reprint of Articles Contributed to The Saturday Review* (London: Macmillan and Co, 1892), p. 58.

¹³³ Maine makes a similar criticism of Austin's abstract form of sovereignty in his series of lectures on the early history of institutions. He stated, ‘when it is steadily borne in mind that the deductions from an abstract principle are never from the nature of the case completely exemplified in facts, not only, as it seems to me, do the chief difficulties felt by the student of Austin disappear, but some of the assertions made by him at which the beginner is most apt to stumble have rather the air of self-evident propositions.’ Maine, *Early History of Institutions*, p. 362.

¹³⁴ Id., p. 66.

¹³⁵ Shaunnagh Dorset, ‘Sovereignty as Governance in the Early New Zealand Crown Colony Period’, in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. by Shaunnagh Dorsett and Ian Hunter, (New York: Palgrave Macmillan, 2010), p. 222.

true of the way sovereignty was intellectually conceived as well as its lived composition. To embrace a Hobbesian or Austinian form of absolute sovereignty in empire would be a tacit admission that these laws, violence, and ultimately contradictions, were reflective of the innate nature of imperial governance. By limiting the conceptual reach of sovereignty through a focus on the practical realities of governing diverse space, such regular recourse to illiberal legality became justified as the result of external historical and geographical differences. The combination of a sovereignty that could be legitimate and divisible, and a limited rule of law that was distinct from justice thus allowed legal and political discourse in the nineteenth century to disavow discretionary government as an ideal, while simultaneously inserting it into law as a practical necessity.

Conclusion

This chapter has sought to think more critically about the history of codification by positioning it in direct conversation with a simultaneous history of colonial exceptionality. To do so it has brought to the fore a series of colonial ideas about law that, premised on uncertainty, installed a greater degree of sovereign discretionary authority in officials producing and delivering colonial law.

It is interesting to note that in comparison to the historiography of codification in India, the complexities of the shift towards a predominately positivist legal framework has been read differently in the history of nineteenth-century international law. With the proliferation of Darwinian social theory by the 1860s, international ideas of civilisational hierarchies dovetailed neatly with the burgeoning relationship between scientific racism and the rule of law in colonial spaces. The various attempts by European states to construct a set of codified international legal norms in this period are therefore seen in relation to these ideas of cultural and scientific difference which concurrently produced a set of justifications for the circumvention of these very standards.¹³⁶ Within this overtly positivist legal frame, and equipped to more aggressively distinguish societies on European metrics of civilisation, the Victorian project of international law is shown to have sharpened the power of European states ability to penetrate diverse spaces, allowing it to fulfil its universalist aspirations.¹³⁷ Yet importantly, in the history of international law, the increased importance placed on these relatively undefined ideas of progress and civilisation in this period has drawn recent scholarship to question any simple transition

¹³⁶ Particularly important was the notion of a capacity for reciprocity, which European jurists claimed was not possible in most of the non-European world. As Pitts writes, ‘During the nineteenth century, legal and political thinkers increasingly argued that although international law was exclusively European in origin, their law was destined, thanks to Europe’s superior civilizational status, to be authoritative for all, and Europeans had the right to dictate the terms of legal interactions to backward, barbarous, or savage peoples.’ Jennifer Pitts, ‘Empire and Legal Universalisms in the Eighteenth Century’, *American Historical Journal*, 1:1 (Feb: 2012), p. 98.

¹³⁷ See Jennifer Pitts, ‘Boundaries of Victorian international law’, in *Victorian Visions of Global Order: Empire and Relations in Nineteenth-Century Political Thought*, ed. by Duncan Bell (Cambridge: Cambridge University Press, 2007), pp. 67-89; Pitts, ‘Empire and Legal Universalisms in the Eighteenth Century’, pp. 92-121; Casper Slyvest, ‘The Foundations of Victorian international law’, in *Victorian Visions of Global Order: Empire and Relations in Nineteenth-Century Political Thought*, ed. by Duncan Bell, (Cambridge: Cambridge University Press, 2007), pp. 47-67.

from naturalist to positivist law. Instead such works claim that residual pockets of natural legal influence maintained an important role across this period.¹³⁸

With its intellectual debt to key figures who straddled the overlapping disciplines of international and imperial legal thought, the IPC and the subsequent legislation was a moment of clear intersection between these two historical narratives. Yet given the interconnected context of both histories, the IPC has been often swallowed up within a larger and domineering historiographical story of law and the ‘indirect’ colonial state. Under these circumstances, to some degree, two quite distinctive trajectories have been plotted. For one, as jurists working within the emergent professional discipline of international law more clearly engaged with legal positivism, the reach of the discipline is shown to have increased, aiding and abetting imperial powers attempts to carve up the non-European world into an international order in which hegemony and sovereignty rested primarily in the hands of European states.¹³⁹ In India following the shift to ‘indirect’ rule, the historical narrative reads differently. Here, as colonial law produced legislation that represented the culmination of its move towards positivist influence, the colonial state is understood to have lost its explicit universalist ambitions and become wilfully circumscribed in practice. The argument in this chapter is that this narrative needs further complication.

First taking the language in the Indian Penal Code, the chapter argued that the colonial legal subject was defined on flimsy terms premised upon porous boundaries separating legality and illegality. This was not interpreted as an accidental slip from imperial legal minds who had avowedly embraced positivism, but a continuation from the logic of sovereignty that had pervaded the colonial response to the rebellion. Translating loyalty into a legal language of allegiance, the colonial state would consolidate its discretionary ability to define and redefine the legal subject through these elastic ideas of law.

Mirroring this ambiguity inserted into the product of the IPC, the chapter then traced a similar uncertainty in the legal thought of the key thinkers and legislators of colonial law in the nineteenth century. In producing a set of justifications for imperialism premised on certain ill-defined concepts, notably justice, truth, and progress, the chapter has argued that the idea of codification was produced in tandem with a more carefully guarded route to exception. Comparing the changing ideas of war and sovereignty the chapter also suggested that the evolving attitudes to these concepts across the nineteenth century allowed imperial thinkers to situate the colonial space at a constant proximity to the idea of war, justifying the frequent transgressions from normative legal procedure.

Taking these ideas of legal flexibility and exception operating within the colonial legal structure from a theoretical level, the next chapter will follow this logic into legal practice. Moving to violent

¹³⁸ For a critique of a simple historical arc from naturalism to positivism in nineteenth century international legal thinking, see Martti Koskenniemi, *The Gentler Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, (Cambridge: Cambridge University Press, 2001), pp. 98-178; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge: Cambridge University Press, 2006), pp. 131-157.

¹³⁹ For a key example see Anghie’s analysis of the Berlin West Africa Conference 1884-85, Anghie, *Imperialism, Sovereignty*, pp. 90-114.

crime at the level of the local, these ideas will be seen to have taken material shape in the decisions justifying various degrees of leniency and severity in trials of violent crime.

Chapter Three

The Particulars of Punishment: Murder and Case Law in Practice

Introduction

The first chapter of this thesis served to outline a new logic of colonial sovereignty which emerged in India after the rebellion. Premised on the production of norms and exceptions, this argued that a flexible idea of loyalty became the new metric to organise Indian society across a gradated taxonomy of relative rights. With the rebellion quelled, the second chapter argued that the role of exception did not disappear with the implementation of the IPC. Instead, ambiguous ideas of allegiance and faith, direct outgrowths of this earlier idea of loyalty, became the guiding forces defining and demarcating legality and illegality in colonial India. In shifting the point of historical engagement to the level of the courtroom and the local, this chapter follows this relationship between law and colonial sovereignty, norm and exception, into the lower rungs of the colonial legal regime, focusing upon case-law and crimes of everyday violence.

Previous historiography concerned with colonial law and violence has concentrated on either episodic moments of extreme violence and emergency legislation, or the strategies employed by the everyday legal regime to formally and informally legitimise quotidian violence, with significant emphasis on race and gender.¹ Given the notable levels of brutality imprinted onto the colonial record, recovering this history has been part of a welcome shift towards revising the deeply rooted myths of colonial benevolence. Nonetheless, this scholarship has stopped short of engaging the violence emanating from the Indian social, and the colonial legal response, within the deeper story of colonial sovereignty. This chapter argues that to fully appreciate the capacious nature of colonial sovereignty and its accompanying violence, the points where colonial law acted in partnership with various power-structures in society must also be recognised.

The historical thread that will be tugged across this chapter is the persistent role of discretionary authority in colonial law in reaffirming, suspending, or retracting the legal and political rights of

¹ For a recent example of colonial violence and episodic violence see Kim Wagner, ‘“Calculated to Strike Terror”: The Amritsar Massacre and the Spectacle of Colonial Violence’, *Past and Present*, 233 (2016), pp. 185-225.

For race and murder see: Jordanna Bailkin, ‘The Boot and the Spleen: When Was Murder Possible in British India?’, *Comparative Studies in Society and History*, 48:2 (2006), 476-493; Elizabeth Kolsky, *Colonial Violence and the Rule of Law*; Martin Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge: Cambridge University Press, 2009), pp. 128-193. For gender and murder see: Jim Masselos, ‘Sexual Property/Sexual Violence: Wives in Nineteenth-Century Bombay’, *South Asia Research*, 12:2 (1992), pp. 81-99.

For sexual violence see, Deana Heath, ‘Torture, the State, and Sexual Violence against Men in Colonial India’, *Radical History Review*, 126 (2016), pp. 122-133; Elizabeth Kolsky, ‘The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57’, *The Journal of Asian Studies*, 69:4 (2010), pp. 1093-1117; Elizabeth Kolsky, ‘“The Body Evidencing the Crime”: Rape on Trial in Colonial India, 1860-1947’, *Gender & History*, 22:1 (2010), pp. 109-130.

colonial subjects. In the context of the IPC the role of judicial discretion was organised to allow trained individuals the flexibility to safeguard the ‘spirit’ of law when responding to the practical complexities of governance and society. Comparing a range of cases, all involving life-taking crimes, the chapter uses the patterns of severity or leniency in punishment that developed from this space of judicial discretion to follow the unequal distribution of political capital across Indian society. Building from approaches to history which have stressed the perpetual instability of singular categories of historical analysis such as gender and race, and focusing mainly upon crimes of a domestic nature, the legality and illegality of a violent act is shown to vary considerably over time, space, and in relation to the individuals involved.² With this focus upon domestic crimes, distinctions between the legal worth of Indian men and Indian women are shown to take particular prominence in this period.

Unlike examples which will be explored in later chapters, the relatively wide degree of judicial discretion in these everyday criminal cases was not peculiarly unique to the colonial Indian context. In Victorian Britain attempts at codification had failed, and for the large part, the period saw the continuation of wide judicial discretion in criminal cases.³ Yet if in procedural terms the role of judicial discretion remained important in both India and in the metropole, the reasoning used when this discretion was employed spoke to the production of specifically colonial legal politics and discourses. It is in large part the legal discourse and rationale emerging from this space which will be the focus of this chapter.

The predominance of murder and case-law in this chapter is both pertinent for the themes of this study, and useful on a practical level. In relation to the thesis, the sovereignty of a modern state has long since been understood as relying upon a monopoly of violence within its territory, and by implication possessing an ultimate authority over the lives of its populace.⁴ Murder represented a rejection of a key tenet of this presumed contract between subject and state, and usually instigated a fairly thorough legal process in response.⁵ In relation to this, on a practical archival level all crimes of murder and any capital sentence passed in the Sessions Courts had to be confirmed in the nearest High

² For a broad perspective on the importance of recognising these categories historic instability, see Jeanna Boydston, ‘Gender as a Question of Historical Analysis’, *Gender & History*, 20:3 (2008), pp. 558-583; Ann Laura Stoler, ‘Rethinking Colonial Categories: European Communities and the Boundaries of Rule’, *Comparative Studies in Society and History*, 31:1 (1999), pp. 124-161. For studies in a South Asian context that emphasize the importance of recognising the instability of these categories see: Durba Ghosh, *Sex and the Family in Colonial India*, (Cambridge: Cambridge University Press, 2006); Satashi Mizutani, *The Meaning of White: Race, Class, and the ‘Domiciled Community’ in British India 1858-1930*, (Oxford: Oxford University Press, 2011); Mrinalini Sinha, *Colonial Masculinity: The ‘Manly Englishman’ and the ‘Effeminate Bengali’ In the Late Nineteenth Century*, (Manchester: Manchester University Press, 1995).

³ For the various attempts to reduce and manage judicial discretion in response to the claims of arbitrary and unequal punishments in this century see Sir Leon Radzinowicz and Roger Hood, ‘Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem’, *University of Pennsylvania Law Review* 127 (1979), pp. 1289-1349; For an analysis of the wide degree of judicial discretion in punishment for manslaughter in Britain, see Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England*, (Cambridge: Cambridge University Press, 2004), pp. 215-222.

⁴ This goes back to the sociologist Max Weber, see Weber, ‘Politics as Vocation’, in *The Vocation Lectures*.

⁵ For the historical utility and importance of the relationship between law and murder see Martin Wiener, ‘Murder & the Modern British Historian’, *Albion: A Quarterly Journal Concerned with British Studies*, 36:1 (2004), pp. 1-11.

Court. This gives such cases a comparatively higher visibility in both the published law records and also in the reports left in the appeals rooms of High Courts.

Finally, the choice of case-law begins the process of breaking the structure of colonial law down into its various interacting orders. As Mitra Sharafi has outlined, an over-emphasis on codification and statute in South Asian historiography has shielded scholarship from the diverse sources through which law was made, altered, and re-made in history. For Sharafi, a comparative inattention paid to the important role played by case law is one result of this. In response to this she urges the historian of law to consider that, ‘Case law came *before* legislation and *in its absence*. It also came after legislation.’⁶ In this case, the subtle and at times marginal legal cultures that persisted in the courtroom had significant effects on the everyday lives of colonial subjects, and offer an insight to the nuances of colonial sovereignty at the bottom of the legal hierarchy.

The chapter is divided into two sections. The first section will compare the justification for varying grades of leniency and severity in punishment. In working these patterns of punishment into a wider and coherent story of colonial sovereignty, the section will show how this space of discretion inserted into colonial law allowed for ideas of legitimate and illegitimate violence to be negotiated across Indian society at different historical moments. The second section will explore how the idea of failure in delivering justice was re-appropriated into a positive narrative for colonial sovereignty. In a period in which crime rates were rising, and nationalist criticism of colonial law was growing, this was part of a discursive and practical strategy to insulate colonialism from being held accountable for its shortcomings.

The Code’s Discretionary Fault Lines: Murder and the North-Western Provinces

Following those established in Calcutta, Madras and Bombay, in 1866 the Allahabad High Court became the fourth High Court built in British India. While in the first three years of its existence legal administration was split between Agra and Allahabad, by 1869 all court duties were undertaken in Allahabad.⁷ The Court’s jurisdiction covered the North-Western Provinces and Oudh, later to be renamed the United Provinces of Agra and Oudh in 1902. As a province, the region was both geographically large and the most densely populated in India. In the 1881 census this density of population was measured at 416 persons by square mile, which was significantly higher than in Bengal, the second densest, which comparatively recorded 360 persons by square mile.⁸ During the period under study, the region saw its large rural population grow in size significantly, while its capacity for cultivation struggled to keep pace with this demographic demand. Alongside devastating famines in the 1870s, the economic impact of colonial rule in the region resulted in a widening of inequality between

⁶ Sharafi, *Law and Identity in Colonial South Asia*, p. 10.

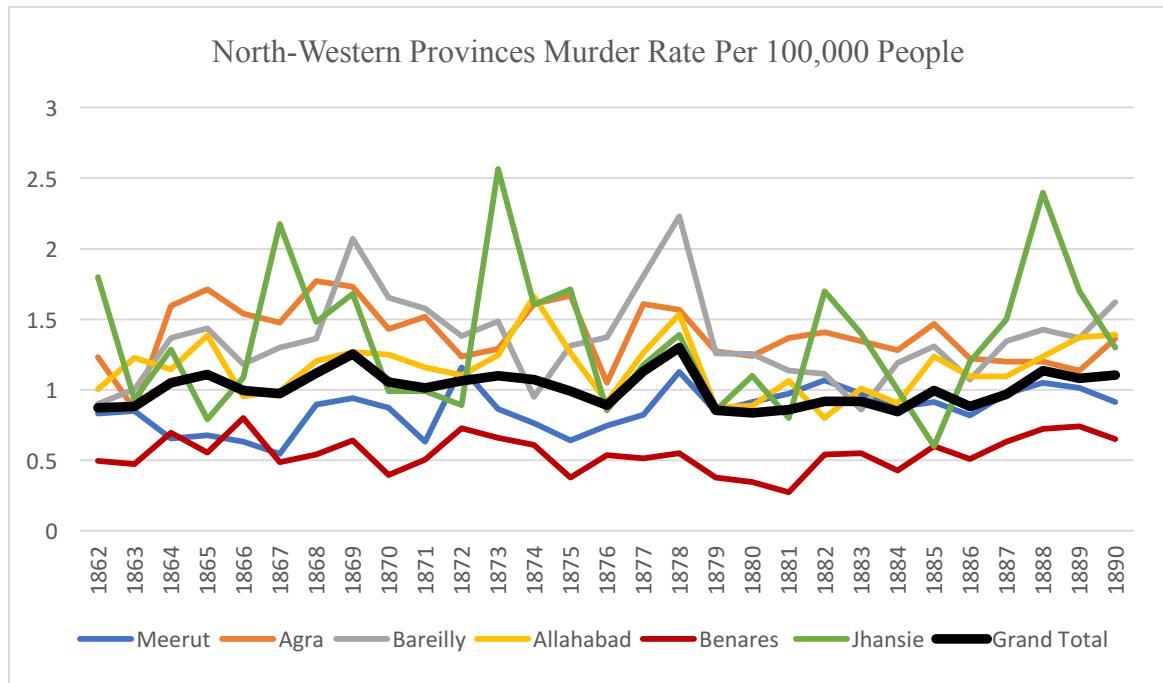
⁷ 125 Years Post Centenary Silver Jubilee, 1866-1991 (Allahabad: Allahabad High Court Post Centenary, 1991).

⁸ See Census of India 1881. Available online:

[http://www.censusindia.gov.in/Census_And_You/old_report/1881%20area%20and%20pop.htm]

a rentier poor and the rich landholding class.⁹ From the perspective of criminal history, the region has been upheld as a case-study for wider criminal panics such as infanticide and the creation of the legal category of the criminal tribe.¹⁰ Much like in other parts of India during colonial rule, crime statistics belie the patterns recorded in most European countries, which saw the decline of violent crime.¹¹ In the North-Western Provinces for instance, the murder rates traced through police records, show a rise from 0.8 per 100,000 in 1862 to 1.1 in 1890.¹²

Fig 1.¹³



⁹ See Eric Stokes, ‘Agrarian Relations: Northern and Central India’ in *The Cambridge Economic History of India, Volume 2: c. 1757- c.1970*, ed. by Dharma Kumar (Cambridge: Cambridge University Press, 1983), pp. 64-65.

¹⁰ Sandra Freitag, ‘Crime in the Social Order of Colonial North India’, *Modern Asian Studies*, 25:2 (1991), pp. 227-261; For female infanticide in North India, with particular reference to the Rajputs see, Malavika Kasturi, *Embattled Identities: Rajput Lineages and the Colonial State in Nineteenth Century India* (Oxford: Oxford University Press, 2002), pp. 102-136.

¹¹ For England see for instance the study of Robert Gurr, ‘Historical Trends in Violent Crime’, *Crime and Justice*, 3 (1981), pp 295-353. Pieter Spierenburg makes use of interesting data to mark a similarly drastic change within Amsterdam. From the second third of the fifteenth century to the beginning of the eighteenth-century murder rates per 100,000 inhabitants were shown to drop from forty-seven to around one. Pieter Spierenburg, ‘Long-Term Trends in Homicide: Theoretical Reflections and Dutch Evidence, Fifteenth to Twentieth Centuries’, in *The Civilization of Crime Violence in Town & Country since the Middle Ages*, ed. by Eric. A Johnson & Eric H. Monkkonen (Chicago: University of Illinois Press, 1996), p. 91-95.

¹² This was not only unique to NWP. In Madras David Arnold has shown that murder rates rose five-fold between 1865 and 1947, twice the rate of population growth. A similar rise was also noted in Bengal. See David Arnold, ‘Crime and Crime Control in Madras 1858- 1947’, in *Crime and Criminality in British India*, ed. by Anand A. Yang (Tuscon: University of Arizona Press, 1985), p. 64.

¹³ This graph has been made from taking the records of population and murders from the North-Western Provinces between the years 1862-1890. It has measured the murder rate per 100,000 people, which is the most common metric to measure this figure. While ‘Grand Total’ offers the average across the Provinces, I have included certain specific rates for different locales to give some sense of trends and differences over this period. These records are kept per year and can be found in the British Library. See the series starting with BL, IOR, V/24/3165.

However, the crime of murder, though one of the few eligible for capital punishment in the IPC, rarely courted the same intense administrative and legal attention as organised crimes such as dacoity, or individual crimes which were deemed uniquely Indian, such as female infanticide. Yet colonial fears did not correspond to a larger quantity of these offences in comparison to less sensational crimes. One estimate of murders in the North-Western Provinces between the years of 1876 to 1886 shows that an average 390 crimes of murder were recorded each year. The estimated figure of murders committed in connection with dacoity, poisoning, and female infanticide was only 134, leaving the larger majority connected to domestic quarrels, land, and theft.¹⁴ While both the nineteenth century colonial state, and contemporary scholarship of colonial rule, have given greater attention to these more dramatic ideas of criminality, the quieter but more substantial paperwork of the everyday colonial legal regime was in relation to the these less sensational types of violent crime.

If these everyday murders seemed to take a backseat in the colonial discourse of Indian criminality in the late nineteenth century, in the early nineteenth century colonial rule had worked hard to gain control of the legal mechanism for punishing murder. Preceding the codification of penal law, the punishment for murder under Muslim law had been severely criticised by Company officials in the late eighteenth century. This earlier law did not make the punishment for murder a primary concern of the state, but that of the heirs of the victim. Under this system, the heir could not only decide whether or not to prosecute, but also had powers to pardon or to exchange punishment for blood money.¹⁵ In Hastings' first attempt to wrest control from Muslim legal authority in the realm of penal law, he argued that in certain cases of 'absolute necessity', the Company should begin overriding the existing legal system and claim final authority in select criminal cases.¹⁶

Poignantly, for Hastings, the crimes which necessitated this extension of the Company's authority were dacoity and murder. The former, he argued, had been punished too leniently, with very few executions for those who were convicted. The crime of murder, Hastings claimed, was irrationally punished and seldom reflected the seriousness of the offence. For Hastings, these interventions were justified given their relationship with Company sovereignty. While admitting the general authority of the Muslim criminal law, he argued, '...it is equally necessary and conformable to custom for the Sovereign power to depart in extraordinary cases from the strict letter of the law'.¹⁷ While his attempt failed, this system of punishment remained the target of colonial legal reformers, who from 1790 onwards began eliminating the individual's right to decide punishment for murder and investing it instead in the state.¹⁸ Over the period of the late eighteenth and early nineteenth centuries the Company

¹⁴ Eustace J. Kitts, *Serious Crime in an Indian Province* (Bombay: Education Society's Press, 1889), p. 2.

¹⁵ Jain, *Outlines of Indian Legal History*, pp. 447-448.

¹⁶ Hastings's letter to the Revenue Board on the Subject of Criminal Law, August 3 1773, in. Monckton Jones, *Warren Hastings in Bengal 1772-1774*, Volume 9: (Oxford: Oxford University Press, 1918), p. 332; For an analysis of this period see, Fisch, *Cheap Lives and Dear Limbs*, pp. 49-56

¹⁷ Id., 331.

¹⁸ Jain, *Outlines of Indian Legal History*, pp. 503-508.

state saw a gradual expansion of this sphere of public justice in which it claimed an increasingly expanded sovereign right of punishment.¹⁹

However, as murder became enveloped under the codified colonial penal law, the judge retained fairly wide discretionary powers when deciding how to punish the crime. In a novel initiative, the IPC provided illustrations to help judges adhere to its undergirding legal principles, yet ultimately, as had been the case even before codification, judges still had to perform what Robert Cover has termed the ‘interpretive act’ of legal judgement.²⁰ In essence, this remained the imposition of a monolithic legal label, superimposed over a complex historical event, justified through a selected collection of evidence and opinion. After defining the act as a particular crime, the judge then had to decide upon the severity of punishment. Often within groups of closely related crimes, or sometimes even within an individual crime, the disparity in potential punishment in the IPC was large. Aptly, perhaps the most significant example of a wide degree of discretion still operating within this uniform legal procedure was the range of punishments applicable to acts of culpable homicide. This portion of the Code was even picked out for particular criticism by James Fitzjames Stephen, who had declared the law for murder and culpable homicide as, ‘the weakest part of the code’.²¹ He claimed that the clumsy wording of the exceptions and the obscure nature of the distinction between forms of culpable homicide left considerable space for inconsistency.

Culpable homicide was split into two distinct categories, those which amounted to murder, and those which did not. It was defined in the following terms:

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.²²

Distinguishing itself from the Muslim Law it followed, the IPC was significantly more concerned with premeditation and the wilfulness of the actor. However, the Code did not make it clear exactly when certain punishment was deemed appropriate.²³ Crimes which were sentenced as murder were punishable by death or transportation for life, while those which did not amount to murder were punishable by

¹⁹ For the changing law on homicide in early Colonial Bengal see Fish, *Cheap Lives and Dear Limbs*, pp. 49-57, 100-104; See also Singha, *A Despotism of Law*, pp. 80-120.

²⁰ Robert Cover argued that the coercive nature of all judgements was possible only through the practice and/or fear of various forms of violence. Cover, ‘Violence and the Word’, pp. 1612-1613.

²¹ James Fitzjames Stephen, *A History of the Criminal Law in England*, vol. III (London: Macmillan, 1883) p. 313. In a contemporary legal analysis, Neil Morgan described the law for murder as one of the ‘two rather dark clouds’ which hangs over the Code, the other being the use of *mens rea* another important element of homicide law. Neil Morgan, ‘The Fault Elements of Offence’, *Codification, Macaulay and the IPC: The Legacies and Modern Challenges of Criminal Law Reform*, ed. by Wing-Cheong Chan, Barry Wright and Stanley Yeo, (Farnham: Ashgate, 2011), p. 59.

²² IPC, Chapter XVI, Section 299, pp. 224-225.

²³ The Islamic law practiced before the IPC split homicide into four categories of which wilful homicide made no distinction between murder in cold blood or murder under grave and sudden provocation. Islamic law was also more lenient to a number of life taking actions. See Tapas Kumar Banerjee, *Background to Indian Criminal Law* (Bombay: Orient Longmans, 1963), pp. 34-68.

imprisonment for life, or of a term up to ten years and a fine.²⁴ For the crime to be considered culpable homicide not amounting to murder, or even dropped to a lesser charge, the action had to meet one of the five exceptions in the Code. These exceptions included acts committed under grave and sudden provocation, in defence of private property, by a public servant who had exceeded the power given to him by law, in the heat of passion, or when the victim took the risk of death with consent.²⁵ Taken in isolation, the exceptions in the Code reflected the priorities of the colonial legal systems. The second exception protected the individual's right to defend their property and their right to self-defence, while the third exception explicitly protected the law and its representatives.

Once an offence had been decided, to choose between the various punishments applicable within that particular section of the IPC, the judge was to correlate the punishment to the precise 'quality' of the crime.²⁶ Perhaps the clearest articulation of this logic was stated as follows:

Where the law provides a maximum punishment for an offence leaving it to the discretion of the Court to inflict such punishment or any less punishment which it may think will suffice in the particular instance, the Court should exercise such discretion upon judicial grounds and after consideration of the principles intended by the Legislature to be applied. The maximum penalty should only be inflicted for the maximum offence, and in every gradation from the maximum downwards that principle ought to be kept in sight.²⁷

In an attempt to standardise decisions, colonial judges usually relied upon precedents taken from the various High Court's in India after 1862. In practice, certain uncontested factors defined the degree of punishment in particular cases. Europeans, for instance, were almost never capitally punished for murder in colonial India, even though they committed a comparatively high level of violent crimes.²⁸ Even as this form of violence became an increasing problem for the colonial state, with increasing coverage in the vernacular press, conviction rates dropped thirty-three per cent between 1870 to 1905.²⁹ However, in cases not involving European subjects, and thus without the same overriding determinant of race influencing legal decision-making, the logic behind raising or lowering punishments reveals a more complicated story.

One way in which the role of judicial discretion did become more significant in this region than in the system operating in Britain was the comparative lack of jury involvement in these criminal cases. The question of the jury in nineteenth-century colonial India has a complicated and important history,

²⁴ This differed from the mandatory sentence of death for murder in English criminal law at this period. See Robert Turrell, *White Mercy; A Study of the Death Penalty in South Africa*, (London: Praeger, 2004), pp. 3-7.

²⁵ IPC, Chapter XVI, Section 300, p. 238.

²⁶ IPC, Chapter IV, Section 83, p. 60.

²⁷ *Queen-Empress v. Raiju*, Criminal Appeal No. 399 of 1893, August 3, 11 Allahabad Weekly Notes (Hereafter AWN) 184 (1893).

²⁸ Jordanna Bailkin notes the rarity of this legal sentence, finding only seven cases between 1861 to 1880. Bailkin, 'Boot and Spleen', p. 464.

²⁹ Id., p. 463.

acting as a battleground for ideas of liberalism, sovereignty, and the nature and purpose of colonial rule across the century.³⁰ With the codification of criminal law following the rebellion, the Code of Criminal Procedure in 1861 installed local government with the autonomy to decide when and how to use the jury in criminal cases.³¹ With power in the hands of regional authorities, this led to an uneven implementation of trial by jury across colonial India. Unlike in Bengal and Bombay which employed the jury for a wider collection of criminal offences, in the North-Western Provinces, where the cases from this chapter are taken, the use of the jury was more restricted.³² By 1885 trial by jury was made possible for ten classes of crimes in the Sessions Courts, and only in the districts of Allahabad, Benares and Lucknow.³³ Pertinently none of these included the crimes of murder or culpable homicide.³⁴ This is important in reference to the cases explored here. With trial by jury excluded as a possibility in the lower courts for the crimes of interest, these cases were either appeals, or confirmation of Sessions Court sentences, decided by judges. In turn, the final sentences and punishments in these cases were then decided by two High Court judges.³⁵

The controversial exception to this was criminal cases in which European British subjects were the defendants. In these cases, the accused was given the right to claim trial by jury in which the majority of the jurors would be European British subjects. It was a system that contributed significantly to the extreme leniency Europeans received for their violent crimes.³⁶ However, it is interesting to note that when the Government of India re-examined the use of juries in India in the 1890s, the North-Western Provinces were seen as a comparatively successful model.³⁷ While the narrative that emerged from other regions emphasized that Indian juries had been too cautious to sentence in capital cases, with trial by jury not being used for such crimes involving Indians in this province, the only examples of questionable murder sentencing using a jury were those including European jurors. In this scenario, a system of trial by jury undertaken by Indians in less serious crimes was seen to work with relative efficacy, while a jury system used in cases of serious European violence was deemed a comparative failure. This led to

³⁰ For a discussion of the criminal jury in the Company period with a particular interest to its perceived relationship to the panchayat see James Jaffe, *Ironies of Colonial Governance: Law, Custom and Justice in Colonial India* (Cambridge: Cambridge University Press, 2015), pp. 128-154; For the relationship between political thought and the jury see Bayly, *Recovering Liberties*, pp. 61-71.

³¹ See W. Theobald (ed.), *The Code of Criminal Procedure*, (Calcutta: Messrs, Thacker Spink & Co, 1861), Chapter XIII, Section 322, p. 97; *The Indian Code of Criminal Procedure Being Act No. X of 1872*, (London: W.H. Allen, 1872), Chapter XIX, Section 233, pp. 60-61.

³² Even in these other regions however, over the course of the nineteenth century the power of the jury was slowly undermined by various amendments to the CrPC in 1872 and 1882. See Sharafi, *Law and Identity in Colonial South Asia*, pp. 201-205.

³³ These included, kidnapping and abduction, rape, theft, robbery and dacoity, criminal misappropriation, receiving stolen property, mischief, house trespass, offences relating to marriage, abetments of, and attempts to commit any of the above offences. UPSA/LB/List 12 Judicial Criminal 1886-1935/N.W.P and Oudh Judicial Proceedings/Jan 1885/Nos. 14-32/p. 17.

³⁴ See also Sorab Wadia, *The Institution of Trial by Jury in India*, (Bombay: Fort Printing Press, 1898), p. 53.

³⁵ For a more detailed discussion on the jury question see: Kalyani Ramnath, 'The Colonial Difference between Law and Fact: Notes on the Criminal Jury in India', *Indian Economic and Social History Review*, 50 (2013), pp. 341-63.

³⁶ See for instance, Kolsky, *Colonial Justice*, pp. 138-139.

³⁷ Letter to Earl of Kimberley, 21 December 1892, BL/IOR/L/PJ/6/338, p. 6.

uncomfortable conclusions being reached by various colonial officials and judges who found the major problems of criminal justice emanating from the involvement of Europeans in the provision of criminal justice.³⁸

Colonial Leniency: Cases from the Allahabad High Court

As referred to in the introduction of this chapter, the variable value placed on an individual in colonial society was often measured, policed, and altered by the law. While proclamations and codified legal structures claimed to offer a universal framework of legal rights, the diverse strategies used to invest individuals and groups with authority and privilege instead produced a hierarchical system of subjects in colonial society. Though this was rarely explicitly articulated in political discourse, the limits placed on an individual's rights in society were often enforced through the quiet passing of legislation, or the informal practice of law. Leniency or severity in punishment practices can therefore reveal both the way society was being structured through law, and simultaneously the practical logic of the colonial state below the level of political discourse.

While the criminal legal system under colonial rule offered little space for Indian's to receive sympathetic hearings, there were cases in which the courts utilised their discretion to provide relatively lenient sentences. Lower court judges used a variety of legally dubious justifications to refuse capital punishment in cases of murder. In one case, in which a man had murdered his mother, a Sessions Judge broke protocol to place the accused under one of the section's exceptions. This was done even though the man had not asked for this exception to be considered.³⁹ Another judge excused severe punishment on the premise there was still a remote chance of innocence even after the murder sentence had been passed.⁴⁰ While these types of sentences were the focus of criticism by more senior judges who denied the legality of their positions, they were often not overturned or enhanced, especially if some time had passed since the judgement had been made.

In cases where High Court judges used their discretionary authority to lower sentences, a fairly clear pattern emerged. These were invariably cases in which women were victims of male violence, usually the result of an informal sexual policing carried out from within the family. One noteworthy example was the 1886 case, *Queen-Empress v. Mohan*.⁴¹ Mohan had been charged with the murder of his wife, who, he believed was having an affair with another man. After he saw her leaving their house at night, he followed her. Seeing that she was meeting with the man in question he murdered her and

³⁸ As one judge stated, 'it is a curious anomaly- and a discreditable one to our race- that whereas the system of trial by native jurors in Court of Sessions have been a success, exactly the contrary is the result of the system as applied to jurors in the High Court of whom must be of the same race as the accused', 'Working of the system of trial by jury in the High Court of Judicature', UPSA, LB, List 43 (Judicial Criminal Block), United Provinces of Agra and Oudh/May 1902/ Nos. 6-11.

³⁹ See *Queen Empress v Chakauri*, Criminal Appeal No. 977 of 1898, 25 November, 18 AWN 209 (1898).

⁴⁰ For an example see *Chief Judge Emperor v Nga Tun*, 4 The Criminal Law Journal Reports 132 (1906).

⁴¹ *Queen-Empress v Mohan*, Indian Law Reports (Hereafter ILR) 7 All 626 (1886).

then attempted to kill himself. The Sessions Court had charged Mohan with culpable homicide amounting to murder and had sentenced him to transportation for life. On appeal Mohan asked to be considered under the first exception concerning the loss of self-control by grave and sudden provocation.⁴² Referencing English and American law, the two appellate judges used strong evidence that as the adultery was merely suspected and not proven, Mohan was guilty of murder. The first judge, Mr Justice Brodhurst, referenced one legal source that stated:

I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder and if I were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be most grievously swerving from our duty.⁴³

The second judge, Mr Justice Straight, agreed with Brodhurst again referencing ‘the most eminent English judges’ who show that Mohan’s act ‘was altogether out of proportion to the provocation given.’⁴⁴ Both judges therefore confidently dismissed the appeal.

Nonetheless, after building their case conclusively for the crime of murder, the judge decided to give Mohan special exemption from the two punishments provided for murder, capital punishment and transportation for life, and lowered his punishment to ten years’ rigorous imprisonment. The judge’s concluding remarks reveal a telling discord between the importance placed upon an official language of legal labels, and the way in which negotiation could be carried out as an exception to such labels. He remarked:

While it is essential that in cases of this kind the true legal nature of the act, of which the person has been guilty, should be recorded against him, the question of punishment may, I think, with propriety, be brought to the notice of His Honour the Lieutenant-Governor, in whose hands resides the exercise of the prerogative of mercy.⁴⁵

The discussion in court had initially focused on the suitability of the sentence of murder premised upon the evidence of adultery. The judge remarked that if it had been proven, the law would have automatically lowered the sentence to a charge not amounting to murder. Though the assessors who pushed for the reduction of the sentence, claimed that Mohan had killed his wife after seeing her in the act of adultery, Mohan himself declared otherwise in his confession.⁴⁶ The judges however stated that the ‘exceptional circumstances’ of the case were sufficient to justify this punishment. In defending this leniency, they pointed to two widely held views prevalent in the colonial legal system. Firstly, he argued, ‘Natives of this country, in cases of this description, appear to be generally unable to exercise

⁴² *Id.*, ILR 7 All 622 (1886).

⁴³ *Id.*, ILR 7 All 624 (1886).

⁴⁴ *Id.*, ILR 7 All 625 (1886).

⁴⁵ *Id.*, ILR 7 All 626 (1886).

⁴⁶ *Id.*, ILR 7 All 624 (1886).

that control over themselves that Europeans usually succeed in doing.' And secondly: 'The prisoner, moreover, is an ignorant man'.⁴⁷ The colonial judge, whilst reinforcing orientalist ideas of Indian masculinity, concurrently acted to conflate sexual promiscuity on the part of the woman with the justification for an exception, implicitly expanding the boundaries for legitimate violence directed towards women within the family.

In a similar case in 1886, *Queen-Empress v Lochan*, Mr Justice Straight, this time accompanied by Mr Justice Mahmood, enhanced the Sessions Court's sentence of culpable homicide amounting to murder, to one of murder. However, the confirmed punishment of fourteen years' transportation again did not meet IPC regulation. Here, Lochan had confessed to the murder of the widow of his cousin, suspected of an illicit connection with another man. Unlike the first case, here the judge did believe Lochan had encountered the widow in the act of sex. However, the enhancement of this sentence was justified on the basis that as Lochan was not the husband of the woman, 'there was no moral obligation upon him to constitute himself her executioner for her transgressions'.⁴⁸ Furthermore, in following the widow to meet her lover Lochan had taken a *gandasa*, the murder weapon, which suggested violent premeditated intent. In response to this, Straight stated 'I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation'.⁴⁹ Similarly to Mohan, the reduction of this punishment in relation to those stipulated for murder was defended to make, 'allowance for the peculiarities of native character in reference to the misconduct of their families, especially among the less advanced and more ignorant residents of the rural districts'.⁵⁰

In both cases, the importance of declaring the crime as murder took precedent over the need to correlate the punishment with its crime as formulated in the IPC. One way of interpreting this ad hoc readjustment is to read it in relation to the historiographical understanding of 'indirect rule'. The judge was actively distinguishing the provision of a law that was packaged as modern, with its application that made allowance for, and promoted the colonial idea of an Indian custom. Thus, instead of defending colonialism on progress towards assimilation, difference was the point of emphasis. Justice Straight, the consistent presence across the two cases, had been vocal in articulating this type of colonial language in other spaces. In offering his opinion on the increase in crime in the province in 1888, Straight placed blame on what he felt was a faulty police force, in turn reflecting a wider society suffering from a 'blind adherence to antiquated custom'.⁵¹ It is pertinent to note that while Straight used this idea of Indian society to explain wider problems in governance, he was seeking out and rewarding this narrative in the courtroom.⁵²

⁴⁷ Ibid.

⁴⁸ *Queen-Empress v Lochan*, ILR 8 All 634 (1886).

⁴⁹ *Id.*, ILR 8 All 639 (1886).

⁵⁰ *Id.*, ILR 8 All 635 (1886).

⁵¹ UPSA, LB, List 43 (Judicial Criminal Block), Judicial Criminal Department/N.W.P & Oudh/Nov 1889/Nos. 1-74. p. 33.

⁵² In response Justice Straight's comment, and reflective of the depth of difference being posited in this period another colonial official commented, 'The "blind adherence to antiquated custom" of which Mr. Justice Straight

Notably, using forms of discretionary legal authority to lower violent sentences in order to assert difference was a colonial logic not distinctive to nineteenth-century India. In the context of nineteenth-century British Columbia, Tina Loo has described a similar process in which executive mercy was used in cases of violence between indigenous communities. In this instance, the use of ‘cultural defences’ projected violence within these communities as natural, connecting the legal idea of diminished responsibility with the imperial idea of civilizational hierarchy. Aptly described as a form of ‘savage mercy’, as with the examples here, what was most significant was the assumption of authority by the colonial legal system to define, and then to respond to, the idea of indigenous culture.⁵³ While a similar colonial legal rationale has also been located in punishment for murder in Nyasaland in the early twentieth-century.⁵⁴

While difficult to prove, it may also be worth reading this story as something more than a simple reaffirmation of colonial difference, but also a delicate recognition of similarity and sympathy between coloniser and colonised along patriarchal lines. If the colonial space was both a laboratory for administrative and scientific experimentation that were hoped to be transferred back to the metropole, it was also a place in which various fantasies and prejudices could be acted out away from the more censored metropole.⁵⁵ In these examples, and by stretching their discretionary capacity to its limits, we find repeated judgements insistent on a relative leniency for domestic forms of violence, directed towards women considered to have transgressed moral and social codes. If we can position this logic on one axis that reproduced colonial difference, it is therefore worth considering if these judgements also ran along another axis, representative of transnational patriarchal sympathy. This, in part, recognised the relative legitimacy of domestic violence.⁵⁶

In many similar cases, the Court’s leniency towards these examples of male violence was made on more straightforward legal grounds, through the simple lowering of sentences. In an example from 1896, a brother had killed his sister and her lover, when he had found them engaged in sexual relations. Similar to the earlier case of *Queen Empress v. Lochan*, this was not a crime between marital partners and therefore did not naturally fall under the exceptions for murder. However, the two judges, Justice Edge and Justice Blennehrasett, declared that using what they termed ‘common sense’ the accused could still qualify and therefore his sentence of murder was reduced to culpable homicide not amounting

complains, must be removed from his flesh and from his bone as well as from his understanding. This will be the work of many decades.’ Id., p. 35.

⁵³ See Tina Loo, ‘Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia’ in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. by Carolyn Strange (Vancouver: UBC Press, 1996), pp. 104-129;

⁵⁴ Stacey Hynd, ‘“The extreme penalty of the law”: mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47’, *Journal of Eastern African Studies*, 4:3, (2010), pp. 551-553.

⁵⁵ Martin Wiener discusses this in terms of an ‘export model’, particularly in reference to violence. Wiener, *Men of Blood*, p. 11.

⁵⁶ For an important related study of the way an Indian public sphere could affect a colonial criminal trial in the case of murder, see Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism* (London: Hurst & Company, 2001), pp. 53-94.

to murder.⁵⁷ He was given a punishment equating to ‘the minimum which the law allowed.’⁵⁸ In other circumstances, men did not even need to plead not-guilty to receive a sympathetic hearing. Rather, the presumption of their ignorance of law was recognised as a mitigating factor, and actively inserted into the proceedings of the trial from the Judge. When one husband killed his wife in Sharapur in 1896, he declared to the court, ‘Guilty. I killed my wife. She had abused me. Called me ‘ware’. No one was present. I killed her with a *kulhari*.’ Raising concerns that ‘prisoners of this class’ rarely understood the ‘ingredients of the offence under s.302’, the court set aside the conviction and sent the case back to the court of sessions for a re-trial.⁵⁹

The above cases can be brought together through a discourse made prominent in two final trials of a similar sort, one which took place in 1885 and the second a later trial from 1914. In the first of these trials a man named Damarua Lodh had been convicted for the murder of his wife, who he had found in bed with another man. The court claimed that it was ‘pretty generally understood in the village that there was a criminal intrigue’ between his wife and this man, and thus Damarua’s defence was premised on his crime falling within this exception. The story provided by Damurua however did not put his wife in the act of adultery, which would have immediately justified the use of the exception, but posits his wife and lover sleeping in the same bed. As in the former cases, the judge distinguishes the ‘native mind’ from ‘the more civilized intelligence of the West’, and in doing so, justifies the lowering of the sentence to twelve months in prison. The judge concluded,

At midnight, in his own house, alone with the very man whose society he had forbidden her, sleeping! Is it surprising that in the young man of twenty all self-control was swept away, and in a whirlwind of irresistible passion he caught up the weapon ready to his hand and dealt out summary justice?⁶⁰

In a case from 1914 a man had murdered his pregnant wife, who he had suspected of adultery, and then later tried to kill himself. Though in this trial the exception was enforced and a sentence of murder passed, the judge lowered the sentence from death to transportation for life. With no proof of actual adultery, the prosecution witnesses all provided testimony that the wife was of ‘bad character’ and used to visit the hut of another man. Paraphrasing this defence and concluding his judgement, the judge stated:

No husband would be likely to have murdered his wife on the eve of her confinement unless he strongly suspects that the child about to be born was not his. We think that the argument is not without force and we therefore reduced the sentence⁶¹

⁵⁷ *Queen-Empress v. Chunni*, Criminal Appeal No. 601 of 1896, 16 AWN 161 (1896).

⁵⁸ *Ibid.*

⁵⁹ *Queen Empress v Bhadu*, Criminal Appeal No. 1078 of 1896, 10 November of 1896, 16 AWN 191 (1896).

⁶⁰ *Empress v. Damarua*, Criminal Appeal No. Unknown, 18 September of 1870, 5 AWN 198 (1885).

⁶¹ *Name of appellant or person acquitted Bhadaiyan*. Appeal No 276 of 1914, Unpublished Court Proceedings, Allahabad High Court Criminal Records Room (Hereafter AHCCR).

These trials, we may observe, draw on two key themes. The first is a consistent assertion of difference between Indian and European men, who were divided along ideas of masculinity, self-control, and violence. This reinforced the production of a discourse termed by Kunal Parker as the ‘eternal time lag’ which separated British and Indian society on racial lines.⁶² The proclaimed modernity of the legal system and the contention that Indian actors were unable to fully operate within it should be read as part of this wider process of making Indian men seem distanced from modern political subjecthood. However, functioning through this political discourse was also the material and more immediate impact of colonial law. If the rationale behind this legal leniency played into the preservation of ideas of racial difference underpinning imperial politics, it was also to a lesser degree, supporting the excesses of violence that husbands could enact upon their wives. Using the discretion invested in him through the IPC, the judge in very real terms was nesting a degree of legitimacy to the violence of the husband, and the wider family, partially justifying what was here called ‘summary justice’. It is significant in the second case that in the judge’s concluding remarks the accused is treated within what appears a monolithic category of husband, which then is automatically assumed to reflect a degree of sincerity to actions and motives. While the judge depicts the model of a husband as unable to commit ruthless violence on his wife without motive, the spectre of the wife, labelled a ‘bad character’ with no way of defending herself, looms large in the judgement.

Sympathy without Leniency, Severity without Sympathy

While the above cases saw judicial discretion provide relative leniency to a selected group, the colonial legal system sentenced many Indians to death across the period under study. The ways in which these judgements differed when capital punishment was confirmed, or when an Indian woman was the accused rather than the victim, offers a useful point of comparison.

Fig 2.

Selection of Figures of Confirmed Death Sentences in NWP		Source
1869	71	NAI, Home(B)/Judicial/April 1872/No. 276
1870	88	
1877	97	BL, IOR, V/24/2171.
1878	139	
1889	77	NAI, Home(B)/Judicial/Nov 1892/Nos.165-168
1890	102	
1893	136	NAI, Home(B)/Judicial/Oct 1894/Nos. 277-278
1894	102	

⁶² Kunal Parker, ‘The Historiography of Difference’, *Law and History Review*, 23:3 (2005), p. 690.

In some instances, capital punishment was justified in response to a high degree of violence. In one case capital punishment was confirmed without considerable discussion. In this incident, a man had admitted to the murder of five adult members of a family, and one child, without any serious motive.⁶³ In other examples it was justified in relation to wider contemporary concerns. In a case of this kind, the accused was sentenced to death for murdering a boy with the intent of stealing his gold earrings. This crime had been committed when the matter of the murder of children for the sake of ornaments was receiving considerable attention at the state level. A government circular from the North-Western Provinces the year following this case described the crime as ‘one of the commonest forms of violent crime, and it almost seems to be on the increase’.⁶⁴ A third example saw a man capitally punished for the murder of his wife. As with the previous cases of wife-murder, the decision in court focused upon the character of the wife. In this case the woman’s character was seemingly unimpeachable. The possibility of her being adulterous was rejected and instead, she was described as a ‘virtuous and religious woman’.⁶⁵

In other instances, crimes which slipped from the realm of ordinary criminality into that of political criminality often saw the state use capital punishment more readily. Shumsh Ahmad, a rebel from 1857, was a model example of this. Ahmad had been belatedly arrested in 1878 for the public murder of a European Henry Aspinall and his family in Bareilly during the 1857 uprising. As the crime occurred before the IPC had been implemented, Ahmad was sentenced under both section 302 of the IPC, as well as under Regulation IV of 1797, which was in place at the time of the rebellion. Though the regulation had been repealed by 1878, it had residual application to events that had occurred before its repeal.⁶⁶ Given the nature of the murder, it had been well publicised at the time. One account stated that after being killed the victim’s bodies had been dragged naked through the town.⁶⁷ Though Ahmad had been arrested earlier in 1870, a lack of witnesses forced the judge to release him. On a second hearing in 1878, and with a larger compilation of evidence, he had been convicted and sentenced to death. Ahmad’s appeal in the High Court stated that the evidence was inconsistent, and that as the majority of witnesses were Hindus, this evidence had been given on communal grounds. Widely considered to have been promoted into a position of prominence during the rebellion, having absconded when mercy was offered, and with a number of witnesses confirming the ‘official history’ which had been referenced in Court, Ahmad’s appeal was rejected and his punishment confirmed.⁶⁸ If Shumsh Ahmad’s case was unique for the length of time it took for the colonial state to arrest and punish, other

⁶³ *Appellant or Person acquitted Baldewa*, Appeal No 561 of 1908, Unpublished Court Proceedings, AHCCRR.

⁶⁴ Letter from the Lieutenant Governor, United Provinces, to Indian members of the local Legislative Council and other influential members, dated 22 August 1915, UPSA, LB, List 42 Judicial Criminal (1908-1941)/File No. 920/1915/Box Number 89.

⁶⁵ *Name of appellant Abdul Shakur*, Appeal No 84 of 1908, Unpublished Court Proceedings, AHCCRR.

⁶⁶ See for instance *Empress of India v Diljour Misser*, ILR 2 Cal 22 and *Empress of India v Mulua*, ILR 1 All 602.

⁶⁷ Reference to the murder is directly made in Sir John William Kaye, *A History of the Sepoy War in India, 1857-58*, Vol. 2 (Calcutta: Thacker, Spink and Co, 1880), p. 276.

⁶⁸ *Crown v Shumsh Ahmad*, Full Judgement, Decided 21 Dec 1878, Unpublished Court Proceedings, AHCCRR.

similar cases revealed the state's readiness to execute in such incidents. A file containing the trials of rebels had been belatedly arrested, and charged with murdering Europeans between the years 1861-1869, saw all barring two cases capitally punished.⁶⁹

As a key function of sovereign power, the decision to use capital punishment, should be seen as part of a calculation inseparable from the consolidation of political legitimacy and the protection of sovereignty at the level of the state. If the individual in question, or the action under inspection, carried some form of political capital, the law's response to both that individual and that event had to negotiate this capital into the decision to be lenient or severe in punishment. In these cases, the importance of the events analysed, whether in the large numbers killed, the connection the crime had to an anxiety of a rising form of crime, or the protection of a pious woman, all outweighed any political capital the individual may be able to employ in order to receive a degree of leniency.

In comparison to these cases in which severe punishments were enacted without recourse to sympathy or regret, a number of cases including women accused of murder resulted in a vocalisation of sympathy, without an equivalency in the resulting leniency in punishment. While there were instances of women who murdered adults, often as acts of defiance directed at abusive husbands, the image of the female murderer in the mind of the colonial state was built predominately around the infanticidal women.⁷⁰

With the comparatively similar rates of infanticide in both colony and metropole in this period, the colonial state had been presented with the disconcerting possibility of perceived cross-culture similarities. As part of an effort to obscure this similarity, the Female Infanticide Act was passed in 1870. The sex-specific nature of the 1870 Act allowed the colonial state to distinguish itself from Indian society by constructing the crime as representative of a uniquely Indian form of female violence.⁷¹ The social implications of the Act were to signal a movement away from the way infanticide was treated in the early nineteenth century, one in which male heads of households and the community at large were considered partially culpable and punishable. After the legislation, the culpability of infanticide began to be placed solely on the woman. The intrusive force of the legislation was reinforced by the state's new registration system of unmarried women's pregnancies and the increased surveillance of 'specially guilty' villages. Increasing the pressure on women who found themselves in difficult circumstances,

⁶⁹ It is interesting to note that one of the cases in which transportation for life was applied rather than capital punishment saw the Sessions Judge defend their sentence by casting significant doubt on the trustworthiness of a chief witness. Described as an Indian woman who carried a European name but was said to only speak Hindustanee. See, 'Selections From Official Records of the Criminal Department of the Rajpootana States and North-Western Provinces of the Murder of Europeans by Mutineers During the Mutiny of 1857 In Which Apprehensions of the Murderers Have Been Made By Mr. James E. Burton, District Superintendent, Oudh Police,' BL, T/41575.

⁷⁰ For wives who murdered husbands, see Padma Anagol, *The Emergence of Feminism in India, 1850-1920*, (Hampshire: Ashgate, 2005), pp. 146-153; See also the story of Trailokya a prostitute who became a serial killer in late nineteenth century Calcutta, Sumanta Banerjee, *The Wicked City: Crime and Punishment in Calcutta*, (Hyderabad: Orient Blackswan, 2009), pp. 281-290.

⁷¹ Daniel Grey, 'Gender, Religion and Infanticide in Colonial India, 1870-1906' *Victorian Review*, 37:2 (2011) p. 110.

the law more strictly criminalised the action before reform movements had sufficiently engaged in reducing the deep rooted social causes of the crime.⁷² Under these circumstances, a number of cases relating to women guilty of murdering children appear in the records.

In one such case of infanticide the court record explained how the mother was regularly abused by her husband. The court detailed that:

She stated that her husband had been keeping another women, and on account of her quarrelling with the kept women her husband used to beat her, the child was ill, and that one day she took a *chapati* (her husband's food) to give the child, her husband snatched it from her hand, and beat her. She says, then she went in anger with her daughter and drowned her in the Ganges.⁷³

After initially confessing, the woman later claimed she had only done so under police influence. The judge declaring the case as 'sad', said he was 'bound to dismiss' the appeal and confirmed the sentence of transportation for life under the charge of murder.⁷⁴

The articulation of a supposed conflict between the necessary requirements of the law and a concern for the plight of women, ultimately resolved in favour of following the relative severity of law, as was visible in other cases of infanticide. On the 26 December 1878, a woman named Musst Kesan had her conviction for culpable homicide amounting to murder, heard before the High Court of Allahabad.⁷⁵ While Kesan had been unrepresented during her trial in the lower courts, the legal process for capital punishment allowed her a hearing in the High Court. In the unpublished court judgement, the justification necessary for punishment and the context for crime were elaborated in great detail, described by the lower courts as a murder of 'one of the most deliberate kind perpetrated upon a helpless being entrusted to the prisoner by nature'. In this manner, the controlled space of the court room allowed the judge to vocalise sympathy in one sentence, while practice a law built on cold indifference in the next.

Musst Kesan was a twenty-year-old widow from the Agra district in the North-Western Provinces. Since her husband's death a few months previously, she had continued living with her in-laws as the mistress of her husband's brother. After some months, the father-in-law sent the accused back to her mother's house with her five-year-old child. On arrival at her mother's house she was refused entry on the basis that she was herself starving, and could not afford to feed both her daughter and her grandchild, although they were allowed to stay one night. The court proceedings stated:

⁷² Anagol, 'Emergence of the Female Criminal'.

⁷³ *Crown vs. Musumat Raibau alias Rasulu*, Appeal No 460 of 1908, Unpublished Court Proceedings, AHCCRR.

⁷⁴ *Ibid.*

⁷⁵ *Crown vs. Musst Kesan*, Full Judgement, Decided 26 December 1878. Unpublished Court Proceedings, AHCCRR. All later references to this case are taken from this file.

It appears that the prisoner was anxious to remain with her mother as she knew not where to go. When her mother refused to receive her she wept she questioned where she would go and she begged to be allowed to remain and eat bread with her mother.⁷⁶

Denied longer stay at her mother's house, the woman began her journey back to her father in-laws house. It was on this journey, accompanied by another man, that Kesan was accused of murder by throwing her child into a nearby well.

In Tanika Sarkar's analysis of the law for the age of consent, which raised the age from ten to twelve, the death of a child-bride due to the violent and non-consensual sex with her adult husband had triggered the clamour for reform. Sarkar notes that the trial judge made no judgement on the custom of child marriage, while the reform itself saw a broad agreement between colonial, revivalist-nationalist and medical-reformers, that connected consent to a purely physical and biological category.⁷⁷ The same rationale for judgement and punishment is present in this case of child-murder. While this story of desperation is slowly unpacked in the courtroom, to which some sympathy is shown towards the woman's plight in the course of the proceedings, the judge still proceeded to pronounce that, 'The only question is whether the child was alive when she threw it down the well.'⁷⁸ In doing so, the smorgasbord of emotional and societal burdens on a widow, abandoned by her biological and marital families, carrying a child which all witnesses confirmed was both sick and hungry, and with no guaranteed place of shelter, were to play no part in the decision making process.

In comparison to men found guilty of murdering their wives, or Europeans guilty of murdering Indians, the use of various extenuating circumstances in the process of punishing violent crime could have wide-ranging legal results. The discretion of the court in these cases was often utilised in significant ways to ensure men were not unduly punished for acting upon the privileges they enjoyed in society. Though the paucity of evidence confirming whether the child had been alive when thrown into the well eventually allowed for Kesan's acquittal, the reduction of this judgement to a purely biological question highlighted the reality in which women deemed guilty of violence were generally excluded from this path to lenient treatment.

Dealing with a large number of varied cases, all involving high levels of violence, the question of the relationship between the logic of colonial sovereignty and the practice of law becomes important. While within this new model of governance universal access to justice was being declared, law's job was in theory the indiscriminate decision over the relative legitimacy and illegitimacy of an action, and the administration of relative punishment in response to these transgressions. What this became however was a wider process in which the state, usually through law, structured the spaces outside of

⁷⁶ Ibid.

⁷⁷ Tanika Sarkar, 'Rhetoric against Age of Consent: Resisting Colonial Reason and Death of Child-Wife', *Economic and Political Weekly* (1993), p. 1874.

⁷⁸ Amongst other comments the judge starts the trial by describing the accused as a 'poor wretched woman', *Crown vs. Musst Kesan*, Full Judgement, Decided 26 December 1878. Unpublished Court Proceedings, AHCCR.

its purview in which violence could be relatively justified, premised upon the political capital of the event and the individual in question. Earlier research has highlighted that the privilege of race acted almost uniformly across cases to allow a high degree of leniency in the colonial penal system. This suggested that once stripped of its deceptive discursive posturing, colonial law operated to protect a political logic, which in its purest form, relied on racial division. The question that should now be posed is whether this logic, in a diluted form, can be located in other contexts as well, and if so what are its results? The argument proposed here is that the relationship between managing economies of political capital, through the decision of the court, was not only in play when the protection of race was at stake. In fact, given a more intersectional analytical approach to colonial legal history, the way this logic was structuring society through law reveals a more complex, pervasive, and pragmatic rationale to colonial power.

This is not to argue, for instance, that a shared patriarchy channelled the force of colonial sovereignty in the same way, or in equal vigour, to the ways it enforced racial asymmetry, but to note that the logic which emerged from these differing degrees of legal leniency shared the same political rationale. In cases of European violence, an absence of punishment emerged from racially infused medical jurisprudence and the implicit notion of sacrifice that these men had made for the imperial cause. This was ultimately because the colonial regime demanded a distinction between European and Indian subjects. In reference to the cases above, such as the wife-murderer, an orientalist conception of the Indian man coalesced with patriarchal mind-sets shared across British and Indian society, inducing the judge to take a sympathetic stance, protecting a man's right to punish a sexually recalcitrant female. This leniency could, however, quickly turn into severity if that same man embarked upon a politically motivated murder in the course of the rebellion, or if he epitomised the imagined characteristics of colonial criminality. In all these cases, severity or leniency were determined by the colonial state's demand for the reproduction of certain tropes, which invested authority in certain ideas and individuals, as in the case of the European man.

Insulating Sovereignty: Failed Truth in Colonial Law

In 1893 Rabindranath Tagore published a short story titled 'Punishment'. Set in Bengal the tale followed two brothers and their wives who lived together in relative poverty. Returning home from work in the fields one evening, one of the brothers, Dukhiram, demanded food from his wife. When she responded sharply that he had failed to provide any, Dukhiram stabbed her to death in anger. His brother Chidam, and Chidam's wife Chandara, had been witnesses to the event. Reeling from shock and in an attempt to save his brother, Chidam told their landlord, the 'pillar of the village', that in fact his own wife had killed the woman after a quarrel. The landlord, Ramlochan, was the local source of legal advice and Chidam had hoped he would provide help to resolve the matter. The landlord advised Chidam to fabricate a story to the police in which his older brother had killed his wife after coming home from

work hungry, a narrative that aligned exactly to the true course of events. When offered this advice, the younger brother revealed the priorities of his motives. He stated, ‘*Thakur*, if I lose my wife I can get another, but if my brother is hanged, how can I replace him?’ With this, and with the help of Ramlochan, he decided to tutor his wife. He had told her to admit to the murder but to claim it was a matter of self-defence. To add to the legitimacy of the story, rumours and whispers were spread around the village that would confirm the new sequence of events.

When it came to the arrest and trial however, Chandara, refused to follow the script. Instead, she took full blame for the murder and denied that her sister-in-law had either threatened her or treated her with any contempt. The instantaneous discrediting of the carefully arranged plan forced the brothers and Ramlochan to quickly give up on their own stories. Both brothers even independently admitted to the murder of the woman to prove to the court that Chandara was lying. Yet, in the magistrate’s eyes, Chandara’s stone-cold admission of guilt and her consistency throughout the trial made her story the most believable. She was made aware of the ramifications of her admission of guilt, and never wavered, going so far as asking for capital punishment to be given to her. Concluding the story, Tagore describes Chandara’s wait to face the gallows. At this stage Chandara is told her husband would like to see her, to which she responded, ‘To hell with him’, and requested instead to see her mother.⁷⁹

Tagore’s account of the seemingly arbitrary nature of violence directed towards women, whether in the case of murder of the first wife within the home, or the capital punishment inflicted on the second wife by the state, laid bare the insincerity of patriarchal protectionism towards women; a concept which was so often employed in defence of both state intervention and of the traditional family unit. Chandara’s defiant stand rejected both the orders of her husband and the rules of the court, and yet, in rejecting these pressures, left her only remaining choice - the conscious acceptance of death. Though this story was a fictional one, as shown earlier, women were disproportionately the victim of this form of violence. It was also not unheard of for husbands to be accused of pressurising their wives into an admission of guilt for crimes that they claimed innocence from.⁸⁰ What this section is particularly interested in, however, is the colonial politicisation of an assumption made by many of the actors in this story, that the courtroom was not a sacred space of truth but a place in which new narratives could be produced. While Tagore’s story revealed how the institutional power of the courtroom and colonial law were perceived as negotiable by outsiders, the idea that the colonial legal system was prone to failure in its attempts to pursue justice was also actively courted in the production of colonial knowledge. This final section thus unpacks the ways in which the idea of obstruction to justice helped

⁷⁹ For the full story see Rabindranath Tagore, ‘The Punishment’, in *Selected Short Stories*, trans. by William Radice (London: Penguin, 2011). Accessed online via Literature Online ProQuest.

⁸⁰ In a case from Allahabad in 1888 a woman had been tried for the murder of a child for the sake of its ornaments, a crime which had been well publicised by the colonial state within the gambit of peculiarly Indian problems. In this case the woman had voluntarily confessed to the crime in court but then later withdrew her statement and blamed her husband. She too claimed that her husband had asked her to take the blame as he thought that while he would be hanged, as a woman she would be sentenced to imprisonment. *Queen Empress, v. Nibbia*, Criminal Appeal No. 8 of 1888, May 19 of 1888, 8 AWN 134-135 (1888).

build a colonial framework that insulated colonial sovereignty from occasions when its legal ‘truth’ failed.

During the late nineteenth century, a swelling state administration saw Indian participation grow in the police force and judiciary, while larger numbers of Indians took recourse to the courts.⁸¹ The magistracy, especially in provincial areas and in the lower courts, was by the late nineteenth century predominately administered by Indian judges.⁸² Moreover, with police, medical experts, local informants, witnesses, and others contributing to the pursuit and production of colonial legal truth, the courtroom was never a sealed space of colonial power. As the extraction of legal truth became increasingly reliant on collaboration with Indian society, while the fundamental premise of colonial rule still depended on the belief that this society fully understood the value of truth, the reliance on Indian actors in the realm of law clashed with the wider discourse justifying colonialism. A partial response to this colonial conundrum was an increasingly prominent narrative that Indian society was only partly able to operate the apparatus of a modern legal regime.

The colonial perception that it was difficult to gather the truth from Indian participants in courts was well versed during the nineteenth century. In the North-Western Provinces, convictions rates for serious crimes remained worryingly low for the colonial state. For instance, the figures for the North-Western Provinces and Oudh between 1884-1886, for all crimes except nuisance, averaged 19.8 per cent.⁸³ The consistent failure to produce more impressive conviction rates drew out colonial fears, described by one officer, of the ‘growing paralysis of the law’.⁸⁴ Varying excuses were put forward to explain these poor legal returns. One of the ideas that took hold was that as Indians had become more educated, and the previous trends of collective crimes were reduced, newer and more difficult to detect crimes had proliferated. As the Bombay Government wrote in 1884:

with the spread of civilization, (there had been) a growing tendency to elaboration in crime... The diminution in crimes hitherto characteristic of the Presidency, of cattle-lifting in Sind and of dacoity in the Deccan, is far more than counter-balanced by the unprecedented and alarming prevalence of lurking-house-trespass and house-breaking with intent to commit and offence, a description of crime which indicates greater skill and more premeditation, if less audacity, among the criminal classes.⁸⁵

⁸¹ To take the Madras Presidency for instance, Indians made up to ninety percent of the police force between 1871-1880. P. Jegatheesan, *Law and Order in Madras Presidency: 1850-1880* (New Delhi: B.R. Publishing Corporation, 1987), p. 56; While participation in the bar for Indians was always unfairly distributed, law was the most popular profession for the Indian middle classes. Indians were also the first major non-Europeans to qualify for the bar and from 1862 onwards *vakils* could practice in the High Courts. See Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (Kent: Biddles Ltd, 1983), pp. 133-134.

⁸² In 1888 out of the 36624 cases handled by a first-class magistrate in the North-Western Provinces, 24948 were under Indian magistrates. UPSA, LB, List 43 (Judicial Criminal Block), Judicial Criminal Department/N.W.P & Oudh/Nov 1890/Nos. 4-13.

⁸³ NAI, Home (A)/Police/Dec 1888/Nos. 118-135. p. 9.

⁸⁴ Id., p. 81.

⁸⁵ Id., p. 10.

As crimes came to be viewed as increasingly complex, another complaint that gained credence was that with the rising number of lawyers available to criminals, and the fairly unsophisticated police machinery for prosecution, police prosecutors were struggling to compete with this new class of well-defended criminals.⁸⁶

These practical difficulties were compounded by a strengthened emphasis on a language of difference, most prominent in the continued presumption of a uniquely Indian proclivity to perjury. Many scholars have shown how the rise of various scientific techniques, whether that be medical jurisprudence, fingerprinting, or even broader disciplines such as psychiatry, were in part defended as useful and objective responses to these problems.⁸⁷ Along with the idea of the unpredictable Indian witness, the competency of those administering justice was also prone to critical attack from the predominantly European High Court judges.⁸⁸ Murder cases for instance, while being confirmed in the High Court, regularly saw complaints vocalised concerning the procedure undertaken in the lower courts.⁸⁹ As the majority of criminal work began being performed by Indian magistrates, the sharpness of this critique grew. The Indian magistrate was labelled as timid, too quick to acquit, and constantly swayed by their closeness to local society and its press. This at times led to requests from officials in the Indian Civil Service to remove Indian magistrates that were seen as impeding the administration of justice.⁹⁰

What was deemed particularly problematic in the eyes of the colonial state was a perception that local judges were unable to recognise what European judges saw in areas of India, i.e. ‘the spirit of lawlessness’.⁹¹ Thus, as the stereotype of the intelligent but effeminate Bengali *babu* was being produced, so too was a related idea of the Indian judge.⁹² Though fully trained he was still understood as incapable of grasping what the IPC had termed the true ‘spirit’ of modern law, discussed in the previous chapter. Symptomatic of this view was the description provided by one official describing Indian magistrates, ‘as a rule more legal and less equitable than the average Englishman.’⁹³ It is worth

⁸⁶ Id., p. 14.

⁸⁷ Amongst the wide body of scholarship see; Clare Anderson, *Legible Bodies: Race, Criminality and Colonialism in South Asia* (New York: Berg, 2004), pp. 3-4, Bailkin, ‘The boot and the spleen’, pp. 476-493, Kolsky, *Colonial Justice in British India*, pp. 108-141; Lal, ‘Everyday Crime’, pp. 145-166.

⁸⁸ For a detailed study of the legal career and difficulties of an Indian High Court judge see Jon Wilson’s study of Justice Syed Mahmud, Jon Wilson, ‘The temperament of empire: Law and conquest in late 19th century India’, in Gunnar Cederlöf and Sanjuta Das Gupta, *Subjects, Citizens and Law: Colonial and Independent India* (London: Routledge, 2017), pp 38-44.

⁸⁹ Judge Straight and Tyrell’s comment is typical ‘In many trials for murder that have come before us, we have had occasion to deplore the now prevalent practice of intrusting the inquiry to Magistrates who, from their standing, antecedents, and education are obviously not the best qualified officers available’, *Empress v. Kura*, Criminal Appeal No. 264 of 1882, 2 AWN 165 (1882). For other examples see, *Empress v. Ramanand*, Criminal Appeal No. 225, May 29 of 1885, 5 AWN 221 (1885).

⁹⁰ On the Subject of the Grave Incompetence Sometimes Found in the Disposal of Sessions Cases by Asstt or Add Sessions Judges Owing to Lack of Training and Apt in Criminal Work, UPSA, LB, List 42/Judicial Criminal /Serial No. 2/File No. 1121/Box No. 99.

⁹¹ NAI, Home (A)/Police/Dec 1888/Nos. 118-135 p. 58.

⁹² For the stereotype of the effeminate Bengali see, Sinha, *Colonial Masculinity*.

⁹³ UPSA, LB, List 43 (Judicial Criminal Block), Judicial Criminal Department/N.W.P & Oudh/Nov 1889/Nos. 41-74. p. 6.

noting that what this critique was calling for, a recognition of lawlessness and a stronger penchant for severe punishment, targeted a supposed ineptitude in managing those residual spaces of discretion left in the IPC in which the judge was to channel the sovereignty invested in him. It was here, and not in the neat administration of the supposedly modern codified law, that the colonial state decided whether an actor was capable of modern political subjectivity. Moreover, this idea of a ‘lawlessness’ was often part of a wider justification used by the state to justify the abandonment of the restrictions that everyday governance provided, and impose emergency or exceptional laws. The critique therefore did not just act to denigrate the ability of the Indian magistrate to reinforce the legitimacy of the colonial political system, it also sought to shore up the claims made of a uniquely European capacity to suspend legal norms and employ the violence of the state.

How this narrative was fashioned through case records and more popular publications offers one entry point into the way this idea was produced and circulated. One anomalous record of appeal in the Allahabad High Court Records Room acts as a useful example. On the 25 June 1891, an appeal from a police officer in the Allahabad district of the North-Western Provinces reached the Allahabad High Court. Sentenced under sections 348 and 506 of the Indian Penal Code for wrongful confinement for the purpose of extorting confession, and criminal intimidation, the officer had been charged with two sentences of nine months rigorous imprisonment. These were to run concurrently.⁹⁴ He had been accused of procuring the false conviction of Goshain Thakurani, a poor widow from Allahabad, for concealing the birth of her child.

The case had recorded that in September of the previous year a dead newly born infant had been found and Thakurani, presumed to be the mother, confessed in court and was convicted. Her confession had also been corroborated by the evidence of two further witnesses. In the early stages of Thakurani’s sentence however a medical examination in jail showed her to be seven months pregnant, making it medically impossible that she had concealed her own new-born child just a few months previously. The court investigation revealed a remarkable sequence of events. On the night of September 17, the police officer in question, along with four other officers, had visited the *chaukidar* to investigate the discovery of the body of a newly born infant. The record states that the *chaukidar* had told them that the crime must have been committed by Thakurani, on account of her being a local widow. The men proceeded to her house at night and roused her from sleep. Removing her from her home they took her to a nearby location where she was shown the corpse of the dead infant. At this point, two of the officers questioned and verbally abused her. Although she had said she was already pregnant, the police officers asserted that this was her child and she had illegally concealed its death.

She was then taken to the house of two *chamars* for examination, a caste traditionally involved in local midwifery. Finally, Thakurani was escorted to another house where she was allowed to sleep, albeit between the police officers. The next day the ordeal continued when the woman was told by the

⁹⁴ All details of this case are referenced from: *Shere Ali vs Queen-Empress*, Criminal Revision 260 of 1891, Unpublished Court Proceedings, AHCCRR.

men “...you say the child is yours and if you do you will get off. If you do not the doctor of the city will split you up.” The threat of the doctor was not a light one, in many cases it was the evidence of the surgeon in court which played a significant role in the decision-making process.⁹⁵ Under such pressure from this assortment of official and non-official structures of patriarchal authority, Thakurani gave a full confession in court, which was overturned only due to the coincidental circumstances of her pregnancy. The village headmen, police officers, the sinister threat of the doctor, and the judge’s quickness to assume the veracity of what seemed a familiar narrative, coerced the woman into confession and conviction.

Such was the strength of these alliances between the various layers of authority in society that Thakurani’s courtroom voice became an unadulterated mouthpiece for this patriarchal world, producing a palatable legal truth to fit a script which aligned with ideas of widows in colonial India. Slipping out of the legal archive due to the chance happenstance of her pregnancy, the story is one saturated with the numerous forms of violence that women of her position faced in society. Her social situation as a village widow, in all probability with little financial and social capital to fall back upon, and almost certainly with no legal assistance at hand, meant that her only recourse to justice was the chance discovery of her pregnancy. In comparison, after considering enhancing the sentence of the policeman who had extorted the confession, the judge refused on the basis of the officer’s record of ‘good character while in the force’.⁹⁶ While the woman’s fate had been sealed by the intimately intertwined structures of formal and informal patriarchy, the literate police officer with a record of employment, even with his appeal rejected, had access to a protectionist platform even when his crime had been proven and his appeal rejected.⁹⁷

Thakurani’s story is rich for historical analysis. As an example of the struggles of a poor widow in the colonial legal system, her case provides further evidence for the state’s role in the creation of the ‘infanticidal woman’, the history of police corruption, and the very material barriers that the colonial archive creates when attempting to recover the subaltern woman’s historical voice.⁹⁸ Yet what is of particular interest for the argument here is the colonial logic that produced an unusually extensive judgement in this case and the justification that such description was given. In the Records Room of the Allahabad High Court the vast majority of appeals leave minimal historical record, often returning with a one-line judgement, rejecting the appeal and passing the sentence with no reference to the lower courts

⁹⁵ See for instance the role of the surgeon in: *Empress v Ramanand*, Criminal Appeal No. 225 of 1885, AWN 221-224 (1885); *Emperor v Kundan*, Miscellaneous No. 7 of 1903, 23 AWN 43-44 (1903).

⁹⁶ *Shere Ali vs Queen-Empress*, Criminal Revision 260 of 1891, Unpublished Court Proceedings, AHCCR.

⁹⁷ The story brings to mind what Upendra Baxi wrote in his analysis of law in subaltern studies, ‘Law becomes fate for individuals when it combines within its manifold self the dominance of both the state and civil society.’ Upendra Baxi, ‘Discussion- ‘The State’s Emissary’: The Place of Law in Subaltern Studies’, in *Subaltern Studies VII: Writings on South Asian History and Society*, ed. by Partha Chatterjee & Gyanendra Pandey, (New Delhi: Oxford University Press, 1993), p. 255.

⁹⁸ Anagol, ‘Infanticidal Woman’; Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in *Reflections on the History of an Idea: Can the Subaltern Speak?* ed. by Rosalind C. Morris, (New York: Columbia University Press, 2010), pp. 237-291.

judgements. The extended nature of this case stood out in comparison. What justified the extensive time and energy spent in undoing the earlier judgement and in drawing out the circumstances of this case?

The High Court judge involved explained this in the following terms:

The hearing of this case occupied a very considerable period of time—far longer than the circumstances warranted...I did as principally because I felt it was essential in a case of so much public importance to ascertain whether the punishment inflicted upon this particular petitioner was adequate to the character of the offence committed by him.⁹⁹

In the argument forwarded by the judge, it was the degree of ‘public importance’ associated with this legal mishap that was the declared point of concern. However, a number of other issues seemed to be at play. The Police Commission of 1860, the consequent Police Act of 1861, and the Code of Criminal Procedure in 1861, had theoretically placed stricter rules on the role of the police and the practice of recording confessions.¹⁰⁰ However the concerns prevalent in this case, extorting confessions through the threat of torture, and the closely linked problem of corruption, remained a source of grave concern within the government circulars, police reports, legal judgements, and newspaper articles in this period.¹⁰¹ The issue was perceived to be a widespread problem and some judges declared themselves reticent to accept any form of confessions for concerns that they had been procured through the use of torture tactics. One judge in 1889 claimed that barely a week went by without hearing of accusations of torture, and went on to describe it as a tactic ‘almost universal with semi-barbarous people’.¹⁰² Though within police reports, torture was regularly understood as a symptom of the very low levels of pay that police received, the consistent advice contained within reports to improve the pay of officers were ignored, and the existence of torture persisted in the colonial records throughout the period.¹⁰³ By actively creating the conditions by which instances of corruption or confession through torture may occur, the colonial state implicitly justified the use of these techniques to help produce the legal truth it required. The proliferation of anxiety in colonial archives was therefore not just based on the uncertainties inherent to imperial rule, but was, at times, an emotion cultivated specifically for serving the needs of political expediency.

As well as fostering an infrastructure that maintained an operational relationship with corrupt practices in the police, the idea that corruption and perjury were specifically Indian problems helped reinforce the discord between colonial ideas of modern law and Indian society. The problem that arose

⁹⁹ *Shere Ali vs Queen-Empress*, Criminal Revision 260 of 1891, Unpublished Court Proceedings, AHCCR.

¹⁰⁰ The Indian Police Commission of 1860, later legislated into Act V of 1861, completely separated the functions of the military and the police, while centralising its organisation across India and detaching it from the judiciary also. See Percival Griffiths, *To Guard My People: The History of the Indian Police* (London: Ernest Benn, 1971), pp. 87-107.

¹⁰¹ This was not an uncommon phrase in cases of corruption or forced confessions, see for instance *Empress of India v Abdul Hakim* ILR 3 All 258 (1880).

¹⁰² UPSA, LB, List 43 (Judicial Criminal Block)/ Judicial Criminal Department/N.W.P & Oudh/May 1889/ Nos. 18-52, p. 38.

¹⁰³ See, ‘Proposal for a careful enquiry into the police organisation and administration in the several Provinces of India’, NAI, Home (A) Home (A)/Police/Dec 1888/ Nos. 118-135.

with this case for the colonial state was that it had revealed the complicity between the production of colonial legal truth, and the notion of supposedly Indian specific problems. The narrative that had been created and the confession given had aligned with the guiding tenets of colonial law in this period. The Infanticide Act of 1870 had targeted Indian women, and widows in particular, and the contaminated ‘truth’ extracted in this earlier case had fully supported this colonial legal tendency. In focusing upon the exceptional nature of this case, while alluding to systemic corruption, the judge was attempting to re-establish this broken notion of distance between colonial society and the modernity of the British administration of justice. By reading this case against the archival grain, one may argue that the concerns raised by the judge were not due to its exceptionality, but were based in the potential the case carried for being understood as both unexceptional and normal colonial legal practice. Its importance for colonial discourse thus lay not in ‘public’ interest, but in reasserting the wider discourses of legitimacy and colonial justice, so regularly used to justify colonial rule to the Indian public.

While the prominence of the idea that locating truth in court was particularly difficult in India was upheld in judicial records, it also seeped into more popular publications, trial reprints and novels. Earlier criminal literature had focused upon ideas of collective crime, most often based around *thuggee*. However, with a growing Victorian market for detective dramas alongside a continued interest in the empire as a space for oriental fantasies, this resulted in the proliferation of both fictional and non-fictional printed accounts of courtroom dramas in the late nineteenth century. These centred particularly around the theme of murder.¹⁰⁴

In one publication, *Reminiscences of an Indian Police Officer*, obstruction to justice in India was discussed in detail. Compared to much colonial discourse, the book was unusual in that it often downplayed ideas of difference. Parallels were drawn between India and Britain in relation to the general police work in India, the levels of violent crime, or jealousy within marriages. However, difference was highlighted in relation to the manner in which evidence in India was extorted, or witnesses tutored.¹⁰⁵ Similarly, in H.A. Adam’s *The Indian Criminal*, these themes again reappear. The chapter discussing murder introduces the crime with the declaration that a ‘certain element of mystery... are typical of such crimes as committed in the East by the Indian criminal.’¹⁰⁶

One lengthy example of this insertion of uncertainty into legal proceedings was the reprint of the trial of Muluk Chand, accused in 1882 of murdering his daughter. The only witness for the prosecution had been the man’s surviving daughter, who claimed to have seen her father kill her sister. The accusation was that he had killed his daughter in order to later accuse an enemy in the village with her murder. As the case had taken place in a village in Bengal rather than the North-Western Provinces,

¹⁰⁴ Most famous of these being, Captain Meadows Taylor, *Confessions of a Thug*, (London: 1839). Whereas some later accounts of individual crimes can be seen in W.A. Hunter, *The Trial of Muluk Chand for the Murder of His Own Child: A Romance of Criminal Administration in Bengal*, (London: T. Fisher Unwin, 1888); Sir Edwin Arnold, *The Queen’s Justice: A True Story of Indian Village Life*, (London: Thomas Burleigh, 1899); T.C. Arthur, *Reminiscences of an Indian Police Official*, (London: St. Dunstan’s House, 1894).

¹⁰⁵ Arthur, *Reminiscences of an Indian Police Officer*, p. 100.

¹⁰⁶ Adam, *The Indian Criminal*, p. 178.

a jury was employed during the trial in the Sessions Court.¹⁰⁷ In this instance, on the conclusive findings of the jury, Chand was found guilty and sentenced to death. From this point, the trial proceedings revolved around the keen skills of the Indian lawyer Manmohan Ghosh, who, after picking up Chand's case for appeal, worked for acquittal. Though he could not persuade the High Court to acquit outright, he convinced the judges that a re-trial was needed.¹⁰⁸ During the prisoner's second trial in another Sessions Court, Ghosh argued that this was not a case of murder, but one of accidental death. Ghosh hinged his argument primarily upon a reassessment of the facts in relation to two wider cultural understandings of the legal process in India. Firstly, Ghosh argued that the police regularly tutored witnesses and therefore questioned the court testimonies by drawing upon the notoriety of the Indian police over corruption.¹⁰⁹ Secondly, Ghosh insisted that given the ignorance of the majority of society with regards to the workings of the legal system, absolute truth was rarely offered by either defence or prosecution. Ghosh went as far as to estimate that in more than ninety per cent of trials, the accused 'will not tell the truth, and will set up a false defence even though they are absolutely innocent of any crime'.¹¹⁰ Determined to prove this statement, Ghosh went on to re-interview Muluk Chand in order to uncover further evidence that contradicted the earlier story. He then cross-examined witnesses, placed doubt on the circumstantial evidence, and reinforced the absence of motive. On appeal, the jury at the second trial acquitted Chand on the basis that, although the child's death remained a mystery, there was insufficient evidence for conviction.

The final chapter of the book describing this trial offers transcripts of interviews that took place between Ghosh and Chand during and after trial. In what is doubtlessly written with flourishes of literary simplification, Ghosh convinces Chand to offer up more details during this period. However, the 'absolute truth' is not revealed until the last two interviews, which occur after his acquittal. The first interview with Chand's daughter takes place the day after trial. In this interview, she admits to being pressurised by the police into her testimony under the threat of having her head chopped off.¹¹¹ The second is with Chand, two days after trial. With the trial concluded, Chand admits to accidentally killing his child, throwing a *khatia* at what he thought was a bull during the night. Under advice from his brother-in-law, he had manufactured the story that she had died after being bitten by a snake. When asked why he hadn't offered this story earlier he commented, 'I am an ignorant man, and I thought no one would believe me, and that the police would accuse me of murder even if I told the truth.'¹¹² The reprint of this trial, including the introduction and post-script chapters, emphasised wider cultural

¹⁰⁷ As referenced above, jury trials in Bengal were used for a larger number of offences, including murder.

¹⁰⁸ Hunter, *The Trial of Muluk Chand*, pp. 34-37. Notably he achieved re-trial by pointing to misdirection by the Sessions Court judge, a common justification for revisiting or overturning jury verdicts. See Ramnath, *The Colonial Difference Between Law and Fact*, p. 352.

¹⁰⁹ Id., p. 31.

¹¹⁰ Id., p. 32.

¹¹¹ Id., p. 64.

¹¹² Id., p. 95.

assumptions of the way colonial law was being practiced in India. In doing so it reinforced an imperial alibi to be used on occasions where the truth, originally produced, was later proven false.

This strategy was summed up in an analysis of the case given by the author in the introduction to the trial:

An English lawyer cannot help being impressed with the superiority, in one respect, of criminal procedure in India. Had the case occurred in England, the only appeal would have been to the Home Secretary, and he would have been compelled to arrive at truth without the aids that a public trial affords. The High Court in Calcutta is a more suitable tribunal to consider appeals; and the manner in which the Court discharges its duties has caused it to be regarded with veneration by the people of India as the noblest manifestation of British justice. The light that this also throws upon the administration of justice in the rural districts of Bengal is somewhat painful. The miscarriage of justice was due to the corruption of the police and their determination to support a wrong opinion by tutoring a child into falsehoods that would result in the imprisonment of her father's life. At the same time the readiness of the people to perjure themselves is a fact full of significance as to the difficulty of carrying out a pure administration of law.¹¹³

An example of the functioning of one of the coherent contradictions that underlay the construct of imperial sovereignty, the IPC is praised as the embodiment of 'British justice' in the same paragraph in which the system of law is explained as being inoperable in the colonial world.¹¹⁴ In this context, the utility in emphasising the notion that perjury and corruption were particularly India-specific problems was to create a safety net, which could be used to support the imperial agenda even when the 'pure administration of law' seemed to fail.¹¹⁵

The analysis here can be reframed in terms of the thesis's larger concerns with sovereignty, law, and colonialism. Paul Kahn has argued that:

Sovereign power was the capacity to create the truth conditions of its own speech: to make law real in the body of the subject. The failure of sovereign power was not the absence of consent but the refusal of the victim to speak.¹¹⁶

With such large numbers of criminal cases being considered in the courts at any given time, and with the colonial state unable to coercively force society to parrot colonial discourse, creating the environment for colonialism to create the 'truth conditions' for the coherent production of sovereign

¹¹³ Id., p. iv.

¹¹⁴ The trial's republished version included a larger authorial engagement by a later writer. Here the concluding confessions, written in a chapter entitled *Enlightenment*, describe the ultimate revelation of truth in celebratory terms, 'thus an innocent man escaped from the toils of the native police, and the dangers of his own timidity and untruthfulness; and the Queen's justice in India was also saved, by the acumen and fidelity of a Calcutta lawyer, from a stain which would have been indelible.' Arnold, *Queen's Justice*, p. 180.

¹¹⁵ Ibid.

¹¹⁶ Paul W. Kahn, *Sacred Violence: Torture, Terror and Sovereignty* (Ann Arbor: The University of Michigan Press, 2008), p. 27.

speech in court was not always possible. Instead, the courtroom became both the archetype of modern governance, as well as the juncture at which doubt could be cast on the Indian ability to become full participants within such a system. Colonial law thus functioned by claiming to offer the colonial subject a chance to speak through law in a way that earlier regimes had not allowed, while at the same time building a discourse in which the subject was always under suspicion of being incapable of speaking truth. Symptomatic of the grinding limits of colonial modernity, a circular and arbitrary logic was inserted into this legal process and into colonial governmentality more broadly.¹¹⁷ Here Indian participants in court were to be understood in relation as either capable or incapable of producing truth, depending on the unstable desires of the sovereign script of that moment.

Conclusion

This chapter has argued that the logic of colonial exceptionality elucidated in the first section of this thesis, far from being an isolated response to the period of rebellion violence, was later built all the way through this new structure of colonial law. Taking a series of violent crimes occurring at the level of the everyday, the chapter has followed persistent patterns in the rationality determining severe and lenient punishments. This, in turn, has been used to reflect the deep and often subtle ways colonial law apportioned degrees of legitimacy to violent acts, varying subject to subject.

Acting to structure violence across the social, the vast majority of these murders which appeared in the colonial record were in some degree domestic. Comparing the punishment by gender, it was notably common for a language of judicial exception to be employed when sentencing men guilty of violently murdering their female family members, loosening the grip the IPC placed on the judge to create the possibility of lenient punishment. Comparably, at occasions in which a woman had committed similar crimes this recourse to exceptionality was regularly ignored, and the letter of the law was tightened to ensure the colonial norm, and often severity, prevailed.

Positioned within the wider history of colonial sovereignty, this intimated more than the simple gendering of legal subjects, but the return of this fundamental logic of this norm-exception relationship, informing the function of law even at the local and the unspectacular. As with the first chapter, at the root of this logic was the management of an uneven distribution of political capital across society, constantly reinforcing a hierarchy of unequal legal subjects. Notably, the Indian social was not a passive bystander in this system, but instead was enacted and put to use by the law. In this example, patriarchal power in the domestic space was actively emboldened by the tacit acknowledgement of the legitimacy of its violence.

¹¹⁷ For Colonial Modernity see Dipesh Chakrabarty ‘The Difference- Deferral of a Colonial Modernity: Public Debates on Domesticity in British Bengal’ in *Tensions of Empire: Colonial Cultures in a Bourgeois World* ed. by Frederick Cooper and Ann Laura Stoler, (Berkeley: University of California Press, 1997), pp. 373-404.

Secondly, the chapter has argued that given the instability weaved through colonial rule, its legal system, and its political discourses, the production of an inevitable notion of failure was fostered by the colonial state as a defensive shield to insulate the court from criticism. The courtroom, a site capable of the ultimate act of modern sovereignty by sentencing a legal subject to death, at other moments could expose the frayed edges of colonial power. On these occasions, the colonial law fell back on these discursive excuses to paper over the cracks and contradictions embedded in this structure of colonial sovereignty.

The next chapter moves from the structural role of colonial law in organising violence at the level of the Indian social, to the state's own capacity for violence, examining the reintroduction of corporal punishment.

Chapter Four

Archaic Sovereignty and a Modern Code: Corporal Punishment in Colonial India

Introduction

For Michel Foucault, violent and public displays of punishment represented an archaic form of sovereignty which disappeared from sight with the construction of modern institutions of surveillance and discipline.¹ However, within the conflicted space of colonial modernity, the implementation of a purportedly modern legal infrastructure, which for many observers surpassed the system of criminal law in the metropole, did not result in the same withdrawal of these expressions of violence and power. As the IPC was implemented in India it was thus accompanied by a sustained recourse to these residual modes of sovereignty, and remained dependent on pervasive forms of violence, both inside and outside of the law. Examining the everyday violence of the colonial state through the reintroduction of corporal punishment in colonial India, this chapter explores the colonial anomaly which produced codified law alongside coexisting forms of archaic violence.² Notably, though important scholarship has analysed corporal punishment in the Company period, in the early twentieth century, as a military punishment, and as part of wider histories of juvenile discipline, its reintroduction as a judicial punishment in the later nineteenth century has been comparatively unexplored.³

Absent from the Indian Penal Code, the judicial and summary punishment of whipping was passed into law through Act No. VI of 1864. This legislation, tacked on as a subsequent appendage to the IPC, invested the judge with wider discretionary powers to administer violence across Indian society. Moving from the previous chapter's focus upon case law, and in keeping with the attempt to disaggregate state-centred colonial law into various legal frames, this chapter focuses primarily on the social politics undergirding the evolution of this legislation. Whereas the trials for murder revealed the important spaces for judicial discretion inserted into the IPC from its inception, the production of legislation represented the attempt to structure the broader framework within which the courtroom could operate. Legislation could thus invest colonial law with emergency and radically new powers, or over

¹ Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, trans. by Alan Sheridan, (London: Penguin, 1977).

² This reliance on violent punishment alongside claims of providing civilised governance has in another study been termed, 'the paradox of colonial discipline'. See Steven Pierce and Anupama Rao, 'Introduction' in *Discipline and the Other Body: Correction, Corporeality, Colonialism*, ed. by Steven Pierce and Anupama Rao (Durham: Duke University Press, 2006), p. 4.

³ For the early company period see Singha, *A Despotism of Law*, pp. 246-253. For analysis of the legislation for whipping in late colonial India, see Sherman, *State Violence and Punishment*, pp. 26-31, 88-9. For military discipline see: Radhika Singha, The "Rare Infliction" the Abolition of Flogging in the Indian Army, circa 1835-1920', *Law and History Review*, 34:3 (2016) pp. 1-36; Douglas Peers, 'Sepoys, Soldiers and the Lash: Race, Caste and Army Discipline in India, 1820-50', *The Journal of Imperial and Commonwealth History*, 23:2 (1995), pp. 211-247; For the use of corporal punishment for juveniles see Satadru Sen, *Disciplined Natives, Race, Freedom and Confinement in Colonial India* (New Delhi: Primus Books, 2012), pp. 178-185.

a process of gradual reform and systematic modification, adjust pre-existing law to meet evolving colonial concerns. In this case what emerged was an evolving attempt to enlarge the colonial state's capacity for quotidian violence, targeting certain bodies to reaffirm, manage, and police the social hierarchies which colonial sovereignty depended upon.

As with the wider thesis, key to this process was the structural role played by law and violence within both imperial political thought and governmental practice. In the context of a slow imperial movement away from the cast-iron distinctions made between groups in the early nineteenth century, distinctions that amongst other things had supported a legally enforced system of slavery, new methods to mark the value of different bodies were created. In the aftermath of the rebellion particularly, the sense that certain bodies could withstand violence, and that violence itself could be used to create economically productive colonial societies, re-emerged in debates around penal law and punishment. In this example, through formal legal restrictions and informal legal-cultural practices, corporal punishment developed into law what one official termed, 'the category of the "whippable"'.⁴

In connection with the previous chapter, the analysis here again draws the logic of colonial sovereignty beyond moments of episodic and widespread violence. Charting the changing shape of this legal category along lines of race, gender, caste, class, and age, the chapter will argue that this logic of exceptionality, channelled here through the application of judicial violence, often attempted to structure Indian society in complicated and insidious ways.

Dipesh Chakrabarty's study of colonialism and modernity will set the terms of this argument. Here it was posited that political modernity, understood by European intellectual thought in the nineteenth century, created a stagist reading of history which left colonial populations in 'an imaginary waiting room of history'.⁵ Placing the Indian population within a universal paradigm of progress, colonial politics determined that India's only route to political modernity would be the slow infusion of European ideas at a speed judged by the metropole. Attempting to build on this argument, the chapter contends that the colonial population were not simply positioned as '*not yet* civilized enough' in the imaginary path to self-government, but were constantly ordered and reordered in a queue of relative civility.⁶ This process of reordering attempted to create a sensation of motion towards an empowered political subjectivity, while in reality created new forms of subjugation within that society. Privileging some communities while punishing others, an exploration of the 'whippable' subject can help unpack

⁴ The full quote is a response from the Deputy Commissioner of Bara Banki district to United Provinces Government (Hereafter UPG), 19 August, 1905. It states the following: 'Legislation cannot well lay down any distinctions of class and determine what castes shall be included in the category of the "whippable"; nor can the hands of the magistracy be tied by strict rules on the subject. If legislation in any direction be proposed, it must, I think, move towards restricting the imposition of this form of punishment to those offences which are nearly always committed by members of the lower classes'. UPSA, LB, List 43 Judicial Criminal Block/ Judicial (Criminal) Department/United Provinces Proceedings/Dec 1905/Nos. 1-62.

⁵ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2007), p. 8.

⁶ Ibid.

the process through which colonial ideas of relative distance from modern citizenship were quantified across Indian society, through law and violence.

First exploring the historical background behind its reintroduction, the chapter will then trace the evolution of this Act at three different points, 1864, 1900, and 1909. The chapter concludes by exploring the spaces outside of the courtroom in which the violence of the whip was employed.

The Reintroduction of ‘Moderate Flogging’

The legislation for corporal punishment in 1864 was part of a longer history connected to changing ideas of punishment, race, and civilisation in imperial and British political circles. Within Britain by the early nineteenth century a number of humanitarian and philanthropic reformers in the metropole had campaigned for more humane methods of punishment in the form of cellular jails and improved rights for prisoners. In their opinion, the British legal system had become unwieldy and irregular, relying on random acts of unquantifiable violence.⁷ These reformers instead believed that law should prioritise the careful administration of punishment along lines of modern jurisprudential and reformatory principles.⁸ In the 1860s, at the pinnacle of nineteenth century opposition to public displays of judicial violence, public flogging was abolished in 1862 and public hanging in 1868. By this point the only crimes punishable by whipping were attacks on the Queen, and in response to the 1862 London garrotting panic, robbery with violence.⁹

Comparatively, in India during the late eighteenth and early nineteenth century a number of public and violent forms of punishment were in operation.¹⁰ Examples such as gibbeting, *tashir*, public floggings and others were regularly applied judicial punishments. Between 1800 to the 1860s, much like the British case, many of these punishments fell out of the penal machinery in India under the influence of various reformist efforts.¹¹ This resulted in 1825 with women being prohibited from being flogged on the grounds of ‘delicacy and humanity’.¹² In this spirit, in 1834 during the 1830s ‘age of reform’, the Governor General of Bengal William Bentinck replaced all punishments of whipping with imprisonment.

In the preamble to the abolition of whipping Bentinck commented on its poor effectiveness, its degrading nature, and the necessity of the colonial government to ‘present in its own system the principles of the most enlightened civilization’. Bentinck commented further that the Act was to,

⁷ Phil Handler, ‘Forgery and the End of the ‘Bloody Code’ in Early Nineteenth-Century England’, *The Historical Journal*, 48:3 (2005), pp. 700-702.

⁸ Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (London: Macmillan, 1978), p. 75.

⁹ Jennifer Davis, ‘The London Garrotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in mid-Victorian England’ in *Crime and The Law: The Social History of Crime in Europe Since 1500* ed. by V.A.C. B. Herman & G. Parker (London: Europa, 1980), p. 208.

¹⁰ Fisch, *Cheap Lives and Dear Limbs*.

¹¹ Singha, *A Despotism of Law*, pp. 229-274.

¹² Anderson, *Legible Bodies*, p. 37.

‘encourage the native states to exchange their barbarous and cruel punishments of maiming, or torture...for those of a more merciful and wise character by which the individual may be reformed and the community saved from these brutalising exhibitions.’¹³ This was quickly followed by legislation in 1835 that removed whipping as a punishment in the army. These legislations were significant moves in the colonial context. Concurrent reform efforts in India were aimed at problems deemed specifically Indian, such as *sati* or *thuggee*. The abolition of whipping alternatively tackled an issue which was equally applicable in the metropole as it was to the colony, and yet went further than any legislation considered in Britain. In the context of colonial history, the army legislation stood out as a particularly distinctive anomaly. Here, for a short period of time Indian soldiers were immune to a punishment that the British soldiers remained vulnerable to.¹⁴

The 1830s also saw the first completed draft of the Indian Penal Code. In a detailed section on the efficacy and morality behind different forms of punishment, a number of violent and public punishments were excluded. Amongst these whipping was deemed inappropriate. Published in 1837 the draft stated:

Being satisfied, therefore, that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps, and to re-establish throughout the British territories a practice which, by a policy unquestionably humane and by no means proved to have been injudicious has recently been abolished through a large part of those territories.¹⁵

Though this opposition to whipping was reinforced in later drafts, its abolition in Bengal received large amounts of criticism from sections of the colonial administration, while corporal punishment persisted in Madras and Bombay.¹⁶ The army in particular felt that the reform legislation was an unnecessary and potentially dangerous threat to discipline. Denigrating these restrictions, the military historian John William Kaye went as far as arguing that even the Indian soldiers whom the regulation benefited disliked the law. He wrote in 1864: ‘It was looked upon less as a boon than as a concession- less as the growth of our humanity than of our fear. So the Sipahi did not love us better, but held us a little more in contempt.’¹⁷ Under pressure in both civil and military spheres whipping was reintroduced in

¹³ Regulation 2 of 1834. BL, IOR, V/8/21.

¹⁴ Singha, “Rare Infliction”, p. 5.

¹⁵ ‘Notes’ in *A Penal Code Prepared by The Indian Law Commissioners* (Calcutta: Bengal Military Orphan Press, 1837), BL, IOR, V/27/144/1, p. 13.

¹⁶ In Bombay flogging was administered under Regulation XIV of 1827. This empowered judges to sentence criminals to up one hundred stripes, which would be administered in blocks of twenty-five. These punishments were administered publicly and applicable for a wide range of crimes. See A.D. 1827, Regulation XIV, Section VIII. BL, IOR, V/8/24.

Under the criminal justice system in Madras flogging was also used for a wide selection of crimes, the instrument used was notably changed from rattan to a cat-of-nine-tails in 1828 as it was deemed a fairer and more equal instrument less likely to inflict ‘serious bodily injury, far beyond the intention of the law’. See A.D. 1828 Regulation VIII, BL, IOR, V/8/28.

¹⁷ John Kaye, *Kaye and Malleson’s History of the Indian Mutiny of 1857-8, Vol. I* (London: Longmans, Green and Co, 1897), p. 199.

piecemeal fashion soon after abolition. It was first justified as a temporary measure for larceny in 1844 under the premise that it was ‘expedient, until adequate improvements in prison discipline can be effected’.¹⁸ Its remit then expanded over the period before peaking dramatically under the martial law of the rebellion.¹⁹

During the rebellion new legislation extending the use of corporal punishment had been justified as a method to maintain law and order in response to the destruction of jails, causing ‘the want under existing circumstances for the means for the confinement of Convicts’.²⁰ Specifically, the legislation empowered magistrates to punish offenders who had been found guilty of a selection of offenses related to property or petty crimes in which fines had not been paid.²¹ Unlike the law that would follow, whipping was premised on simply defined racial lines. Excluding European British subjects and Americans, it targeted solely Indian men.²² At the time of legislation, the duration of this measure had been limited to two years.

The nature of punishment throughout this earlier period had varied in application across regions, both in the number of lashes which were deemed acceptable, the instrument used to administer the punishment, the part of the body whipped, and the space in which the punishment was given. This lack of uniformity in punishment led to drastically different practices across India. The result in practical terms was the construction of a colonial economy of legal violence with very little regulation at the local level. Within this penal structure, extreme brutality and punitive violence was sanctioned by law, and with the exception of the short period following Bentick’s abolition, maintained consistent institutional support.

The loosely controlled administration of sanctioned colonial violence became a point of contention from those who disagreed with the punishment. A particularly harrowing account of the results of this laxly managed violence was offered from a magistrate of the North-Western Provinces opposed to new legislation. He described a judicial flogging in the following terms:

In districts where flogging is a favourite punishment, you find a couple of specially powerful and thoroughly trained tent-pitchers invested with the office of floggers. The man who is to be punished is stript and tied up to the triangle: one of the “clashes” also stript to his waist, steps out armed with a rattan about 5 ½ feet long, he takes two paces to the left of the triangle, measures the distance, so that the end of his weapon will exactly fall across the offender’s body, makes a slight scratch on the ground with one foot to guide his after movements, steps back two paces further, firmly grasp in both hands the rattan, and then, swinging it round his head, and bounding forward to the line, delivers with the

¹⁸ *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose Laws and Regulation, 1864*, vol. III, BL, IOR, V/9/6-9, p. 22.

¹⁹ Heather Streets narrates the violence in Bareilly in which three scaffolds and six whipping posts were set up and over 700 men were summarily executed and punished. Heather Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857-1914* (Manchester: Manchester University Press, 2010), p. 40.

²⁰ Act No XI of 1858, BL, IOR, V/8/36.

²¹ Ibid.

²² Ibid.

whole strength of his arm and the whole weight of his body, a blow that screeches through the air like a rifle bullet. An instant after there is a long gash on the body almost like a sword wound, from which the blood streams before the second blow descends. The first “clashee” gives five such stripes, and the second then steps forward, to be again succeeded after five more stripes by the next, and so on till the torture, which I should say lasted fully a quarter of an hour, is concluded. The first twenty stripes are usually laid about an inch apart and just parallel to each other and the last ten are *crossed* over these. Strong men habitually faint at the second or third crossed stroke, and men have died during the disturbances, from the effects of fifty well administered stripes.²³

The letter was read by Charles Jackson in the Legislative Council in 1861. At this point Jackson was the sole voice at this echelon of government to reject the efficacy of corporal punishment in India. With the Council stacked against his position Jackson’s intention was to shock other members into moderating the number of lashes applicable and to consider changing the instrument used rather than defeating its eventual full reinstatement. To some degree this was successful and he garnered sympathy for his wider philosophy, and condemnation for this form of flogging. Yet while most members agreed to his proposals to lower the maximum limit of lashes and to reconsider the instrument being used more carefully, support for the punishment itself remained resolute.²⁴

The letter was part of a wider series of discussions between 1857 to 1864 concerning the efficacy of corporal punishment and its relationship with the final implementation of the Indian Penal Code. Underwriting these discussions was the considerable colonial question of finance. In reducing prison sentences the punishment was a fiscally prudent option for a colonial state unwilling to invest in infrastructure on a comparative level to the metropole.²⁵ Thus, by this juncture, rather than representing a real debate about whether the punishment should be used, the overwhelming support it carried meant that it was how the punishment could be incorporated into the evolving colonial legal structure and translated smoothly into colonial political discourse that was now in question.

From a logistical point of view, discussions revealed that corporal punishment had in fact been added to a draft form of the Indian Penal Code in 1857. However, unlike the officially published drafts, this addition had not passed through the formal process in which the opinion of regional governments and officials had been gathered. According to one estimate at its very shortest this process would take six months to complete. With the target of implementing the IPC by 1 May 1861, and with these debates ongoing in September 1860, the Chairman informed the council that a separate bill would need to be

²³ Legislative Council Proceedings, 31 August 1861, BL, IOR, V/9/3-6.

²⁴ Charles Jackson in fact was keen to restrict the instrument to a rattan rather than a cat-o-nine’s tail but the final bill made no clear decision on this. *Ibid.*

²⁵ On the comparative underinvestment in the legal system, one journalist commented ‘England spends on judges alone for thirty millions of people covering an area of 119,924 square miles, more than twice the amount spent on the administration of justice on the same number of people in the North Western Provinces. Where England spends £2,600,000, besides the unpaid labour of an enormous number of magistrates and justices of the peace, India spends £247,000 and has no such honorary judges.’ *Friend of India*, 8 January 1863, p. 32.

passed to avoid delaying the more important penal code.²⁶ Notably also, some supporters of corporal punishment saw a certain benefit to separating the more controversial and violent nature of the whip from the IPC. With this separation, corporal punishment could be more easily positioned as a temporary measure, leaving the IPC to still be recognised as a modern and permanent piece of legislation.²⁷ This also meant that from the Indian Penal Code's full implementation in 1862 to the passing of the 1864 Whipping Act there was another brief interlude in which whipping was prohibited as a judicial punishment.

For the consistent minority who opposed this Bill, arguments were forwarded based on the notion that the Indian Penal Code in its original form deserved a fair trial period, that the Indian Law Commissioners and enlightened governors such as William Bentinck had deemed it unnecessary, and that civilised governments should avoid violent forms of punishment. Amongst the imperial critics of the Bill, Sir Charles Trevelyan, Lord Canning, and later politicians such as Sir Henry Cotton all aired concern with a piece of legislation that brought violence so openly into the hands of colonial authorities. Moreover, in light of the recent violence of the rebellion in which corporal punishment had been widely resorted to, its return was seen as an ill-advised reminder of colonialism's violent underbelly. As Mr Campbell the Judicial Commissioner of Oudh wrote in 1860:

The constant participation in such scenes must have a more or less a brutalizing effect on almost any man's mind, and must tend to perpetuate that harsh and severe feeling which, not unnaturally resulting from the scenes of 1857, it must now be our object to soften down and eradicate.²⁸

Other concerns raised were the perceived relationship whipping had with the institution of slavery that had only been made illegal in India in 1843, and the prevalence of torture, which as recently as 1855 had been a cause of controversy due to the Madras Torture Commission.²⁹ One detractor stated this explicitly, bluntly arguing that the legislation would in effect, 'establish and legalize torture throughout India'.³⁰ Others warned that European judges would be unwilling to be present for the whipping, leaving Indian officials dispensing colonial violence, a disconcerting inversion of racially structured power relations.³¹.

²⁶ Legislative Council Proceedings, 8 September 1860, BL, IOR, V/9/3-6.

²⁷ Ibid.

²⁸ *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose Laws and Regulation, 1864*, Vol. III, BL, IOR, V/9/6-9, p. 25.

²⁹ Whipping had at times been used as a proof of slavery in the past. In law courts in early nineteenth century America whipping had been used as evidence of slavery when the question of an individual's legal status was questioned in court, see Rebecca Scott, 'Social Facts, Legal Fictions, and the Attribution of Slave Status: The Puzzle of Prescription', *Law and History Review*, 35:1 (2017), p. 26.

Concerns with torture for instance had only recently been revealed in Madras in 1855. See Anupama Rao, 'Problems of Violence, States of Terror: Torture in Colonial India', *Interventions*, 3:2 (2010), pp. 186-205

³⁰ *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose Laws and Regulation, 1864*, Vol. III, BL, IOR, V/9/6-9, p. 22.

³¹ The Legislative Proceedings stated: 'Our Judges would not readily submit to be turned into executioners; such scenes were so painful that no English gentleman would be present at them, who could possibly avoid it, and, the superintendence of the infliction of the punishment would be left to irresponsible Natives.' Id., p. 24.

As chapter two suggested, the idea of a relative closeness between the state of war and peace in colonial societies in nineteenth-century imperial political thought would translate into material legislation in the governance of colonial India. In this case, it resulted in a liberal embrace of certain ideas of violence and difference in the everyday colonial space. The logic and language used to defend this Bill therefore did not drastically diverge from the key liberal vocabulary employed by these officials who opposed it. Instead, with the 1860s shift towards what Thomas Metcalf has termed ‘authoritarian liberalism’, colonial lawmakers now sought to invest the same key reference points of humanity, progress, and civilisation, with a new cynicism towards political enfranchisement, racial difference, and a recognition of the productivity of violence.³²

Here, many of these officials candidly accepted the premise that violence equated to an uncivilised form of punishment which they personally disliked.³³ However for this group the impact of the rebellion had had a profound impact on the way Indian society was viewed. As one official tersely stated in support of the Bill:

I agree with Mr. Ross in thinking that the mutinies have proved that we have made great blunders in our endeavours to place the Natives of India on a level with ourselves in matters of legislation.³⁴

With the rebellion confirming to these legislators that India and Britain now needed to be treated as distinct spaces for governance, a narrative was produced in which compassionate and ethical rule no longer needed to rely on universal principles of governance, but on specific forms of knowledge extracted from that society.³⁵ For H.B. Harington, a prominent supporter of corporal punishment in the Indian context, acting in a ‘humane’ fashion equated to treating individuals according to their position in a social and civilisational hierarchy. He defended the Bill in the following terms:

in the present state of civilization, among three-fourths of the population, and in the present defective state of prison discipline, he was satisfied that corporal punishment was a necessity in this country. As regarded a great majority of the criminal population, it was a more humane punishment, had more power as a deterrent, and was not more demoralizing than imprisonment.³⁶

In this new colonial political discourse, the reversal to policies which were previously felt as unsavoury by modern standards were supported as the necessary burden of imperial governance. This formula of a liberal language of rule alongside the expanded capacity of state violence, squared through the

³² Metcalf, *Ideologies of the Raj*, p. 56.

³³ Bartle Frere, a supporter of the bill, was representative of this position when he claimed ‘It had been supposed that he and other gentlemen who objected to the omission of this punishment from the Code did so on the grounds that they had approved of the punishment in itself and desired to retain it permanently as a general punishment. Nothing could be farther from the truth... anxious to see the punishment at once entirely and for ever abolished.’ Legislative Council Proceedings, 8 September, 1860, BL, IOR, V/9/3-6.

³⁴ ‘Letter from the Secretary to the Government of the North-Western Provinces to the Secretary to the Government of India, 441A Nynee Tal, 23rd June 3rd, NAI, Home (A)/Legislative/December 1862/ Nos. 10-148.

³⁵ This is the overarching argument of Karuna Mantena, Mantena, *Alibis of Empire*.

³⁶ *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose Laws and Regulation, 1862*, Vol. 1. BL, IOR, L/V/9/8, p. 52.

propagation of freshly drawn ideas of civilisational backwardness, was nowhere more visible than the invocation of the tribal figure.³⁷ For these officials, the imprisonment of tribal groups from across frontier and border regions had resulted in a significantly higher rate of mortality in prison. Relying upon the opinion of medical officers who argued this was due to a unique physiological problem relating to these groups, corporal punishment was framed as the more empathetic alternative to what one Legislative Council member described as, the ‘certain death’ of imprisonment.³⁸ With a wider shift to colonial ethnography, enumeration, and scientific principles of punishment, colonial governmentality ensured that legally sanctioned quotidian violence did not fall out of its utilitarian apparatus of discipline.

A second and connected justification was the notion that crime was contagious, and that the underdeveloped colonial prison facilitated its spread. Many officials argued that India’s prisons were less sophisticated than the English models, and that without thorough provision of cellular jails, prisoners mixed more regularly. Under these conditions they argued that the current prison infrastructure was unable to offer modern reformatory rehabilitation. Given the circumstances whipping was posited as a comparably more productive and effective punishment. Henry Maine for instance stated:

that a man who went into prison simply a knave, would come out a finished ruffian; that his family might be destitute during his imprisonment, and that if he had had any caste, he would leave the Jail an out-cast.³⁹

For Maine and many other supporters of the legislation, the modern jail was a space for the habitual or serious offender who could be clearly demarcated from law abiding society. In this colonial paradigm, the danger of this type of individual lay not just in their criminal past, but their ability to pass on their criminal knowledge to a wider society, which had already been labelled as possessing a natural inclination towards criminality. In the minds of these men, the reformatory potential of the jail was therefore undermined by the production of broken family units and the hardening of petty criminals.

The ‘whippable’ subject, not suitable for the prison yet still labelled a criminal, signalled a larger governmental tactic that distinguished serious offenders from petty ones, but then also ensured the separation created between the two remained easily collapsible. The creation of an invisible, pervasive, and unquantifiable Indian criminality was thus part of a colonial strategy that weakened the restraints placed on the state’s discretionary, executive, and often violent legal capabilities.

Nonetheless, some concerns with the new Bill were aired from those who supported its reinstatement. These aptly focused upon the change to the legislation from the 1858 model in which a

³⁷ For a comparable study of the whip in the wider imperial context see work on corporal punishment and aboriginal communities in Western Australia see Dinesh Joseph Wadiwel, ‘Thick Hides: whipping, biopolitics and the white soul of power’ *Social Semiotics*, 19:1 (1999), pp. 47-57.

³⁸ Legislative Council Proceedings, 8 September, 1860, BL, IOR, L/V/3-6.

³⁹ *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose Laws and Regulation, 1864, vol. III*, BL, IOR, V/9/6-9, p. 35.

racial distinction disqualifying white bodies from this punishment had been dropped.⁴⁰ These concerns were alleviated by legislators by emphasising a distinction that would be made between the letter of the law, and what legislators in the IPC had termed the law's guiding 'spirit'.⁴¹ Reminiscent of earlier cases such as the amnesty following the rebellion, if the law was not to explicitly state the importance of race, the whip was to make distinctions along these lines.⁴² As a discretionary punishment invested in the authority of the judge, it was stated that, 'In determining whether an accused person guilty of an offence, punishable with corporal punishment should be flogged, the Court or Magistrate would necessarily take into consideration many circumstances which could not be put into law.'⁴³ It was then argued that Europeans had been punishable in the Supreme Court by the whip, but none had been given that punishment in the last twelve years. As it was retained as an optional and discretionary punishment, and with the system of Supreme Court judges moving directly into the High Courts, this unofficial impunity would therefore continue.⁴⁴

In essence, a dominant political discourse was developing in which the implementation of what one Legislative Council member rebranded 'moderate flogging', could be uncritically folded into a wider liberal language of progress and development.⁴⁵ By both claiming this liberal vocabulary while drawing out the renewed importance of civilisational difference, the state no longer claimed the necessity of leading by example, or attached itself to the same restraints which restricted its violence in the metropole. Rather it now governed through a set of tools defended on knowledge produced about the specific society being ruled. The acceptance of corporal punishment here was not a simple return to the retributive ideas of violence and punishment that existed earlier, but by injecting the liberal principles of reformatory punishment with these ideas of difference, colonial rule declared its ability to tame violence into a tool for civilisational pedagogy. As with the earlier examples of rebellion amnesty and the wide degree of discretion left for punishment in murder trials, the reintroduction of corporal punishment reflected the insertion of the logic of colonial exceptionality being slowly included into the idea of the modern colonial norm.

Importantly, once passed into law, this everyday colonial violence did not target colonial subjects uniformly. Instead the violence was carefully structured across society, guided by orientalist conceptions of Indian bodies, but also through compromises made with pre-existing structures of power operating in the Indian social. Returning to the contingency of colonial sovereignty and its ongoing relationship with the Indian social, the next section will trace this category of criminality as it evolves over time.

⁴⁰ Legislative Council Proceedings, 18 August, 1860, BL, IOR, L/V/9/3-6.

⁴¹ IPC, Chapter IV, Section 95, p. 72.

⁴² As explored in chapter one, rebellion amnesty refused to openly distinguish racial difference, however its centrality in the definition 'British subjects' was implicitly accepted. See.

⁴³ Legislative Council Proceedings, 31 August, 1861, BL, IOR, L/V/9/3-6.

⁴⁴ Ibid.

⁴⁵ The full quote from Mr. Harington states 'But moderate floggings as a punishment for certain classes of offences not of the most heinous kind has, we think, many advantages over other punishments, especially in this country.' Legislative Council Proceedings, 18 August, 1860, BL, IOR, V/9/3-6.

The Evolution of the Whipping Act: 1864-1909

The law in 1864 invested subordinate magistrates of a certain qualification with the authority to punish criminal behaviour with corporal punishment. The whipping was to be executed with a medical officer present, who would confirm that the offender was in a fit state to receive the punishment, as well as a Justice of the Peace.⁴⁶ For adults, it was limited to a maximum of thirty stripes with the rattan, or one hundred and fifty stripes with a cat of nine tails. For juveniles, it was to be ‘inflicted in the way of school discipline with a light rattan.’⁴⁷ Local governments were authorised to decide which measure they felt was appropriate. In neither the IPC nor the later Code of Criminal Procedure of 1872 was it stated whether the nature of execution should be public or private. Even after Charles Jackson’s earlier efforts to standardise the whip, with relative autonomy given to local governments in deciding the method of execution, by 1907 every region in India were still employing different procedures for punishment, and public whippings were not uncommon.⁴⁸ As this section will show, if the method of application of corporal punishment remained loosely defined, as the legislation progressed the legal subjects it targeted became increasingly precise, carving society into those suitable or unsuitable for this form of violence.

In its 1864 form the law could be used for a number of crimes on first offence, and a range of other crimes on repeated offence. Mr Harington who had headed the Select Committee to draw up the original bill stated that the crimes chosen were those which, ‘carried with it a greater degree of social and moral degradation than was the case as regarded the punishment of other offences.’⁴⁹ Notably as the law evolved over time, this concern with crimes of moral obliquity or turpitude were regularly used when justifying additions or removals. The crimes that constituted this category of criminal at this early stage centred on three themes; crimes connected to personal property, crimes that diverted the course of justice, and crimes of a sexual nature. Out of the ten crimes for which whipping could be used in lieu of other punishments, eight had some relation to theft or property, and two with extortion.⁵⁰ From the eighteen crimes punishable on repeated offence; three were related to fabricating evidence, two with unnatural offences, two with forms of sexual violence towards woman, six in relation to theft and property, and five forms of forgery.⁵¹

⁴⁶ Act No VI of 1864, BL, IOR, V/8/39.

⁴⁷ Ibid.

⁴⁸ To compare Madras and Bombay in 1907. In the city of Madras whipping was carried out in the Penitentiary, however in the mufassil it was usually in court and in public, while in some districts even in the street or market-place. In Bombay there was no uniform manner, some were carried out in prison, others in the precincts of the court. The place of whipping on the body also varied between buttocks and bare shoulder. NAI, Home (A)/Judicial/March 1907/Nos. 167-183.

⁴⁹ Legislative Council Proceedings, 5 Jan, 1861, BL, IOR, V/9/3-6.

⁵⁰ I have included amongst the eight crimes with relation to theft or property varying forms of theft, dishonestly receiving stolen property and lurking house-trespass or house-breaking, Act No. VI of 1864. BL, IOR, V/8/39.

⁵¹ To clarify some of these groupings, the crimes of sexual violence towards women included ‘Assaulting or using criminal force to any woman with intent to outrage her modesty’ and rape.

Inserted into the legislation were also provisions that expanded the state's ability to whip certain groups. All juveniles guilty of a crime excepting capital offences could be punished by the whip. Moreover, frontier district groups, on the discretion of local governments, could be whipped for all twenty-eight listed crimes on lieu of other punishments. If the boundaries for corporal punishment were enlarged for some groups, they were restricted for others. Women, males over forty-five, and those who had been sentenced to imprisonment of over five years or for capital punishment were excluded from the whip.

With the letter of the law stipulating the broad remit for corporal punishment, the informal practices of law further concentrated the legal subjects to be targeted with this form of violence. As Radhika Singha has shown in relation to the punishment for bad-livelihood, rather than removing judicial discretion, the shift towards legal codification instead worked to systematise it.⁵² Leaving the decision of whether to use the whip to the magistrate was another example of this organisation of these discretionary and exceptional spaces within this codified legal structure. In this light, though it was not seen as politically fitting to openly insert clauses that separated between classes and castes, whipping was widely considered inappropriate for high caste Hindus and well-to-do Muslim men.⁵³ In a discussion concerning a later reform in 1905 the Commissioner of Baillie summarised this consistently acknowledged position in relation to the punishment. He argued:

To a Brahmin a Rajput, or a Muhammadan of decent birth a whipping by order of a magistrate is a lifelong stain; to a chamar or a sweeper it is simply temporary suffering, which, as a rule, they would themselves prefer to suffer rather than be taken away for even a week or two from their homes.⁵⁴

Distinguishing subjects across lines of caste and class, a strained utilitarian logic was being used to argue that as the social implications of being whipped differed across society, for colonial punishment to be experienced equally, law had to make distinctions premised upon the social position of the criminal. Investing the ultimate decision over whether to use the whip in the magistrate, these individuals were expected to traverse social and cultural lines to consider the implications of administering the whip. As predicted, this discretion also ensured that Europeans in India, outside of the army, were not at the receiving end of the whip.

The result was the presentation of the 'whippable' subject as a juvenile or lower-class male, not yet past working age. In creating this class of criminal, the law consolidated its remit of colonial violence in both its physical and epistemic forms. In justifying the necessity of this type of legislation, and in reducing the restrictions on the colonial state's route to judicial violence, the legislation firstly contributed to a wider normalisation of the legal employment of violence onto colonial bodies.

⁵² Singha, 'Punished by Surveillance', p. 4.

⁵³ As one official commented: 'The law can, of course, make no difference between persons of good castes and others. But executive order could direct magistrates to respect the general feeling except in the case of juveniles'. H. C. A. Conybeare to UPG, 11 August 1905, UPSA, LB, List 43 Judicial Criminal Block/United Provinces Proceedings/Dec 1905/Nos. 1-62.

⁵⁴ D.C. Baillie to UPG, 20 July 1905, Id.

Meanwhile the law conflated this group with crimes that implied a predilection towards rejecting the importance of property, respect for the procedural basis of the law, heteronormative sexual behaviour, or violence towards the female body. This, in turn, strengthened the deeper political discourse upon which colonial rule existed, the incapability of colonial society to meet the requirements of modern citizenship.

Transforming law into an instrument for carving society across newly constructed or pre-existing social boundaries, the suitability of a subject to receive violent punishment served as one marker to consolidate the uneven value of colonial legal contracts distributed across society at this point. Following the law across the period, this association of moral obliquity with caste, class, and an idea of immature Indian low-caste masculinity would become increasingly prominent.

Under evolving historical conditions various concerns were raised to regional governments about the suitability of removing or adding crimes to the law. While earlier debates had occurred in the 1880s, reform in 1900 represented the first significant change in the structure of the legislation. Firstly, the amendment extended the use of whipping towards juveniles by allowing local governments to administer it for all local and special laws that lay outside of the IPC.⁵⁵ Secondly, discussions considered the addition of two crimes to the Bill for adults, gang-rape, and rioting with a deadly weapon. It was here in which the larger political motivations behind the legislation were revealed.

The first of these, the crime of gang-rape, can be analysed alongside a large number of other colonial laws which manipulated the symbolic site of women's bodies to push through other agendas.⁵⁶ The colonial concern with this crime should therefore be considered in relation to two larger and intertwined colonial narratives; the colonial language of paternalism on one hand, and the colonial language of difference on the other.

In this instance, the crime was one of a violent and sexual nature, and its victims were Indian women generally understood to be married. It was described as mainly being perpetrated by Muslims of lower classes who waited for moments when these women were, 'unprotected by the absence of her husband or her parents.'⁵⁷ During the debates the crime was stated to be prevalent mainly in certain districts of eastern Bengal, especially Mymensing.⁵⁸ Although the crime had never triggered the same degree of response as earlier colonial fears of collective Indian criminality, it had entered colonial discourse in a similar fashion to previous colonial panics, being compared to a criminal epidemic comparable to the London garrotting epidemic of the 1860s.⁵⁹ In an extended statement it was described in the following terms:

⁵⁵ See C.E.A. Bedwell, *The Legislation of the Empire: Being A Survey of the Legislative Enactments of the British Dominions From 1898 to 1907*, vol. III, (London: Butterworth & Co, 1909), p. 9.

⁵⁶ This was most thoroughly outlined in the debates around *sati*. See See Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998).

⁵⁷ BL, IOR, L/PJ/6/533.

⁵⁸ Although it was admitted that there were also reports of the crime in Burma and amongst the British Army. A particularly harrowing such case in Burma is described in Kolsky, *Colonial Justice*, pp.199-200.

⁵⁹ BL, IOR, L/PJ/6/533.

peculiarly brutal and inhuman wanting in many instances, even the poor palliation of overmastering desire, and presenting in its most loathsome, its most despicable aspect, the tyranny of numbers over a weak and defenceless woman to her utter and irreparable injury.⁶⁰

Crucial here, and laced throughout the debates on these punishments in legislative discussions, was the employment of colonial disgust with these forms of violence. To take the earlier debates in 1864, while the application of whipping for other crimes were more vigorously contested, the notion that rape reflected a ‘peculiarly demoralized mind’ faced considerably less critique.⁶¹ This had not changed by 1908 in which one official defending the legislation claimed, ‘Women always require extra protection, and when the utter helplessness of Indian women is considered the need for the extra severity becomes acuter.’⁶²

Nonetheless if the disgust vocalised in Legislative Council assemblies and in government circulars ensured these punishments stayed in the colonial arsenal, in practice they would be rarely used in response to the crimes which that emotion had been directed at. Between the years 1896-1905, there were 262,542 whippings in lieu of other offences, the vast majority being for theft and other house-breaking offences. None were for rape or assault. In the same period the whip was used 30,735 times in addition to other punishments, out of which it was used sixty-two times in cases of rape.⁶³ This of course should be placed within a wider context in which, as Elizabeth Kolsky records, there was an increasing leniency in conviction rates in cases of rape between 1860-1947.⁶⁴

As the historiography has shown, the discourse of the colonial state protecting Indian women from Indian men played a central role in the intellectual and discursive foundation of imperialism.⁶⁵ With this in mind, and with the courts empirical reticence to use the punishment in cases of these crimes, the emergence of this anxiety around the welfare of women must first be understood as an attempt to strengthen this hollow, but discursively important discourse of colonial paternalism.

The second narrative which this crime spoke to was that of colonial difference. Unlike crimes such as homicide which were constructed in fairly similar ways across imperial legal spaces, the legal response to gang-rape, later defined as, ‘being a member of an assembly of two or more persons, the common object of which is to commit rape as defined in section 375 of the Indian Penal Code’, was made particular to the Indian context.⁶⁶ In Britain, the distinction between rape and gang rape was not separated by the same degree of legal difference, while whipping was not a punishment for either crime. However, if the laws were constructed differently, the essence of this criminal act was not absent from

⁶⁰ Ibid.

⁶¹ Legislative Council Proceedings, 5 Jan 1862, BL/IOR/V/9/3-6.

⁶² BL, IOR, L/PJ/6/805.

⁶³ NAI, Home (A)/Judicial/March 1907/Nos.167-183, p. 42.

⁶⁴ Kolsky, ‘The Body Evidencing the Crime’, p. 115.

⁶⁵ Spivak, ‘Can the subaltern speak’.

⁶⁶ Act V of 1900. BL, IOR, V/8/63.

Victorian Britain. Carolyn Conley's study of rape places the number of gang rapes in Kent between 1859 to 1870 as twenty-five per cent of the overall convictions for rape.⁶⁷

Moreover, as V.A. Gatrell has shown, though violent crime decreased in England between 1850 to 1890, sexual assaults kept rising, peaking between 1886-1890.⁶⁸ In a final parallel, in both Britain and India trends in conviction rates had begun shaping the perception of sexual violence into a predominantly lower-class crime.⁶⁹ With colonialism dependent on maintaining perceived civilisational distance between metropole and colony, one method of ensuring difference in light of evidence of similarity had been the creation of subsets of crimes deemed unique to India. As recent scholarship has shown, a focus upon the rape of children was one example of this, fashioned into 'a seemingly exotic phenomenon'.⁷⁰ Another, as explained in chapter three, was the gendering of the infanticidal criminal to promote the idea of the uncaring Indian mother.⁷¹ The emphasis on this new legal category of gang-rape can be interpreted as a further example, ensuring differences along lines of race would overwhelm any perceptions of similarity connecting British and Indian men in their treatment of women. Thus, whereas in Britain these would remain perceived as rare crimes in the larger narrative of the legal category of rape, for the colony gang-rape was naturalised in the colonial mind as peculiar and prevalent to certain communities.

The second offence, rioting with a deadly weapon, was discussed in a drastically different tone. This was a crime chiefly found in agrarian regions and notably its offenders were presumed to be mainly zamindars, cultivators, or their servants. The connection drawn between property respecting subjects and their unsuitability to violent punishment was consistent in opposition to this addition. The crime was described as 'a respectable offence', or the result of a zamindar who 'has allowed his passion for a bit of land to involve him in a fight'.⁷² The politicisation of criminal law was made most explicitly by one colonial official who described the potential realisation of this proposal 'a political blunder'.⁷³ Concerned principally with the North-Western Provinces including Oudh, fears of antagonising the

⁶⁷ Carolyn Conley, 'Rape and Justice in Victorian England', *Victorian Studies*, 29:4, (Summer, 1986), p. 525. Discussion of gang-rape in nineteenth century Britain can also be found in Kim Stevenson, 'Ingenuities of the female mind': legal and public perceptions of sexual violence in Victorian Britain, 1850-1890', in *Everyday Violence in Britain, 1850-1950*, ed. by Shani D'Cruze (London: Routledge, 2014), pp. 89- 91; Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian Britain*, (Cambridge: Cambridge University Press, 2004), pp. 104-108.

⁶⁸ V.A. Gatrell, Bruce Lenman and Geoffrey Parker, *Crime and the Law: The Social History of Crime in Western Europe since 1500* (1980), p. 289. Though Gatrell is cynical of placing too much on the value of these statistics, scholars like Kim Stevenson have argued that given the underreported nature of sexual crimes, as well as the cost that prosecution cost to the victims, these numbers should not be quickly dismissed.

⁶⁹ As Carolyn Conley shows, in eighty-one per cent of the cases of men of higher status than soldier or labourer, charges of rape where lessened to attempted rape or indecent assault. Conley, 'Rape and Justice in Victorian England', *Victorian Studies*, 29:4 (1986), p. 523.

⁷⁰ Ishita Pande, 'Phulmoni's body: The autopsy, the inquest and the humanitarian narrative on child rape in India', *South Asian History and Culture*, 4:1 (2013), pp. 10-11.

⁷¹ Grey, 'Gender, Religion and Infanticide'.

⁷² 'Notes and Orders' Commissioner, Fyzabad, UPSA/LB/List 2/Judicial (Criminal) Department/N.W.P and Oudh/ Nov 1889/Nos. 51-67.

⁷³ Ibid.

landlord classes echoed a more cautious post-rebellion approach in the area.⁷⁴ Notably, the final legislation concluded by adding gang-rape, but dropped rioting with a deadly weapon.⁷⁵

Compounding the growing relationship between class and colonial violence, the 1900 Bill had extended the reach of the law. In doing so it had strengthened the notion that sexual violence was attributable to lower-class men, and reinforced the idea that a section of Indian society was unsuitable for modern citizenship. In slowly removing or rejecting the addition of crimes understood as being connected to respectable Indians, the protection from corporal violence informally offered to this section of society mirrored the earlier process which had seen financial rewards and titles offered after the rebellion.

The final Bill, passed in 1909, completes the series of reforms in this period. Differing from the earlier two reforms, changes made at this juncture were at least in part a response to a series of unanticipated events between 1900-1909 which had contributed to a growing momentum for change. The first of these events had been the death of a habitual offender in 1903 after a judicial whipping.

Ramji Hariba had been convicted of theft and was sentenced to corporal punishment in Bombay. Soon after he had died from blood poisoning, resulting from neglected wounds. In the defence of the treatment provided to Hariba, the local authorities stated he was a drunk and that they had administered ‘native remedies’ to his wounds.⁷⁶ However his death had caused controversy in both India and Britain, prompting inquiries to be made in Parliament and for reports taken from both the Bombay Government and the Government of India.⁷⁷ The circular that followed this event asked a number of questions, but chief amongst these was whether the offender should remain in prison until his wounds were healed, how to avoid the breaking of the skin, and whether a medical officer was always present during the procedure. In response, it was clear that the size of cane, the strength of floggers and the process of medical treatment before and after varied considerably across India.⁷⁸

As seen in the debates which led to the punishment’s reintroduction in 1864, colonial sociology had attempted to rationalise corporal punishment within a wider post-rebellion colonial discourse of scientific and utilitarian legal governance. The unforeseen death of a subject exposed the emptiness of these colonial claims of taming violence, and administering a ‘just measure of pain’.⁷⁹ In light of this, Hariba’s fatality became a lightning rod for a number of growing criticisms about the colonial legal system. These included the growing power of the executive, the increasing visibility of colonial violence, and a clear tension between the supposed uniformity of codified law and the unscientific nature of corporally measured pain.

⁷⁴ Bayly, *Indian Society and the Making of the British Empire*, p. 197.

⁷⁵ Act No. V of 1900. BL, IOR, V/8/63.

⁷⁶ ‘Notes’, NAI, Home (A)/Judicial/March 1907/Nos. 167-183.

⁷⁷ 21 July, 1904, *Hansard*, cc. 755-756; From Secretary to Government of India to Secretary to Government of United Province, 8 June 1905, British Indian Association Papers, Nehru Memorial Museum and Library (Hereafter NMML).

⁷⁸ ‘Statement showing how the sentence of whipping is carried out in the different provinces’, NAI, Home (A)/Judicial/March 1907/Nos. 167-183.

⁷⁹ Ignatieff, *A Just Measure of Pain*.

Following Hariba's death, the second spark for reform came from the emerging swadeshi movement in Bengal and its revolutionary violence. Explored in greater detail in chapter six, the period following the partition of Bengal in 1905 saw a rise in juvenile offenders arrested for political activity. Controversially many of these individuals were punished with the whip, receiving critical commentary from Indian legal circles and vernacular newspapers. With pressure from various directions, the government mitigated the severity of the law to reflect an 'ever-increasing disfavour' of public opinion towards whipping.⁸⁰ Confirmed into law in 1909, the revised legislation significantly streamlined the number of offences for which judicial whipping was possible. However, if the breadth of this punishment was diminished, the political bent of its targeting remained acute.

For adults, the whip was now only enforceable for ten crimes, chief among these were three in relation to rape, voluntarily causing hurt in committing or attempting to commit robbery, and dacoity.⁸¹ In this process receiving stolen property was removed. Resonating with the earlier debates concerning rioting with a deadly weapon, this removal was justified by the lawmakers as it was a crime that 'frequently belongs to respectable classes', the whipping of which, 'would outrage native opinion.'⁸² With particular connection to the events in Bengal that had seen this rise of youths whipped for crimes of a politically connected nature, the amount of stripes for juveniles was limited to fifteen.⁸³ At the other end of this social spectrum, the revision to section six of the Act dealing with groups in frontier regions expanded its remit. This transitioned from one declared as, 'any of the offences specified in section four of this Act' to that of 'any offence punishable under the Indian Penal Code with imprisonment for three years or upwards'.⁸⁴

Through this legislation the class lines drawn around the judicial use of the whip which had been evolving over the period were again made forcefully clear. Typical was A. W. McNair, the Deputy Commissioner of Bara Banki who argued in an earlier discussion for this legislation:

My own opinion is that respectable persons should not be flogged, but that that form of punishment should be reserved for those whose sense and sensibility was sub-normal. But how is this difficulty to be met? Legislation cannot well lay down any distinctions of class and determine what castes shall be included in the category of the "whippable"; nor can the hands of the magistracy be tied by strict rules on the subject. If legislation in any direction be proposed, it must, I think, move towards restricting the imposition of this form of punishment to those offences which are nearly always committed by members of the lower classes.⁸⁵

⁸⁰ BL, IOR/L/P/J/6/805.

⁸¹ The crimes in relation to rape were rape, abetment to rape and attempt to commit rape.

⁸² Magistrate of Banda to Secretary to UPG, 11 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial Criminal Department/United Provinces/Dec 1905/Nos. 1-62.

⁸³ Statement of Objects and Reasons, 11 March 1908, BL, IOR, L/PJ/6/805.

⁸⁴ Ibid.

⁸⁵ Deputy Commissioner of Bara Banki to UPG, 19 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial Criminal Department/United Provinces/Dec 1905/Nos. 1-62.

As the period of study draws to a close with this legislation, the Deputy Commissioner's logic brought into stark view the persistent reliance on the form of colonial exceptionality this thesis has been tracing since the amnesty offered in the Queen's Proclamation. Articulated within the same paragraph, the Commissioner defends the importance of the legal norm, refusing to install into law a difference between class and caste, and then simultaneously proposes methods to organise transgressions and exceptions that could be informally inserted into the practice of law.

These exceptions, as in the previous chapter, were very regularly the site where colonial violence could be produced. While the previous chapter saw the violence from the social partially excused in the courtroom, in this case the state's own violence was being administered from the same tension between norm and exception.

Following this evolving legislation for corporal punishment across the century the whip therefore provides insight into one of these spaces of colonial exception built into law, acting to structure society through violence. The whip as a tool of colonial power and order acted initially to discipline subjects on a pedagogical register of citizenship that, while with a wider remit for punishment at the start of the period, produced a less defined and targeted legislation. However, by the early twentieth century, the understood scales of respectability were more defined, and such a wide net of 'whippable' subjects were less viable. Instead the violence of the whip now focused on a smaller group of crimes largely of a sexual nature and isolated to lower caste men. By this point, the role of class in Indian society was playing a more defined role in the way colonial law was made, undoubtedly at least a tacit recognition of the growing reliance in the colonial administration on Indian upper caste lawyers. Central to the production of everyday law, reflective here in the whipping legislation, was the strategic insertion of discretionary and quotidian legal violence that dehumanised and infantilised certain Indian subjects, while protected and promoted others.

Ageless Juveniles and Perpetual Children

While the previous section focused primarily upon the relationship corporal punishment had with an evolving idea of the lower class-man, fluid ideas of race, gender and age were similarly important factors in dividing society along lines of suitability for this punishment. From its inception legislators had presented the punishment as particularly appropriate for juvenile offenders. Over time this resulted in an expansion of the remit for corporal punishment in relation to juvenile delinquency, peaking with the 1900 reform which allowed all offences, except those punishable with death, to be used in response to juvenile crime.⁸⁶ Yet while the legal category of the juvenile had been defined as individuals under the age of sixteen in the Code of Criminal Procedure of 1861, the discussions and justifications for the broader application of this punishment highlighted the porous and gendered

⁸⁶ Act V of 1900. BL, IOR, V/8/63.

boundaries separating ideas of children, juveniles, and adults in colonial discourse and legal practice.⁸⁷ Instead of acting to settle these terms, the practice of corporal punishment and the debates that ensued around it revealed the varying, and often contradictory conceptions of age and maturity, intersecting at the point in which law required definition.⁸⁸

The emergent category of the juvenile and the child, fixed in law during the mid-nineteenth century, has received valuable attention in recent scholarship. This work has focused upon child-specific legislation to emphasise the importance of these categories in penal law, and in the production of colonial modernity more broadly.⁸⁹ With examples such as the Reformatory School Act of 1876 and the Age of Consent Act of 1891, the scholarship has roughly divided the female child and the boy juvenile into separate targets in the colonial disciplinary regime, carrying different value in political discourse.⁹⁰ With exceptions notwithstanding, the criminal child was generally portrayed as a male figure constituting the broader category of juvenile delinquency in the late nineteenth century.⁹¹ It was not until the modification of the Reformatory School Act in 1897 that girls were even included as a juvenile offenders, and as Satadru Sen points out, even then the formal process was discouraged.⁹²

Unlike these other laws however, the Whipping Act targeted both juveniles and adults, positioning the male child and the criminal adult together in one punitive legal frame. While various officials made distinctions between the rationale of punishing juvenile boys and adult men, it was similarities rather than differences that drew together the underlying logic of colonial punishment across these two groups. Central across the period was the notion that this punishment was particularly suitable to both children and men, who through their criminal actions, displayed infantile and juvenile characteristics.

Juvenility here could be interchanged between biological youth and perceived intellectual infantilism. Given the wider justification of corporal punishment in terms of civilisational backwardness, at its base the law acted to reproduce and repackage ideas of political immaturity present in Indian society. For juveniles for instance, while citing the fiscal benefits that the whip offered in reducing prison population, it was also justified in large part as a method to produce good subjects.⁹³ As one official argued:

⁸⁷ Youthful offenders were defined as those under sixteen in the Code of Criminal Procedure (CrPC) in 1861. See W. Theobald, ed. *Code of Criminal Procedure*, (Calcutta: Messrs Thacker, Spink and Co, 1861), Chapter 31, Section 433.

⁸⁸ This section has been informed by new scholarship which analyses age as a category of historical analysis. See for instance, Rachel Leow, 'Age as a Category of Gender Analysis: Servant Girls, Modern Girls, and Gender in Southeast Asia' *The Journal of Asian Studies*, 71:4 (2012), pp. 975-990.

⁸⁹ Satadru Sen and 'juvenile periphery' as symbolic of the colonial position on the periphery of modernity. See Satadru Sen, *Colonial Childhoods: The Juvenile Periphery of India, 1850-1945*, (London: Anthem Press, 2005), pp. 1-8.

⁹⁰ See Sen, *Colonial Childhoods*, Pande, 'Phulmoni's body'.

⁹¹ Exceptions included concerns around child prostitutes Satadru Sen, 'A Separate Punishment: Juvenile Offenders in Colonial India', *The Journal of Asian Studies*, 63:1 (2004), p. 85.

⁹² Sen, *Colonial Childhoods*, p. 115.

⁹³ In numerous cases the use of whip for juveniles was defended to prevent the overpopulation of jails. Sec. to Gov, NWP to the Sec., to Gov of India, 7 December 1893, NAI, Home (A)/Judicial/Jan 1894/Nos. 109-116.

With boys, whose character is in process of forming, the advantages of a light whipping, followed by residence at a reformatory school, where they are instructed in the means of earning an honest livelihood, are undoubted, and have been asserted as strongly by Sir Charles Crosthwaite's predecessors in office as by himself.⁹⁴

If for juveniles the whip took its place amongst a colonial armoury of reformation in the proclaimed pursuit of creating an individual of ‘honest livelihood’, faith in the punishment’s pedagogical potential could carry very literal connotations in relation to adults. After connecting the caste of certain criminals and the class of certain crimes to varying degrees of intellect, various officials argued that the whip should be reserved for those of lesser intelligence. One judge stated that ‘the form of punishment should be reserved for those whose sense and sensibility was sub-normal’, another arguing that the removal of perjury and forgery was justified because it was ‘committed by men of a higher intellectual type than criminals against the body and professional criminals against property’.⁹⁵ Slowly removing crimes that were deemed ‘respectable’ from the Act, the collective targeting of the boy and the lower-caste man began to dissolve biological and sociological distinctions separating juveniles with this group of men.⁹⁶

In more serious offences, mainly those of a violent nature towards women, the adult man was again infantilised by colonial law. In response to the concerns around gang-rape, Mr Woodroffe, a select committee member, argued that:

To satisfy this condition the offender who can with propriety be whipped must have committed offences of great moral turpitude, offences which by their very nature mark out the offence as one devoid of all the nobler qualities of manhood, one whom whipping cannot degrade.⁹⁷

Though an extreme example, Woodroffe’s comments drilled into the crux of the discourse that this legislation was seeking to recreate into a comprehensible social reality. The ‘whippable subject’, a figure spread across male lower caste society up to the age of forty-five, located bodies biologically determined as male, but at a stage of current or permanent distance from a culturally constructed idea of ‘manhood’.

If the logic of this law recognised a similarity between children of a certain age with adults of a certain intellect, even defining the physical distinction differentiating juveniles and adults was a contentious process. Discussing the age restriction of sixteen for juveniles in 1900, the theoretically determined legal category of the juvenile still seemed to occupy an undefined position in the minds of many legislative members. Often without reliable information concerning the specific age of offenders,

⁹⁴ Ibid.

⁹⁵ ‘Deputy Commissioner of Bara Banki to Secretary to Government of United Provinces, 19 August 1905’, UPSA, LB, List 43 Judicial(Criminal)Branch/Judicial Criminal Department/United Provinces/Dec 1905/Nos. 1-62.

⁹⁶ Variations on the phrase ‘Whipping is considered a suitable punishment for boys and for low caste thieves’, for instance emerged at numerous occasions. See District and Sessions Judge of Cawnpore to Secretary to UPG, Ibid.

⁹⁷ BL, IOR, L/PJ/6/533.

the law had empowered the magistrate to decide the age of the individual in the courtroom. For some members, the cultural differences between Indian and British family units meant that certain Indian boys shouldered adult responsibilities while technically defined as a juvenile. One member for instance proposed that ‘in this country a juvenile offender means and includes a man who has probably two or three children.’⁹⁸ For others, the numerical age of individuals from lower classes was a secondary concern to their physical development. In this context, another member argued:

It is notoriously impossible to ascertain exactly the age of a native of the poorer classes. And if a lad whose age cannot be ascertained exactly is so developed physically that he looks as if he were sixteen; it surely is only reasonable that he should be treated as if he really was sixteen; for the probability is that his mind and character will have developed together with his body.⁹⁹

As with the mixed procedure for the application of corporal punishment, the reality was that distinctions separating the category of the adult and the juvenile remained fuzzy throughout the late nineteenth century. More important for the consolidation of colonial political discourse was the continued production of colonial knowledge, extracted through pro-active legislation, that ensured these boundaries remained porous. Thus, if the juvenile was measured through a legal definition of sixteen years old, areas of confusion, as well as varied legal practice, safeguarded a situation in which numerical age and ideas of juvenility were neither secure concepts, nor inextricably bound together in the eyes of those producing and practicing colonial law.

If the collapse of the Indian adult male with the figure of the criminal child acted to drag the perceived maturity of the lower-class Indian man into a state of perpetual political juvenility in colonial political discourse, the absence of the woman from the whip spoke to a starker system of depoliticisation. As Ishita Pande has argued, before the production of a more gender neutral legal category in the Child Marriage Restraint Act of 1929, the female child had been predominantly wrapped together in the ‘women’s question’. This had in turn acted to blur the idea of the female child and woman within the colonial project of women-rescue and ‘protection’.¹⁰⁰ Preceding the transitional notion of maturity that was projected onto various male bodies through an idea of juvenility, one stage from adulthood, women were alternatively maintained in the more distant category of childhood.

In both formal legal terms and informal legal practice, those left absent from the whip had represented an unusual collection of subjects; European men, elite Hindu and Muslims, property owners, criminals guilty of more serious offences, males over forty-five, and women. With the whip widely accepted in colonial circles as an uncivilised punishment, and its main purpose to respond to

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ishita Pande, ‘Coming of Age: Law, Sex and Childhood in Late Colonial India’, *Gender & History*, 24:1 (2012), pp. 205-230.

groups of society themselves deemed uncivilised, exemption for Europeans and elite Indians reflected the state's recognition of a 'civilized' identity and a privileged position in society.

The exemption for female children and adults however was part of a different process. The female body as adult and child had been excluded from this form of judicial violence in 1825, considerably earlier than any other. Similarly tied in to gendered ideas of citizenship and political maturity, this absence can only be understood in relation to the woman's broader position in colonial law. Their absence from the disciplinary targeting of colonial law for instance did not reflect a similar invisibility from the larger legal-political debates of the century. In fact, the backbone of legal reform movements, from sati in 1829 to the Widow Remarriage Act in 1856, to the Age of Consent in 1891, in varying degrees engaged with the discussion of the legal capability of the female child and the legitimacy of the state to intervene on their behalf. At the core of these discussions lay the contested relationship between biological age and its implications for the female child's ability to give consent to domestic, religious, and sexual practices that presented the possibility of bodily harm. Before abolition earlier sati legislation in 1812 for instance sought to fix puberty with consent, declaring this the point at which immolation became legally possible.¹⁰¹ The 1891 Bill saw the age of legal consent for all girls married or unmarried raised to twelve, the age at which harm was deemed unlikely to result from intercourse.¹⁰²

If the image of the vulnerable female child provided a powerful symbol in the period, as mentioned, most scholarly work has discredited any notion of a consequential empowerment of Indian women through reform. Instead, these laws used the female body as a ground for political engagements concerning religious tradition or class contestation.¹⁰³ In the period in which the idea of male enfranchisement started to carry increasing weight, the result of such paternal legal reform for the Indian female chipped away at a parallel belief in the women's capacity to give political consent. The absence of the whip from the body of the woman, while similarly a decision made within this broader paradigm of pedagogy and graduated political and legal subjectivity, was therefore part of a deeper system of violence and a wider structure of political disempowerment. This has been described by Michel Foucault as a coercive imposition of silence, a form of repression equating to 'an affirmation of nonexistence, and, by implication, an admission that there was nothing to say about such things, nothing to see, and nothing to know.'¹⁰⁴ If the law in action produced an idea of a juvenile boy, even if in purely superficial terms, as trainable in the pursuit of political adulthood, the law's absence in relation to the female spoke to a more complete denial of individual political agency. The refusal to whip the Indian

¹⁰¹ Tanika Sarkar, 'A Just Measure of Death? Hindu Ritual and Colonial Law in the Sphere of Widow Immolations', *Comparative Studies of South Asia, Africa and the Middle East*, 33:2 (2013), p. 169.

¹⁰² Sarkar, 'Rhetoric against Age of Consent', p. 1869-1878.

¹⁰³ Mani, *Contentious Traditions*; Lucy Carroll, 'Law, Custom, and Statutory Social Reform: the Hindu Widow's Remarriage Act of 1856', *The Indian Economic and Social History Review*, 20:4 (1983). pp. 363-388; Sarkar, 'Rhetoric against Age of Consent'.

¹⁰⁴ Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume I*, trans. by Robert Hurley, (London: Penguin, 1978), p. 4.

female body reflected a wider rejection of the possibility of political maturation, leaving the Indian female frozen in a political space of silent ‘nonexistence’, a permanent state of childhood.

This relationship between an absence of law and a depoliticisation of the Indian female was of course not restricted to whipping. As referenced in chapter two, through marriage the IPC began to invest some of the Indian woman’s individual legal personality in the overriding authority of her husband. Moreover, in the period after the rebellion a number of laws were passed which were gender specific. Elopement for instance, not a crime stipulated in the Indian Penal Code but a terminology much described in newspapers, fell under the law for being ‘forcibly taken away’, and was either charged under abduction or enticement. As Aparna Bandyopadhyay has argued, this crime was completely dependent on the denial of the female’s sexual agency in the process. If the woman’s complicity could be proven, the crime itself was much less likely to be convicted.¹⁰⁵ The legal structure of the colonial system, of which whipping is only one example, was constructed as an infrastructure that in many spheres forcibly exchanged the agency of the female legal subject in return for this poorly practiced idea of protection.

This shifting logic related back to society by allowing for the minute and gradated entry of individuals into quasi-political communities, often premised on the confluence of legal, scientific and cultural forms of colonial knowledge. The frontier communities who lived on the border of the nation were whipped not for pedagogy but because of an understood closeness to savagery, a very explicit connection drawn to the sub-human or the animal. The lower caste man and the juvenile boy were targeted through a conflation of political maturity with numerical age, and the racialised relationship made between political immaturity and civilisational difference. The female and the elderly male were left ‘protected’ from the whip on the basis that their bodies were unsuited to such punishment, facilitating a larger structural practice of political exclusion. Though evolving over time, one constant to the law was its relationship to deeply forged ideas of gender, caste, and age, threaded together by an unstable measurement of political maturity embedded in the colonial civilising mission. Here the law was a mapping tool that constructed legal subjectivity in relation to an idea of the capacity to give, or the potential to learn to give, political consent.

It is worth making one final point. Many nineteenth century liberal thinkers placed the metaphor connecting age, political maturity, and race at the heart of liberal ideologies underpinning imperial political thought in the nineteenth century.¹⁰⁶ John Stuart Mill’s writings for one are symbolic examples of such. In his work *On Liberty*, he described a particular relationship between maturity, ‘manhood’ and race in the following way:

¹⁰⁵ Aparna Bandyopadhyay, ‘Of Sin, Crime and Punishment: Elopements in Bengal 1929’, in *Intimate Others: Marriage and Sexualities in India*, ed. by, Samita Sen, Ranjita Biswas, Nandita Dhawan, (Kolkata, STREE, 2011), p. 103.

¹⁰⁶ Political theorists seeking to understand colonial discourse have long emphasized the depoliticising metaphor of the colonial subject as a child. Ashis Nandy, *Intimate Enemy: Loss and Recovery of Self Under Colonialism* (Oxford: Oxford University Press, 2013); Uday Mehta points to the use of the childlike metaphor of Indians in the writings of both Mill’s, Locke and Burke, amongst others. Mehta, *Liberalism and Empire*, pp. 31-33.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered in its nonage.¹⁰⁷

What is interesting about this description is that while these metaphors have been shown to have serious and material consequences for the way colonial subjects were treated, the legislation for corporal punishment, to a degree that has not been acknowledged in other colonial practices, quite literally collapsed the biological distinction between child and adult across this notion of absent ‘manhood’. In this case, the allegorical relationship between the two were made manifest in the pedagogical justification of the whip for both lower caste men and juvenile boys. This history of corporal punishment thus offers an example of how physiological signs of maturity that usually determined the distinctions between child and adult, could become displaced by a dominant cultural construction of age, determined by colonial theories of race, class, and civilisation, and then practiced in law.

Beyond Judicial Whippings

Regional differences between modes of legal administration, the protean nature of the challenges faced by the colonial state, and the sheer geographical and administrative difficulty that came with ruling a space as large as India, meant that the colonial state’s use of violence could drastically change given the local and historical context. Without a real motivation to hold judges to a centrally enforced standard and unwilling to standardise the varying conditions of local courts, the method of corporal punishment, as noted, varied widely across India.¹⁰⁸ Though this chapter has been primarily focused upon the use of the whip as a judicial punishment, the messy administration of corporal punishment in the colony was of course spread well beyond the courtroom, existing across a diverse and uneven political and legal landscape. Therefore, before concluding, this final section will briefly touch on the use of corporal punishment in other spaces, contextualising this law and its violence in the larger ‘coercive network’ of colonial punishment.¹⁰⁹

Beyond the judicial process, the whip as a form of punishment could be invested in a variety of figures of authority, whether legally or illegally. Numerous other stories were reported in the vernacular newspapers of official and non-official European communities corporally punishing servants. One example in the *Rabhar-i-Hind* reported that the Assistant District Superintendent of Police in Amritsar, ‘makes free use of his whip... It is quite a habit with Europeans to freely whip a poor native who happens

¹⁰⁷ John Stuart Mill, *On Liberty (1859)* (Ontario: Batoche Books, 2001), p. 14.

¹⁰⁸ Complaints of illegal whippings for instance were not uncommon see, ‘Proposal to amend the Whipping Act (VI. Of 1864)’, NAI, Home (A)/Judicial/August 1878/Nos. 19-21.

¹⁰⁹ The term ‘coercive network’ is borrowed from Taylor Sherman’s work. Sherman, *State Violence and Punishment*.

to be in the way of their horse or carriage'.¹¹⁰ Coolies also were particularly vulnerable to extra-judicial punishment. Alongside the huge levels of mortality in plantations, estimated to be 270 per 1000 in some tea gardens, there were frequent reports of the summary and non-judicial use of the whip towards both men and women.¹¹¹ Colonial institutions also saw a more frequent recourse to corporal punishment. Memoirs from those transported to penal colonies such as the Andaman Islands retell the brutality of the whip in colonial spaces at greater distances from the more restrained urban centres.¹¹² While within reformatory schools, the failure to produce ordered subjects or effective reformatory schooling is shown to have resulted in a consistent reliance on the punitive use of the whip.¹¹³ Moving beyond the period of study, Taylor Sherman's work has explored the relationship between corporal punishment and riots and disturbances in the later colonial period.¹¹⁴

Two of the most prominent spaces where the whip was used with a wider degree of unaccountability in this period were the prison and periods of famine. The relationship between these spaces offer a useful point of comparison. In theory, the prison was an exceptional space of sovereign control and biopolitical power, providing the institutional environment where the lives of inmates could be managed, recorded, and disciplined.¹¹⁵ The famine alternatively represented the breakdown of biopolitical power in which the state, faced with the widespread and uncontrollable death of its population, was forced into emergency forms of legislation and surveillance. In both cases the limits of the state's sovereign control were revealed under varying circumstances.

With the desperation of famine, a number of crimes rose considerably, in particular this included theft and food rioting, but also more serious crimes of murder and dacoity.¹¹⁶ During these periods the colonial state, unable to house this number of criminals in its jails and unwilling to invest in larger facilities, responded to disorder with extraordinary levels of corporal punishment, a punishment seen as both quick and inexpensive. During the famines in 1877 for instance 72,650 Indians were punished with the whip while similar rises occurred in the famine of the late 1890s.¹¹⁷ The extortionately high number in 1877 compared to non-famine years was explained in the House of Commons:

distress among the people, petty crimes increased greatly, and the magistrates exercised largely their discretionary power of inflicting whipping instead of fine and imprisonment. If a sentence of fine was

¹¹⁰ *Rahkbar-i-Hind*, 7 February, 1877, BL, IOR, L/R/5/54.

¹¹¹ 3 Dec 1890, *Hansard*, cc. 1632-33.

¹¹² See for instance the memoirs of the revolutionary Barindra Kumar Ghose, *A Tale of My Exile*, (Pondicherry: Arya Office, 1922), p 131.

¹¹³ Sen, *Colonial Childhoods*, pp. 103-113; Sen, *Disciplined Natives*, pp. 183-184.

¹¹⁴ This has explored the Bombay Whipping Act of 1933 which was a response to two riots. Sherman, *State Violence and Punishment*, pp. 88-91.

¹¹⁵ Of course, these were rarely the disciplined spaces that the Foucauldian model had outlined. See David Arnold, 'The Colonial Prison: Power, Knowledge and Penology in Nineteenth-Century India' in *Subaltern Studies VII: essays in honour of Ranajit Guha* ed. by David Arnold and David Hardiman, (New Delhi: Oxford University Press, 1994), pp. 148-184.

¹¹⁶ Arnold, 'Crime and Control in Madras, 1858-1947', pp. 68-69.

¹¹⁷ 28 June 1880, *Hansard*, cc. 960-962.

passed, it would have been equivalent to imprisonment, as people in distress could not pay.¹¹⁸

While the whip was used to avoid jail sentences, the jails themselves remained packed. Its role in these times of crisis evolved to the more volatile circumstances. During the 1878 famine various government circulars were sent explaining that for those who stole out of desperation:

The Lieutenant-Governor and Chief Commissioner does not think it advisable to make wholesale releases at present while grain is still so dear; but you should prepare at once lists of prisoners now confined in the jail of your district who might, in the terms of the orders of the Government, be released as soon as grain becomes cheaper.¹¹⁹

Here the jails had become holding pens for many driven to theft by starvation, released in line with the fall of grain prices rather than any notion of reform or deterrence. This was in no sense a shift towards a notion of state welfare in times of need however. Under such constrained conditions the jail saw an expanded use of the whip. In Bengal jails alone 11,000 floggings were recorded between January 1879 to March 1880, almost all charged of short work. This same group were simultaneously being kept on diets deemed by many involved with the prison system, ‘insufficient to support healthy life’.¹²⁰ The combination of malnourished and weak bodies facing the violence of the whip resulted in the inevitable rise of mortality in jails during the period.

Though unlike the extreme rises of corporal punishment during famine, the everyday application of corporal punishment within the jail reinforces the temporal and spatial unevenness of disciplinary forms of colonial violence that itself necessitates further attendance in scholarship. While seen in considerably lower numbers outside of famine periods, the whip was used in jails throughout the colonial period. While its practise did drop across the century, vast regional differences between jails created considerably divergent cultures of confinement across British India.¹²¹ Comparing the two examples of the North-Western Provinces and British Burma makes visible such differences, while other regions reflected their own peculiarities in punishment practices. Thus, if an analysis of the law for judicial punishment represented the more structured face of colonial oppression, moving into the spaces in which even the minimal restraints of the colonial penal law did not exist, reveals an even more flexible administration of violence guiding the colonial disciplinary regime.

¹¹⁸ Ibid.

¹¹⁹ NAI, Home (B)/Judicial/September 1878/No. 342.

¹²⁰ 8 June 1882, *Hansard*, cc. 480.

¹²¹ One report claims that while in 1879 there was 21,015 whippings in Indian Jails, by 1905 this had fallen to 799. BL, IOR/L/PJ/6/805.

Fig 3.

Province	Year	Percentage of Prisoners Whipped to total number of male prisoners
North-Western Provinces	1875	3.0
	1876	3.3
	1877	3.5
	1878	4.3
	1879	5.9
	1880	6.8
British Burma	1875	17.4
	1876	14.2
	1877	16.9
	1878	20.8
	1879	14.9
	1880	14.1
UPSA, Varanasi Branch, List 2-Miscellaneous Record/Box 58/Serial Number 646/File No. 251/Year 1883.		

Conclusion

This chapter has sketched out the relationship between the everyday violence of colonial law, and its role carefully structuring colonial society into a gradated hierarchy of legal subjects. As with the previous chapters, this was possible through the recursive relationship between the norm and the exception located all the way through the colonial penal law in this period. In relation to corporal punishment, this was visible on two levels. Firstly, the legislation itself represented the introduction of an archaic form of violent punishment positioned within a codified penal structure, celebrated by colonial officials for its modern guiding principles. In terms of the organisation of the colonial legal structure, the legislation therefore existed as a permanent but separate appendage to the normative framework of the IPC.

Secondly, this tension functioned within the punishment itself. Regularly asserting the importance of law to not officially distinguish subjects on lines of class or caste, in reality the careful restructuring of the law, and its informal practice in court, saw an incredibly uneven dissemination of colonial violence across society on these exact lines. This process, central to the colonial project, created a false perception of motion towards political enfranchisement for some groups by pitching them favourably against others. In reality, this evolution of penal reform acted to create new spaces in which discourses of depravity, infantilism and vulnerability could be propagated. In offering a series of minute

and tailored legal incentives or punishments to different communities in colonial India, this legal process of gradual reform ultimately worked to bolster the paternalist necessity that bound all of Indian society within a larger system of political domination.

Finally, in terms of the position of law in history, the relationship between active, passive, and absent forms of law provide a number of interesting insights. While it is clearly important to consider the space in which law acts very visibly, it is similarly necessary to ensure that the space in which law does not act, where legislation refuses to enter, is enveloped more fully into legal-historical analysis. This seems particularly pertinent given the context of the late nineteenth century which saw the colonial state stretch itself further across the Indian social and geographical space than any previous legal systems. As already seen, the codification of the Indian penal law had provided a definition of all forms of criminal behaviour and provided a corresponding punishment. Similarly, it is easy to point towards the laws on sedition, the Age of Consent, the Murderous Outrages Act, plague laws, and many others, in which the colonial state acted with confidence, plotting new lines of legal intervention into unchartered colonial spaces. Given such moments in which the colonial state showed relative confidence in declaring new grounds of legal authority, the decision to not intrude, seen clearly here in the case of the exclusion of women from the whip, also carried serious legal and political historical consequences. When we attempt to formulate the relationship between colonial law and the flow of colonial power, further scholarship can help map this process onto a more complicated matrix of connections and disconnections along these highly nuanced intersectional threads.

Shifting the focus from law and violence to the theme of law and forgiveness, the next chapter will move to more spectacular moments of exception, examining the routinisation of royal clemency during durbars and jubilees.

Chapter Five

Archaic Sovereignty and a Modern Code: Jubilee Clemency and a Seditious Response

Introduction

As argued in the introduction of this thesis, to understand the capacious and yet contingent nature of colonial sovereignty, historical analysis must move beyond moments of spectacular violence to draw out a more insidious impulse locatable across varying degrees of colonial exceptionality. This chapter seeks to continue this process by examining the legal mechanism of pardon offered during royal celebrations. Maintaining the point of analytical focus on another archaic form of sovereignty, this chapter moves away from the quotidian and physical violence of the previous chapter to analyse rare but routinized examples of spectacular colonial forgiveness. As part of a consistent effort to produce loyal subjects, the production of these transient moments of colonial empathy returns the analysis to spaces of discretion, illustrative of another example in which a ‘touch of subjectivity’ was inserted on top of the codified structure of colonial law.¹

Pertinently, English legal history has already produced a significant and informative set of debates concerning the role of pardons and mercy. Douglas Hay’s early and influential study used the system of pardoning in eighteenth-century England as a window into the deeper workings of criminal law in this period. For Hay, criminal law is best understood as an ideological system which helped maintain the political hegemony of the ruling class. The law assisted in such ends by unevenly dispensing state terror and discretionary mercy through its various punishment practices.² In Hay’s argument, the political rationale justifying these patterns of punishment helped cement the ‘tissues of paternalism’ upon which the wider structure of society was built.³ While Hay’s analysis emphasised the significance of class, later scholarship has added the important ways in which ideas of gender, age, poverty, and ‘good character’ were also interwoven into these decisions.⁴ The study of the relationship between capital punishment and pardon practices has also been undertaken in colonial legal history, with particular attention shown to settler colonies and colonial Africa.⁵ Within these historical settings,

¹ For mercy and the insertion of subjectivity into everyday law see Otto Kirchheimer, ‘Quality of Mercy: On the Role of Clemency in the Apparatus of Justice’, *Social Research*, 28:2 (1961), p. 170.

² Douglas Hay, ‘Property, Authority and the Criminal Law’ in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. by Douglas Hay et al, (London: Verso, 2011). The first edition, published in 1975, sparked a series of studies, and a set of fierce debates, between Hay and fellow legal historian John Langbein. See John H. Langbein, ‘Albion’s Fatal Flaws’, *Past & Present*, 98, (1983), pp. 96-120. For Hay’s response see Douglas Hay, ‘Writing about the Death Penalty’, *Legal History*, 10 (2006), pp. 35-51.

³ Hay, ‘Property, Authority and the Criminal Law’, p. 46.

⁴ See Peter King, *Crime, Justice and Discretion in England, 1740-1820* (Oxford: Oxford University Press, 2000), pp. 259-333; J.M. Beattie, *Crime and the Courts in England: 1600-1800*, (Oxford: Clarendon Press, 1986), pp. 436-449.

⁵ See particularly, Stacey Hynd, ‘“The extreme penalty of the law”: mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47’, *Journal of Eastern African Studies*, 4:3, (2010), pp. 542-559; Robert Turrell, ‘“It’s a Mystery” the Royal Prerogative of Mercy in England, Canada and South Africa’, *Crime, History & Societies*, 4:1 (2000), pp. 83-100; Turrell, *White Mercy*.

this work has noted the fundamental role played by race, emphasising how these practices fed into the distinctively colonial relationship between ideas of paternalism and the notion of a civilising mission.

Comparatively, while legal scholarship on colonial violence in India has produced a burgeoning literature, terror's adjoining category of mercy has received scant attention. Examining the Delhi Durbar of 1877, the Jubilees of 1887 and 1897, and the coronation of Edward VII in 1903, central to the argument of this chapter is thus the necessity of considering acts of colonial non-violence, or apparent compassion, within the wider matrix of colonial violence.⁶ Positioned within its wider context, the offers of amnesty here are shown to speak to a conscious effort to obscure the violence built into the everyday colonial regime, masking the contradictions which its laws imbibed. Sharing an interest in the way ideas of mercy and forgiveness shed insight into the law as a politicised instrument, the chapter departs from the aforementioned literature on pardons and mercy in an important manner. While these earlier works are connected by an interest in the distribution of pardons at the everyday level, this chapter instead explores examples of mass pardons at moments of extraordinary sovereign displays.⁷ At these occasions ten percent of prisoners were released on the command of the imperial sovereign.

Moving from the political rationality which drove the provision of these mass-pardons, the second section of the chapter shifts the analysis towards the third overarching theme of this thesis, the contestation of colonial law and sovereignty. As the nineteenth century drew to a close, and with an increasingly organised and coherent anti-colonial nationalist critique circulating around India, the ability of the colonial state to impose its sovereign will upon society faced new challenges. Taking the series of events that occurred during the 1897 Jubilee, beginning with the assassination of the unpopular plague commissioner W.C. Rand, the chapter then demonstrates how these spectacles of sovereignty, assembled to symbolise colonial benevolence, were warped into sites of hostility directed at the colonial state.

⁶ Releases occurred again in 1911 for the King's Coronation however the majority of the archival material in relation to this event is labelled non-traceable in the National Archives of India. For located discussions concerning this later event see: NAI, Home, Jail/Deposit/2 Feb 1910.

For a description of the 1911 Durbar see Charles V. Reed, *Royal Tourists, Colonial Subjects, and the Making of a British World, 1860-1911* (Manchester: Manchester University Press, 2016), pp. 191-193.

⁷ An exception to this is the work of Barry Wright, who explores the pardons offered to rebels after a rebellion in Upper Canada in 1838. See Barry Wright, ‘“Harshness and Forbearance”: The Politics of Pardons and the Upper Canada Rebellion’, in *Qualities of Mercy: Justice, Punishment, and Discretion* ed. by Carolyn Strange (Vancouver: UBC Press, 1996), pp. 77-103; For a useful overview of the history of mass amnesty and the ways in which it could be used to reconstruct legal systems, dating back to the original Athenian amnesty, see Edwin Caravan, *The Athenian Amnesty and Reconstructing the Law* (Oxford: Oxford University Press, 2013), pp. 1-23.



FIG 4: THE PUNCH'S SATIRICAL TAKE ON VICTORIA'S 'NEW' TITLE⁸

The rebellion saw major cities overrun and competing claims to sovereignty and authority challenge the legitimacy of colonial rule in India. Following this event, the Queen's Proclamation was read from these same cities in an attempt to reclaim these urban spaces, re-writing the rebellion violence into a new narrative of legal and political loyalty to the imperial sovereign. This was quickly followed by tours across India headed by Viceroy Canning in which durbars and meetings with key Indian princes were organised to reaffirm the Queen's message.⁹ By the 1870s persistent anxieties rooted in the memory of 1858 had combined with concerns that the costly colonial infrastructure programmes had not produced the loyalty of the Indian population, necessary to prevent future rebellions. As part response to this, the then Viceroy Lord Lytton suggested to Queen Victoria that renewed investment in royal tours and durbars would be an effective method to garner political loyalty in India.¹⁰ The first of these, the Delhi Durbar in 1877, inaugurated an imperial tradition in which grand spectacles were organised in celebration of royal events, mainly arranged in India's larger cities.

There were five headings under which these took place; durbars, reviews (which included praises and prizes for various sections of society), bestowal of titles, release of prisoners, and illuminations.¹¹ As Bernard Cohn has argued, the organisation of the durbar translated into an imperial attempt to codify and regulate hierarchy and authority across princely India. These created rules of conduct in relation to the varying ranks of princes, with the Viceroy and imperial sovereign positioned

⁸ *The Punch*, 15 April 1876, p. 146.

⁹ Bernard S. Cohn, 'Representing Authority in Victorian India', in *The Invention of Tradition*, ed. by Eric Hobsbawm and Terrence Ranger, (Cambridge: Cambridge University Press, 2003) p. 167.

¹⁰ Reed, *Royal Tourists*, p. 35.

¹¹ NAI, Home (A)/Judicial/April 1887/Nos. 155-160.

at its summit.¹² When Lord Lytton made his speech to celebrate the Queen's new title at the Delhi Durbar in 1877 he took the opportunity to reinforce the 1858 Proclamation as the founding principles of British rule in India.¹³ He stated that the Proclamation was understood by Indians as their 'most precious political possession', and that:

The promises then made by the Sovereign, whose word has never been broken need no confirmation from my lips. Eighteen years of progressive prosperity confirm them; and this great assemblage is the conspicuous evidence of their fulfilment.¹⁴

These stage-managed spectacles offered an opportunity to display the supposed fruits that British rule bore, while veiled under these displays lay an implied threat, established by the state's ability to immediately make public spaces compliant to such narratives.

While the 1877 Durbar itself was limited to Delhi, celebrations were organised across India and even further afield in places such as Aden and Zanzibar.¹⁵ In promoting notions of progress, order, and control, Anglo-Indian newspapers such as *The Times of India* were keen to project a sense of loyal pacification. One journalist describing Bombay wrote that 'the various races that compose the 700,000 inhabitants of this great city were all well represented there and mingled harmoniously together, actuated it is to be hoped, by one universal feeling of loyalty.'¹⁶ Amongst the wider population these large processions past through towns and cities. Statues, schools, universities, and technological colleges were also built in order to honour the occasions, and lights, fireworks and decoration were organised for cities and towns.¹⁷ One discussion concerning the 1887 Jubilee revealed the extensive nature of preparations, recording how each resident of important roads were individually called upon to illuminate their houses. Only those who were in mourning and felt it inappropriate to hang lights were given dispensation.¹⁸ Amongst other events, a feast was organised for 16,000 school children in front of the Secretariat in Bombay.¹⁹

The urge to create these moments of colonially imposed docility and harmony was to penetrate both high and low society. As David Cannadine has explained, the conflation of Indian and British tradition was part of a conscious effort to invent a continued line of authority, unbroken from Mughal to British rule.²⁰ Tactfully situated next to the old Mughal capital, the 1877 Durbar saw Viceroy Lytton

¹² Cohn, 'Representing Authority', p. 180. For a thicker description of the Imperial Assemblage see pp. 189-209.

¹³ This celebration of Queen Victoria's title as Empress of India was one ironically she presumed she already had. Miles Taylor, 'Queen Victoria and India, 1837-1861' *Victorian Studies*, 46:2 (2004), p. 264.

¹⁴ *The Times of India*, 5 January 1877, p. 2.

¹⁵ J. Talboys Wheeler, *The History of the Imperial Assemblage at Delhi* (London: Longmanns, 1877), p. 124.

¹⁶ *The Times of India*, 2 January 1877, p. 2.

¹⁷ Wheeler, *The History of the Imperial Assemblage*, p. 124.

¹⁸ From Captain W.P. Walshe for Byculla, Chairman Sub-Committee for Decorations, Bombay Feb 14 1887, To Captain Henry Morland, Chairman Executive Jubilee Committee, BL, IOR, MSS Eur/F/86/267, p. 69.

¹⁹ Record of the Proceedings in Bombay Being the Report of the Executive Committee Entrusted with the work of arranging for the celebration, BL, IOR, MSS Eur F/86/267.

²⁰ Cannadine, *Ornamentalism*, p. 73.

and his wife dramatically enter the ceremony on a large elephant, his children following behind on smaller ones, to be greeted by a collection of diverse Indian royalty.²¹ Similarly, the system of honours, introduced first in 1861, was then refined in 1877 to commence the new award of ‘Most Eminent Order of the Indian Empire’.²² These flattered elite Indians into both politically and publicly uniting with the British. This was compounded by the organisation of the spectacle itself, in which during the processions newly titled princes were purposefully sat to the left and the right of the Viceroy of India, and many chiefs were presented banners decorated with the chiefs’ personal coat of arms with the imperial crown positioned on the top.²³ The relationships fostered with princely India led to requests such as in 1877 for Indian princes and chiefs to bring as many elephants as possible to celebrate the Queen’s imperial title.²⁴ In an attempt to project the ubiquitous power of the sovereign and the state through these rare but striking royal interventions, these spectacles combined organised military might, connection with India’s royal past, and charity and decorative splendour, many of which stood in significant contrast to the experience of everyday life.²⁵ A reality reinforced by the overlapping of the 1877 and 1897 celebrations with disastrous famines across the subcontinent, a comparison not unnoticed by many Indian newspapers.²⁶

This organisation of colonial space extended into institutions such as jails and penal colonies. On the Andaman Islands celebrations existed in similar formats to free society, with fêtes, parties and a recognised public holiday in honour of the Queen.²⁷ The Chief Commissioner of the Andamans R. C. Temple also gave speeches in both 1897 and 1903 to various audiences to celebrate British rule. His 1897 speech was given in front of the officers working on the Islands. It took the form of a brief history of the penal colony. This began with stories of Andamanese tribal groups described as untamed and savage, through the events of the rebellion of 1857, and concluded with the creation of a functioning and effective penal system.

Describing the role of the Islands, Temple claimed that ‘The convict comes to us a creature, who, by his life or his acts, has shown himself to be so unfitted for human society that he has been cast out of it for life or for a long term of years.’²⁸ He then described the various stages of colonial reformation which, ‘teach him what it is like to be forced to bend his uncontrolled nature to the iron yoke of a regime, not of hard toil, but of soul-crushing monotony.’²⁹ The formula was described year

²¹ *The Times of India*, 2 January 1877, p. 2.

²² Cannadine, *Ornamentalism*, p. 88.

²³ 2 January 1877, *The Times of India*, p. 3.

²⁴ Circular No. 33A of 1876, From the Offg. Sec. to Gov NWP to the Commissioner of Agra, 2 November 1876, UPSA, Agra Branch (Hereafter AB), Agra Collectorate Records, Miscellaneous Department Records/List 3/Box No. 27/File 5196-A,

²⁵ For an excellent overview of the durbars in 1877, 1887 and 1903, with a particular focus on imagery and photography, see Julie F. Codel, *Power and Resistance: The Delhi Coronation Durbars* (Ahmedabad: Sepia International, 2012).

²⁶ See for instance, *Shokh-i-Oudh* 1 February 1883, BL, IOR, L/R/5/54.

²⁷ NAI, Home (A)/Port Blair /July 1897/Nos. 96-101.

²⁸ Ibid.

²⁹ Ibid.

by year, first placed in an isolating cellular jail the prisoner then progressed to associated jails working in a team as an ‘unpaid, unrewarded labourer, but well fed, housed, clothed and cared for, and always under watch and guard.’³⁰ Once these stages had been concluded he was offered small supervision posts and an allowance. Finally, the prisoner became a self-supporter, from an unfree ‘slave’ he was now described ‘in a sense “free”’. He could keep cattle, own land, and marry as a ‘properly conducting member of human society’.³¹

Before finishing the speech, a convict was brought out and spoken to in front of the audience. The man had been guilty of a grave crime as a youth, but had now been selected for jubilee clemency. Temple explained that he had personally overseen each of the chosen released prisoners and described this man as the ‘only exception made’.³² Given the criteria needed to be eligible for release, the convict did not meet the required length of time already spent on the Andamans and was thus unsuitable for clemency. Temple however explained that although ‘I have never seen you before to know you’ the ‘excellent and exceptional work’ of the prisoner was ‘well-known’ to him, and such was the total nature of the convict’s reform he was said to deserve release.³³ While during his reformation the commissioner remained invisible to the prisoner, in panoptic like fashion he boasted total knowledge of his life and behaviour.³⁴ Celebrating this achievement Temple became visible to the prisoner for the first time at the moment he was about to transition to becoming a free man.

As in the case of urban centres, these occasions were manufactured spaces in which the political fantasies of colonial rule which justified their presence in foreign territories were fleetingly entertained as a material reality. In this case, the operation of the colonial penal regime, described as a ‘long education to useful citizenship’ was portrayed as a successful reformatory process.³⁵ The employment of the language of a pedagogical route to citizenship was thus to be understood as poignantly microcosmic of the realisable nature of the civilising mission and colonial project itself. Under these circumstances of intense colonial supervision, the commissioner had claimed to have overseen the transformation of a criminal guilty of serious offences into a functional and loyal member of society.

Placed within a context of contestations within the colonial government itself, it is also worth considering the colonial audience which the speech could have been directed towards. In the years preceding the 1897 jubilee various colonial committees and conferences had been critical of the Andaman Islands effectiveness. After many ex-convicts had returned to India, arguments had been posed that its earlier deterrence, built upon the terror of the unknown and a perceived loss of caste, had

³⁰ Ibid.

³¹ Ibid; For a detailed description of the role and life of the self-supporter see Sen, *Disciplining Punishment*, pp. 100-109.

³² NAI, Home (A)/Port Blair /July 1897/Nos. 96-101.

³³ Ibid.

³⁴ This example is brimming with Foucauldian symbolism and the metaphor of modern power with the model of the panopticon. Foucault, *Discipline and Punishment*.

³⁵ NAI, Home (A), Port Blair//July 1897/Nos. 96-101.

been weakened by the normalisation of the punishment.³⁶ As 1897 had been the first jubilee since the cellular jail had begun to be constructed, itself an attempt to redefine this form of penal discipline in response to this criticism, the speech should also be read as a riposte to these sceptical views.

Legacies of Proclamation Amnesty: Royal Pardons 1877-1903

Representing another parallel to the 1858 Proclamation, the figure addressed by the Chief Commissioner was one of thousands of prisoners pardoned on these occasions. After a report in *The Times* had declared that up to 25,000 prisoners had been released from Indian jails in the 1887 celebrations, these pardons were explained in the Houses of Parliament as a measure to reflect a ‘general oriental custom’.³⁷ However as a practice not exercised during the corresponding imperial celebrations in Britain, the defence of this policy did not reveal the complex motivations behind its continued practice. It was in fact a procedure that raised scrutiny from various sections of Indian society at the time. One magistrate argued, ‘I was a Magistrate of a district in 1877 when the measure was last adopted, and I found that it was very little understood, and very unpopular among the Native community, outside the jail.’³⁸ While general fears of rises in crime were also provoked. Undoubtedly linked to attempts to dovetail imperial rule with deeper historical connections to India, and certainly considered favourably due to the economic benefits of heavily reducing the prison population, at its core, the pardon reflected another space etched into the colonial legal framework to transgress its codified rules and norms.³⁹ Without the same catalyst of widespread violent rupture which had prompted the amnesty offered in the Queen’s Proclamation, in this period of relative peace the pardon became a structured and even predictable legal procedure guided by the requirements of the everyday colonial regime.⁴⁰

The general practice of this new system of pardoning allowed for ten per cent of prisoners to be released on the basis of Crown clemency, while others were to have reduced sentences. At the 1877 celebration, the Governor General ordered that each prisoner receiving royal clemency was to be personally explained that the grace bestowed upon them was to inaugurate the Queen’s new title of “Empress of India”.⁴¹ Instructions were then sent out to local governments to ensure the prisoners

³⁶ Clare Anderson notes that both the 1877 Prison Conference and the 1888 Jail Management Committee urged the abolition of the penal colony system. Clare Anderson, ‘The politics of convict space: Indian penal settlements and the Andaman Islands’ in *Isolation: Places and Practices of Exclusion*, ed. by Carolyn Strange and Alison Bashford (London: Routledge, 2003), p. 45.

³⁷ Viscount Cross, Secretary State for India, Feb 18 1887, *Hansard*, cc. 45-46.

³⁸ NAI, Home (A)/Judicial/April 1887/Nos. 155-160.

³⁹ The financial savings of the release was estimated to be as much as ten lakhs in 1887, NAI, Home (A)/Judicial/Jan 1877/Nos. 260-262.

⁴⁰ V.D. Savarkar testified to the ways in which the regularity of jubilee releases had become a well discussed part of transportation life. He wrote that those on the islands felt that ‘every two or three years, “the Jubilee was coming”, and that “release or remittance of sentence was a surety” would become the talk of the whole prison’ V.D. Savarkar, *The Story of My Transportation: A Biography of Black Days of Andamans*, (Bombay, Sadbhakti Publications, 1950), p. 187.

⁴¹ NAI, Home (A)/Judicial/Jan 1877/No. 262.

released were to be quietly returned to their homes in small batches, and accommodated by police if possible.⁴² The ultimate percentage of prisoners released in 1877 was in fact higher than this projected amount. In Bengal, 36.4 per cent of the prisoners received full or partial remission of their sentence, accounting for 8,974 prisoners. Given the fact that some of these partial remissions were nearing the end of their sentence and consequentially were also let off on that day, the percentage of released prisoners was 15.4 per cent.⁴³ By 1887, a total of 22,918 prisoners were eventually released across India, a number, if coincidentally, very close to the figure of prisoners released by rebels in 1857.⁴⁴

On the Andaman Islands the concessionary measures would in varying degrees, impact almost the whole community. Self-supporters who had displayed good behaviour during their term of incarceration would receive remissions on land-rents and house-site taxes. Some would have time counted towards their progression to a higher class of convicts which allowed for a greater degree of freedom on the penal colony. While others would receive a money gratuity ‘for any purpose for which it may be recommended by their district officer’.⁴⁵

Echoing the managed provision and restriction of relative rights which directed the amnesty in 1858, from the first large scale release in 1877 guidelines separated a deserving prisoner populace from those ‘without the pale of clemency’.⁴⁶ Those who had been poorly behaved in prison, represented a threat to society and public order, or who were professional or habitual criminals convicted more than twice, were deemed unsuitable for release. This meant that by 1903, mutineers who had murdered Europeans were still considered ineligible.⁴⁷ Alternatively, ‘those who have generally borne a good character, but have been led under sudden impulse to commit crimes’, were positioned as suitable recipients.⁴⁸ This could include criminals guilty of violent crimes including murder, rioting or affray. Moreover, every civil prisoner convicted for debt related offences below one hundred rupees had their debt cleared, although it was stipulated that the debtor had to be ‘poor but not fraudulent’.⁴⁹ Again reminiscent of the logic in 1858, it was the consciousness of the act, and in particular the rejection of the sites key for colonial sovereignty, in these instances public space offences or rebellion, which determined exemption.

The choice of those prisoners offered full release and forgiveness however, unlike the 1858 event, were no longer repentant rebels. By 1877 prisons and penal colonies were primarily populated

⁴² Wheeler, *The History of the Imperial Assemblage*, p. 149.

⁴³ NAI, Home (B)/Judicial/Sept 1877/Nos. 56-59.

⁴⁴ NAI, Home (A)/Judicial/Nov 1887/No. 150.

⁴⁵ NAI, Home (A)/Judicial/Feb 1887/No. 243.

⁴⁶ NAI, Home (A)/Judicial/Jan 1877/No. 260.

⁴⁷ There is some confusion in the exact eligibility of mutineers for amnesty across the period. In 1877 the amnesty is theoretically extended to mutineers but still excluded from mutineers who had murdered Europeans. In 1903 it is simply stated that no mutineers were eligible under the terms. I have presumed that at this stage this reference to the exclusion of mutineers was in relation to the terms of 1877, as in mutineers who had murdered Europeans. NAI, Home (A)/Jails/Jan 1903/No. 106.

⁴⁸ Ibid.

⁴⁹ NAI, Home (A)/Judicial/April 1887/Nos. 155-160.

by criminals who had been sentenced under the new penal legal system built in the 1860s.⁵⁰ The specific choice of those released at these junctures was now determined in response to the paradoxical relationship holding together the practice of criminal law in the everyday and the claims being made regarding the broad advantages of colonial justice at the level of political discourse. The relationship between forgiveness and Indian women, and Indian mothers in particular, acts as a notable example.

As explored in previous chapters, since the earlier Company reforms colonial rule had placed the Indian woman at the discursive centre of its political and legal concerns. However, her symbolic position in the construction of colonial law was complicated and often contradictory. British and Indian patriarchy had found common ground in the provision of light punishments and low conviction rates for crimes such as rape, domestic violence, and wife murder.⁵¹ Yet running concurrent to this culture of light sentencing was a paternalist trope that emphasised the necessity of protecting Indian women from patriarchal violence prominent in Indian society. Being both the victim of transnational patriarchal bias in law, as well as a symbolic figure justifying the colonial presence in India, the Indian woman was also keyed into wider oriental tropes that distinguished Britain from India in imperial ideologies. In the 1870s, the decade in which these jubilees began, this resonated most clearly around the colonial discourse of the idea of the uncaring Indian mother, prone to acts of violence towards their children. With the legislation for female infanticide passing in 1870, as argued by Padma Anagol, this law signalled the emergence of the very idea of the female criminal into colonial discourse.⁵²

Yet if these women were suffering under the harsh conditions of everyday colonial law, for these moments of public pardon they were treated with comparative sympathy. When the decisions were being made for clemency in 1877, it was infanticidal women seen to be acting out of fear and shame who were highlighted as particularly suitable benefactors.⁵³ By the 1887 jubilee, clemency had been given to all women guilty of offences not of a serious nature, alongside infanticidal women again.⁵⁴ Leniency was further shown towards women in family units. Both marriage laws and transportation policies had been tailored to offer the best possible opportunity to forge heteronormative family structures on the penal colonies, even at times in circumvention of caste rules.⁵⁵ In doing this, married female life convicts were released after thirteen years, four years earlier than their male counterparts, under the rubric of keeping families together.⁵⁶

The emphasis on releasing women and families spoke to the political agenda underwriting these moments.⁵⁷ By the 1903 release in Bombay, 1,903 male prisoners were released out of a prison

⁵⁰ Sen, *Disciplined Natives*, p. 77.

⁵¹ Kolsky, 'The Body Evidencing the Crime'.

⁵² Anagol, 'Emergence of the Female Criminal'.

⁵³ NAI, Home (A)/Judicial/Jan 1877/Nos. 260-262.

⁵⁴ NAI, Home (A)/Judicial/April 1887/Nos. 155-160.

⁵⁵ Sen, *Disciplined Natives*, pp. 267-268; Samita Sen, 'Cohabitation and Conflict: Legalizing the Convict Marriage System in the Andamans, 1860-1890', in *Intimate Others: Marriage and Sexualities in India*, ed. by Samita Sen, Ranjita Biswas and Nandita Dhawan (Kolkata: STREE, 2011), pp. 66-97.

⁵⁶ NAI, Home(A)/Judicial/Feb 1887/Nos. 240.

⁵⁷ Hay, p. 42.

population of 10,376, representing around eighteen per cent of the male population. In comparison 214 of 333 female prisoners were released, representing a significantly higher sixty-four per cent of female inmates.⁵⁸ Reinforcing the paternalist discourse of colonialism and consolidating the image of the Queen as the motherly protector of Indian women, the event played into the notion that the measure of a government's civilisational progress was the treatment of its female populace.⁵⁹ The duplicity of this claim was that the forgiveness on offer was to symbolise the progressive nature of the same system that had created unforgiving laws imprisoning these women in the first place. The colonial construction of the infanticidal woman, projected as a failed mother, was thus kept in prisons gathering political capital. When it came to these moments where colonial rule was placed in a position of high public visibility, the state, through the Queen, offered forgiveness and redemption to these same women.⁶⁰

The colonial legal system had a similar predilection to bias on lines of racial violence. Though in the late nineteenth century governors such as Lord Lytton and Lord Curzon had paid lip service to the enforcement of stringent punishments for European violence in India, the period saw decreasing conviction rates for Europeans who had attacked Indians.⁶¹ As the nineteenth century progressed the frequent tolerance on offer to European communities guilty of violent crimes became a prevalent narrative in vernacular newspapers.⁶² The problem it posed was clearly understood when the release of Europeans in relation to royal pardon was discussed.

During the correspondence for the 1903 coronation for King Edward VII, a government circular discussed the release of three European men guilty of murders. The men had been convicted of a crime of 'peculiar brutality' in Barrackpore that had given rise to noteworthy outrage in the Indian press. The victim, an Indian doctor, was 'old, weak and defenceless and was attacked without a shadow of provocation.'⁶³ Aware that this form of white male violence didn't fit the agenda of the royal pardon the officials approached the subject with concern. H.H. Risley's letter on the matter stated:

If these men are now released as an act of clemency and grace, and still more if they are so released in Calcutta, as in the present state of the law they ought to be, there would seem to be some danger of the indulgence giving rise to comments and criticism of a very undesirable nature.⁶⁴

⁵⁸ NAI, Home(A)/Jails/March 1903/No. 24.

⁵⁹ In literary and artistic representations Queen Victoria was often portrayed as the imperial mother of her colonial children, see Janet Winston 'Queen Victoria in the *Funnyhouse*: Adrienne Kennedy and the rituals of colonial possession' in *Remaking Queen Victoria*, ed. by, Margaraet Homans and Adrienne Munich, (Cambridge: Cambridge University Press, 1997), pp. 239-240

⁶⁰ It is worth noting that a system of offering relative mercy towards women who had committed infanticide operated in Victorian Britain, though in this case through a culture of lenient sentencing rather than at these moments of spectacle. See Ginger Frost, 'Illegitimacy, Masculinity, and Violence' in *The Politics of Domestic Authority in Britain since 1800*, ed. by Lucy Delap, Ben Griffin & Abigail Wills, (London: Palgrave Macmillan, 2009), pp. 31-32; Carolyn Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford: Oxford University Press, 1991), pp. 110-112.

⁶¹ In 1870 the conviction rate for murder rates for European defendants was at seventy-eight per cent, by 1905 this had fallen to forty-five per cent, Bailkin, "The Boot and the Spleen", p. 463.

⁶² Kolsky, *Colonial Justice in British India*, pp. 185-196.

⁶³ NAI, Home (A)/Jails/Jan 1903/No. 164.

⁶⁴ NAI, Home (A)/Jails/Jan 1903/No. 178.

After the officials discussed releasing the murderers in Calcutta, concerns over the strength of the nationalist press presence in the city were raised and they were forced to reconsider. Bombay was then considered as an alternative and the discussions were initially more positive. However, one official raised further concerns that if the press in Calcutta were to find out that the men had been shipped away purposefully in an effort to hide them, it would become an even more scandalous story.⁶⁵ While the release still went ahead quietly, such careful consideration in official discussion reflects not only that there was an understanding of the workings of the everyday courts, but also that these occasions were recognised opportunities for conscious reversals of the racialised and gendered prejudices undergirding that system.

The performance and timing of these pardons, alongside the wider narratives built into the celebrations, were contrived to nullify the threats of disorder posed from the practices of everyday colonialism. In this case, momentarily reversing the inclinations of everyday law, the pardon was to facilitate the contradictory but mutually supportive legal double-speak of colonial rule. Perhaps most symptomatic of this within a legal context was the central discursive role played by the language of colonial justice and equality, and the everyday functioning of colonial law in relation to gender and race. Cognisant of this, pardons at royal celebrations were used by the colonial state to attempt to obscure these visible contradictions which distinguished the lived experience of colonialism with the fictional language of governance that colonial rule spoke. Contrasting drastically with the normative operation of colonial law, for these specific moments the factors typically determining the leniency or severity of an individual's relationship with colonial law were to some degree reversed. As with the previous chapters, this practice of subjectively shifting individuals across legal boundaries again attempted to nest political capital in certain discourses, individuals and structures. In this case the release of carefully chosen prisoners obfuscated the mutually symbiotic contradictions binding colonial language and practice, while reasserting a colonial political discourse of liberal paternalism.

Sovereign Paralysis: The Jubilee of 1897

While pondering over this, we were inspired with the following idea: There is a statue of the Queen of England situated at a certain crossing off our roads in the Fort in Bombay. This place is an important one. This woman, after the Mutiny of 1857, acquired the universal sovereignty of India by making fair but deceitful promises. She alone is the real enemy of our people. Other white men are our enemies only in so far as they are her subjects. We should, therefore, begin at this place.⁶⁶

Extract from Damodar Hari Chapekar's Autobiography, assassin of the Poona Plague Commissioner, 1897.

⁶⁵ Ibid.

⁶⁶ 'Autobiography of Damodar Hari Chapekar', From Bombay Police Abstracts of 1910, (Hereafter *Autobiography*) Available at [<https://cultural.maharashtra.gov.in/english/gazetteer/VOL-II/autobiography.pdf>], p. 999.

The expression of colonial sovereignty so far analysed has drawn out a political rationale woven through various legal practices that provided sustenance to colonial power in India. Relying upon a governmental structure contingent on various theatres of sovereign authority, whether the courtroom, the Legislative Council, the prison and penal colony, or moments of royal celebration, these spaces were constructed to carefully police the way acts of crime, rebellion, and violence, were received by the Indian public. Though the varying effectiveness of these attempts over the course of the period has hitherto been only lightly touched upon in this thesis, the historical period under study witnessed significant changes in the way power was distributed across colonial Indian society. This in turn had important ramifications for colonial governance, law, and the limits of colonial sovereignty. In relation to these imperial spectacles more specifically, by the early twentieth century the combination of a more firmly entrenched nationalist base and the rise of terrorist violence in Bengal saw the colonial state's capacity to organise public events without fear of disruption weaken. The most prominent example of this was the attempted assassination of Viceroy Lord Hardinge during the ceremonial transfer of the capital from Calcutta to New Delhi in 1912.⁶⁷ Whereas in the preceding year during the 1911 Durbar the King was regarded to have been purposefully insulted by the Maharaja of Baroda, who purportedly refused to follow procedure.⁶⁸

With this increasing pressure from Indian society, various scholars have attempted to pinpoint the moment of historical rupture in which the public sphere, and the organisation of these spectacles, first became particularly vulnerable to these competing and critical nationalist narratives. Sukeshi Kamra has positioned the 1897 trial of the nationalist leader B.G. Tilak as the point at which Indian nationalism, 'discovered fully the power of discursive violence', facilitating this shift towards a coherent and popular anti-colonial movement.⁶⁹ From a perspective focused on the organisation of these spectacles, Brinda Roy has argued that while these events were always 'contaminated' and 'imperfect', the point of transition was the 1903 coronation of Edward VII, a figure lacking the authoritative presence of Queen Victoria.⁷⁰ Bringing these two arguments together this section attempts to move this point one step further back, locating the point of rupture with the implementation of the unpopular plague legislation in 1897, and the inspiration it provided for the assassination of the plague commissioner W.C. Rand during the jubilee celebrations. It was at this moment in which the figure of the sovereign became the explicit target of anti-colonial critique that a number of the pillars supporting colonial sovereignty crumbled under critical pressure from Indian society.

⁶⁷ Joseph McQuade, 'The New Asia of Rash Behari Bose: India, Japan and the Limits of the International, 1912-1945', *Journal of World History*, 27:4 (2016), p. 641-642.

⁶⁸ The Maharaja was accused of turning his back on the King, not wearing all his jewellery, and of swinging his walking stick 'jauntily'. Some even called for charges of sedition in response: Charles W. Nuckolls, 'The Durbar Incident', *Modern Asian Studies*, 24:3 (1990), pp. 543-544.

⁶⁹ Sukeshi Kamra, 'Law and Radical Rhetoric in British India: The 1897 Trial of Bal Gangadhar Tilak', *South Asia: Journal of South Asian Studies*, 39:3 (2016), p. 548.

⁷⁰ Brinda Roy, 'Late Victorian Spectacles of "Allegoresis": Narrative and the Staging of Empire in the "fin de siècle"', *Interdisciplinary Literary Studies*, 2:1 (Fall, 2000), pp. 73-82.

During the late nineteenth and early twentieth century, more so than any rebellion or draconian colonial law, the Indian body's relationship with life and death was contingent on the ability to escape the effects of persistent famines and bouts of malaria, and in areas like Bombay, the impact of the bubonic plague. David Arnold has shown that between 1880 to 1911 the death rate per thousand of the population rose from 41.3 to 48.6, while between 1890 to 1920 malaria alone could have taken up to twenty million lives.⁷¹ As death from such causes seemed to be taking hold in India, the presentation of modern state sovereignty, itself dependent on an ability to manage and control the life and death of its subjects, became particularly open to scrutiny. In this context, and in the face of consistent failures to meet the criteria set in 1858, the 1897 Jubilee coincided with another famine and the spread of bubonic plague in western India, devastating large parts of the country.

The terrible impact of the famine saw local newspapers describe the death of millions of Indians, reporting desperate acts of survival, the selling of children, and soaring levels of crime.⁷² Thus as the colonial state attempted to self-publicise ideas of liberal governance and progress through the symbolic body of the monarch, the famine violently highlighted the effects of systemic underinvestment, poor agricultural policy, and the slow response to rapidly rising grain prices. The incompatibility of such divergent imagery playing out in the Indian public space was emphasised by many contemporary observers. The *Jámi-ul-Ulím* for instance commented that it:

expressed its indignation that certain flatterers of the powers that be at Moradabad recently held a private meeting and resolved to present an address to Her Majesty on the occasion of her coming commemoration, containing not only congratulations on her completing the 60th year of her reign, but highly praising the British Government for the measures it has adopted to mitigate the prevailing famine and plague in India... The writer would have taken no objection to the contents of the proposed address, if the famine showed sign of being over in a year or two. On the contrary, he is convinced that famine will now become *eternal* in India, for it moves a hundred miles ahead of railways. Let the commemoration day be observed with all kinds of rejoicings and congratulatory addresses presented on the occasion, but the Indians ought not to seek to please the local authorities by falsely praising the famine and plague measures at the same time.⁷³

In a similar reaction to the colonial state's inability to monopolise violence and manage the lives of its populace during the rebellion, the colonial state responded to this onslaught of ecological disasters by introducing extensive legislation that invested the state with new legal powers to penetrate previously restricted spaces. In this instance, the controversial Epidemic Diseases Act was passed in 1897 to respond to the plague. Applying to the whole of India, the Act empowered the government to inspect

⁷¹ David Arnold, *Colonizing the Body: State Medicine and Epidemic Disease in Nineteenth-Century India*, (Berkeley: University of California Press, 1993) p. 200.

⁷² *Godharm Prakásh*, February, 1893, BL, IOR, L/R/5/70.

⁷³ *Jámi-ul-Ulím*, 21 April, 1897, BL, IOR, L/R/5/74.

any ship, pilgrimage or fair, and gave local government the power to forcibly take Indians to hospitals, or segregate individuals from their families and communities. The ramifications of this law courted particular anger when Indian women were forcibly removed to these segregation camps and inspected by European doctors.⁷⁴

The resentment generated from this legislation was compounded in western India by the appointment of W.C. Rand as the plague commissioner in Poona. Rand was already an unpopular figure for his work as a magistrate in which it was reported he had forced Brahmin prisoners to walk for twenty miles to jail during sweltering heat as part of their punishment.⁷⁵ As commissioner, Rand had refused to give Indians any substantial role in the administration of plague prevention, restricting their involvement to that of translators. For many the legislation represented an attack on social and caste practices, while it was described by Tilak's English language newspaper the *Mahratta* as reflective of a 'criminal indifference' which personified the colonial state's general response to the plague epidemic.⁷⁶ Given the Queen's Proclamation promises of progress, religious tolerance, and equal opportunity, in the year of her jubilee this older message seemed irreconcilable with the situation at the end of the century.

In the midst of these ongoing controversies, on the 22 June 1897 two brothers from a small village in Maharashtra ambushed Rand as his carriage toured Poona during the jubilee celebrations. As Rand's carriage passed by the two men, one ran up to its side opened the flap and shot inside, killing Rand and an accompanying officer. Quickly escaping the two brothers evaded the police for around three months before being captured by the police and giving full confessions.⁷⁷ The sequence of events that followed this act of politically motivated violence revealed the foundational cracks upon which the architecture of colonial sovereignty had been built, and the points from which future challenges would emerge.

Damodar Chapekar, the assassin of Rand, was a relatively poor and semi-educated Brahmin who had been left deeply bitter from his refusal into the army on the basis of his caste.⁷⁸ After being imprisoned and awaiting his hanging he wrote an autobiography in his cell. The autobiography, read alongside his confession, pointed towards a rampant resentfulness and anger towards both modernising Indian elites and British rule. A yearning for both publicity and the protection of Hinduism motivated his actions, writing 'A man's life should be the accomplishment of such righteous deeds as would engage the pens of several authors'.⁷⁹ Chapekar went on to explain that 'There are two ways in which

⁷⁴ For extended discussion see, Arnold, *Colonizing the Body*, pp. 200-237.

⁷⁵ Stanley A. Wolpert, *Tilak and Gokhale: Revolution and Reform in the Making of Modern India* (Berkeley: University of California Press, 1962), p. 83.

⁷⁶ *Mahratta*, 30 December, 1896.

⁷⁷ Chapekar, *Autobiography*, pp. 1014-1015.

⁷⁸ For extended description of Damodar Chapekar and this event see, John McLane, *Indian Nationalism and the Early Congress* (Princeton: Princeton University Press, 1977), pp.343-357. A number of foreign newspapers describe Chapekar as a lawyer, although there was no evidence in his autobiography that he was trained or practiced as one. See for instance 4 Nov 1897, *Chicago Tribune*, p. 4.

⁷⁹ Chapekar, *Autobiography*, p. 955

a man can acquire fame namely, by committing a reprehensible deed or by performing a very laudable act'.⁸⁰ In an attempt to become the subject of such pens, and to alleviate a frustration at what he deemed was the emasculation of Hinduism through English education, Chapekar constructed a programme that combined physical exercise with an escalating level of covert and violent protest. Recruiting a small number of men, the group committed a number of crimes including attacking missionaries and sabotaging the show of a travelling European entertainer.⁸¹

Chapekar's activities were never random or spontaneous acts of unbridled anger, but symbolic and considered. The audience and message conveyed by these acts were intended to be much larger than the immediate target of his violence. For Chapekar, the Queen as an illegitimate figure claiming 'universal sovereignty' in India was the real target of any action taken.⁸² In one earlier act of defiance Chapekar made this explicitly clear by tarring the face of a statue of Queen Victoria. Explaining himself Chapekar wrote that 'had she been in India we would have tried to wreck vengeance upon herself even at the risk of losing our lives'.⁸³ Rejecting the language of loyalty that imperial citizenship was premised upon, and condemning moderate nationalists who concealed their critiques of colonial rule in a cloak of loyalism, Chapekar stated bluntly that 'We however, do not consider ourselves to be her loyal subjects'.⁸⁴ Denying the Queen represented a just sovereign, the disfiguring of the statue was intended to 'fill the English with sorrow, and put upon themselves the brand of treason'.⁸⁵ These acts of violence purposefully courted political attention and were coherent denunciations of the political and legal system colonial rule had imposed upon him.

In an ironic aside to the later murder, after shadowing Rand for three months prior to the jubilee Chapekar expressed positive feelings towards the commissioner's personal life, conveying respect for a man who he believed 'was not addicted to any vice', showed 'no meanness', and while at the tennis club 'would never play with ladies'.⁸⁶ Chapekar's anger towards the British sprung from a number of sources, but by 1897 he had been most angered by government response to plague, for which he held Rand accountable. Comparing the doctors and plague commissioner to dacoits and marauders he argued that they 'commence their pillage under the guise of law'.⁸⁷ Following his previous acts of protest the assassination of Rand was meant to create publicity on the widest scale yet. Furious that some of his previous plots had been widely reported as acts committed by Europeans or Muslims as Hindus were understood too meek, a pamphlet had been organised to be circulated in English and vernacular in Poona and Bombay to ensure the political message he intended from the murder was articulated. The pamphlet asked 'Yet great civilized nations of the world! Will you listen to the cry of the oppressed in India in

⁸⁰ Id., 957.

⁸¹ Id., p. 1005

⁸² Id., p. 999.

⁸³ Ibid.

⁸⁴ Id., p. 1013.

⁸⁵ Id., p. 999.

⁸⁶ Id., p. 1012.

⁸⁷ Id., 1007.

the far east? The Queen of England and Empress of India is celebrating her Jubilee. Do you know what it means? It means demartializing the whole of the Indian continent. It means death and slavery to millions of your Asian brethren who are certainly entitled to your consideration that the inhabitant of Greece or Asia Minor.⁸⁸ Described by John McLane as ‘the first “modern” terrorist organization’, Chapekar’s organisation, while small, had located the sovereign as their target, sought after the ‘brand of treason’, and through trial and error managed to garner a huge degree of publicity through an act of spectacular violence.⁸⁹

The waves of this violence were significant and far-reaching. While Chapekar was executed, the root cause of the murder instigated a wider governmental campaign alongside efforts to sharpen the colonial legal machinery. One of the figures who came under scrutiny during this time was the nationalist leader B.G Tilak. Tilak’s *Kesari* paper had been a vocal critic of the jubilee and its insensitive timing.⁹⁰ Compounded by this, ten days before the jubilee Tilak had attended and given comments at a lecture discussing Shivaji’s killing of Afzul Khan in the late seventeenth century. The lecture narrated the killing as a carefully organised trap in which the murder, followed by an ambush, led to the ultimate consolidation of Maratha power in western India. This was quickly pounced upon by colonial observers who felt these activities had offered implicit support for the murder of Rand. Anglo-Indian newspapers in particular quickly blamed the Poona murders on Tilak’s efforts to whip up disaffection in the city. Under pressure to act the colonial state arrested Tilak and charged him with sedition.

While the IPC section for sedition was not a recent innovation, the 1897 conviction was an important legal watershed for colonial law’s use as an explicit weapon to quell political expression in India. Like corporal punishment, sedition had not been in the IPC in its 1860 form. A section for sedition had however been organised, but in what was described as an ‘oversight on the part of the Committee’, it had fallen out by the time of publication.⁹¹ It was later reinserted in an amendment in 1870 on the dubious grounds relating to the fears of fanatic Wahhabism in North India.⁹² The wide powers this law invested in the colonial state were made clear in the only conviction that predated Tilak’s arrest.

Implemented in response to the *Bangobasi* newspaper’s indictment of the Age of Consent Act in 1891, the crime was at this stage broadly defined as one of ‘disaffection’, explained in the following terms:

Disaffection means a feeling contrary to affection, in other words dislike or hatred. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the

⁸⁸ This was subsequently reprinted in *The Pioneer*, 25 June 1897.

⁸⁹ McLane, *Indian Nationalism*, p. 355.

⁹⁰ Wolpert, *Tilak and Gokhale*, pp. 83-87.

⁹¹ Walter Russell Donogh, *A Treatise on the Law of Sedition and Cognate Offences in British India* (Calcutta: Thackel, Spink & Co, 1911), p. 2.

⁹² Julia Stephens, ‘The Phantom Wahabi: Liberalism and the Muslim fanatic in mid-Victorian India’, *Modern Asian Studies*, 47:1 (2012), pp. 22-52.

government...he will be guilty of the offence of attempting to excite disaffection.⁹³

Yet with the lack of considerable precedents for conviction, at the time of Tilak's prosecution the Bombay government had concerns about the applicability of this section and initially considered circumventing the IPC to re-invoke a Company era regulation. With this rising concern about the threat of sedition, the central government were however keen to bolster the strength of IPC due to its broader legal jurisdiction. They therefore saw this as a moment to either create a precedent to support future punishments, or if this failed, produce evidence for the necessity to reform the law.⁹⁴ They therefore informed the Government of Bombay that they would prefer an attempt to be first filed under section 124-A as, 'If prosecution unsuccessful, case for amendment would be greatly stronger than at present.'⁹⁵ Emphasising the closeness maintained between branches of colonial government, these events were then quickly followed with amendments to the Criminal Procedure Code in 1898. This allowed local government to call seditious publishers to provide security for good behaviour, a punishment previously targeting vagrants and *badmaashes*.⁹⁶

Eventually convicting Tilak to eighteen months in prison, the judge defended his definition of disaffection in similarly broad terms to the earlier conviction, described as:

simply the absence of affection...It means everything which indicates hostility to Government...You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment.⁹⁷

Given its rare use and imprecise definition Tilak's sentence had been controversial for a multitude of reasons which were only compounded by the events at trial. In particular, the jury had been weighted in favour of Europeans, of whom all found Tilak guilty, while the trial also ran without fluent Marathi speakers present in court, the language of which the material under examination had been published in.⁹⁸

Though he had been a popular figure before the trial, the perceived injustices of this conviction transformed Tilak into a household name in India. With his imprisonment a range of nationalist leaders came out in support of Tilak's plight, many of whom had in political terms made sharp critiques of him

⁹³ Donogh, *A Treatise on the Law of Sedition*, p. 40.

⁹⁴ As one official wrote in reflection of the rising concerns of sedition: 'I do not think it admits of dispute that the native press has done, and is doing, a great deal of mischief. It must be remembered that for one man who reads, a hundred listen, and thousands receive into their minds the seditious stuff which is poured out to them.' NAI/Home(A)/Public/No. 330.

⁹⁵ NAI/Home(A)/Public/No. 330.

⁹⁶ This amendment also extended the law which allowed Magistrates to bind over suspected offenders. Previously defined by those 'or to do any wrongful act that may probably occasion a breach of peace.' reframed to add 'that is likely to disturb the public tranquillity', BL/IOR/L/PJ/6/479. Though not the primary focus of the article, Radhika Singha discusses the extension of the law to sedition See Radhika Singha's article that traces this law from 1872-1898, Singha, 'Punished by Surveillance', pp. 24-25.

⁹⁷ *Queen Empress v. Bal Gangadhar Tilak and Keshav Mahadev Bal*, ILR 22 Bom 134 (1897).

⁹⁸ Much of the narrative of Tilak's trial is gleaned from Noorani, *Indian Political Trials*, p. 121.

earlier.⁹⁹ Newspapers such as the *Amrita Bazar Patrika* and the *Bengali* based in Bengal printed there papers with black borders, while students in Lucknow wore black capes to school and 53,000 rupees were raised to support his legal case.¹⁰⁰ Once in jail Indian newspapers continued to campaign for his release, also gathering support from European figures such as Max Muller and William Hunter. As protests went on, Tilak's health had deteriorated in prison and after eight months he appealed for clemency. The government by this point recognised the influence that external pressures were having on the 'public mind', and harboured concerns that if Tilak's full sentence was served, significant 'demonstration honours' would be organised at the point of his release.¹⁰¹ Accepting the petition for clemency, the government organised for his early release on 6 September 1898 to widespread celebration in Bombay.¹⁰²

As has been argued, the spectacle of jubilee was an attempt to invest the colonial law with the political capital to measure the value of violence and crime and to position individuals on a fluid and colonially defined spectrum of legality and illegality accordingly. In this context, the attempt to label Tilak as seditious in response to Rand's murder resulted instead in the exposure of a residual build-up of nationalist friction, as an unprecedented collection of individuals from across Indian society rejected the validity of this judgement. This included a group of nationalist leaders, vernacular newspapers, and a wider and engaged Indian public. Reflecting more than a momentary instance of colonial sovereign paralysis, this event had uncovered an expanding fissure in the structure of colonial sovereignty that had been holding together these various theatres of colonial authority. To take the example of prisons, while in 1857 the sovereignty of British rule was injured by the physical breaking open of the jail, by 1897 and with the autobiography of Damador Hari Chapekhar and Tilak's imprisonment, colonial prison walls were again becoming dangerously porous spaces for the colonial state. This time however it was the leaking of discursive political capital being gathered by anti-colonial narratives that represented a new threat to colonial rule.

In a domino effect, these aforementioned theatres of sovereignty, whether in legislation making, the colonial courtroom, the royal ceremony, or the prisons, had become transformed into sites of active contest for a widened nationalist cause. As is well known, by the twentieth century many luminaries of the nationalist movement deployed the jail for a variety of different agendas, regularly depicting it as a microcosm of India's larger subjugation or as useful space for spiritual and political reflection.¹⁰³ A key

⁹⁹ Gopal Krishna Gokhale for instance called the decision 'a great national calamity', cited in Kamra, 'Law and Radical Rhetoric', p. 557.

¹⁰⁰ Ram Gopal, *Lokamanya Tilak: A Biography* (London: Asia Publishing House, 1965), pp. 191-198.

¹⁰¹ Sandhurst to Elgin, September 11, 1898, BL, IOR, MSS Eur/D. 509/12, Part I, cited from Wolpert, *Tilak and Gokhale*, p. 124.

¹⁰² Ibid, p. 204.

¹⁰³ Gandhi for instance spoke positively of the effect and utility of prison life going as far as terming it a 'holy and happy place', a place which he pleads his reader to 'resolve his mind that his only happiness will be in going to gaol for the sake of the motherland, or his religion, in submitting himself to the suffering involved in it, or bearing hardships in other ways.', in *The Collected Works of Mahatma Gandhi, Vol 9 (September 1908–November 1909)*, (Ahmedabad, Navajivan Press, 1963), pp. 182-183. For more examples of nationalist leaders who used the prison, and its metaphorical value, see David Arnold, 'The Self and the Cell: Indian Prison

point in this shift towards a more aggressive contestation of spaces and symbols can be located with the series of events sparked by the 1897 assassination.

Conclusion

The chapter has sought to make two contributions to the wider questions of the thesis. Firstly, in returning to the theme of colonial forgiveness in its later form, the chapter has positioned the more regulated use of amnesty within the wider context of everyday colonial law and violence. With the reality of a fragmented, contested, and contradiction-ridden colonial rule, its quotidian legal practices were necessarily balanced by these public and highly constructed performances. As with punishment for murder and the application of corporal punishment, these amnesties reflected further spaces of discretion and exception fixed onto the wider colonial legal structure. Organised given the explicit concerns regarding the weak levels of loyalty enjoyed by the colonial state in India, the strategic release of certain criminals saw the state forge a platform to reassert the key narratives its sovereignty was contingent upon. In this process, the body of the Indian woman again became the site which colonial politics sought to anchor its justificatory logic.

Secondly, if these interdependent frames of colonial law collectively represented the broad framework which colonial sovereignty was built upon, in the political context of the late nineteenth century, cracks in one of these sites of sovereignty could quickly transmit pressure onto other places of colonial authority. The sequence of events that followed the implementation of the Epidemic Diseases Act in 1897 was one example which saw anti-colonial rhetoric, initially directed at an unpopular legislation, conclude with the release of a political prisoner under considerable pressure from voices across Indian society.

Continuing with the question of law and contested colonial sovereignty, the final chapter will trace the history of anti-colonial and nationalist legal thought across this period, paying particular focus to the previously examined laws for corporal punishment and sedition.

Narratives as Life Histories', in *Telling Lives in India: Biography, Autobiography, and Life History* ed. by David Arnold and Stuart Blackburn (New Delhi: Permanent Black, 2004), pp. 29-53.

Chapter Six

Anti-Colonial Legal Thought: Legal Debates and Contested Political Vocabularies

Introduction

In August 1922, a government circular discussed a new tactic being used by the nationalist press. Concerned with the draconian legislation for sedition and believing there to be a legal loophole that left fictional news accounts immune from seditious charges, certain papers had started disseminating false stories highlighting the repressive nature of colonial rule. The circular focused on one article printed in the *Bombay Chronicle* which described the trial of a fourteen-year-old Muslim boy. The child had been active in Congress activity in Benares, arrested and punished to a dozen stripes. The arrest and trial, described as being based on a ‘trumped up charge’, was then narrated by the paper as follows: ‘What is your name? “My name is *Azad (Free)*. ” What is your father’s name?” “My father’s name is *Swatantra (Independence)*. ” Where is your home?” Jail of late has been my home.’¹ Describing the punishment in detail, the paper continued:

The lash came down and sank into his flesh. And immediately his voice rang out strong and true “Swatantra Bharat ki Jai (Victory to Free India). And with every lash the same victorious cry was heard, weakened for loss of strength but truer and more resolute than ever. And Benares, the holy, smiled her immemorial smile. Full of the wisdom of the thousands of calm-eyed ascetics who had pondered for many ages of the problem of life by the bank of the sacred Ganga, she laughed at the folly and pride and arrogance of the upstart West- The West which imagines that force is the remedy for every ailment and that by force it can attain its ends: which does not yet know that the spirit of man is immortal and cannot be bent or broken.²

Published just a few months after Gandhi’s imprisonment for sedition and following the end of the non-cooperation movement, this sentiment spoke to a broader shifting of gears in nationalist rhetoric. Moreover, with the recent memories of World War One and the massacre at Amritsar it had become significantly easier to collapse colonial rule with explicit violence in the minds of the Indian public. The age of the victim, the basic Western misreading of human nature, the strength of Indian spirit in the face of violence, and a wider critique of colonial law were all drawn out through this imagined trial and punishment. Yet, the foundations for this critique of colonial law had much deeper historical and intellectual lineages than its immediate context.

With the world of explicit politics a restrictive space for Indians, the legal profession had become a comparatively more accessible route into positions of authority and influence for the middle classes. It was this that explained the huge number of lawyers present in the inaugural Indian National Congress in 1885, and why so many of the leading lights of the nationalist movement in the twentieth

¹ BL, IOR, L/PJ/6/1821, File 4848.

² Ibid.

century had been trained in law.³ Though the range of fermenting legal and political opinion in India was diverse and at times openly antagonistic to one another, the implementation of colonial law often provided the sturdiest and most widely understood frame with which modern Indian political thinking could articulate itself in response to. This was no derivative or self-interested reactionary response to a pedagogical bureaucratic frame, but an actively contested space used to test, shape, and practice anti-colonial strategies and Indian political ideologies.⁴

Critical legal thought was therefore an indivisibly political question to a degree that exceeded its already heavily politicised role in histories of many non-colonised spaces. It became a central feature in the process of dismantling the material and intellectual structures undergirding imperialism, but also in the configuration of India's modern political spectrum. Yet while the importance of lawyers within the history of Indian anti-colonialism has been regularly alluded to in Indian political and intellectual histories, this immutable relationship between legal-political thought and action has only recently begun to be seriously investigated.⁵

This chapter takes its framing from one of these recent studies, C.A. Bayly's study of liberal political thought in India. Here, Bayly charts the emergence of a uniquely Indian form of liberalism founded upon the cross-pollination of international, colonial, and local ideas and experiences.⁶ Amongst the wide selection of political questions in which these ideas were being formed, ranging from education, religion, the free press and others, law is given a central position in this study. Using the contested jury question of the 1820s, the mushrooming of legal forums in the 1860s, or the role of Indian lawyers in courtrooms, Bayly argues that the law became a 'liberal forcing-house' over the course of the nineteenth century.⁷ The intellectual and practicing world of law and legal concepts not only provided a space from which Indian thought could begin challenging colonial rule, but also contributed to the production of a distinctive political discourse within a colonial framework. Seeking to build on these ideas in relation to the questions of this thesis, this chapter places specific focus upon the role of violence in these emerging critiques of colonial law.

With particular reference to the themes of this thesis, as colonial law continued to be defended on political discourses of justice and progress, it was disputes over the proliferation of unstable legal rights that became the site of sustained contest between an emergent Indian legal community, and the colonial state. As part of a wider legal politics, the re-emergence of sedition, the explicit criminalisation of politics in colonial conditions, will be explored as an important tipping point in this history.

³ B.B. Misra, *The Indian Middle Classes: Their Growth in Modern Times* (London, Oxford University Press, 1961), pp. 326-332.

⁴ Older works of the Cambridge School emphasised the important role of the lawyer in Indian nationalism however did not present a critical analysis of an insurgent critical legal-political ideology which emerged. See Anil Seal, *The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century* (Cambridge: Cambridge University Press, 1971), pp. 123-130.

⁵ Recent studies that have begun this process include. See Bayly, *Recovering Liberties*. Mukherjee, *India in the Shadows*, pp. 105-227.

⁶ Bayly, *Recovering Liberties*, p. 104.

⁷ Ib., p. 131.

Situating its analysis across the various hues of Indian political thought that crystallised between 1857 to 1914, the chapter therefore attempts to sketch out some of the political thinking and strategies which were built on, and through, ideas and practices of law. The significant degrees of difference distinguishing the collection of legal-politics analysed are united, at times singularly, by a hostility towards certain impulses in colonial law. Amongst other questions, the figures studied here took different positions on religion, violence, and the role of the state, and yet consistently expressed shared grievances towards an expansive executive, moves towards despotic governance, and an ambiguity in the languages and practices of rule. In offering a broad sweep of these various positions, it is important to note therefore that anti-colonial legal thought did not translate into monolithic Indian political or nationalist thought.

Drawing out the intellectual genealogy of *Azad*, the corporally punished and politically motivated boy, the opening sections focus upon the growing concerns directed at the laws for whipping and sedition. These criticisms, over time, were actively enveloped into a shared critique that used this figure to point to the overarching violence guiding the system of colonial law itself. The chapter then unpacks some of the way themes running through this thesis were contested by these figures. These included ideas of sovereignty, the limits to legitimate violence, and the role of the state and subject.

Epistemological Anchoring: The Rejection of Corporal Punishment

The punishment of political offenders for seditious offences, whether by prison sentences, transportation, or in special circumstances whipping, had been a source of controversy from the late nineteenth century. Similarly, the use of corporal punishment by the colonial court for everyday offences had been rebuked by various Indian organisations and actors since its re-enactment in 1864. What connected both laws in the minds of many critics was a locatable shift towards personal governance and despotism, dirtying British claims of an impartial ‘rule of law’ and contradicting its own languages of modernity and good governance. As C.A. Bayly has argued, it was the everyday issues of ‘labour, crime and taxation’ that created, ‘the context in which India’s first liberal political agendas were forged.’⁸ For Bayly, the strategies used in response to these inherently legal-political questions were termed ‘epistemic insurgencies’ and ‘counter-preaching’. Frequently petitioning the state to make good on their promises, from the early nineteenth century debates on slavery, the rights of lascars, and later criticism on the treatment of coolie labour in tea plantations, the violence of colonialism had been at the centre of this critical legal commentary.⁹ Building from this wider milieu, pointed reproach of the law for corporal punishment quickly appeared from Indian quarters, for the large part following this format of counter-preaching.

⁸ Bayly, *Recovering Liberties*, p. 32.

⁹ For the controversy surrounding tea plantation violence and coolie labour see Kolsky, *Colonial Justice in British India*, pp. 142-184.

As discussed in chapter four, colonial officials who both supported and rejected the reintroduction of corporal punishment employed the same ambiguous political reference points. These terms, whether ‘advancing civilization’, ‘modern’, ‘barbaric’, ‘justice’, ‘enlightened’ or ‘humanity’, collectively represented the pillars of an amorphous civilising mission narrative. In response to this muddled epistemological landscape, Indian organisations who opposed the law were keen to structure the language of these debates more clearly. The British Indian Association (BIA), an influential group of landholders from Bengal, immediately sent a number of petitions to various high-ranking officials to challenge the law. Written in February 1864, and representing their third petition on the topic, it argued that whipping was ‘a barbarous punishment, incompatible with sound and enlightened principles of penal jurisprudence, and ineffective either in the way of reformation or example.’¹⁰ In refusing to accept an exchangeable relationship between the financial savings that the legislation may provide with the compromises of a shrinking moral landscape upon which colonial governance was practiced, the petition called the government to repeal the legislation. In the petition they contended the law would produce the ‘utter demoralization’ of the Indian population.¹¹

With no success, the following month the organisation petitioned again, this time with an extended and more strongly worded letter. Here the petition argued that the legislation was ‘hostile to the progress and welfare of a people advancing in civilization’. In drawing upon a lineage of enlightenment thinkers the petitioners asked the government to align their legislation with the work of Montesquieu, Beccaria and Whewell, to avoid what they posited as a slip back into arbitrary and despotic rule.¹²

While calls for ‘humanity’ and an emphasis on the ‘evil’ of the punishment regularly appeared in these petitions, in what is a telling comment, the petitioners forthrightly rejected the claim that the whip was peculiarly suitable to India given its ‘present state of society’. This was dismissed in a bracketed comment as a ‘(somewhat vague if even intelligible assertion)’.¹³ If a civilizational hierarchy was to underpin imperial politics and the implementation of its laws, it would not be left uncontested by these groups. The organisation remained consistent in their opposition of this law, and in response to the death of Ramji Hariba after corporal punishment in 1903, the BIA were again vocally critical. Calling for its total abolition their letter argued that the ‘degradation and disgrace’ of the punishment was even greater than in their earlier campaigns.¹⁴ While the BIA were the most consistent organisational opponents to the law, other institutions such as the Provincial Muhammadan Association

¹⁰ ‘An address against the Whipping Act, 15th February, 1864’, BL, General Reference Collection DRT Digital Store 2022.h.19.(3.).

¹¹ Ibid.

¹² ‘To The Right Hon’ble Sir Charles Wood Bart, British Indian Association, 21st March 1864’, BL, General Reference Collection DRT Digital Store 8022.h.19.(3.).

¹³ Ibid.

¹⁴ Letter from the Hon. Life Secretary, British Indian Association Oudh, Lucknow to S.H. Butler, Secretary to Government, United Provinces, British Indian Association Papers. File Number 117, 1904-1905, NMML.

and the Eastern Bengal Landholders' Association would also express support in favour of abolishing it.¹⁵

These organisations were joined by a group of lawyers and Indian representatives active in the public sphere and in imperial legislative bodies who routinely criticised the law. While it is certainly true that there was no monolithic support for abolition from Indian lawyers, or even for the curtailment of its use, it was consistently Indian representatives in Legislative Council meetings and government circulars who attempted to blunt the exercise of the judicial whip. At the Imperial Legislative Council in 1900, the eminent lawyer Pherozeshah Mehta sought to restrict the punishment. Pointedly, he refuted the widely-held assumption among colonial officers that many Indians preferred the whip and placing the feelings of the Indian public at the centre of his argument, declared that for Indians, it was 'a far more degrading and hardening punishment than imprisonment'. His speech also criticised the indiscriminate application of whipping juveniles in relation to special and local laws and the lack of appeal available for the punishment.¹⁶

Regularly citing 'the feelings of the native public' in defence of this position was common amongst other the critics of the Bill. As part of the response to the death of Ramji Hariba the judges of the North-Western Provinces were asked to provide their opinions on corporal punishment. Though colonial officials drew conclusions from these documents that the punishment was widely supported within Indian society, Indian judges who opposed the law contested this idea of public sentiment. Rai Baij Nathu Bahadur, District and Sessions Judge at Ghazipur declared it 'strongly against the feeling of the native public', while Nawab Muhammad Yusuf Ali Khan, Bahadur of Mendu argued it was 'regarded by every class of men with disfavour.'¹⁷

While the claims of genuinely speaking for a wider Indian public were clearly overstated, a growing literate population and an increasing circulation of newspapers and pamphlets helped further politicise the law in the nineteenth and early twentieth century.¹⁸ Within this burgeoning coverage, much discussion focused upon the legitimate limits of law in relation to governmental policies of non-interference in cultural and religious matters. However, other criticism emerged in response to the problems of racial inequality in the law, the failure to separate the judicial and the executive branches, and the consistent failure to meet the liberal agenda espoused by its practitioners.¹⁹ The re-enactment of corporal punishment found traction in such spaces. Reasserting the language used by the BIA and

¹⁵ BL, IOR, L/PJ/6/805

¹⁶ C.Y. Chintamani ed., *Speeches and Writings of the Honourable Sir Pherozeshah M. Mehta*, (Allahabad: The Indian Press, 1905), p. 598.

¹⁷ UPSA, LB, List 43 Judicial(Criminal)Branch/Judicial Criminal Department/United Provinces/Dec 1905/Nos. 1-62.

¹⁸ Sumit Sarkar posits that the circulation of vernacular newspapers rose from 299,000 in 1885 to 817,000 by 1905. Sumit Sarkar, *Modern India: 1885-1947* (New Delhi: Macmillan, 1983), p. 96.

¹⁹ For criticism of the failure to separate judicial and executive see Amvika Charan Mazumdar, 'Separation of Judicial from Executive Functions: Being his great speech in the National Congress of 1893, with Congress Resolution and cases from other speeches', in *New India Pamphlets No. 3*, ed. by Mrs Annie Besant (Madras: Theosophical Publishing House, 1915); Romesh Chunder Dutt, *The Separation of Judicial & Executive Functions in Bengal*, (Calcutta: Elm Press, 1894).

these high placed lawyers, newspapers emphasised the way corporal punishment jarred with wider ideas of modern penal practices claimed by the colonial state, and pointedly, how it compared to the perceived modernity of other national governments.²⁰

Perhaps the most eloquent critique of this law came from a pamphlet published by Hiralal Chakravarti in 1909. Chakravarti, a Bengali lawyer with connections to the Humanitarian League in Britain, wrote an extensive ‘plea’ for the abolition of whipping. The essay was candid and thorough in its criticism of the legislation, arguing it was unsuitable in reference to all classes of criminal.²¹ The petition called for an even more comprehensive abolition than the earlier BIA petition, also including frontier groups.²² His justification, again fashioned within the wider discursive confines of progress and modernity, echoed Henry Maine’s legal-historical analysis. Here, Chakravarti took a comparative historical approach to legal studies, positing the gradual development of legal ideas in both Roman and English legal history. These shifted from an arbitrary despot who punished through vengeance, encapsulated by corporal punishment, to an organised society in which the sovereign was responsible for order and government.²³ Moving to the relationship with English law and India his argument separated from Maine’s thesis and, inflected with humanitarian logic, argued that this law was a ‘disgrace’ to the statute book and a ‘standing reproach to humanity’.²⁴ This was not a mere parroting of the penal reformism of Macaulay and Bentinck, but in fact a more severe critique of the moral duty of government. While these earlier imperial reformers made caveats on the necessary prerequisite of a modern prison infrastructure before reform, writing in a context where that infrastructure had failed to materialise, Chakravarti made his argument on the sole basis of the ineffectiveness and despotic nature of the whip. Notably, some contemporary newspapers went even further, comparing expenditure on military expeditions and high taxes with prison investment. After such comparisons, the *Amrita Bazar Patrika* disparagingly concluded, ‘And, it is said, we live under the enlightened rule of England- the most civilised country in the world.’²⁵

If in Chakravarti’s example his interlocutors at the Humanitarian League enlarged the audience of his writings outside of India, the work of other international reformist organisations would be increasingly picked up within India. The Howard Association, a prominent voice for penal reform in London, produced comparative criminological reports on the efficacy of the abolishment of capital and corporal punishment across the world. By 1897 this had been reproduced in wider debates in India, with papers such as the *Jámi-ul-Ulum* favourably comparing the ‘civility’ in countries such as Holland,

²⁰ For one example see the *Paridarshak* which declared that ‘We consider the infliction of flogging to be a practice which is wholly unworthy of a civilized Government, and hold that even the most rigorous imprisonment is a hundred times better than this.’ *Paridarshak*, 26 December 1880, BL, IOR/L/R/5/7.

²¹ His writings against whipping were also published in the *Humane Review*. This was an English journal edited by the humanitarian Henry Salt which contained essays from eminent social reformers such as Edward Carpenter, G.B. Shaw and Henry Cotton.

²² While the earlier British Indian Association petitions were calling for a total abolition, they conceded there may be justification for the whip’s use with some frontier tribe groups.

²³ Hiralal Chakravarti, *Whipping in India: A Plea for its Abolition*, (Calcutta: Majumdar Library 1908), p. 2.

²⁴ Ibid.

²⁵ *Amrita Bazar Patrika*, 16 March 1908, BL, IOR, L/R/5/34.

Finland, Portugal to that of England and India in their punishment practices.²⁶ As we will see later, the comparative space of the international world, as well as understandings of modern international law, became fertile grounds for a variety of critiques in response to other colonial laws, particularly in relation to sedition.

In concluding his pamphlet Chakravarti summed up his argument, writing, ‘No progressive community can long afford to disgrace the statute book with an enactment which is a standing reproach to humanity, and its total repeal is only a question of time.’²⁷ Though the appropriation of humanitarian discourse was understood by various colonial legislators as a ploy by higher caste Indians to avoid the humiliation of corporal punishment, in reality the ‘cannibalisation’ of this politics resituated the debates of liberalism and law within an internationalist political frame.²⁸ Legitimacy for rule was tacitly being placed not on a self-reflective history of imperialist expansion and colonial backwardness, but the colonial state’s policies in relation to competing international ideas of science and penology. This insistence on blurring imperial and international frames in this fashion ensured India, and the modern role of governance, were being imagined outside of the more strictly policed politics of the imperial world.

Tracing the depth of such legal-political ideologies across society is often a difficult task. However, it is possible to surmise that this distain for the use of judicial violence was fairly widely held by those who had successfully penetrated the colonial legal system in the North-Western Provinces. As Mitra Sharafi has shown, judges in colonial India could enjoy relative autonomy in the courtroom. While she draws out a history of ‘chivalric imperialism’ in which colonial judges attempted to reduce the husband’s ability for unilateral divorce in Islamic marriage, a resentment towards corporal punishment from Indian judges reflected another avenue in which this autonomy could be practiced.²⁹ Given the aversion to violent punishment voiced by large sections of the Indian legal community, many Indian magistrates in the lower courts avoided using corporal punishment. In numerous government circulars discussing the administration of criminal justice Indian magistrates were criticised, stressing the ‘failure of the Native Magistracy to inflict adequate punishments’.³⁰ In one file from 1894, two magistrates from the North-Western Provinces were picked out for particular scrutiny. They were said to have awarded four cases of whipping in comparison to 217 rigorous imprisonments, whereas across the province in districts such as Aligarh, Bareilly, Etawah, and Moradabad annual reports regularly measured the use of whipping at around ten percent of possible cases.³¹ Operating within the colonial system, this nascent judicial activism from Indian magistrates aligned not with imperial politics, but with early anti-colonial sentiment.

²⁶ *Jámi-ul-Ulum*, 21 February 1897, BL, IOR, L/R/5/74.

²⁷ Chakravarti, *Whipping in India*, p. 40.

²⁸ I borrow the ‘cannibalisation’ of political terminology from C.A. Bayly. Bayly, *Recovering Liberties*, p. 11.

²⁹ Mitra Sharafi, ‘The semi-autonomous judge in colonial India: Chivalric imperialism meets Anglo-Islamic dower and divorce law’, *The Indian Economic and Social History Review*, 46:1 (2009), pp. 57-81.

³⁰ See for instance the numerous circulars located in, NAI, Home (A)/Judicial/Jan 1894/Nos 109-116.

³¹ Ibid.

What was being produced within these legal debates was a larger question about the limits of colonial politics and the location of sovereignty across the state-society divide in the modern world. In relation to corporal punishment, the colonial state emphasised the importance of the executive and discretionary powers of the magistrate, acting as the local sovereign to quickly and violently punish. The politics that defended this legislation relied upon a regurgitated, conflicted, and increasingly worn out political lexicon underpinning imperial liberalism. In response, the re-appropriation of its key reference points by the legislation's critics, 'humanity', 'progress', 'civilization', attempted to attach meaning to these unsteady terms. Critically re-employing the central terms from the imperial liberal political lexicon in ways that subtly diverged or undermined their colonial meaning was therefore not a reflection of an intellectually trapped Indian liberal thought, but strategies composed in rejection of the functional logic of imperial sovereignty.

This process of epistemological anchoring therefore not only acted as implicit criticism of colonial rule, but also helped settle a political-discursive landscape from which a wide array of more radical and sure-footed anti-colonial ideologies would later appear. Within this process a heightened place was given to the idea of a modern international order. This energised political-legal thought in India not just because it offered a wider range of historical precedents for politicians to make their cases when criticising colonial legislation, but perhaps also because unlike the very visible monarchical sovereign in the imperial world, the less simple order of the international lacked such definite sovereign authority. Here, the idea of India, but also that of Britain, could be positioned in an arena with less stable power relations than that binding the colony to the metropole.

Imperial Rights and the Emergence of Sedition

If the legislation for corporal punishment had been used to routinely criticise the violence and despotism guiding the colonial regime, the laws directed against sedition represented another point of conflict for debates concerning the contested rights of the colonial subject. Since its formal reinsertion into the Indian Penal Code in 1870, the IPC had been part of a wider system of laws which acted to curtail the expression of seditious views deemed dangerous to governmental authority. With its embrace of executive power, its sketchily defined basis, and its circumvention of *habeas corpus*, the law had garnered critical attention from its inception.³² Yet laws tightening executive control over various features of seditious crimes followed, including the Dramatic Performances Act in 1876, the Vernacular Press Act, and the Sea Customs Act in 1878.

While the Indian response to these laws were premised on protecting fundamental principles of political liberty and the freedom of speech, it is important to note that the particular freedom that had often triggered this broad brush legal expansion, particularly in the 1860s and 1870s, had been the freedom to criticise the prevalence of colonial violence. The Dramatic Performances Act in 1876 for

³² Stephens. 'The Phantom Wahabi', pp. 40-45.

instance, a legislation that censored performances in the thriving Calcutta theatre scene, was in large part a response to the theatre production of the *Nil Darpan* play. The play, which had earlier been censored for libel in 1861, was a disparaging attack on the system of indigo plantations.³³ As a text it threads together the despotic influence of the arrogant planters through a litany of violent floggings, sexual violence, and corrupt complicities held between the local magistrate and European planters.³⁴ The Vernacular Press Act, introduced shortly after, followed a similar pattern. With sedition already punishable in the Indian Penal Code, the Act represented another legal appendage extending colonial legal authority, in this case specifically to censor the political commentary of newspapers. Again, this was in large part a response to criticism of colonial law and its protection of European violence towards Indians. Many of the translations from vernacular newspapers which had been used to defend the legislation had, for instance, made critical reference to the lack of justice in colonial India.³⁵

In response to such laws leading public figures were damning in their commentary, making their views known to increasingly large and politicised public audiences. In Calcutta, crowds estimated at five thousand came to the Town Hall to hear speeches opposing the law, while hundreds more were said to have been turned away.³⁶ Surendranath Banerjea, an important political leader and founder of the Indian National Association, had spoken both at the meeting and elsewhere. He provided a typical moderate nationalist response to the legal-political question.³⁷ Channelling Bentham's critique of over-legislation, Banerjea addressed the colonial state through his audience. He reminded them that as 'every law is an evil...It, therefore, becomes the bounden duty of those who introduce any measure of law, to justify it be facts and arguments.'³⁸ In lawyerly fashion he then approached the issue by drawing upon extensive evidence that refuted the law's implication of Indian disloyalty. This included a historical account of India's naturally loyal character, right up to statements from numerous government officials' corroborating that loyalty in the recent past.³⁹

Yet where Banerjea directed his strongest critique was the state's assumption of a monopoly to decide when state sovereignty was threatened. He wrote:

Why, the safety of the State, says Government, requires that the poison should not be allowed to spread. The supreme law of the safety of the

³³ Even this earlier libel charge had been disputed by a large number of elite Bengalis who protested that it was an accurate portrayal of Indian feeling concerning indigo production. See 'The humble memorial of the undersigned native inhabitants of Bengal [concerning the aspersions of Justice M. L. Wells on the native character] Appendix', copy of the Native Address to the Rev. James Long. BL, General Reference Collection DRT Digital Store 8022.h.28.

³⁴ Dinabandhu Mitra, *Nil Darpan; or The Indigo Planting Mirror, A Drama Translated from the Bengali by A Native* (Calcutta: Calcutta Printing and Publishing House, 1861)

³⁵ S.N. Banarji, *Report of the Proceedings of the Vernacular Press Act, Held in the Town Hall on Wednesday the 17th April 1878* (Calcutta: Englishman Press, 1878), p. 9.

³⁶ Ibid, p.1.

³⁷ For an overview of the politics of moderate nationalism, see: Sanjay Seth, 'Rewriting Histories of Nationalism: The Politics of "Moderate Nationalism" in India, 1870-1905', *The American Historical Review*, 104:1 (Feb, 1999), pp. 95-116.

³⁸ Banarji, *Report of the Proceedings*, p.7.

³⁹ This included interpreting the Rebellion as 'essentially a military revolt'. Surendranath Banerjea, 'The Vernacular Press Act', in *Speeches and Writings of Babu Surendranath Banerjea*, (Madras: G.A. Natesan & Co, 1930), p. 235.

State is invoked, and we are asked to fall down before this dread divinity and to hold our tongues in sullen silence.⁴⁰

Banerjea's imagined sense of imperial citizenship was one in which sovereignty had, to some degree, been consensually and contractually lent to the colonial state. The safe-guards of liberal rule, freedom of speech and a wide enough distinction between executive and legislative branches, were all central to this imagined contract. For all Banerjea's polite posturing, his loyalty was not tied to the idea of British rule, but directed at a set of principles completely antagonistic to the arbitrary sovereignty which imperialism was in reality founded upon.⁴¹ In concluding Banerjea shifts his jurisprudential reference point from Benthamite positivism to natural law theory, writing:

We claim this privilege not as a favour. We are no longer the conquered subjects of England. We are the incorporated citizens of a free empire... We are British subjects, and are we to be deprived of an inalienable right of British subjects, in this summary and perfunctory manner?⁴²

For other moderate Indian politicians, it is almost impossible to not read the indirect threats of revolt implicit in their commentary of the Bill. Pherozeshah Mehta's letter to *The Times of India* offered a comparative historical analysis of countries in which press censorship was employed. Referencing England pre-Civil war and France pre-revolution which had experienced similar censorship, he argued:

the gagging of the press will be simply tantamount to pressing down a lid on the seething cauldron... it would go on boiling and bubbling and generating more and more under the cover clapped on it, unnoticed and unknown, till in a careless, unguarded, or preoccupied moment, the pressure may be relaxed, and all the pent-up forces may burst through, causing infinite mischief.⁴³

Mehta also returned to the problematic translation of British laws across the imperial world, this time in a very literal sense, pointing to the faulty translations of vernacular newspapers used to justify the legislation. While Mehta simultaneously notes that while Englishmen may know facts about Indian society, it is their lack of understanding concerning its 'humanity' which leads to such problems.⁴⁴

Sandwiched between the series of legislations passed in the 1870s and Tilak's first arrest for sedition in 1897, the second onslaught of legislation would occur in the early twentieth century following the partition of Bengal and the rise of revolutionary terrorism. These new laws ranged from the Prevention of Seditious Meeting Act, the Newspapers Incitement to Offences Act, and the Indian

⁴⁰ Ibid, pp. 241-242.

⁴¹ For an extended discussion of Banerjea and imperial citizenship see, Sukanya Banerjea, *Becoming Imperial Citizens: Indians in the Late-Victorian Empire*, (Durham: Duke University Press, 2010), pp. 150-190.

⁴² Banerjea, 'The Vernacular Press Act', p. 254.

⁴³ Sir Pherozeshah M. Mehta, 'Censorship of the Vernacular Press', in *Speeches and Writings of the Honourable Sir Pherozeshah M. Mehta, K.C.I.E.* ed. by C.Y. Chintamani, (Allahabad: The Indian Press, 1905), pp. 139-140.

⁴⁴ In further criticising the bill Mehta notes, 'It is only Englishmen who could misconstrue them in their unimaginative and unsympathetic social isolation from the humanity around them... Some English officers possess a vast store-house of Indian facts, e.g the present Governor of Bombay. But the knowledge is like a Chinese portrait; every hard, little detail of shape, figure and dress is there; but the soul is wanting', Id., p. 141.

Press Act. In the same period, nationalist leaders from V.D. Savarkar to Tilak to Lajpat Rai would all be imprisoned under laws for sedition.⁴⁵ The response to this tightening of executive legal authority between 1897 to 1911 would see colonial law placed at the centre of anti-colonial political action.

For moderates, the swelling of the executive at the expense of political liberty invigorated the now widely networked political organisations across India. Petitions and Legislative Council member criticisms flooded the Government of India, regularly making constitutional claims in reference to the Proclamation and demanding repeal.⁴⁶ The Legislative Council speeches of Rash Behari Ghose and Gopal Krishna Gokhale in 1907, later republished in a pamphlet titled ‘On Repression’, were perhaps the most erudite examples of this position.⁴⁷ Ghosh not only rejected the premise of a law that punished disaffection, arguing that a disaffected populace should by implication see a government on the defence stand, but concluded by noting the ‘unfortunate’ coincidence of the meeting of the Bill being the 1 November, the same date of Queen Victoria’s Proclamation.⁴⁸

Alternatively, for those propagating ‘extremist’ anti-colonial sentiment the role of the law had long since been recognised as a useful platform to engage a wider public. For these nationalists, many of which believed that a revolutionary spirit had not yet taken adequate root in the country, the law played a functional place in their politics. Here, attempts were made to draw out the underlying despotism of colonial law while avoiding engaging its full apparatus. For many, this meant placing a professed legal limit on anti-colonial politics. For Aurobindo Ghosh for instance passive resistance was defined as, ‘lawful abstention from any kind of co-operation with the Government.’⁴⁹ In a speech recorded for its seditious content, Lajpat Rai similarly argued:

I do not think it is necessary to lay down any hard and fast rules as to what shall be our attitude towards the Government. That it must be one of *legal* loyalty is granted on all hands.⁵⁰

By recognising an ostensible legal limit to their politics, their resistance drew out the legally policed threshold of imperial rights and placed it in public view. In restricting their activities, colonial law was being taunted to reveal itself not as the protector of political liberties or freedoms, but as the coarse instrument of their restriction.

The courtroom itself represented another useful place which could be appropriated within this politics. By Tilak’s second trial for sedition 1908 for his writings concerning revolutionary violence and the partition of Bengal, his ideological position had been emboldened. During his trial performance,

⁴⁵ See Janakhi Bakhle, ‘Savarkar (1883-1966), Sedition and Surveillance: the rule of law in a colonial situation’, *Social History*, 35:1 (2010), pp. 51-55.

⁴⁶ These included petitions and letters from leading Indian nationalists including Motilal Nehru and Pherozeshah Mehta. See NAI, Home (A)/Political/Dec 1907/Nos. 64-84.

⁴⁷ Dr Rash Behari Ghose and Gopal Krishna Gokhale, ‘On Repression’, in *New India Political Pamphlets No. 11*, ed. by Mrs Annie Besant, (Madras: Commonwealth Office, 1916).

⁴⁸ Id., pp. 4-13.

⁴⁹ Daniel Argov, *Moderates and Extremists in the Indian Nationalist Movement, 1883-1920*, (London: Asia Publishing House, 1967), p. 123.

⁵⁰ BL, IOR, L/PJ/6/810.

he declared that the British state was alien and that it was the India's definitive enemy. Speaking to the jury rather than to the judge, interpreted by Mithi Mukherjee as symbolising the Indian public, the trial has been seen as another rupture in which Indian nationalism started directing its politics beyond the remit of the colonial state.⁵¹ It is also interesting to note that Tilak's decision to not hire a barrister and represent himself could have had symbolic meaning beyond the abstract rejection of the structure of colonial rule that Mukherjee shows. With Lajpat Rai sentenced to sedition the year before, and having been controversially rejected legal aid, it could also have been a further indictment of this event.⁵²

Anti-Colonial Legal Fictions and 'the spectacle of a boy politician'⁵³

The 1922 figure of Azad, corporally punished for politically motivated offences, was thus part of a persistent and wide-ranging opposition to both the violence of colonial discretionary legal authority, as well an increasingly hostile attitude towards a freedom of political expression. Within these debates the image of the whipped and political child carried his own particular genealogy. The figure for instance was also notably found in Chakravarti's pamphlet, who described the violent treatment that the 'boy-politician' could suffer under colonial rule, while contentious examples were regularly alluded to in local newspapers. Acting as an intersectional point between criticisms towards these two sets of laws, the publicity given to this figure, starting in the early twentieth century, allowed anti-colonial critiques to position both the physical and epistemic forms of colonial violence in the singular figure of the politically inspired boy.

While over the nineteenth century the law for corporal punishment had its application for adults reduced, as explored previously, its remit was extended in reforms between 1898 and 1900 to apply across special and local laws for juveniles to target specific problems. It was also kept as a punishment for juvenile boys for all crimes in the IPC.⁵⁴ This extension of whipping to special and local laws had made juvenile boys much more vulnerable to the whip. In the Madras Presidency for instance, sixty-five per cent of boys admitted to jail were convicted under such offences in the year it was extended.⁵⁵ A further implication of this carte blanche application of whipping for juveniles was that though it became an illegitimate punishment for adults committing political offences, it could be still used to punish juvenile male offenders committed of the same crime.

⁵¹ Mithi Mukherjee, 'Sedition, Law, and the British Empire: The Trial of Tilak (1908)', *Law, Culture and the Humanities*, (2017), pp. 16-17.

⁵² For the rejection of Lajpat Rai's legal aid see, Lajpat Rai Petition to The Right Honourable Secretary of State for India, 22 September 1907, BL, IOR, L/PJ/6/810.

⁵³ Chakravarti, *Whipping in India*, p. 23.

⁵⁴ These were laws created to run alongside the Indian Penal Code with specific geographical and communal jurisdictions. Those most applicable to whipping included laws enforced against railway crime, gambling, and causing nuances. This was said to have been done 'in the interest of juvenile offenders themselves'. UPSA, LB, List 2 Judicial-Criminal/Judicial (Criminal) Department/N.W.P. & Oudh Proceedings/August 1898/Nos. 33-53.

⁵⁵ UPSA, LB, List 2 Judicial-Criminal/Judicial (Criminal) Department/N.W.P. & Oudh Proceedings/August 1898/Nos. 33-53.

Beyond the material ramifications of the law, the child had held a particularly symbolic place in the nationalist imaginary of India, in which the nationalist rhetoric had regularly employed the metaphor of the child as society with the nation as mother.⁵⁶ It was not a coincidence that the Age of Consent debates in the 1890s, the catalyst opening up latent differences in nascent nationalist thought, was a battle over the body of the female child. Yet, if the contested role of the women in the nation could be triggered by the intrusion of the state in relation to the female child at home, an increasing angst about the exclusion of men from public spaces could create similar alarm in relation to the whipping of boys. A series of government reports in Dacca in 1883 complained about the numerous problems caused by groups of school-boys during public events, resulting in one magistrate whipping a number of boys. This received critical coverage in the local press and as such was enquired into by the local government.⁵⁷ Another story published in the *Deccan Herald* in 1890 discussed the whipping of a six-year-old boy, punished with six stripes for stealing a pair of socks from a *dhobi*'s line. This again forced governmental inquiry into the reports.⁵⁸ However, it was with the swelling involvement of nationalist organisations in public spaces in the early twentieth century that this unique legal status held by the juvenile boys drew serious controversy.

In 1907 a fourteen-year-old boy had been outside the trial for the nationalist leader Bipin Pal who had been charged with sedition. While in the crowd he became involved in a violent altercation with a European officer and was summarily sentenced to fifteen stripes.⁵⁹ Within the context of an emerging swadeshi movement in Bengal and its accompanying revolutionary violence, this long running contestation over whether the whip was a suitable tool for political offences culminated in serious criticism from nationalist papers such as the *Bengalee* and *Bande Mataram*.⁶⁰ The issue reached London, and when the magistrate in question later threatened young boys under the age of ten with whipping for throwing stones, he was strongly criticised in the Houses of Parliament.⁶¹

This was not an isolated event, newspapers across India had made similar complaints during this period. The *Lahore Tribune* stated that they could cite several cases in which 'boys of tender years have been sentenced to whipping simply because they allowed themselves to be carried away by their love for the country or zeal for *Swadeshi*'.⁶² While other newspapers, significantly in Bengal,

⁵⁶ For the construction of 'Bharat Mata', or 'Mother India', and the ways in which this figure was forged, altered and developed from the 1880s, see Sumathi Ramawamy, *The Goddess and the Nation: Mapping Mother India* (Durham: Durham University Press, 2010).

⁵⁷ BL/IOR/L/PJ/6/136, File 1884.

⁵⁸ BL/IOR/L/PJ/6/287, File 1702.

⁵⁹ Peter Hees, *Bomb in Bengal: The Rise of Revolutionary Terrorism in India, 1900-1910*, (Oxford: Oxford University Press, 1993) p. 108.

⁶⁰ *Bengalee* 28-29 August, 1907; *Bande Mataram* 28-29 August, 1907.

⁶¹ Henry Cotton asked in response to this, 'Does the hon. Gentleman think it simply outrageous that a magistrate should threaten small boys with the punishment of flogging for stone-throwing a very common practice in this country'. While Mr Haviland Burke argued: 'Is the hon. Gentleman aware that the judicial torture by the infliction of the lash is unknown in the case of any French or native subject in Algeria, and will he use his influence to bring India up to the level of humanity which has obtained so many years in Algeria?' April 28 1908, *Hansard*, cc. 1084-1085.

⁶² *Lahore Tribune*, 22 March 1908, BL, IOR, L/R/5/189.

consistently brought up the issue.⁶³ Such was the degree of criticism that when restrictions to the law were enforced in 1909, legislators debating the reform made reference to these events. The relationship between the whip, nationalism, and revolutionary violence was for instance explicitly questioned after two boys had been whipped for attacking a policeman in Calcutta. One official asking whether ‘the recent bomb outrages in India are the effects of the floggings of youths in Calcutta?’ While sceptical of this logic, H.H. Risley, involved in the framing of the law, admitted that Indian outrage had been a factor in now empowering the Governor General in Council to exempt juveniles from such a punishment.⁶⁴

Pertinently though, the majority of cases pointed to by these papers were not for sedition or for overtly political offences, but for more moderate offences committed in the politically charged environment of the period. These were generally public nuisance offences, throwing stones, or petty assaults. In the later reform of the Bill, while referencing this topic the Government declared themselves ‘unable to find evidence that any juvenile has ever been whipped for an offence under section 124-A (law for sedition).’⁶⁵ The case which Hiralal Chakravarti had pointed to had taken place in Midnapore had seen a boy sentenced to whipping for handing out seditious leaflets. Aptly, the child eventually avoided the punishment, the situation being described as ‘too ludicrous’.⁶⁶ Yet with parallel campaigns running against the sedition law, for which nationalist leaders including Tilak and Lajpat Rai had recently been sentenced under, such criticism was neatly combined with that directed at the quotidian violence of corporal punishment, centred upon the legal possibility of the corporally punished seditious child. It was this that Chakravarti had pointed to as the ‘boy-politician’ in his pamphlet, and who would later appear in the figure of *Azad* in the *Bombay Chronicle*.

Emerging from the archive within this political context the seditious child, often more a spectral and literary figure than a material one, was a rejection of imperial politics and its accompanying legal apparatus. The creation of panics and the proliferation of anxieties to justify extending emergency laws had been a central impulse within colonial power that saw the colonial regime amass broad and violent legal capabilities. While usually dormant, at times of crises these could be quickly employed under the opaque umbrella of ‘legitimate’ law. This anti-colonialist critique of colonial law played upon the very logic of colonial exceptionality and panic production to highlight the wide-ranging nature of colonial violence. Mirroring the logic justifying colonial exceptionality, constructing panics from slights, both real and exaggerated, drew publicity to the anti-colonial position. In this case, critical Indian lawyers had tacked together the ideas of sedition-cum-politics with whipping-cum-brutality and publicly inscribed these onto the colonial state’s political record. This was not simply an opportunistic case of

⁶³ In the newspaper reports from 1908 alone, Bengal newspapers such as *Anushilan*, *Hitavadi* and *Amrita Patrika Bazar*, all regularly commented on the brutality of whipping young boys (1908). BL, IOR, L/R/5/34.

⁶⁴ BL, IOR, L/PJ/6/805.

⁶⁵ BL, IOR, L/PJ/6/805.

⁶⁶ Chakravarti, *Whipping in India*, pp. 22-23.

broadening the appeal of anti-colonial politics or an example of guileless mimicry, but a sophisticated retort to the functioning logic of colonial sovereignty and its law-making machinery.

The Subject State: Principle of Harm and the Duty of the Sovereign

These efforts to anchor the terms of political debate, while also highlighting the despotic and violent logic of colonial rule, were joined by Indian lawyers and politicians who produced competing ideas of the relationship between law, sovereignty and the role of the state in colonial society. As Bayly has shown, within these discussions, and in response to the more conservative imperialism of the 1870s, Indian interpretations of John Stuart Mill's principle of harm were increasingly employed in this period as a useful retort to various colonial measures.⁶⁷ A prominent example can be found in the writings of the judge and co-founder of the Bombay Presidency Association, K. T. Telang. In an article published in 1879 titled 'The Reign of Law in the Bombay Presidency', he offered a damning criticism of an older system of discretionary and personal governance which he saw re-entering the colonial legal regime. Reeling off a large list of legislations implemented between 1870-1879 he argued that the 'Reign of Law' was empty, and the period had instead witnessed an expansion of executive power.⁶⁸

What is of most interest in this criticism was the ways in which Telang envisioned the role of law, state, and society. Whereas the language of colonial law in this period articulated the primacy of faith being shown by the subject to the colonial state, Telang inverted the force of this relationship back onto the state.

His speech revealingly started with a quote that rearranged the hierarchy of sovereign authority within society. It snappily stated "Who shall command the King" Said Lord Finch "Why" said those glorious old Puritans "the law shall command your King."⁶⁹ Immediately dislodging the preeminent position of the King by stipulating his own dependence on the law, Telang then made two broader points over the course of his speech. Firstly, he argued that the only legitimate body to employ the force of law was the legislative branch, and secondly that the state, through legislation, should protect rather than impinge 'Private Rights'.⁷⁰ With the rise of the executive at the expense of the legislative, he argued that the 'Reign of law' had ceased to operate and 'Private Rights' had been compromised. The implication posited, although not explicitly declared, was that the sovereignty of the rulers was no longer incontestable.⁷¹

⁶⁷ See C.A. Bayly's analysis of the Calcutta based lawyer Ashutosh Mukherjee and his critique of James Fitzjames Stephen, Bayly, *Recovering Liberties*, pp. 200-203.

⁶⁸ Amongst a wide list of acts criticised included the Dramatics Performances Act of 1876 and the Vernacular Press Act.

⁶⁹ K.T. Telang, 'The Reign of Law in the Bombay Presidency', in *Select Writings and Speeches, II*, ed. by V.N. Naik (Bombay: Y.K. Khadilkar, 1931), p. 484.

⁷⁰ Here he references the Bombay Salt Act, but also mentions the Opium Act of 1878.

⁷¹ Id., p. 488.

Yet his argument in fact went beyond a vague call for the legal protection of rights, situating the colonial state in a relationship of dependency upon higher and measurable political duties which recognised the importance of dealing with difference. As Telang placed various colonial laws under his analytical microscope the primacy of this notion of duty and the need for an accommodation of difference became particularly clear in the scepticism shown towards the role of ‘good faith’. He wrote:

Good faith is perfectly compatible with the most stupendous errors in the appreciation of other people’s rights and privileges. And therefore, the confidence required is confidence in the capacity of Government to collect and correctly judge of the material on which individual rights are based. We have no hesitation in saying, that Government does not command our confidence in the sense now stated⁷²

Following the Vernacular Newspapers Act of 1878, and seemingly pre-empting the Ilbert Bill storm that would soon follow, Telang understood that a law uncritically protecting ‘rights and privileges’ defined by a racist colonial state held little hope for Indian subjects. For Telang, ‘good faith’, was positioned as a corollary to, and subsumed underneath, ‘confidence’ in the state. In turn, this idea of confidence was an earned one, measured by the state’s ability to locate and protect those individual rights deemed of value. While for the colonial state, the practice of law and the production of legislation had been primarily concerned with the ‘loyalty’ and ‘faith’ of the colonial subject as part of an implicit submission to colonial sovereignty, for Telang ‘good faith’ was itself contingent on the provision of the system of law he was outlining.

This subtle reimagining of the interdependent triangle of state sovereignty, law, and subject, was made clearer in Telang’s ‘Notes’, discussing the Age of Consent Bill controversy. Here Telang, baited by Hindu-revivalist critics of the legislation, apologetically spent the majority of his writings reconciling the Bill with the philosophy of the Queen’s Proclamation and Hindu law. Responding to the charge by conservative lawyers such as B.G. Tilak and R.C. Mitter that the legislation represented a broken Proclamation promise interfering with and compromising Hindu law, he instead argued that there had been a misreading of both the Proclamation and the Shastras. Telang posited that if the system of Hindu law was taken into account properly, the perceived sin that the Bill brought could be easily recovered by its adjoining penance. For Telang, legislation existed at comfortable an intersection where ‘it is quite possible for an “orthodox Hindu husband” to obey British Law when the proposed Bill forms part of it, without in any way disregarding the true effect of the “injunctions of the Shastras.”⁷³ In this position he declared he was joined by ‘Manu on the one side and with Humboldt and Herbert Spencer on the other.⁷⁴ Yet while his reconciliation of British and Hindu law within a reforming modernist agenda was in itself an interesting move, Telang repeatedly stated that the larger issue was not to be

⁷² Telang, ‘The Reign of Law in the Bombay Presidency’. p. 502

⁷³ K.T. Telang, ‘Notes on Age of Consent IV’, in *Select Writings and Speeches, II*, ed. by V.N. Naik (Bombay: Y.K. Khadilkar, 1931), p. 463.

⁷⁴ K.T. Telang, ‘Notes on Age of Consent I’, in *Select Writings and Speeches, II*, p. 449.

found in these questions but in the ‘paramount duty’ of any sovereign, the protection of its subjects from harm.⁷⁵

For Telang, though he himself believed there was no contradiction between the proposed bill and these other quasi-constitutional and religious questions, he noted that the shastras were ‘a mere afterthought’ and that, ‘The Queen’s Proclamation neither can get rid of that duty (protection from harm)’.⁷⁶ What was central to his vision of governance and law, as in the earlier criticism for corporal punishment, was ‘the interests of humanity’, upon which the legislature was ‘compelled’ to serve.⁷⁷ Taking this to its ultimate conclusion, he again subsumed rights under this duty. He stated:

I can pledge myself not to enforce payment of what is due to me, but I cannot, in any reasonable sense, pledge myself not to pay what is justly due by me to others. This proposition, requires only to be stated to be at once accepted. My next proposition is, that this distinction between a renunciation of right, and a desertion of duty requires to be maintained as between sovereign and subject, even more strongly than between ordinary man and man.⁷⁸

The sovereign, in this case the colonial state, had a contingent duty to, ‘pay what is justly due’ to its subjects. This reassertion of the primacy of the ‘duty’ holding the relationship between sovereign and subject together, superseding that owed between subject and subject, was underwritten with ideas of popular sovereignty and political contractualism. If liberals like Telang have often been defined by their petitioning, understood as simple reminders to the colonial state of their promises, their political thought shows significantly more nuanced ripostes to that form of governance. Their ideas were reordering the imagined structure of society and relocating the state’s sovereignty as contingent upon a universal duty towards ‘humanity’. Importantly this contested rethinking of an ideas of particular rights, primary duties and contingent sovereignty was not restricted to these powerful intellectuals, but was part of a wider dissemination of legal-political consciousness across society.⁷⁹

Violence and the idea of ‘British Justice’

As some critiques of colonial law attempted to anchor political vocabulary onto a less slippery discursive landscape, and others reimaged the structural relationship of law, state, and subject, coinciding efforts had begun chipping away at the legitimacy of central political concepts supporting

⁷⁵ Id., 449.

⁷⁶ K.T. Telang, ‘Notes on Age of Consent V, in *Select Writings and Speeches, II*, ed. by V.N. Naik (Bombay: Y.K. Khadilkar, 1931) p. 471.

⁷⁷ Id., p. 471.

⁷⁸ Telang, ‘Notes I’, p. 449.

⁷⁹ To take the example of the Age of Consent debates, gender historians have been particularly effective in demonstrating the ways wider society, and particularly women themselves, articulated support for reform. See Padma Anagol, ‘The Age of Consent Act (1891) Child Marriage Controversy in India’ 12:2 (1992), pp. 100-118.

the legitimacy of the colonial state. While calls for ‘British rule’ by economic nationalists of the late nineteenth century gained significant traction in the context of devastating famines, the idea of ‘British justice’ was another bone of contention in the period. Violence, the principle of harm, and the freedom of political discussion in India were increasingly intertwined in these discussions.

One locus of such complaint was the noticeable racial difference structuring decisions in courtrooms which allowed Europeans to go unpunished after committing violent crimes such as murder, rape, and assault. This had been particularly the case in reference to the violence of planters and the non-official European community, but appeared across society whenever Europeans and Indians came into regular contact. A reading of the translations of vernacular newspapers sees the reoccurring trope of the violent but unpunished Englishman fill numerous column inches. A typical example, found in the *Jámi-ul-Ulúm*, a newspaper published in the North-Western Provinces in 1897, is described below:

that the character of Englishmen has undergone a great change since the Mutiny of 1857. Her Most Gracious Majesty the Queen-Empress and the English nation are actuated by a sincere desire to do justice to the people of India, and this is why the laws framed by them appear to be fair and just. But the administration of those laws does not rest with them, and the result is that the sword, which was intended to defend the people, has been used in cutting their throats.⁸⁰

The newspaper goes on, like many others, to discuss numerous other cases in which Europeans had been acquitted for murder on the grounds of various medical loopholes.⁸¹ The range of critical responses to examples of such violence were as broad as the Indian political spectrum was wide, yet what is particularly noteworthy in the critique above was the growing move to suggest a basic schism between the sentiment and intention of British rule, and the realistic implementation of those ideas into practice in the Indian context. The colonial legal regime had regularly used the conditions of India to excuse the variety of crimes committed by Europeans, while also playing on ideas of difference to justify legal measures that contradicted their avowedly liberal programme. An insurgent liberal counter-narrative inverting this logic, articulated a growing belief that the idea of ‘British justice’ was simply untranslatable across national borders, hinted towards a radically different conclusion, the intrinsically impossible ambitions of the colonial project.

This in a wider context reflected a decreasing social capital attached to the image of the Englishman in India over the course of the nineteenth century. With the increased administrative needs of empire, entry requirements for colonial positions were lowered for non-official Europeans in the 1880s and 1890s. This larger influx of Europeans had not all found success in India and the presence of European loafers on the streets of colonial centres such as Calcutta had further undermined the image of Western civility.⁸² As these images combined with the violence of corporal punishment and the

⁸⁰ *Jámi-ul-Ulúm*, 28 February, 1897, BL, IOR, L/R/5/74.

⁸¹ Ibid.

⁸² For a detailed study of the community of poor Europeans and their relationship with the state see Harold Fischer-Tiné, *Low and Lascious Europeans: Race, Class and ‘White Subalternity’ in Colonial India* (New Delhi: Orient Blackswan, 2009).

constant racial prejudice displayed in colonial courtrooms, a rich symbolic arena for this insurgent liberal critique was the train.

As Elizabeth Collingham has argued the railway carriage represented both ‘a travelling symbol of British civilization’ and a site for ‘extreme acts of British incivility.’⁸³ With Indians and colonial officials alike able to buy first class tickets, numerous incidents of violence from Europeans unhappy to share their carriage with Indians occurred. G.P. Pillai, a renowned south Indian lawyer involved in the creation of the Indian National Congress wrote a lecture titled ‘The Englishman in England and India’ that discussed his own experiences with violent Englishmen on trains. One incident occurred in which when an Englishman realised he was to sit in the same waiting room as Pillai and Pillai’s friend the man became aggressive and verbally abused the pair incessantly. Later returning to apologise Pillai wrote, ‘Evidently, though the Englishman’s real honest, kindly, nature came back to him for a moment, his brutal instincts which are easily developed in India got the mastery of him soon afterwards and he changed his mind.’ Recalling other incidents Pillai then writes:

Now, when such is the treatment accorded by Englishmen in India to men like my honourable friend and myself who are thoroughly alive to our rights and our sure to insist on our rights being respected, what should be the sort of treatment accorded to the generality of natives who are either ill-educated or are easily frightened by the brag and bluster of Englishmen? If we had gone into a court of law in India, the probability is that while the two Englishmen are acquitted we all either be fined or sent to jail for a few months.⁸⁴

Within the small lecture the term ‘Englishman’ was used seventeen times and while Pillai broadly speaking offered sympathy for the behaviour of the violent Englishman who he saw as being placed in an environment in which his automatic privilege easily led to violence, his solution was a call for Indians to understand and demand their rights. Though not visibly antagonistic in language, he was again questioning the possibility of directly transplanting British ideas onto Indian soil. The increasingly visible contradiction between the ‘real honest, kindly’ English nature and the English nature that appeared on Indian soil would make the languages of loyalism and nationalism an increasingly incompatible marriage in the twentieth century.

Misinterpreting this form of moderate loyalism as an immature nationalism trapped by an acute inability to imagine citizenship or nationality beyond the imperial frame does not do justice to the implications of such statements. The legal critiques that emerged from India’s liberal politicians draw on a wide range of references from Hindu notions of duty, Benthamite ideas of positivism, to Lockean ideas of rights, compiling an increasingly trenchant record that decoupled imperial rhetoric and practice. For Surendranath Banerjea, his loyalty to imperial rule had been contingent on it being ‘firmly wedded’

⁸³ E.M. Collingham, *Imperial Bodies: The Physical Experience of the Raj c. 1800-1947* (Malden: Blackwell Publishers, 2001), p. 142.

⁸⁴ ‘A Lecture entitled ‘The Englishman in England and India’, delivered by G.P. Pillai at the Pachaappa’s Hall Madras on 10th November 1897 with the Hon’ble T. Ananducharlu in the Chair’, G.P. Pillai Papers, NMML.

to ideas of humanity and justice.⁸⁵ Yet in claiming inalienable rights as the premise of legitimate rule, a tension was emerging. This on one hand espoused a growing vision of law and governance from Indian liberals who looked to tie the state to ideas of natural justice which existed above imperial politics, while on the other a colonial state which relied upon subsuming the idea of justice within its ideological structure. As these ideas periodically clashed, the extension of arbitrarily defined law and the expansion of personal governance, whether invested in the colonial judge, the murderous European, or the central colonial government, was increasingly understood not as an aberration from colonial legal logic, but as part of its political composition. The law which has been fittingly described as the ‘state’s emissary’ in one context, was becoming the site upon which multiple anti-colonial offensives were built in another.⁸⁶

The Broad Church of Anti-Colonial Legalism: 1885-1914

The re-appropriation of an idea of humanity, the call for inalienable rights, and the harnessing of an imagined liberal international order were effective politics because while responding to quantifiable state practices, they forged a discursive path for political debate to circumvent the parameters of imperial political sovereignty. Yet if the liberal figures so far addressed were critical of a perceived deformed liberalism operating in India, broadly speaking they kept faith in the salvageable liberal-constitutional model of governance. Successfully tugging at the very heart of tensions innate to colonial modernity, the exposure of colonial contradictions had however enlarged the space for another set of critiques to emerge in public discourses. Shruti Kapila has shown with particular reference to Tilak and Har Dayal that by the late nineteenth century a coherent strand of Indian political thought was articulating an anti-liberal politics that sought to transcend the state itself, engaging more openly with violence and popular action.⁸⁷ While other scholarship has explored the revived ideas of civilisation in Hindu literature and cultural performances, which from the 1870s began to produce more holistic anti-colonial critiques of Western modernity.⁸⁸ This form of politics moved from destabilising and restructuring an essentially imperial epistemological order, to the rejection of western modernity and the construction of a new national political geography. Here the duty of the state and its legislature was to serve various sovereign markers of cultural and religious community. This in turn led to radically different reflections on the role of law.

⁸⁵ Banerjea, ‘The Vernacular Press Act’, p. 255.

⁸⁶ Guha, ‘Chandra’s Death’, p. 141.

⁸⁷ Shruti Kapila, ‘Self, Spencer and *Swaraj*: Nationalist Thought and Critiques of Liberalism, 1890-1920’, *Modern Intellectual History*, 4:1 (2007), pp. 109-127; Shruti Kapila, ‘A History of Violence’, *Modern Intellectual History*, 7:2 (2010), pp. 437-457.

⁸⁸ See for instance the work of Rochona Majumdar on the contested ideas of civility and civilization in Bankimchandra Chattopadhyay’s writings, Rochona Majumdar, ‘From Civilizational Heroism to an Ethic of Universal Humanity’, in *Civilizing Emotions; Concepts in Nineteenth Century Asia and Europe*, (Oxford: Oxford University Press, 2015), pp. 214-217.

It was the Age of Consent Bill which first publicly drew out this broader liberal and conservative split in Indian political thought. Tilak who was the leading and most vocal opposition to the legislation presented an argument punctuated by overt parochial Hindu rhetoric. He refused to accept the legitimacy of foreign interference in religious law and society and criticised the leading advocate of reform Behramji Malabari for his Parsi identity. As a non-Hindu he was, in Tilak's view, equally unsuited to adjudicate on such issues.⁸⁹ However, while such discourse played into a populist identity based politics, Tilak's substantial problem with the Bill lay not in its ambition, but with the principal that the state should drive societal change through legislation.

The *Mahratta*, a Marathi language newspaper edited by Tilak, declared the Bill as the “thin edge of the wedge” of increasing government interference with religion. Its editorial of February 15, 1891, voiced Tilak's anti-statist position:

We have often pointed out that we are not against the particular reform advocated. Individually, we would be prepared to go even further than what the Government proposes to do, but we are certainly not prepared to force our views upon the mass of orthodox people... We have every confidence that in time most of the reforms now preached would be gradually accepted.⁹⁰

Refusing to force his views upon ‘orthodox people’, leading speakers following Tilak's conservatism reinforced this populist line of reasoning to position themselves as the true representatives of the people. Atul Krishna Nandi's pamphlet on the Bill for instance dismissed the high-minded rhetoric of liberals and argued that ninety-eight per cent of Bengal did not want reform.⁹¹ For Nandi, as for Tilak:

Laws should be framed in a spirit suitable to the condition and habits of the people and consistent with the prevalent customs and religious beliefs of the mass of the country, and should not be of a character calculated to produce heart-burn and general discontent in the nation.⁹²

This critique of legislative action for the sake of purported moral societal improvement was in many senses premised upon utilitarian and democratic concerns of practicality and majority support. The law was not just antagonistic to constitutional promises made in Proclamation, but in the minds of these critics, it did not even serve the purposes of improvement it declared.⁹³

Driving these critiques was another conception of humanity that the state had a duty to protect. If for the liberal model this lay in inalienable rights that existed outside of the nation, for the

⁸⁹ There is a wider history of Indian nationalism and identity formation to be drawn from this period. As explained by Mitra Sharafi, it is pertinent to note that it was a Parsi judge, Dinshaw Davar who sentenced Tilak in 1908. This provided the basis upon which Gandhi would later be punished in 1922. To add to this story, Davar had in fact represented Tilak in his previous trial in 1897. See Sharafi, *Law and Identity in Colonial South Asia*, p. 253.

⁹⁰ *Mahratta*, 15 Feb 1891, citation from Charles Heimsath, *Indian Nationalism and Hindu Social Reform*, (Princeton: Princeton University Press, 1964), p. 164.

⁹¹ Atul Krishna Nandi, ‘A Few Thoughts on The Age of Consent Bill (From a purely Hindu point of view)’, (Calcutta: I. C. Bose & Co, 1891), p. 1.

⁹² *Ibid*, p. 29.

⁹³ An interesting reference point for Nandi is Burke, for whom defending his position he quotes, ‘The temper of the people amongst whom he presides ought therefore to be the first study of a statesman.’ *Ibid*, p. 13.

conservative model it was placed in a truth found inside the nation, in this case in the *Shastras*. The very relationship between man-made laws and the religious and the cultural sphere was an extremely problematic notion for thinkers of this ilk.⁹⁴ Though these two groups clashed at this early stage, their two perspectives on law and state, angled in different directions, both drew colonial rule into webs of accountability and dependency which drained the state of its claims to sovereignty. Rachel Sturman has argued that in the nineteenth century legal debates on custom, particularly in relation to Hindu marriage, became a ‘key terrain for the extension of state power’.⁹⁵ Though her argument holds true in many regards, it also seems noteworthy that by the end of the century it was the site of custom and law which would provide the seeds for Indian ideological rejections of the liberal state. Moreover, if these debates appear to represent a point of divide in the history of Indian national politics, taken in reference to the genealogy of Indian anti-colonial thought both critiques worked in tandem, tying the colonial state to contracts they were invariably incapable of keeping.⁹⁶ One to an Indian liberal conception of progress which various strands of British imperial thought would never fully accept, the other to an Indian religious-cultural nationalism which strands of British liberal thought would similarly reject.

The spark over the contested body of the Hindu female child in the 1880s and 1890s, though eventually won by the reformers, successfully inserted this populist Hindu revivalist discourse into the public sphere. The event had considerably increased the consumption of populist newspapers which Tanika Sarkar has argued provided nationalist newspapers such as the *Bangabashi* its initial success., While the *Amritabazar Patrika* could convert from a weekly newspaper to a daily on the back of an increased market.⁹⁷

Unlike moderate politics which looked to one day wrest the state from imperial power, the manipulation of politics from ‘extremist’ nationalist politicians were representative of more than a simple inversion of colonial power politics at the heart of its sovereignty, but reflected a genuine rejection of law in that form. For many leading nationalists, the acceptance of the despotism of the colonial legal system therefore prompted alternative visions of law and governance, including a rejuvenation of the idea of the panchayat in their national imaginaries. In speeches in 1906 both Ajit Singh and Lajpat Rai called for a boycott of the British run courts, urging Indians to head to the panchayats instead.⁹⁸ Perhaps even more pertinently, if Tilak’s anti-statism had been first publically exposed in the Age of Consent Bill in 1891, and his position as a key Indian nationalist confirmed by his second trial for sedition in 1908, it was the following year on the way back from his legal work in

⁹⁴ Tilak for instance argued instead that men ‘are not called upon to invent, but to find out what the *Shashtra* is’. A letter written by Tilak referenced in Subrahmanyam Aiyar, *A Lecture on State Interference in Social Matters in India, 12th December 1890* (Madras: Varadachari & Co, 1891), p. 10.

⁹⁵ Sturman, *The Government of Social Life in Colonial India*, p. 150.

⁹⁶ The history of anti-colonialism is connected to intellectual histories of the nation, yet the national story too often becomes a hegemonic framework that is not sufficient to fully understand an Indian anti-colonial history. For useful points of departure from this collapse see: Sudipta Kaviraj, ‘The Imaginary Institution of India’ in *Subaltern Studies VII*, (New Delhi: Oxford University Press, 1992), pp. 1-39; Sumit Sarkar, *Beyond Nationalist Frames: Postmodernism, Hindu Fundamentalism, History*, (Indiana: Indiana University Press, 2002), pp. 1-9.

⁹⁷ Sarkar, ‘A Prehistory of Rights’, p. 614.

⁹⁸ BL, IOR, L/PJ/6/810.

South Africa that the most eminent anti-statist Indian thinker, Mahatma Gandhi, would pen *Hind Swaraj*.⁹⁹ Celebrated for his critique of western modernity, in which the panchayat played a central role, the essay would also fiercely suggest that justice could not be found in the law courts, and that the problems between Hindus and Muslims and the power of British rule were built squarely upon the construction of its rights based colonial law system.¹⁰⁰

Conclusion

As this thesis has shown in its earlier chapters, the careful presence and absence of colonial law was a primary instrument through which colonialism inserted itself deep into Indian society. However, if the broad argument of this work has been to offer a re-evaluation of the way various frames of law acted to sustain and promote a particularly insidious form of colonial sovereignty following the rebellion, the functional logic of this sovereignty never acted in isolated detachment from Indian society. In response, this chapter has attempted to foreground both the practice and the idea of law as ongoing forums for the expanding field of Indian politics, and particularly that of anti-colonial ideologies. As earlier elements of this thesis have argued, one of the strategies of imperial liberal politics was the creation of an opaque political landscape which made the discursive markers of its politics difficult to grasp. If there was an impulse within imperial liberalism to protect this epistemic flexibility supporting its paradoxical legal and political practices, early liberal political strategies attempted to anchor meaning to colonial politics.

It has been argued that this was achieved by organising, checking, and realigning the purposefully scattered markers and convoluted meanings underpinning imperial political ideology, in turn allowing for greater clarity in India's intellectual and political responses to colonial violence. This evolving process was not just theoretical conjecture, but representative of a tangible back and forth between protest and legislation, traced in the series of laws produced and connected by a genealogy of anti-colonial critiques. With the rise of an Indian anti-liberal set of politics, the law again became the site upon which these ideologies gained public legitimacy. Used as a springboard into bigger questions concerning the contingency of colonial sovereignty, the moral duty of the state, or the rights of the individual and the community, these thinkers constructed a wide range of strategies to disseminate their anti-colonial ideologies. Whether they chose to look outwards to the globalising world of political theory, historical precedents and a nascent modern international order, or inwards to the cultural-religious markers of religious scriptures, across this period the law became a site in which thinkers could begin to look beyond the colonial state, even when they situated their debates on top of it.

⁹⁹ For Gandhi as an anti-state thinker see Kapila, 'Self, Spencer and *Swaraj*', pp. 124-127; Karuna Mantena, 'On Gandhi's Critique of the State: Sources, Contexts, Conjectures', *Modern Intellectual History*, 9:3 (2012), pp. 535-563.

¹⁰⁰ M.K. Gandhi, 'Hind Swaraj', in *Hind Swaraj and Other Writings*, ed. by Anthony J. Parel, (Cambridge: Cambridge University Press, 2009), pp. 56-59.

Conclusion

Eight years after the period under study drew to a close, on March 18, 1922, India's leading nationalist Mahatma Gandhi stood for trial in Ahmedabad. He had been charged with the offence of sedition. Unlike Bahadur Shah Zafar, with whom this thesis began, Gandhi was arrested for crimes written into a codified legal structure, and the trial took place in an official court of law.

Taking the liberty to define himself as a farmer and a weaver, Gandhi pre-empted the court, explaining that when the time came, he would plead guilty. As the Advocate-General Sir Thomas Strangman read article after article from *Young India*, the journal from which the criminal charges had been procured, Gandhi, undefended, is reported to have quietly smiled throughout.¹ When invited to respond, Gandhi fully endorsed Strangman's remarks, and even accepted his culpability in the violence of Chauri Chaura from the previous year. When considering Strangeman's timeline for his path to disaffection, he however corrected the Advocate-General, confessing that his disaffection had begun even earlier. He then concluded with the following statement:

I am here, therefore, to invite and cheerfully submit to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen. The only course open to you, the judge, is as I am just going to say in my statement, either to resign your post, or inflict on me the severest penalty.²

With this request made, Gandhi went on to set out in full and extensive terms his journey from imperial loyalist to non-co-operator. Taking aim at the core tenets of colonial rule, Gandhi rejected its notion of progress, economic prosperity, and the supposed provision of justice. Pertinently, as this thesis has shown, if the colonial legal system in India had attempted to coerce colonial subjects into social contracts bound by law, this was also summarily dismissed in his denunciation of sedition. Here Gandhi argued, 'Affection cannot be manufactured or regulated by law'.³

Dominating the proceedings in court, at every turn it was the 'weaver and the farmer' who knitted together the courtroom narrative being spun about his life, offering a damning critique of colonial law in this process. With Gandhi's proud embrace of the label of sedition, what he described as 'the prince among political offences', the judge passed a sentence of six years imprisonment.⁴ As the trial concluded, the record stated that Gandhi was moved to jail only after his friends had taken leave.

This performance in court, poignantly distinctive to the spectacle of Bahadur Shah Zafar's colonial victor trial, was an important moment in anti-colonial nationalism, and a hammer blow to the

¹ M.K Gandhi, 'The Great Trial' in *The Law and the Lawyers*, ed. by S.B. Kher, (Ahmedabad: Navajivan Publishing House, 1962), p. 10.

² Id., p. 116.

³ Id., p. 119.

⁴ Ibid.

structure of colonial sovereignty that this thesis has been examining. Having located the various fault lines that existed in both colonial practice and discourse, these were ruthlessly exposed here in public view. The space of the courtroom, and the significance of the political nature of sedition, are not coincidental to the story that has been traced across this study. Unlike in the case of the King, by simultaneously accepting and dismissing colonial law, while happily admitting guilt for a political crime, Gandhi was reclaiming both agency and politics from a theatre of colonial sovereignty organised to regulate its denial.

Situating its analysis between the period 1857 to 1914, this thesis has sought to outline the emergence of this modern form of colonial sovereignty, and particularly, the legal skeleton which sustained it. Beginning with the trial of Bahadur Shah Zafar the study has argued that, through the body of the expelled Mughal King, colonial law and sovereignty was built on exception. Tracing this logic into universal declarations of equality and legal rights, in both the Queen's Proclamation and the Indian Penal Code, the thesis identified spaces carved into these moments which would channel this undercurrent of colonial exceptionality. Significantly, whether in the relative provision of amnesty in 1858, or the unstable idea of good faith and allegiance in the Indian Penal Code, this logic of exception was produced alongside, and in relationship with, the idea of the colonial norm.

Placing this within its broader intellectual and imperial context, this recursive relationship between norm and exception is shown to have reflected a particular impulse among imperial liberal thinkers across the nineteenth century. Though keen legal positivists who collectively constructed the most expansive codification project of the period, the key figures of this process constantly justified imperial presence on abstract ideas of justice and progress which remained undefined throughout the construction of this uniform legal procedure. In producing an idea for modernity on one hand, defined by the provision of codified law, they articulated the justification for exceptionality on the other, pinpointing imminent dangers considered prevalent in colonial society.

As this logic of exception and norm travelled into the everyday legal regime, the thesis then compared three different practices of law across the late nineteenth and early twentieth century. Taking the punishment for murder, the reintroduction of corporal punishment, and the provision of amnesty at royal celebrations, these were connected by a dependence on a discretionary authority operating within this newly constructed codified system. In all three frames, the expression of colonial sovereignty was measured in the state's ability to transgress the codified structures of its own law, constantly shifting individuals across flimsily constructed legal boundaries.

For the crime of murder, patterns of severity and leniency were determined not by the relationship the act of crime had with the letter of the law, but alternatively, by the actor's position within an informal social hierarchy of colonial rights. In analysing the state's own violence, the evolution of the legislation for corporal punishment represented further strategies employed to distinguish the value of different colonial legal subjects. In this case, the whip carved out of society an idea of the lower-caste man, imagined as sexually deviant and responsive to violence, reinforcing

narratives of colonial difference. Finally, jubilee amnesty represented a semi-regulated and yet semi-exceptional form of legal practice. At these rare but predictable junctures, the subjects often suffering under the everyday legal regime were released into society, draping these celebrations with transient glimpses of a progressive and forgiving legal regime.

After sketching out this framework for law and sovereignty, the thesis then moved towards the emergence of an anti-colonial and nationalist thought which began targeting the functioning logic of this sovereign structure. Beginning with the explosive assassination of the Poona plague commissioner, the final chapter then drew upon the wide range of anti-colonial critical thinking that developed in response to colonial legality. Placing a significant focus upon the criticisms directed towards the laws for whipping and sedition, the discursive foundations of this structure of sovereignty were shown to have been slowly disassembled by these evolving critiques of colonial law.

Taken as a collective, a number of key themes were consistent across these chapters, and have been used to revise the current frameworks employed by historians to understand colonial sovereignty and its relationship with law. With previous scholarship primarily focused upon moments of episodic and spectacular violence, or singular forms of quotidian brutality, this thesis has instead located the logic of colonial sovereignty across a continuum of different legal practices, present right into the banal. Placed within the historical context of late nineteenth century colonial India, this has reconsidered the dichotomy made by Giorgio Agamben which more confidently separated sovereignty and exception from law and norm. If, for Agamben, the state of exception represented an ‘emptiness of law’ that was located in ‘extreme circumstances’, this thesis has argued that sovereignty and exception were alternatively threaded into every layer of the colonial legal regime.⁵ Colonial sovereignty, in this sense, did not exist outside of the juridical order, but as chapter two argued, was essential in the continued process of defining everyday legality and legal subjecthood in colonial India.

This effort made to locate the points of legal exception deeper into the practice of colonial law has been made possible by the methodological choices of the thesis. Distinct from most earlier attempts to consider colonial violence and sovereignty, this study has attempted to produce a legal and intellectual history that also takes social history seriously. This has been useful on a number of fronts, but perhaps most significantly, it has brought the questions of gender, caste, and class, into the overarching story of colonial sovereignty and violence. To take one example, in comparing the law’s attempts to structure the violence outside of the law, in the case of murder, with the law’s own violence, in the case of corporal punishment, the political rationality guiding the two legal procedures were found to have been the same. In both examples, the law made subtle distinctions between colonial legal subjects. These differences were determined by the demands on the colonial state to informally structure society, offering incentives to certain groups while denigrating others.

In thinking more critically about the wider terrain upon which colonial sovereignty operated, the thesis has therefore considered the Indian social as an active space that was shaped by, and in turn

⁵ Agamben, *State of Exception*, p. 6, p. 31.

shaped, the constitution of colonial sovereignty, having an impact on the results of its legal practices. It is, for instance, not an accident that these examples saw the colonial law tacitly acknowledge the legitimacy of domestic forms of male violence, or the importance of class and caste hierarchy. As scholarship moves forward, more time spent at this intersection between intellectual, legal, and social history will be vital in adding texture and nuance to these historical questions of colonial violence and sovereignty.

Ultimately, the thesis has argued that to fully understand the nature of colonial violence, law and sovereignty, isolated studies of singular forms or moments of violence will never provide the thicker context needed to understand how these moments of excess were made possible. Unlike the approach taken by Achille Mbembe who depicted colonial sovereignty as a force unrestricted by rules, which could kill any subject, this thesis has urged historians to consider the more complicated structures of power that existed in colonial India in this period.⁶ This is not to argue that colonialism was less violent than has been acknowledged, but to suggest that to understand the intricate and truly pervasive nature of colonial violence, locating the limits within which colonial sovereignty operated is vital.

The model therefore proposed in this thesis is to consider colonial sovereignty in an aggregated form, dependent on its ability to organise and distribute political capital present in society, while maintaining the colonial state's paramount, but not absolute authority. This process, reliant on the colonial legal regime's capacity to manage its populace, was visible in the sentencing of the criminal in court, the application of corporal punishment, or the release of the prisoner at jubilee. In the Foucauldian sense, legal practices of punishment, forgiveness, or reward thus acted in an effort to sustain, 'overall states of equilibration' in which the colonial state could remain lodged as an extractive force in India, while continuing to deny political subjectivity to Indian society.⁷

With these conclusions in mind, the questions raised in this thesis would benefit from further research in a number of directions. Firstly, while this thesis has theorised the relationship between law and the local through a series of published and unpublished court records from Allahabad, studies of the criminal records kept in other High Courts located around India would shed much needed light upon the wider fabric of the colonial legal system, and provide the basis for exciting comparative regional legal histories. As illustrated in this conclusion, the legacies of this structure of colonial sovereignty also had a very clear afterlife in both the late colonial period, and in the postcolonial nation. While most criminal legal histories are bound to roughly demarcated periods of history, tracing a deeper history across the modern and contemporary history of India would be of significant value. Finally, thinking beyond the national frame, the relationship between imperial sovereignty and the Indian Penal Code provides fertile ground for comparative legal approaches to South Asia from a global standpoint. With the IPC employed across varied spaces including East Africa, Aden, and Singapore, the movement of

⁶ Mbembe, 'Necropolitics', p. 24.

⁷ Michel Foucault, "Society Must be Defended" in *Lectures at the Collège De France. 1975-76*, ed. by Mauro Bertani and Alessandro Fontana, trans. by David Macey, (New York: Picador, 2003), p. 247.

legal concepts, people, and ideas through these networks may also helpfully complicate the history produced here.

Acknowledging the areas of further research from which this study could benefit, the thesis has offered a number of novel insights into the history of law, colonial violence, and sovereignty. In placing the relationship between colonial norm and exception at the heart of this analysis, the thesis has moved beyond histories that have suggested colonial sovereignty was unhampered by rules and its violence limitless. Focusing on a number of different case studies, it has emphasised the vital importance of situating colonial sovereignty in specific historical context, and within as wide an analytical lens as possible. In analysing the imperial intellectual thought that undergirded this history, the thesis has suggested that the canon of imperial liberal thinkers involved in codifying Indian law also helped produce a political vocabulary that contributed to the modern justification for exception. Finally, with the tensions and contradictions embedded in this structure of sovereignty operating across the period, the thesis has contributed to the developing conversation concerning the history of anti-colonial legal political thought.

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