

Introduction

How were men tried? There is no better touchstone for a social system than this question.

Marc Bloch, 1939¹

I. LIBERALISM VERSUS EMPIRE?

The British Empire was built upon a contradiction: justified as a benevolent liberating mission to many millions of Asians, Africans, and other non-Europeans enslaved by ignorance, oppressive traditions, and misrule,² it depended at the same time upon the subordination of these millions to the authority of the small ruling British elite. This contradiction was highlighted by the workings of the legal systems the British established in their possessions. The single most important exemplar of the claimed beneficence of the Empire was its system of laws, and by the nineteenth century there was great pride in spreading the benefits of English law around the world. Perhaps the best-known principle of that law was the equality of individuals – that all were equally subject to its strictures, and that all could equally claim its protection. This had been established for the Empire as early as 1774, when in the case of *Campbell v. Hall* Lord Mansfield declared that “an Englishman in Ireland, Minorca or the Plantations has no privilege distinct from the natives.” A century

¹ *Feudal Society* (Chicago, 1961), p. 359.

² An example of this pride in “British justice” can be seen in Elspeth Huxley, *The Flame Trees of Thika: Memories of an African Childhood* (Harmondsworth, 1959), p. 132. An official version from the same time was given by Sir Kenneth Roberts-Wray, legal adviser at the Colonial Office: “British administration in overseas countries,” he wrote in 1960, “has conferred no greater benefit than English law and justice” [“The Adaptation of Imported Law in Africa,” *Journal of African Law* 4, 2 (Summer 1960), 66].

later the noted political thinker and legal adviser to the Government of India Henry Maine observed that the Government “is bound, by the moral conditions of its existence, to apply the modern principle of equality, in all its various forms, to the people of India – equality between religions, equality between races, equality between individuals, in the eye of the law.”³ Yet the most basic working principle of empire, as Maine well knew, was *inequality* – a necessary inequality of power between the British ruling class and the subject populations, a distinction that (as colonies of white settlement gained self-government) increasingly merged with that between white and colored races. To put this contradiction another way: in the course of the nineteenth century British society became ever more based on “liberal” ideas. Yet the Empire this society constructed and extended was deeply authoritarian. Could a liberal society run an authoritarian empire, without one or the other being corrupted? As Ranajit Guha, founder of the “subaltern studies” school, observed, the British colonial state in South Asia was “an historical paradox, an autocracy set up and sustained by the foremost democracy in the Western world.”⁴

How meaningful was the British commitment to “the rule of law”? Many “postcolonial” scholars have argued that it meant little except as a veil to cover the unpalatable realities of exploitation.⁵ Guha influentially claimed that colonial law was simply the “state’s emissary,” whose function was to transform “a matrix of real historical experience” into a “matrix of *abstract legality* so that . . . the will of the state could be made to penetrate, reorganize part by part and eventually control the will of a subject population in much the same way as Providence is brought to impose itself upon mere human destiny.”⁶ Borrowing from Marx and Gramsci, Guha described the notion of the “rule of law” as “mystifying” the true relations of power in the Raj, and encouraging Indians to develop a false consciousness, thus diverting the flow of discontents into harmless

³ Quoted in Sir M. E. Grant Duff, *Sir Henry Maine: A Brief Memoir of His Life* (London, 1892), p. 40.

⁴ *Dominance Without Hegemony: History and Power in Colonial India* (Cambridge, Mass., 1997), p. xii. Guha’s terms – “autocracy” and “democracy” – render the paradox rather too starkly. Before 1918 Britain was still some distance from a democracy, while examination of the workings of colonial law reveals this “autocracy” to have been more complex than Guha portrays; see Peter Fitzpatrick, “Tears of the Law: Colonial Resistance and Legal Determination,” in *Human Rights and Legal Theory*, ed. Katherine O’Donovan and G. R. Rubin (Oxford and New York, 2000).

⁵ For the most recent such argument, see the forthcoming book by Karuna Mantena, *Alibis of Empire: Social Theory and the Ideologies of Late Imperialism* (Princeton).

⁶ “Chandra’s Death,” *Subaltern Studies* 5 (1986), 141.

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channels of legal appeals: “While the colonial regime first took it upon itself to inculcate the notion of rights and liberties upon its subjects and then deny these in full or in part in the principles and practice of governance, the disenfranchised subjects went on pressing the rulers to match their administration to their own ideals. Ironically, therefore, a large part of the politics of protest under the Raj, especially when initiated by the educated middle-class leaderships, turned on a certain concern about the ‘un-British’ character of British rule.”⁷

Even the radical historian E. P. Thompson, Guha declared, had been a victim of English self-satisfaction when he had argued in his important work on eighteenth-century England, *Whigs and Hunters*, for seeing the development in England of the notion of the rule of law as “a cultural achievement of universal significance.”⁸ This critique of Thompson was elaborated by Robert Gregg, who noted Thompson’s own colonial roots: his father, a liberal missionary in India, had been a noted critic of empire, but a critic from within empire’s larger assumptions that Britain had brought valuable “gifts” to India. “The equity of the law,” Thompson had declared, in a context of class inequality

must always be in some part sham. Transplanted as it was to even more inequitable contexts, this law could become an instrument of imperialism. . . . But even here the rules and the rhetoric have imposed some inhibitions upon imperial power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters.

“Here,” Gregg insisted,

Thompson tried to have his cake and eat it too. First of all he pronounced the rule of law to be a cultural achievement. He then recognized that it might be an ‘instrument of imperialism’. . . . But then we are told that its presence led to ‘inhibitions upon imperial power’ – perhaps because the imperialism was in this case British. . . . To imply, as this surely does, that there is some absolute benefit to be gained when nationalists learn the language of imperialism in order to overthrow it seems at the very least ironic when that imperialism has only been made effective by that same language.⁹

This critique of British “imperial liberalism” has become extremely influential among scholars of empire and of liberalism.¹⁰ Yet at heart it

⁷ *Dominance Without Hegemony*, p. 57.

⁸ *Ibid.*, p. 67.

⁹ Robert Gregg, *Inside Out, Outside In: Essays in Comparative History* (London, 2000), p. 78.

¹⁰ See for example, Uday Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, 1999); Jennifer Pitts, *A Turn to Empire: The Rise of*

ignores the complexities and paradoxes of history that Thompson pointed to. “Imperialism,” for Guha and those who take their lead from him, is close to being a single “project” with at root one nature, one aim, one effective actor. The nearer one looks, however, the more this supposed monolith dissolves into a multitude of often incompatible projects and actors. Guha’s critique of colonialism has by now been overtaken by more subtle work. As Sally Engel Merry has noted, at the same time that the law served as an instrument of control, it not only “provided a way for [colonized groups] to mobilize the ideology of the colonizers . . . to resist some of the more excessive demands of settlers for land and labor . . . [but also] provided a way for the colonial state to restrain the more brutal aspects of settlers’ exploitation of land and labor.” In practice, then “the legal arena became a place of contest among the diverse interest groups in colonial society,” even if the contest was certainly an unequal one.¹¹

Were British colonial governments, then, racist autocracies adorned with a thin and self-serving veneer of legal liberalism? Or did the principle of the “rule of law” ever provide a real check to arbitrary rule, and its corollary, the equality of legal subjects, afford a mitigation of racism? Did “home” Britain and its Empire constitute two separate worlds, as Guha posited, one of liberty and expanding democracy, the other of autocracy, or did these worlds interpenetrate and influence each other? This was an issue that deeply concerned many Britons throughout the history of empire, not simply something that was raised by postcolonial critics.

Imperial Liberalism in Britain and France (Princeton, 2005); Mantena, op. cit.; Allen Beattie and Patrick Dunleavy, “New Perspectives on the British Imperial State,” unpublished paper 2004; Gita Subrahmanyam, “Schizophrenic Governance and Fostering Global Inequalities in the British Empire: The UK Domestic State vs. the Indian and African Colonies, 1890–1960,” paper presented at the 2004 annual meeting of the American Political Science Association, Chicago. Online <.PDF> Retrieved 2006–10–05 from http://www.allacademic.com/meta/p61046_index.html.

¹¹ “Law and Colonialism,” *Law and Society Review* 25 (1991), 889–922. One can accept this and still be strongly critical of imperialism. “Of course,” John Comaroff has insisted, “the historical fact that there were these ‘tensions of empire’ did not make imperialism any the less exploitative. Or coercive. Nor did it soften the inequalities that saturated colonial societies everywhere; if anything, it sharpened them. But, for the colonized, conflict among colonizers sometimes opened up fissures through which the contradictions inherent in colonialism became visible. In so doing, they gave the consciousness of ‘natives’ material to work on, material from which to fashion their own understandings of European overrule, their insights into its ways and means, their reactions to the challenge that it posed to vernacular cultural practices, even, at times, their strategies of resistance” [“Colonialism, Culture and the Law: A Foreword,” *Law and Social Inquiry* 26 (2001), 313]. However, I would suggest that such tensions and fissures did in fact diminish the “coerciveness” of British imperialism.

How was the inevitable tension between liberal ideals and myths on the one hand, and the pressures and inducements of authoritarian rule on the other, to be worked through?

II. INTERRACIAL HOMICIDE TRIALS

What in fact happened when the contrasting “principles” – of equality and liberalism on the one hand, and inequality and authoritarianism on the other – came into practical conflict? Or when, indeed, liberals’ acceptance of the need for a period of tutelage for “backward” peoples slid, as it could easily do, into a prospect of indefinite authoritarian “tutelage”? This book addresses this question by exploring significant moments when the rule of law and its promise of equal treatment were put to the test. It examines revealing episodes in the ordinary operation of the criminal law across the Empire, cases in which this underlying conflict could not simply be argued in the abstract but had to be resolved by a courtroom decision over the fate of an actual defendant.¹² These cases disrupted the smooth everyday operation of the legal machinery, leading to moments of unusual illumination into the Empire’s fundamental nature.

Law lay at the heart of the British imperial enterprise. And criminal justice was at the core of law. “The administration of criminal justice,” the eminent jurist James Fitzjames Stephen argued, “is the indispensable condition of all government, and the means by which it is in the last resort carried on.”¹³ A modern historian has observed that “the legal colonisation of large parts of the non-European world as a result of the expansion of Europe has been one of the most thorough, and most durable, of the effects of imperialism.”¹⁴ Such legal colonization was particularly central to the efforts of the British. Indeed, one must ask, why did British colonial regimes put in place judicial institutions that have been characterized as “expensive, expansive, and far in excess of functional requirements” for maintaining their rule?¹⁵ The

¹² Historians have recently become aware of the importance of “ordinary” civil and criminal law, and not just constitutional law, in empire building. See, for example, Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi, 1998); Peter Karsten, *Between Law and Custom: “High” and “Low” Legal Cultures in the Lands of the British Diaspora* (Cambridge, 2002).

¹³ “Minute on the Administration of Justice in British India,” selection from the Records of the Government of India, Home Department, no. 89 (Calcutta, 1872).

¹⁴ Martin Chanock, “The Law Market: The Legal Encounter in British East and Central Africa,” in *European Expansion and Law*, ed. W.J. Mommsen and J.A. De Moor (New York, 1992), p. 279.

¹⁵ Comaroff, *op. cit.*, p. 308.

answer, I would suggest, lies in British, more than imperial, needs. Such needs are suggested in Stephen's assertion; like Maine, Stephen served for a time as legal adviser to the Government of India. "Our law," he declared while serving in that post, "is in fact the sum and substance of what we have to teach them. It is, so to speak, the *gospel* of the English, and it is a compulsory gospel which admits of no dissent and no disobedience."¹⁶

This "gospel" was preached through the courts and the trials they conducted. As with religion, the law as it was practiced in the courts fell far short of its ideal. Yet, also as with religion, the ideal never ceased to exert its pressure on practice. The courtroom thus became an arena in which social, political, and ideological contests played themselves out, in which not only particular litigants and defendants struggled, but the contradictions of British law were exposed and the Empire itself put on trial.¹⁷ Even more than other parts of law, the criminal law, with its sanctions of corporal punishment, imprisonment, and death, was deeply political, as Marc Bloch long ago recognized.¹⁸ In criminal trials of Europeans for killing natives, and vice versa, implicit political visions clashed: for most non-official Europeans, colonial law's primary mission was to protect them in a threatening environment, while for those involved in government, it was to maintain the authority of the state by providing consistent, available, and equal justice. When European employers whipped disobedient native employees, they saw themselves as part of the apparatus of colonial authority, and not private individuals trespassing on the state's preserve. Such dissonant understandings of empire were bound to clash, quite apart from the expectations brought by natives themselves.¹⁹

¹⁶ "Legislation under Lord Mayo," in W. W. Hunter, *Life of the Earl of Mayo* (London, 1875), vol. 2, 143–226. Even when the British intended to leave as much of the law of the colonized as unchanged as possible, the repugnancy principle (that nothing truly "repugnant" to the fundamental principles of English law could be left in operation) worked to expand the sphere of British law, especially in criminal law. Today the law – and particularly the criminal law – of nearly all the states that once were part of the British Empire remains based on colonial law.

¹⁷ On the usefulness of criminal trials in understanding both British and imperial history, see Martin J. Wiener, "Murder and the Modern British Historian," *Albion* 36, 1 (Spring, 2004), 1–12.

¹⁸ For an excellent argument for the inevitably political character of criminal law, see Victoria F. Nourse, "Reconceptualizing Criminal Law Defenses," *University of Pennsylvania Law Review* 151 (2003), 1691–1746.

¹⁹ This study follows a call made by Foucault about power (even if he rarely followed it up himself): that historical analysis should be concerned not primarily with who possessed power but how power was *exercised* in day-to-day situations – the "*micro-physics*" of power.

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Some of the most crucial tests for colonial law were thus posed by instances of homicide when one of the parties was “European” and the other was “native.” Despite Lord Mansfield’s dictum, often repeated by jurists thereafter, power differentials ensured that when natives and Britons assaulted one another, the law in practice was rarely the same for both. Yet a growing part of the legitimacy of British rule, in the eyes of subject peoples as well as of those back home, depended on such equality. As a result, such cases put the administrators of law in the colonies and back in Whitehall under great pressure, dividing the white ruling class while affording an opportunity for spokesmen for subject peoples to deploy British colonial ideology in criticism of British rule.

Homicide is perhaps the most attention-getting of crimes, and when it was perpetrated across the lines of race it was potentially inflammatory. Not that interpersonal violence was rare in the Empire; if anything, white-on-“colored” violence was ingrained in the everyday life of Empire. While state violence, particularly dramatic episodes like Governor Eyre’s suppression of a rebellion in Jamaica in 1865, or the 1919 Amritsar massacre in India, has been much studied, everyday private violence, although far greater in total than that perpetrated by the state, has received far less attention. Recently, Jock McCulloch, on East Africa, and Elizabeth Collingham, on India, have shown how close violence was to the surface of imperial life. “Prestige,” Collingham has observed, “manufactured at the level of face-to-face interaction, relied heavily on a deferential response on the part of Indians. . . . British sensitivity to the slightest hint of a challenge to their dignity or authority meant that they frequently met any act which suggested insolence with physical violence.”²⁰ Beating of servants and employees, in particular, was frequent and unremarkable, usually only reaching the courts (and not always even then) if a victim died. This book will examine what happened when such cases did reach the courts.

The cases we will explore took place between the 1870s and the mid-1930s, an era in which the Empire was at its height, preoccupied neither with establishing itself nor with preparing for its end. It was a period in

²⁰ *Imperial Bodies: The Physical Experience of the Raj, c. 1800–1947* (Oxford, 2001), p. 142; see also McCulloch, “Empire and Violence, 1900–1939,” in *Gender and Empire*, ed. Philippa Levine (Oxford, 2004). Even symbolic physical threats to European domination were worrisome; thus Lord Minto was pressed in 1910 to prohibit interracial showings of the “cinematographs” of a prize fight in which a Negro contender defeated his white opponent [Lawley (Governor of Madras) to Minto, 13 July 1910, cited in Stephen E. Koss, *John Morley at the India Office, 1905–1910* (New Haven, 1969), p. 126n].

which it was least shaped by external forces and most “itself,” so to speak. Moreover, it was a time in which the ideal of “the rule of law” and its closeness to notions of “Englishness” and “Britishness” was strongest; A. V. Dicey’s influential book on the constitution, published in 1885, made the term “the rule of law” into a byword, and identified it with the English way of life.²¹ One of its essential characteristics, he declared, was equality before the law. “We mean,” he wrote, “when we speak of the ‘rule of law’ as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit.”²² Pushed indeed, as we will see, to a limit that was to press against the structures of imperial rule.

In this study we will move between five regions and, within them, seven colonies, ranging across the Empire and the world. The Empire, as we will see, was an extremely diverse and complicated entity, embracing a vast range of physical locales and inhabitants; even its forms of government varied greatly. Yet it had crucial common elements. All its parts were subject, if in different degrees, to the same British Government, acting through the Colonial Office and India Office, and the officials appointed by that Government – officials who were frequently moved from colony to colony (or in India from province to province) not only to give them varied experience but to prevent them from developing too-strong local loyalties and perspectives. Another element of commonality within diversity was the way the racial divide between “white” and “colored” subjects recurred everywhere. Further, nearly everywhere this racial divide was reinforced by the economic divide between laborers or servants and employers. Nearly all parts of the Empire followed essentially the same criminal law, based on England’s. The Indian Penal Code of 1861, which became the basis for the criminal law not only of the Raj but of Burma, Singapore, Mauritius, and most African colonies, was a systematization and adaptation to Indian conditions of English criminal law,

²¹ As he had put it in 1875: “English law is the most original creation of the English genius” [A. V. Dicey, “Digby on the History of English Law,” *Nation*, 21 (9 Dec. 1875), 373–374].

²² Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, 1885), pp. 177–178.

and criminal law in other British colonies differed little from it. The administrators of the legal system tried as far as possible to maintain its uniformity across the Empire. In the 1879 case of *Trimble v. Hill*, the Judicial Committee of the Privy Council, the highest court of appeal, declared it to be “of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same.”²³ Thus, in criminal trials throughout the Empire we can see common issues played out, with similar rules and procedures, under varying conditions of place and time.

III. THE COURTROOM AS ARENA

The actors that first spring to our minds are the nonwhite, usually indigenous, population of the Empire. Yet for our story they are for the most part secondary players. Occasionally, one or more of them were in the dock; more often, they were remembered victims, or else entered the courtroom as witnesses, “assessors” (advising Judges in place of jurors), spectators, and press reporters. Their spheres of action were more limited than that of whites, their voices usually less audible. Nonetheless, they too often had decided views and pursued their own strategies. Their presence, real or in the minds of the white actors, was always a factor.

The leading set of actors in interracial homicide trials were the usual offenders, non-official Europeans. Whites who were not part of Government – settlers, businessmen, clerks, and ordinary soldiers and sailors – varied by class but felt a common bond racially, against all nonwhites as subject peoples. Left to themselves, they would have placed racial distinctions in the formal law. However, wherever they retained final authority, officials, bound at least in principle to look out for the rights and welfare of all the subjects of the Crown, prevented this. As Lord Kimberley, Secretary of State for the Colonies in Gladstone’s second ministry, remarked to Lord Ripon, Gladstone’s Viceroy for India, the “dislike of anything which tends to the treatment of natives on an equal footing with European British subjects,” which Ripon had complained of in Anglo-Indians, was true of “colonists generally throughout the British Empire.” “The chief difficulty of a Colonial Minister,” he reflected, “is to avoid a collision between the Liberal policy towards colored races which is now on the whole firmly established at home as the only just policy, and

²³ Cited in Janet McLean, “From Empire to Globalization: The New Zealand Experience,” *Indiana Journal of Global Legal Studies* 11, 1 (Winter 2004), 164.

the narrow-minded views of most of the colonial communities.”²⁴ Such collisions were not easy to avoid. Non-officials were almost everywhere strong believers in the notion of the “rights of freeborn Englishmen,” carried as a personal entitlement throughout the world, including the right to trial by a jury of one’s peers – that is, other white men.²⁵ Officials, in the Empire and particularly in the Home Government, were aware that this was not in fact the law. However similar to England’s the laws of the Empire were, they ultimately rested first on royal prerogative and then on parliamentary sovereignty, and such unwritten rights as trial by jury applied only where and to the degree that they were embodied in statute.²⁶ Often settlers from Britain gained such an embodiment; sometimes not. Thus, criminal trials, especially between Britons and nonwhite others, evoked deep clashes of ideology about “Britishness” and the rights of Britons.²⁷ Even more, however, this fundamental ideological difference

²⁴ Quoted in *Liberal by Principle: The Politics of John Wodehouse, First Earl of Kimberley*, ed. John Powell (London, 1996), p. 164.

²⁵ The *locus classicus* of this settler claim in formal law was a famous opinion given in 1720 by Richard West, recently appointed counsel to the Board of Trade and Plantations in London. West advised that the common law of England was also the common law of the plantations. “Let an Englishman go where he will,” he declared, “he carries as much of law and liberty with him as the nature of things will bear” [Anonymous (1722) 2 P Wms 75; 24 ER 646]. Two years later, in an appeal from Barbados, the Privy Council officially endorsed the principle that English people who went to settle in the overseas dominions of the Crown took their laws with them.

²⁶ “Mid-nineteenth-century constitutional writers,” Miles Taylor has noted, “poured cold water on the idea that emigrating Britons took their freedoms with them. . . . George Cornwall Lewis and Alpheus Todd, amongst others, pointed out that English case law, as long ago as the 1780s, had settled that Englishmen only enjoyed those rights which existed at the time of their departure, and were they to settle in conquered territories, such as parts of the formerly French, Spanish and Dutch Caribbean, or the Cape, then they were subject to local laws, until if and when the British parliament chose to amend them” [“Colonial Representation at Westminster, c. 1800–1865,” in *Parliaments, Nations and Identities in Britain and Ireland, 1660–1850*, ed. Julian Hoppit (Manchester, 2003), p. 208].

²⁷ Alan Lester has observed that British settlers in different colonies “co-constructed a particular, trans-imperial discourse of colonialism. This discourse was immediately informed by the imperatives of rationalizing projects of capitalist expansion and defending personal security (itself threatened precisely because of commercial expansion on to indigenous lands). But settler discourse was also built around the need to defend settler colonial practices from a critique elaborated by British humanitarians” – a critique, I would add, often accepted by governing officials. In response to this critique, Lester continued, settlers were “forced to define the ways in which they, as respectable Britons, were distinguished from colonized others, and to specify the forms of behavior that such Britons could legitimately adopt in relation to those others.” Thus, the struggles between settlers and humanitarians were in part “struggles over the nature of Britishness itself” [“British Settler Discourse and the Circuits of Empire,” *History*