# Introduction

> 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.
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> *Proclamation, by the Queen in Council, to the Princes, Chiefs and People of India*, 1858

> The talk of clemency comes with ill grace, and comes upon a public that asks for no clemency, no mercy, but asks for simple justice. If there has been a plot really to wage war against the King or to overthrow the Government, let those who are found guilty by a properly constituted court be hanged.
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> Mohandas Karamchand Gandhi, "The Viceroy's Speech: Inquiry Committee," *Young India*, 10 September 1919

Between January and February 1858, Bahadur Shah Zafar II, the last Mughal emperor, was placed on trial for his role as the leader of the most consequential uprising in the British Empire since the American Revolution. Importantly, he was not charged for these crimes as a Mughal sovereign, but instead was accused of mutiny and treason as a subject and pensioner of the East India Company. In an act of pointed humiliation, the courtroom was set up in his former palace, the seat from where the Uprising was said to have been directed. Described by the legal scholar A.G. Noorani as "the first victor's trial in modern

history," the event would see an elderly man in waning health face a court of questionable legitimacy, and in a language in which he was not fluent.[1] Though the emperor maintained his innocence, the European Military Commission found him guilty on all counts. As his surrender to British authorities had been contingent on the guarantee of his life, the court banished him to Rangoon to live out the rest of his days in exile.

Within months of this trial, the British parliament in London had formally recognized India as a crown colony. The transfer of power was publicly announced by Queen Victoria through a royal proclamation, delivered to the people from cities and towns across the subcontinent. The charter laid out the new terms governing the relationship between sovereign and subject under colonial rule. Among the promises of economic prosperity, equality under the law, and the protection of local customs and traditions, the proclamation contained an offer. An amnesty was presented to rebels on the condition of their surrender. Forgiveness would be available to all but a small group of rebel leaders. After a display of power "in the field," this new configuration of imperial sovereignty would be established through an act of mercy.[2]

Over sixty years later, Mohandas Karamchand Gandhi led the Noncooperation Movement (NCM). This began in September 1920 and quickly became India's largest organized mass political effort to bring about *swaraj* or self-rule. In echoes of the Uprising of 1857, the movement started with a call for Indian soldiers to withdraw from the British army. What followed was a strictly nonviolent program of boycotts which targeted schools, lawcourts, legislatures, and finally taxes. Here Gandhi was building on a reading of colonial power that he first articulated in *Hind Swaraj* in 1909. One of the most novel aspects of this thesis revolved around the question of consent. Unlike both liberal and revolutionary nationalists, who to different degrees critiqued the colonial state for its refusal to ground its authority in the popular will, Gandhi suggested that Indians had in fact already consented to colonialism. This was not a consent performed via the

[1] A.G. Noorani, *Indian Political Trials, 1775–1947* (New Delhi: Oxford University Press, 2005), 77.
[2] "Queen Victoria's Proclamation," in *Indian Constitutional Documents, 1773–1915*, ed. Panchanandas Mukherji (Calcutta: Thacker Spink and Co., 1915), 355–358.

vote, but through everyday practices. Whether it be in commerce, law, politics, or education, Gandhi argued that, while Indians continued to be the patrons of colonial institutions in their daily lives, they conferred colonial rule legitimacy.[3] In a somewhat counter-intuitive move, by making colonial subjects complicit in their own subjugation, Gandhi's reading of colonial authority proved incredibly empowering. The implication was that Indians need no longer petition the colonial government for constitutional reform. Nor should they target the institutions of colonial power through acts of revolutionary violence. The agency to end empire was reimagined as a resource already available from within, something that could be activated through personal sacrifices and a disciplined program of nonviolent withdrawal. As the argument ran, the British remained in India only because Indians kept them there, and with full nonparticipation, colonial rule would collapse in a year.

Gandhi's call to arms electrified anticolonial sentiment across India and inspired noncooperators to flood colonial prisons. For many, the act of jail-going became a moment of original liberation. As the future deputy prime minister C. Rajagopalachari would write from his prison cell in 1921, "Have I really become so free that Government has to lock me up if they wish to keep me? For the first time in my life I felt I was free, and had thrown off the foreign yoke."[4] While the movement ultimately failed, this period is generally recognized by historians as a turning point in the history of popular anticolonial nationalism, and a blow to the authority of the colonial state that the British Empire would never fully recover from.[5]

Myriad factors had led Gandhi to the conclusion that reform from within the existing constitutional order was no longer plausible. A major issue had been the infamous declaration of martial law in Punjab in 1919, passed in response to the outbreak of anticolonial protests across the province. In a coauthored report sent to the Indian National Congress examining the violence that ensued, Gandhi decried

[3] M.K. Gandhi, *Hind Swaraj and Other Writings*, ed. Anthony J. Parel (Cambridge: University of Cambridge Press, 2009).
[4] Chakravarti Rajagopalachari, *Jail Diary: Being Notes Made by Him in Vellore Jail from December 1921 to March 1922* (Madras: Swarajya, 1922), 3.
[5] David Hardiman, *Noncooperation in India: Nonviolent Strategy and Protest, 1920–22* (Oxford: Oxford University Press, 2021).

the indiscriminate use of flogging, the humiliating crawling orders, and the large number of severe sentences passed in hastily established martial law courts. The most grievous sin though had been the terrible violence of the Jallianwala Bagh massacre which had left almost 400 unarmed protestors dead and around 1,200 more injured.[6] In the report's words, this was a "calculated piece of inhumanity ... unparalleled for its ferocity in the history of modern British administration."[7]

Gandhi recognized better than most the role played by violence in sustaining empire. And yet during this period he had also begun to consistently warn his followers about another dangerous instrument of colonial power: the ensnaring promise of mercy. In a series of political cases connected to arrests in 1919, colonial judges had tempered their sentences as a gesture of goodwill to the accused. Gandhi understood these measures as strategies to restore amicable relations between the government and the people, and throatily denounced them. Whether in his private correspondence or in his public writings, he advised those accused of crimes to demand justice but refuse mercy.[8] When he wrote about the judges involved in these cases, he compared them to plunderers who first stole property and then decided to return a portion of it as an act of kindness.[9] Gandhi argued that Indians needed to recognize that colonial violence did not always take the shape of a sword.[10]

In March 1922, with the movement stuttering, Gandhi would find himself in a criminal court facing multiple charges of sedition. The experience of trial had been a demeaning one for the last Mughal emperor. The leader of the NCM, by contrast, positively welcomed the criminal charges brought against him. The accused explained that as an Indian citizen he had been duty-bound to commit these crimes, and was similarly compelled to plead guilty and accept his punishment.

[6] Kim A. Wagner, *Amritsar 1919: An Empire of Fear and the Making of a Massacre* (New Haven: Yale University Press, 2019).
[7] "Congress Report on the Punjab Disorders," 25 March 1920–June 1920, vol. 20, *Collected Works of Mahatma Gandhi* (hereafter *CWMG*) (Ahmedabad: Navajivan Trust, 1958–1984).
[8] See, for instance, "Durgadas Adwani," *Young India*, 3 December 1919, vol. 19, *CWMG*.
[9] "Unhappy Punjab," *Navajivan*, 7 September 1919, vol. 18, *CWMG*.
[10] "Dr Satyapal's Case," *Young India*, 3 September, 1919, vol. 18, *CWMG*.

If colonial rule attempted to coerce colonial subjects into promising their political allegiance to the Crown, bound through laws like the Indian Penal Code (IPC), this was summarily dismissed in his now famous denunciation of the concept of sedition. As Gandhi stated, "Affection cannot be manufactured or regulated by law."[11] For Gandhi, the citizen's prime obligation lay not in obeying the sovereign commands of the modern colonial state and its assembly of positive laws, but "in obedience to the higher law of our being, the voice of conscience." As he faced the colonial judge he declared, "I do not ask for mercy. I do not plead any extenuating act."[12] He pled guilty and asked, instead, for the strictest possible punishment. He was sentenced to six years imprisonment.

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In a colonial context marked by tremendous violence, it is easy to dismiss the promise of imperial mercy as hollow. However, the place of amnesty in the Queen's Proclamation had been no accident. Neither was its rejection by Gandhi an afterthought. The offer of mercy to rebels had rather been consciously organized to enfold a new class of subjects within an expanding imperial order in the aftermath of 1857, each individual bound to the sovereign through a tie of allegiance. It was only when colonial mercy was rejected that Indian nationalism began to express itself as fully unbound from the political and legal constraints of imperial subjecthood. However, if mercy proved pivotal to both the founding of the modern colonial state and the emergence of a new iteration of anticolonial nationalism, its significance has received scant attention from historians of colonial law and violence in South Asia. This book by contrast takes mercy much more seriously. While colonial rule was at all times dependent on extreme force to maintain its authority and punish those that transgressed its laws, it remained equally reliant on calculated exercises of mercy and leniency to preserve its thin but vital claims to legitimacy as a paternalist force. As this book argues, to understand the complex nature of colonial violence, we need to examine its constitutive relationship to discretion and colonial mercy.

[11] M.K Gandhi, "The Great Trial," in *The Law and the Lawyers*, ed. S.B. Kher (Ahmedabad: Navajivan Publishing House, 1962), 118.
[12] Francis Watson, *The Trial of Mr. Gandhi* (London: Macmillan and Co., 1969), 68.

By returning to the question of colonial power through the lens of mercy, I make two larger interventions in the legal histories of South Asia and the British Empire. First, *Trials of Sovereignty* studies colonial terror and mercy as related expressions of colonial sovereign power. In recent years, new histories of imperialism have effectively disturbed an earlier historiographical complacency regarding the role of violence in empire, while simultaneously challenging the still present imperial nostalgia that echoes through contemporary British public discourse. These studies of colonial law have largely focused on either exceptional episodes or practices of violence, or very clear examples in which white subjects were afforded racial privilege.[13] This has, I suggest, produced an overly straightforward reading of how "the rule of colonial difference" governed the majority of the law's violence in colonial India.[14] While the central role played by race has been underscored across this work, how law managed and deepened a secondary set of markers of difference has been comparatively obscured. Whether it be along lines of class, status, caste, religion, or gender, colonial officials and judges thought carefully about these social hierarchies, and developed a legal apparatus to ensure the violence of the state would be applied unevenly accordingly.[15] As this book argues, the decision to punish some colonial subjects with violence relied on the same logic

[13] There is now a large body of work on these questions, 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), 1–39; 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), 1218–1246; Kim A. Wagner, "'Calculated to Strike Terror': The Amritsar Massacre and the Spectacle Violence," *Past and Present*, 233 (2016), 185–225; Nasser Hussain, *A Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003). For examples of everyday violence, see Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010); Jordanna Bailkin, "The Boot and the Spleen: When was Murder Possible in British India?" *Comparative Studies in Society and History*, 48 (2006), 462–493; Martin Wiener, *An Empire on Trial: Race, Murder and Justice under British Rule, 1870–1935* (Cambridge: Cambridge University Press, 2008); Deana Heath, *Colonial Terror; Torture and State Violence in Colonial India* (Oxford: Oxford University Press, 2021).

[14] Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 14–34.

[15] Scholars of gender and personal law have been more attentive to these processes, demonstrating how colonial codification acted to enshrine conservative and elite interpretations of religious authority at the expense of more plural customary

which allowed others to be treated with greater degrees of leniency. When colonial violence is read in these terms, the complexities of politics of colonial difference appear with greater clarity. Violence did not simply separate the colonized from the colonizer, but also allowed lawmakers and judges to reproduce and police differences between communities in an effort to co-opt and placate social and political elites. At all stages, these decisions attempted to deepen the authority and bolster the legitimacy of this broader colonial political order. These complex calculations took place during periods of both crisis and emergency and through the administration of everyday justice, and help us better chart the complicated and often circumscribed nature of colonial state power.

Second, *Trials of Sovereignty* moves beyond approaches to violence and sovereignty that have exclusively focused on the ideas and practices of the colonial state. Instead this book studies the right to punish as a contested and unstable expression of sovereign power. As new intellectual histories of Indian political thought are demonstrating, the ideas of liberal imperialists were not uncritically consumed as they traveled to the colony. They were rather heavily debated, critiqued, and remade under the conditions of colonial rule. Over time, as the legitimacy of the state waned in the eyes of the governed, anticolonial thinkers offered coherent and compelling alternate political imaginaries. These political projects not only sought to displace the colonial government but also attempted to rethink the place of rights and justice, as well as the nature of sovereignty itself.[16] Rather than treating the history of state violence and the history of anticolonial political thought as separate fields of inquiry, this history of colonial punishment affords us an opportunity to productively bring this scholarship together. As this book shows, when representative institutions did not exist in meaningful ways, the criminal trial emerged as the most important political debating chamber in colonial

traditions. See, for instance, Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999).

[16] For important recent histories of South Asian political thought most relevant to this study, see C.A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012); Faisal Devji, *The Impossible Indian: Gandhi and the Temptation of Violence* (Cambridge, MA: Harvard University Press, 2012); Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton: Princeton University Press, 2021).

India. In these moments, as the state attempted to enforce its right to punish criminal wrongdoing, colonial subjects responded by effectively probing, testing, and over time rejecting the ideological foundations of colonial rule. This book therefore studies the decision to punish or pardon not only as key "strategies of rule" but also as a site of very serious colonial resistance.[17]

In studying the contested and unsettled nature of colonial sovereignty through the right to punish across this history, *Trials of Sovereignty* also offers the first legal history to explore how the early development of India's modern criminal justice system would be shaped by both the violence of 1857 and the subsequent emergence of an anticolonial political nation. This period represents a highly significant chapter in the history of colonial justice and provides important context for the postcolonial present. Though justice in India is now done in the name of a sovereign Indian people, the courts and codes assembled during this period continued to play a formative role in postcolonial criminal law long after British colonialism ended. They remain powerful reminders of the enduring legacies of colonial rule which continue to mark our contemporary world. This introduction will begin by describing this book's approach to terror, mercy, and sovereignty, before offering an overview of the book's chapters.

## The Politics of Terror

The relationship between terror, mercy, and criminal law was first thoroughly explored in Douglas Hay's classic study of England's eighteenth-century "Bloody Code." Hay argued that this system of criminal justice was interesting neither for the very large number of capital statutes on the books (over 200 at its peak) nor for the number of death sentences passed in courts.[18] The riddle was rather to understand why an ever-growing number of capitally punishable

[17] K.J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge: Cambridge University Press, 2003), 2.

[18] Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow (London: Verso, 2011), 17–64.

offenses, mostly relating to property crime, produced a fairly unchanging number of hangings. If the criminal law looked bloody, Hay explained that the criminal trial had remained shot through with discretion. It was the tactful deployment of these pockets of discretion that enabled private networks composed of the propertied classes to save most offenders from the gallows. In building a legal order around terror, the point was thus not to kill more convicts, but to increase the occasions in which subjects might stand fearfully at the foot of judges and jurors, only to be saved through the benevolent act of pardon. The drama of the trial and executive clemency therefore became an opportunity to reinforce "vertical chains of loyalty" between those who held power and those who did not.[19] The criminal law, ordered around the death sentence, helped to uphold the rule of property in an era in which the state lacked an established police force.

Though discretion would remain an important feature of English criminal law, by the early nineteenth century this legal order would collapse, to be replaced by the type of modern disciplinary carceral institutions that have been the focus of so much scholarly attention.[20] Following a wave of legal reforms in the 1830s which dramatically reduced the number of capital statutes, the figure of the condemned was now almost always a murderer.[21] As the "Bloody Code" was dismantled, the number of executions in turn drastically decreased.[22] This trend was found across Western Europe, as well as in other parts of the empire. Australia's proclivity for hangings, for instance, peaked in the 1830s before also beginning to steadily decline.[23]

The declining scale of state violence and its increasingly private performance was bound up in processes of state formation and much

[19] Ibid.

[20] Though the "golden age of discretion" has been recently shown to have lived on beyond the end of the bloody code in England, the decision-making authority of the judge remained substantively broader in colonial India. Phil Handler, "Judges and the Criminal Law in England, 1808–61," in *Judges and Judging in the History of the Common Law and Civil Law*, ed. Paul Brand and Joshua Getzler (Cambridge: Cambridge University Press, 2012).

[21] Phil Handler, "Forgery and the End of the 'Bloody Code' in Early Nineteenth-Century England," *The Historical Journal*, 48:3 (2005), 683–702.

[22] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People, 1770–1868* (Oxford: Oxford University Press, 1994), 617.

[23] Steven Anderson, *A History of Capital Punishment in the Australian Colonies, 1788 to 1900* (Cham: Palgrave Macmillan, 2020), 53.

wider concurrent transformations relating to political authority during this period.[24] The widening access to the ballot box for instance developed hand in hand with the changing nature of state violence. The "Great Reform Act" of 1832 increased the franchise to more than 650,000 property-owning men.[25] Within two years, gibbeting, the practice of hanging bodies in chains after execution, was scratched from the statute books. The more generous Second Reform Act of 1867 almost doubled the electorate, and in Robert Saunders' words ushered "in the age of mass politics" in Britain.[26] The next year capital punishment was made a completely private affair.[27] As the law increasingly derived its authority from the notion of popular consent and representative institutions, it demonstrated a diminished appetite for public violence.

In colonial India, the relationship between an expanding electorate and a diminishing level of state violence was fully inverted. In the colony, the restricted nature of the franchise developed alongside a sustained recourse to violence. While liberal imperialists of the early nineteenth century had been committed to rapidly transforming Indian society through a series of interventionist projects, the violence of 1857 instigated a shift toward "indirect rule." As Karuna Mantena has lucidly detailed, this ideological turn was embodied by a more conservative approach to reform and a more authoritarian mode of governance.[28] Under these conditions, the principle of elected representation was first introduced at the local level in 1882 through a highly restricted franchise which voted for rural district boards and municipal councils only. From this point, progress moved at a glacial pace. By the time of the final political reform during our period of

[24] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Macmillan, 1978); Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin, 1977).

[25] John A. Phillips and Charles Wetherell, "The Great Reform Act of 1832 and the Political Modernization of England," *The American Historical Review*, 100:2 (1995), 411–436.

[26] Albeit still remaining an all-male mass politics. See Robert Saunders, "The Politics of Reform and the Making of the Second Reform Act, 1848–1867," *The Historical Journal*, 50:3 (2007), 571.

[27] Gatrell, *The Hanging Tree*, 23.

[28] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Imperial Liberalism* (Princeton: Princeton University Press, 2010).