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Chapter One

From *Faujdari* to *Faujdari Adalat*: The Transition in Bengal

The issue of criminal justice, wrote Jonathan Duncan, British resident at Banaras, was both 'momentous and delicate', being 'so novel in this part of the country for the attention heretofore paid to it'.[1] Duncan was echoing the feeling of many British contemporaries that one of the numerous deficiencies of criminal justice in Indian polities was that there simply wasn't enough of it.[2] Gholam Husain, an avid chronicler of those changing times, had his own assessment of the novelty of a *faujdari* separated from its military associations and re-shaped as a sphere of criminal jurisdiction under the Company's dominance in Bengal.[3] The only office under the earlier Mughal administration which suggested itself as a similarly constricted sphere of authority was that of the *kotwal* who policed the towns. The faujdari now, wrote Gholam Husain, 'consisted of little else than a discharge of a Cutvaul office, that is, in fining and killing and hanging and maiming and confining people.'[4] It is evident that Husain regarded these as mean

[1] Jonathan Duncan, Resident at Banaras, 1787–94 (henceforth RB) to GG in C, 28 October 1788, Bengal Revenue Consultations (BRC) P/51/27, 28 November 1788, p. 490, IOL.

[2] Cf. GG Cornwallis' minute on justice, 3 December 1790, stating that neither the Mughal nor the Hindu administration had given adequate attention to criminal justice. BRC P/52/22, 3 December 1790, pp. 191–2. RB to GG in C, 28 October 1788, BRC P/51/27, 28 November 1788, regarding the Banaras Raj; W. Tennant, *Indian recreations*, II, second edition, London, 1804, p. 259 on Awadh; W.H. Tone, 'Illustrations of some institutions of the Mahratta people', *Asiatic Annual Register (1798–99)*, pp. 124–51, 139, reporting that the Marathas had no notion of civil or criminal jurisprudence.

[3] Saiyid Gholam Husain Khan, *Seir Mutaqherin*, trans. Nota Manus, 1789, reprint, Lahore, 1975. *Faujdari:* Military executive governance, which came to mean criminal justice under colonial rule. *Faujdar:* Military commander of a district under the Mughal administration.

[4] Ibid., vol. III, pp. 103, 80.

functions indeed when faujdari had once meant marching in military state to subdue 'overgrown' zamindars.[5] The institution of a sphere of criminal justice under a civilian magistracy, distinct, in theory at least, from the summary measures of military governorship is the first subject of enquiry in this book. The regulations of 1772 inaugurated a process by which the colonial state claimed exclusive rights to judicial and punitive authority as the prerogative of sovereignty. These rights were moreover, distinguished from fiscal claims which could be farmed out or dispersed over the chain of social authority through which revenue-tribute was collected.

The judicial 'reforms' of 1772, according to the Committee of Circuit, were intended

> to recur to the original principles and to give them that efficacy of which they were deprived by venal and arbitrary innovations . . . [6]

Both Hastings and Cornwallis claimed they were restoring the 'ancient constitution' in justice, merely introducing changes which would ensure its impartial and effective application.[7] The suggestion was that Mughal agencies of justice had decayed because of the laxity and venality of regional rulers, whose powers had been usurped by zamindars and farmers of revenue. Hastings focussed on the centralist aspects of Mughal order structured around the figure of the *faujdar*, when he touched on the theme of criminal justice. It was the faujdar, the representative of the *nazim*, he contended, not the local raja or zamindar to whom the people looked for justice and protection.[8] In contrast, his opponent Philip

[5] Cf. *Seir*, vol. III, pp. 175–7 for one such rousing description. Of course, the decline of the Mughal faujdar had preceded the Company's ascendancy, with the expansion in the power of the revenue farmers and the emergence of large zamindaris in many regional states.

[6] Committee of Circuit to Council at Fort William, 15 August 1772, in J.E. Colebrooke, *Supplement* to *A digest of the regulations and laws*, I, 1807, p. 8 (*Supplement*).

[7] Cf. Warren Hastings (WH) to J. Dupre arguing that the Company had merely renewed the laws and forms of the past, with only such variations as were necessary to make them effective, 8 October 1772, in G.R. Gleig, *Memoirs of the life of Warren Hastings*, I, 1841, p. 263. Governor and Council at Bengal to the Court of Directors (COD), 3 November 1772, Seventh report from the Committee of Secrecy on the state of the East India Company, 6 May 1773, *Reports from committees of the House of Commons*, vol. IV, 1772–3, p. 346.

[8] Hastings had discounted the idea put forward in the 'Sixth Report of the Committee of Secrecy, 1773' that the judge of the criminal court in the districts was the zamindar or raja. Minute of 7 December 1775, in G.W. Forrest, *Selections from letters, despatches and other state papers*, vol. II, 1890, pp. 454–5. Cf. also W. Firminger, *Introduction to the fifth report*, 1917, pp. xliii–xlv.

Francis had argued that the zamindars could be allowed to exercise magisterial authority.[9] The other aspect of the critique of judicial arrangements was that even the Mughal regime was after all a despotism. In the absence of a regular system of law it had arbitrarily interfered in decisions, so that justice 'during the Vigour of the ancient Constitution was liable to great Abuse and Oppression.'[10] Contemporary European views on the greater efficacy of fixed and immutable penalties, as against ancient regime practices of discretionary selection for punishment and 'cruel spectacles' were posed in India as a contrast between the arbitrary justice of the oriental despot and due process of law under the Company.[11] However, it was the laxity which indigenous rulers seemed to display in exercising their punitive rights, rather than the 'barbarity' with which they did so which drew the more strident criticism.[12] The Islamic law, as it was applied in the Company's criminal courts, was found wanting for a similar reason, for the constraints it seemed to place on the state's powers of prosecution and punishment.[13]

The Company's early regulations began to extend the punitive jurisdiction of the state against the punitive and restitutive claims

[9] For the views of Philip Francis, see Ranajit Guha, *A rule of property for Bengal*, 1963, reprint, 1982, pp. 111, 143, 151–2.

[10] Seventh report, 6 May 1773, *Reports from committees of the House of Commons*, vol. IV, 1772–3, p. 324.

[11] Thomas Law sketched out the goal for judicial reform in the following terms: 'the certainty of suffering for proved offences operates more effectually to prevent commission than cruel punishment. When, therefore, a system is found easily to discover and quickly to make example, I hope that humanity will not be shocked by staked spectacles writhing in agony if superior judgement shall resolve that partial torture does not promote general security.' Thomas Law, *A sketch of some late arrangements*, 1792, pp. vii–viii.

[12] This was specially so in the matter of punishment for homicide. Cf. J. Fisch, *Cheap lives*, for a very deft exposition of this theme.

[13] Hastings argued that government would have to intervene to ensure adequate punishment, because the Islamic law was 'founded on the most lenient principles and on an abhorrence of bloodshed.' Letter from WH, 10 July 1773, recorded on the progs of Council, 3 August 1773, *Supplement*, pp. 114–19.

of its subjects. The result was the emergence of a sharper distinction between criminal process for offences against 'public justice' and civil process to compensate for 'personal injury'. In fashioning these jurisdictions the Company also sought to distance itself from certain forms of moral and social regulation which had characterized the justice dispensed under pre-colonial regimes. Yet the new rulers would also draw upon some of the discretionary powers that they had castigated as a mark of despotic arbitrariness.

'Usurped' Prerogatives of Sovereignty?

The Mughal Order

Against these broad rhetorical flourishes with which indigenous regimes were both invoked and criticized, I have framed certain schematic questions about the circumstances in which the Company instituted its judicial arrangements. Authoritative answers to questions on pre-colonial theories of kingship and justice can come only from scholars of medieval history, but it was necessary to place the Company's critique in perspective. To what extent did the Mughal order, which the Company claimed to be restoring, rest upon a centralized exercise of justice and punishment?[14] To what extent were offences tried by the *sharia*, as interpreted and administered by *kazis* and *muftis*?[15] Did the farming out of judicial offices and the extensive use of fees and fines in the eighteenth century mean that the dispensation of justice rested on the rationale of revenue alone?

For the Mughal empire, public order consisted of keeping its own official and semiofficial agencies from ambitious forays outside their jurisdiction, and of keeping these agencies in place against the local rajas and zamindars.[16] The rituals of personal justice which the emperors dispensed as part of their daily routine, dramatized their rôle in keeping the various layers of the powerful to their proper limits. This was the protection which the emperor's justice gave to the weak, against the *zulm* of the mighty.[17] In institutional terms this meant the maintenance of overlapping administrative agencies with separate routes of information to the emperor.[18] But the empire also sought to sustain channels of communication with rural and urban notables, holding out honours, titles and promises of imperial support, in return for their identification with Mughal order and their assistance in revenue collection.[19]

The crucial executive and military unit for controlling the zamindars and policing the roads was the faujdar's jurisdiction, supplemented by *kilahdars* stationed in forts at strategic points.

[14] The role of the various non-official agencies through which the plaintiff sought redress, or which punished an offender for some breach of the social and moral code must be evaluated in the light of a body of work reassessing the extent to which Mughal authority rested on a centralized bureaucracy. Chetan Singh, 'Centre and periphery in the Mughal state: the case of seventeenth century Punjab', *MAS*, 22, 2 (1988), pp. 299–318; Frank Perlin, 'State formation reconsidered', part II, *MAS*, 19, 13 (1985), pp. 425–80; A. Wink, *Land and sovereignty in India*, 1986.

[15] *Sharia*: the canon law of Islam; *kazi*: Islamic judge, also public notary.

[16] See *Ruka'at-i-Alamgiri*, trans. J.H. Bilimoria, 1972, pp. 20, 57, 124, 289 for an expression of such ideas. It was in the same terms that the justice of quasi-independent Nazims was measured in Persian chronicles. Cf. A. Salam, trans., *Riyazu-s-Salatin by Ghulam Husain Salim*, 1902, pp. 276, 284.

[17] *Zulm*: oppression. Francois Bernier, *Travels in the Mughal Empire AD 1665–1668*, ed. A. Constable, 1968, pp. 263, 360. The *darbar* as tribunal of justice allowed a very direct address from plaintiff to emperor and was conducted on arrangements very different from the formal etiquette of the darbar where nobles assembled. Cf. R. Orme, *Historical fragments of the Mughal Empire*, 1782, reprint, 1972, pp. 273, 285. Hajji Mustafa, the translator of the *Seir*, remarked that nowhere else were Princes and Ministers 'so inclined to put up with the murmurs, the reproaches, and even the foul language of their disappointed suitors.' *Seir*, vol. III, 1975, p. 158, n. *Darbar*: hall of audience, giving audience.

[18] These included the several information agencies which were also expected to report any 'oppressive' conduct on the part of powerful officials: the *sawahnihnigars*, secret reporters, and the *waqi'anavis*, official recorders, in addition to which the emperor kept his own newsrunners and spies. Cf. Z. Siddiqi, 'The Intelligence Services under the Mughals', *Medieval India, a miscellany*, Aligarh Muslim University, 1972, pp. 53–60. The Diwani office provided a fiscal check on the executive/military domain, i.e. that which was manned by the *subahdar*, governor, *naib nazim*, deputy governor, *faujdar*, and the *kilahdar*, the keeper of forts.

[19] The *chaudhuri*, 'usually a member of a local warrior caste and dominant head of a stratified lineage', or the chaudhuri of the *sa'ir* revenues, drawn from some prominent merchant or banker of the town, undertook managerial responsibilities in revenue administration and rose to special status *vis-à-vis* their kinsmen or peers through imperial recognition. Cf. J.F. Richards, *Document forms for official orders of appointment in the Mughal Empire*, 1986, introduction, pp. 14–15. Also BRC P/5/52, 4 February 1789, pp. 283–5, for Ali Ibrahim Khan, the judge-magistrate of Banaras' description of the chaudharies of the markets as intermediaries between the state and the residents. *Sa'ir*: sayer, taxes other than land revenue, transit duties; *chaudhuri*: headman, of a village or of a merchant community.

The zamindars had to be kept in a state whereby they acknowledged imperial authority, paid their revenues, allowed the movement of treasure, and did not impose such heavy levies on trade and commerce as to deplete imperial revenues.[20] The principle on which the highways were kept safe was of enforcing liability through military force, from one level down to the other, from the faujdar and *thanadar* to the zamindar and his dependants. In theory, both were supposed to make good any loss if they could not produce the robbers.[21] Mannuci reported that the faujdar was held responsible for robberies on travellers during the day, but if the traveller was robbed at night it was ascribed to his own negligence.[22] In the cities too, the Mughal kotwal had a military contingent, but relied substantially on setting up a chain of interlocking securities in the *mohullas*, urban neighbourhoods, and on information-gathering from various occupational groups.[23]

Military-Executive Authority and Legal Points of Reference

Mughal order over the countryside provided very little in the way of a judicial reference point for punishing offences which approximated to rebellion or refractoriness.[24] Highway robbery

[20] 'The different degrees of cooperation or resistance among the local zamindars, or differences in terrain helped to determine the extent of territory assigned to a faujdar.' J.F. Richards, Introduction, *Document forms*, p. 16.

[21] Cf. Bond for the Position of Amin and Faujdar, *Document forms*, Nos 218b and 226b, for the zamindar, No. 220b. This provision was probably effective only if the owner was influential enough or could induce the faujdar to recover the amount from the zamindars. Cf. S.P. Sangar, *Crime and punishment in Mughal India*, 1967, p. 56. *Thanadar*: head of a police post.

[22] Cited in S.N. Sinha, *Subah of Allahabad under the Great Mughals*, 1974, p. 100. At night the traveller was expected to find himself at a *sarai*, where influential zamindars were supposed to arrange protection, or at a fort or a town, one of the defensible points from which thanadars and faujdars made forays into the countryside to enforce revenue payment, or to punish banditry. Perhaps daylight robbery was assessed as an indication that the faujdar had lost his authority over local zamindars. *Sarai*: resthouse, halting place.

[23] Cf. Akbar's 'Farman of high dignity containing necessary commands and prohibitions issued to Nazims' c. 1588, in M.F. Lokhandwala (trans.), *Mirat-i-Ahmadi: A Persian history of Gujarat, Ali Muhammad Khan*, Gaekwad's Oriental Series, 146, Baroda, 1965, pp. 144–5; *Document forms*, 224a. C.A. Bayly, *Rulers, townsmen and bazaars*, 1983. *Mohullas*: urban residential neighbourhoods.

[24] Mughal *sanads* direct the faujdar and the zamindar to punish bands of 'miscreants' who committed theft and highway robbery, without asking them

within the Mughal polity was akin to rebellion, and the two terms were often used together in chronicles.[25] However, the Mughals and their successors in the regional states made some attempt to reserve the performance of executions, in particular, those of the spectacular variety handed out to rebels, for themselves. Akbar instructed nazims to 'abstain from skinning, trampling under feet of an elephant and similar punishments meted out by great kings.'[26]

In urban centres the kazi's *kachcheri* provided a point of reference for invoking the sharia in the trial and punishment of offences.[27] The kazi had a special responsibility for the religious welfare of Muslim inhabitants. But he was also an imperial official in a very wide ranging sense, acting as a bridge between the sharia and the exigencies of administration.[28] But the degree to which the kazi was consulted depended on the significance of the case, and on the cooperation of executive authority, the nazim, faujdar, or kotwal. Zameeruddin Siddiqi cogently argues that if there was a head of the judicial administration in the province, it was the nazim rather than the kazi, for it was upto him to decide which cases he would transfer to the kazi and the kazi was, in general, expected to obey the orders of the nazim.[29]

to refer the case to any other authority for trial. *Document forms*, 218b, 220b, for faujdar and zamindar respectively. However there was some effort to prevent officers from inflicting capital punishment unless immediate retribution was necessary. They were to send prisoners deserving of death to the imperial court. Cf. Akbar's farman, c. 1588, *Mirat*, p. 140; also *Document forms*, 217a and 218b.

[25] 'In the reign of Bahadoor Shah, the zamindars of the eastern districts . . . rose in rebellion, refused payment of revenue, and began to follow the trade of robbers.' F. Curwen (transl.), *The Bulwuntnamah*, 1875, p. 1.

[26] *Mirat*, 1588, p. 141. Cf. *Document forms*, 217a and 218b specifically addressed to faujdars.

[27] *Kachcheri*: a place for public business, a court, an office.

[28] The kazi had the scholarly assistance of the mufti in consulting the sharia to find a ruling appropriate to the case, but the final decision rested with him. Z. Siddiqi, 'The institution of the *Qazi* under the Mughals', *Medieval India, a miscellany*, vol. I, pp. 240–59. Cf. also 'Manual of the duties of officers', dating to the early eighteenth century, which Jadunath Sarkar got from a Kayastha family of Patna district. This urges the mufti to read books on jurisprudence, and if the kazi gave a judgement opposed to all precedent, to advise him to consult a particular book. J. Sarkar, *Mughal administration*, 1920, p. 37.

[29] Z. Siddiqi, 'The institution of the Qazi'.

In the towns it was to the *kotwali chabutra* that people brought their complaints of theft, assault, and homicide.[30] In Orme's description: 'one wants assistance to take, another has taken a thief: some offering themselves for bondsmen; others called upon for witnesses . . . '[31] The degree to which the kotwal associated the kazi with the trial and punishment of prisoners probably varied with the political backing which the kazi could marshall, and with the legal issues at stake in the dispute.[32] But the kotwal exercised a primary judicial function insofar as he decided which of the parties brought before him were to be released and which to be sent to the kazi for trial.[33] Where assault or injury was linked to quarrels over marriage, inheritance, or property, the kazi's legal training would help to sort out such matters, particularly if the disputants were Muslims. Such cases were not divided along the lines of civil right and criminal offence but treated as issues of somewhat the same kind: the injured party or his heirs had to receive 'satisfaction' and the cause of the dispute had to be sorted out.

Mughal agencies could and did sometimes adopt a punitive approach, even when offences against property and person did not directly concern the revenue tribute or the maintenance of order. The authority of a well-entrenched Mughal *hakim* could also be

30 But the kotwal was also supposed to take his own measures for apprehending thieves, pickpockets and brawlers. 'At places of sale and purchase, at places of entertainment where spectators assemble, keep watchmen to seize the pickpockets and snatchers up of things and bring them to you for punishment.' 'Manual of the Duties of Officers' in J. Sarkar, *Mughal administration*, p. 95. *Kotwali chabutra*: police pavilion.

31 *Historical fragments*, 1974, p. 290.

32 The sanad of appointment for the kotwal said he was not to act at his own discretion in imprisoning men accused of peculation, or releasing them, but to carry out the written orders of the kazi. J. Sarkar, *Mughal administration*, p. 97. Cf. *Document forms*, 224a: 'He should implement the signed verdict of the judge (qazi) regarding the retention or release of persons imprisoned for crimes . . . '

33 In the 'Manual' cited by J. Sarkar, the kotwal was to examine the prisoners, and report the cases of those he considered innocent to his superior (the nazim?) and secure their release. The guilty could be fined and released, and if they were penniless their case was to be reported. A statement of those who deserved to be kept in prison was to be sent to the officers of the canon law (the kazi and mufti) and their signed orders were to be carried out. *Mughal administration*, pp. 93–4.

drawn into forms of community restitution and retribution.[34] However the wishes of the plaintiff, and the arrangements he concluded with the offender for restitution, were usually taken into account in determining the outcome. In general, the just kazi was described as one who encouraged contending parties to come to a compromise, not one who only decided responsibility and awarded punishment.[35] If the kazi tried an offence 'of blood' by the procedures of the sharia, he could conclude that the heirs of the victim were entitled to *diya*, blood-money, or to *kisas*, retaliation, i.e. to the life of the slayer. However, the heirs of the deceased could commute capital punishment to blood-money, or even pardon the slayer entirely. In such cases of personal injury, where the victim or his heirs signed a *razinamah* with the offender, Mughal officials, as also Hindu rulers, would not usually award capital punishment.[36] European travellers to India were often surprised to find that individual cases of homicide seldom received a death penalty from Indian rulers and chiefs,[37] unless their context was highway robbery or banditry which was seen as a challenge to sovereignty.[38] When a robbery did not take place with this degree of organized violence, the plaintiff and accused could come to an agreement about the restitution of stolen property, or compensation for it, and it was

34 Cf. Cynthia Herrup, 'Crime law and society, a review article', for a useful reminder that a simple contrast between a past age of community law and a modern age of state law can lose explanatory value. *Comparative studies in society and history*, 27, 1 (January 1985), pp. 159–70. *Hakim*: person in authority, the ruler.

35 Cf. *Seir*, II, p. 167, for the terms in which Gholam Husain praises a magistrate (here the kazi): 'his sole view was to cut the difference short, to the satisfaction of both parties; always contenting himself with his legal fees.'

36 *Razinamah*: deed of agreement.

37 Of the petty states of eighteenth-century Gujarat, Forbes noted: 'Capital punishments are seldom inflicted under these administrations; fines are more frequent and more acceptable to all parties; pardons can generally be purchased for the most atrocious crimes between man and man, where the prince and his rulers are not affected' J. Forbes, *Oriental memoirs*, vol. II, 1813, p. 25. RB to GG in C, 6 February 1788, BRC P/51/16, 1–29 February 1788, pp. 413–14, for Banaras; J. Low, Resident Lucknow, to Secy to Govt of India (GOI), 1 November 1838, J. Paton, Addnl Mss 41300, pp. 338–51, British Museum (BM).

38 Highway robbery was often the signal for disaffection; it implied a danger to the flow of tribute, and a potential accumulation of wealth for rebellious independence.

understood that the signing of a razinamah to that effect would secure a more lenient punishment from the hakim.[39]

Whereas such cases were treated as matters of personal injury in the first instance, there were spheres related to moral regulation in which Mughal rulers very confidently assumed a hortatory stance and a punitive prerogative.[40] The kazi was understood to have a special responsibility in such matters — to abolish wine shops, gambling, and prostitution in the city.[41] Aurangzeb instituted the *muhtasibs* as another layer of official agency to prosecute such offences. The muhtasibs were to prevent people from 'unlawful deeds especially drinking of wine, taking bhang, ale, other intoxicants, committing shameful deeds and adultery . . . '[42] Imperial justice and order in the towns was also supposed to sustain a fair market, protecting consumers from false weights and measures, and, in times of scarcity, preventing an artificial escalation of prices through hoarding.[43]

In stating the ideal for determining forms of punishment, Akbar said they should vary according to the rank and status of the offender:

> In short, punishment is the most important affair of sovereignty and hence it should be made with sedateness and understanding. . . .

[39] See chapter two.

[40] The nazim, the faujdar, the kotwal and even the zamindar who was given a *sanad* were all instructed to prevent the consumption of 'forbidden articles and substances'. *Document forms*, pp. 32, 36, 38, 43, 48.

[41] For executive assistance in such matters, the kazi would usually have to apply to the kotwal. The taxation of such sinful activities was out of the question. The via media which probably prevailed was to 'fine' them regularly and prevent them from too conspicuous a presence.

[42] *Mirat*, p. 222. The muhtasib was to enforce the Islamic code of morals, which included a ban on the purchase and sale of intoxicating drinks and drugs. He also had to prepare a daily schedule of rates in the market and standardize weights and measures within it. These functions overlapped with those of the kazi and the kotwal. M.Z. Siddiqi, 'The muhtasib under Aurangzeb', *Medieval India Quarterly*, p. 113. Cf. also J. Sarkar, *Mughal administration*, pp. 40, 45–6.

[43] Nawab Jafar Khan is praised in the *Riyazu-s-Salatin* for not allowing rich people to hoard stocks of grain, and making sure that poor people were not charged more than the current prices of foodgrains. *Riyaz*, pp. 280–1. Cf. D.L. Curly, 'Fair grain markets and Mughal famine policy in later eighteenth century Bengal, *Calcutta historical journal*, II (1977), pp. 1–26, for the Mughal strategy of local autarky and regulation of grain prices in central marketplaces in bad times.

> Further, punishment of every one should be befitting his condition . . . a severe glance at a man of lofty nature is equivalent to killing him, while a kick is of no avail to a man of low nature.[44]

Personal dishonour was considered a powerful weapon, particularly effective at the upper levels of society.[45] But the ruler still upheld his support for rank and social status, because the corporal forms of pain were usually reserved for the lower orders. The ideal of rule once stated, other factors could come into play. The diverse forms in which a ruler could punish offenders for the same crime, is a characteristic narrative in the Mughal chronicles, one meant to illustrate a determined approach, not a capricious exercise of power.[46] In the Banaras residency records we have an exposition from the pandits and Islamic law officers of the Ghazipur *adalat* on the norms for determining the sentence. Consulted by the British resident on the appropriate punishment for forgery, they began by saying that punishment rested with the discretion of the judge, and should be 'agreeable to the rank of the criminal'. They then went on to introduce other factors: the local norms for punishing the offence; whether it was a season of scarcity or plenty; whether debased coinage and forgeries were

[44] 'A farman of high dignity' c. 1588, *Mirat*, p. 142. *Tazir*, discretionary punishment for the reform of the offender, could take the form of whipping, imprisonment, banishment, or *tashir*, public disgrace, as in being paraded on a donkey with a blackened face.

[45] Its deployment signified the emperor's exemplary displeasure, whether against contumacy or violations of public morality. A high official could be dismissed from the sight of the emperor, and a zamindar defaulting on revenue payment subjected to various religious and status indignities, in addition to incarceration. Rituals of public disgrace were often used to punish violations of market morality. Dealers and weighmen found guilty of hoarding stocks of grain and charging more than the current prices of foodgrains were paraded through the city on asses. *Riyazu-s-Salatin*, pp. 280–1. On other occasions, however, men of rank would be fined but exempted from any ritual of public disgrace. Cf. Orme for a reference to the kotwal extracting money from 'Gentoos who have commerce with public women; Moors who are addicted to drinking spirituous liquor; all persons who hazard money in gaming' to exempt them from public disgrace. Selections from *Of the government and people of Indostan*, p. 36.

[46] As, for instance, when Ali Vardi Khan decided to chastise the *Banjaras*: 'some men were killed, others thrown into prison, many released'. J. Sarkar (trans.), *Bengal Nawabs*, Azad-al-Husaini Nau-bahar-i-Murshid Quli Khan, 1952, p. 17. *Banjaras*: armed bodies of grain and cattle dealers, who sometimes made raids on their own behalf or as mercenary auxiliaries.

very prevalent or whether people were unaccustomed to these.[47] The emperor Muhammad Shah, they recounted, to punish forgeries and debasement of coin, 'by advice of the Molavies confined some, flogged others, and cut off the hands of some and banished others.'[48]

This reference to the 'advice of the Molavies' introduces the other ideal by which Persian chronicles praised the justice of a Mughal ruler or a provincial nazim, namely his deference to the norms of the sharia. For offences in which the Islamic law prescribed a fixed penalty, kisas or *hadd*, the justice of the ruler was measured by his insistence on following this to the letter, irrespective of the rank of the parties.[49] However, as the Company's officials were to discover, the range of offences for which a specific punishment was fixed in Islamic law was very limited. Moreover, these specific punishments were often barred by criteria of evidence or by legal exceptions. The punishment actually handed out often depended on the discretion of the kazi or of the executive officer on the spot.

While Mughal order rested to a great extent on military governorship and executive discretion, consultation with the sharia was of considerable symbolic importance to its legitimacy. Under Aurangzeb, however, there was a discernible effort to extend the prosecutorial prerogative of the state, especially to vest official agencies with greater punitive responsibility, and to explore Islamic jurisprudence to provide reference points for this enterprise.

[47] Evidently a principle of 'buyer beware' operated if forgery and debased coinage were very prevalent. Report of P. Treves, April 1789, and report from the Ghazipur adalat, 1 December 1788, in G.N. Saletore, *Banaras affairs (1788–1810)*, vol. I, 1955, pp. 105–10.

[48] Ibid., p. 107.

[49] *Hadd:* fixed penalties for acts forbidden in the Koran; *kisas:* retaliation for killing or wounding. The *Riyaz* praises Murshid Quli Khan, the nazim of Bengal, for executing his own son in obedience to the sharia, to avenge the wrong done to another, thereby obtaining the title *Adalat Gastar*, strewer of justice. *Riyazu-s-Salatin*, pp. 258, 282. It cites another incident in which the nazim, despite the intercession of a faujdar, had a kotwal stoned to death for enticing away the daughter of a Mughal. Ibid., p. 284. The offence was evidently tried by the Islamic law relating to *zina*, prohibited sexual intercourse. One of Aurangzeb's chroniclers praises him for never having ordered an execution without reference to the sharia. But this evidently includes those cases in which the maulvis allowed capital sentence *siyasatan*, that is, at the ruler's discretion, 'for the general good'.

Aurangzeb's Farman of Justice

In contrast to Akbar's attempt to emphasize the mystical and all encompassing nature of the emperor's communion with God, Aurangzeb's political strategy, particularly after 1666, favoured a more clear-cut association with Muslim orthodox opinion, and an effort to stress the special status of Muslims under the Mughal imperium.[50] The importance he gave to the kazi in the administration was remarked on by contemporaries, not always with approval.[51] Aurangzeb's appointment of muhtasibs in 1659 could be characterized as an earlier gesture towards Islamic orthodoxy.[52] However M.Z. Siddiqi also suggests that the muhtasib came to extend his functions in the domain of market regulation.[53] Could one attribute this to the growing difficulty of maintaining Mughal control over markets and their revenues? In 1670 Aurangzeb ordered a compilation of extracts from authoritative works of the Hanafi school of jurisprudence. A syndicate of scholars was summoned to go through all the books on jurisprudence in the imperial library and the result was the *Fatawa-al-Alamgiriyya*, which according to Aurangzeb's admiring chronicler, rendered the world independent of all other works of jurisprudence.[54] The author of the *Maasir-I-Alamgir* (completed in 1710) attributes Aurangzeb's decision to his desire to make the general Muslim public act according to the legal decisions and precedents of the *ulama* of the Hanafi school.[55] But here again it seems reasonable to speculate

[50] Cf. M. Athar Ali, *The Mughal nobility under Aurangzeb*, 1970, pp. 98–9.

[51] Khafi Khan remarked that Aurangzeb had established the kazi so firmly in the affairs of the state that leading officers felt envious. Anees Jahan Syed (ed.), *Aurangzeb in Muntakhab al Lubab (Khafi Khan)*, 1977, p. 248. Cf. also *Riyazu-s-Salatin*, p. 284. The *wazir* complained that 'experienced and able officers of the state are deprived of all trust and confidence while full reliance is placed on hypocritical mystics and emptyheaded scholars.' *c.* 1676, cited in *The Mughal nobility under Aurangzeb*, p. 99. Gholam Husain who favoured a more universalistic attitude for the ruler said the power given to such men was exercised with so much avarice that it brought 'ruin to the posterity of the faithful'. *Seir*, II, pp. 180, 160.

[52] M.Z. Siddiqi, 'The muhtasib under Aurungzeb', pp. 113–19. J. Sarkar, *Mughal administration*, pp. 40, 45–6.

[53] 'The muhtasib under Aurangzeb', p. 117.

[54] Saqi Must'ad Khan, *Maasir-I-Alamgiri*, trans., Jadu Nath Sarkar, 1947, p. 316. *Encyclopaedia of Islam*, III, 1971.

[55] *Maasir-I-Alamgiri*, pp. 314–15. *Ulama*: those learned in Islamic law and religion.

that a wider administrative rationale may have begun to frame this measure. Significantly, the funds for this project were derived by discontinuing the charges incurred for recording the annals of the reign. Was Aurangzeb suggesting that this jurisprudential compilation would have a greater significance for the empire than the personal chronicles of an emperor?[56]

The compilation was translated from Arabic into Persian to make it more accessible, and came to form an authoritative source for guidance on interpreting Islamic law.[57] A very important farman issued by Aurangzeb in 1672, again indicates that the emperor was trying to extend the prosecutorial initiative of the state.[58] There were obvious advantages to having a body of case law to regularize this endeavour. Aurangzeb's farman stresses the importance of regularity in the disposal of cases.[59] It is also distinctive for the specificity with which offences are described, for its emphasis on extending the punitive responsibility of the state, and for using a judicial point of reference in doing so. The order did not insist that the kazi and mufti alone were to determine the punishment of every offender, but that 'what the Nazim of the Subah decides should be

[56] The terms in which the chief kazi of the Company's Nizamat Adalat interpreted Aurangzeb's decision for J.H. Harington, the chief judge, are suggestive: 'Credible persons have related . . . it occurred to the King that there were many books of history in the world, and that from the inclination which mankind have to read such books they are composed without order from kings and nobles; that the foundation of good government is justice . . .' Since the examples of law were dispersed, he went on, and cases of lesser weight not distinguished from the authoritative ones, some decisions repeated and others omitted, so Aurangzeb concluded that a new compilation of authoritative decisions was necessary. J.H. Harington, *Elementary analysis*, vol. I, pp. 240–1.

[57] Aurangzeb's reign saw a flourishing of schools for teaching Islamic jurisprudence. The chief kazi of the Company's Nizamat Adalat said that Aurangzeb was able to call upon legal expertise from Punjab, Shajahanabad, Akbarabad Allahabad, and the Deccan to compile the *Fatawa-al-Alamgiriyya*, *Elementary aspects*, I, p. 241. Cf. Abdul Halim Sharar, *Lucknow: The last phase of an oriental culture* (trans. and eds) E.S. Harcourt and Fakhir Hussain, 1975, p. 38, for the fame of the Firangi Mahal curriculum at Lucknow.

[58] *Mirat*, p. 248. This drive reveals another dimension to the importance which Aurangzeb tried to give to the kazis. In a letter of 1696 to his son Mohammad A'azam, he wrote, 'There is no more important work than "kaziship", because the people of God (whose dignity is great) are imprisoned or sentenced to death by the decision of a kazi.' *Ruka'at-i-Alamgiri*, p. 42.

[59] People were not to be kept in confinement for long periods without investigating their cases. *Mirat*, pp. 248, 253.

done in accord with the judges.'[60] Secondly, the farman encouraged the administration to assume powers of discretionary punishment where the evidence did not fulfil the legal requirements for one of the fixed penalties of hadd or kisas.[61]

This can be illustrated by the cases of theft and of homicide. In the case of theft, the value of the property stolen had to be above a certain amount to qualify it for the hadd penalty. Aurangzeb's farman stated that where the sum stolen was less than this prescribed amount, the thief was to be flogged and imprisoned 'till he repented'.[62] The farman orders that for repeated offences the thief could be permanently imprisoned or even put to death.[63] For the offence of strangling the offender was to be flogged and kept in prison till he repented, and

> If a person drowns another person in water or throws him into a well or pushes him down from a terrace and he dies. There is a legal proof for the same; the man should be flogged and imprisoned. He should be made to give blood money as sanctioned by religion.[64]

Such cases of homicide are those in which no weapon is used to kill the victim. According to the Hanafi school of jurisprudence favoured in Mughal India, capital punishment could be awarded only if the homicide involved a weapon usually associated with the shedding of blood, and whether a particular weapon met this requirement was the subject of much legal debate. By the Hanafi interpretation, homicide by drowning or strangling did not establish a liability to kisas, retaliation, and the heirs of the deceased were only entitled to diya, the fine of blood.[65] Aurangzeb's farman

[60] *Mirat*, p. 248.

[61] Aurangzeb did not outline any specific punishment for cases where hadd or kisas could not be awarded. His farman was more in the nature of a directive that the administration should assume a responsibility for awarding punishment in such cases, and consult the kazi and the mufti in doing so. Ibid.

[62] According to the *Hidaya* of al-Marghinani (died 1196), a twelfth century Arabic legal text, held in high esteem by Hanafi jurists of the Mughal period, a theft was defined as the taking of goods to the value of ten dirhams or more when in safe keeping. Lt. Col. Vans Kennedy, 'An Abstract of Muhammedan Law', *Journal of the Royal Asiatic Society* (*JRAS*), 2 (1835), pp. 81–162. Henceforth, 'Abstract of Muhammedan law'.

[63] *Mirat*, p. 248. Cf. also order No. XXXII, in S.M.A. Husain (ed.), *Kalimat-i-Taiyibat*, 1982, p. 37.

[64] *Mirat*, p. 248.

[65] 'Abstract of Muhammedan law', pp. 142–4.

indicates that in addition to the fine paid to the heirs, imperial officers should also exact some punishment, though it does not suggest capital punishment. The farman also orders the punishment of anyone who strangled people for their property, not only if his guilt was proved by sharia law, but also if he was 'notorious among the people for this misdeed', or 'if the Nazim of the Subah and the judges believed that the misdeed was committed by him'.[66]

The Ottoman emperors made far more elaborate provision for *kanun* relating to criminal justice than the Mughal emperors. However, it has been remarked that Aurangzeb's farman of 1672, though limited in scope, was the only parallel to the Ottoman kanun in the Muslim world.[67] In one sense Aurangzeb's effort to extend the judicial and punitive territory of the state would be taken up again in the Anglo-Muhammedan law as it evolved in the Company's criminal courts. Harington, judge and orientalist, based his influential sketch of Islamic criminal law chiefly on the *Hidaya* and the *Fatawa-al-Alamgiriyya*, the former for rules and principles, the latter to supplement illustrations through cases.[68]

Law and Justice under the Regional States: Breakdown and Judicial Venality?

By the eighteenth century the Mughal state was unable to maintain a balance between its own agencies on the one hand and local rural and urban notables on the other.[69] The economic resilience of

66 *Mirat*, Preface of Justice, p. 249.

67 Uriel Heyd, *Studies in old Ottoman criminal law*, 1973, p. 2. The Ottomans issued these kanuns both to allow non-sharia judges to exercise powers of punishment, and to keep local officials and fief holders in check. Ibid., pp. 2–3. *Kanun*: law.

68 *Elementary analysis*, vol. I, p. 241. The *Hidaya*, was brought to Hastings attention when he wanted a standard work for guidance in criminal justice. He had it translated from Arabic into Persian, thereby making it accessible to the Islamic law officers of the faujdari courts.

69 Some scholars have attributed this decline to the very dynamic of growth under the Mughal empire, which allowed regional contenders, both from the ranks of Mughal officials or from the ranks of local zamindars, to accumulate armies and resources. M. Alam, *The crisis of empire in Mughal North India*, 1986, p. 6; *Rulers, townsmen and bazaars*, pp. 11–12, 36–7, 72, 162–3, 267; and *Land and sovereignty in India*, pp. 32–4 for a similar argument. However R.P. Rana argues that zamindars prospered by appropriating Mughal revenues, not through an expansion in production. 'A dominant class in upheaval', *IESHR*, XXV, 4 (October–December 1987), pp. 395–410.

certain areas allowed some regional magnates to increase their own resources while still meeting the imperial demand. Elsewhere this contest threw productive tracts out of cultivation, and changes in bullion flows disrupted trade.[70] As the faujdari network on the highways weakened,[71] local zamindars and Mughal satraps positioned themselves as the dispensers of 'justice and protection', levying fees and fines in this capacity.[72] The uncertainty of resources from the centre may have impelled Mughal-appointed kazis and muftis to enhance their fees.[73] The other explanation for the escalation in fee-taking and farming of offices is that state-building in the seventeenth and eighteenth centuries demanded a steadier cash flow to sustain the employment of mercenary armies.[74]

The decay of Mughal agencies did not necessarily mean that no alternative arrangements for the dispensation of justice and the

70 Cf. *Historical fragments*, pp. 266–7.

71 Around 1719 it was reported that many of the faujdars on the royal highway from Delhi to Patna had abandoned their posts or were without contingents. Saiyid Abdullah Khan Qutb-ul-Mulk to Rajah Chhabela Ram, Subehdar of Allahabad, c. August 1719, in Satish Chandra (ed.), *Balmukund Nama*, 1975, p. 27.

72 Zamindars began to establish rival markets under their own protection and to levy fees and fines for arbitrating in disputes. For Bengal, see P.B. Calkins, 'The formation of a regionally oriented ruling group in Bengal, 1700–40', *Journal of Asian Studies* (*JAS*), 4 (August 1970), pp. 799–806; W. Firminger, *Introduction to fifth report*, pp. xxvi–xxviii; A. Chatterji, *Bengal in the reign of Aurangzib, 1658–1707*, 1967, pp. 255–6. Aurangzeb had tried to check officials from augmenting their local resources with fees and fines. Around 1661, he ordered that royal officials were not to levy charges for restoring a slave or a concubine to their owner, or for recovering a loan, *Mirat*, pp. 223, 256–7. In a farman of 1678 to the Diwan of Gujarat he pointed out that 'punishment with wealth' was not allowed by the sharia, *Mirat*, p. 261. The traditional Islamic law knew no fines except for diya, the fine of blood.

73 The kazi, the kotwal and the muhtasib had probably always taken some local fees for their various functions: the kotwal from heads of trades and professions and shopkeepers; the kazi for performing marriages, arbitrating between parties, putting his seal upon a document; the muhtasib for putting his seal upon weights and measures to certify their correctness. Referring to the muhtasib's fees, Gholam Husain said these were meant to be token in nature. *Seir*, III, 1975, p. 172. The compiler of the *Mirat* complained of illegal exactions since the early eighteenth century. The tax collector of the nazim interfered in fixing the prices of articles, and royal officers existed in name alone. *Mirat*, p. 343.

74 Subrahmaniam and Bayly, 'Portfolio capitalists and the political economy of early modern India', *IESHR*, XXV, 4 (October–December 1988), p. 423.

maintenance of order took shape. But the tussle for power could mean an intervening period of 'banditry' and insecurity.[75] It could also bring a decline in official patronage for families which had flourished in the service of the Mughal empire. For many of the Muslim literati and service gentry of small towns who depended upon Mughal order for the security of their land rights, the new-found presumption of the zamindars was highly offensive.[76] In addition, the idea that the kazi could withhold the performance of religious offices for non-payment of fees and that the farming system allowed entry to all kinds of 'new men', could also be interpreted as a symptom of disturbing times.[77] The author of the *Riyaz* recalled that in the reigns of Aurangzeb and in the Nizamat of Jafar Khan, only the nobility, the scholars, the learned and the excellent, who passed the examinations were appointed to the post of kazi. The office was never bestowed on 'the low and the illiterate'.[78] Such complaints found an echo in the Company's contention that the farmers of revenue and the zamindars had usurped the administration of justice from Mughal offices.

Where the regional ruler was himself a Muslim, who controlled cities with large Muslim populations, and depended on bodies of Muslim warriors, the offices of the kazi and mufti continued to receive endowments.[79] However, even under the Nawabs of Bengal

[75] As outlined for early eighteenth-century Golconda in J.F. Richards and V.N. Rao, 'Banditry in Mughal India', *IESHR*, XVII, 1 (January–March 1980), pp. 95–100.

[76] *Seir*, 1783 edition, II, p. 571. Cf., *Rulers, townsmen and bazaars*, for a discussion of this theme. *Jagirs*: assignment of land revenue.

[77] Gholam Husain expressed his outrage at the pressure put on the poor for the payment of fees at a death, circumcision or marriage. *Seir*, III, pp. 160, 166. In addition, aspects of the syncretic culture of the Muslim regional courts may have shocked the more orthodox among the Muslim elites. Regional rulers drew their administration into closer association with regional traditions of law or judicial arbitration, as for instance when a Shia mufti was appointed to the court of Awadh in 1847. J.R.I. Cole, *Roots of North Indian Shi'ism in Iran and Iraq*, 1988, pp. 209–13.

[78] *Riyazu-s-Salatin*, p. 284.

[79] J. Malcolm noted that the offices of the kazi and the mufti were still upheld in Bhopal, though they had declined in the Maratha states. *A memoir of central India*, 1823, pp. 543–4. In regimes where this point of connection with the Mughal past was not so important, the income and endowments of the kazis and muftis declined. Of the kazis in the Banaras Zamindari, Duncan remarked that they were in a forlorn condition, with no settled allowances, RB to GG in C, 12 September 1788, BRC P/51/25, 6 August 1788, p. 215.

and Awadh, kazis and muftis could lose their authority in urban administration to revenue farmers and other 'new men' favoured by the regime.[80] Under all the successor states, however, kazis and muftis retained their significance as local notables who could speak on behalf of the resident Muslim community, and as members of the respectable landholding section of society.[81] Even those chroniclers who lament the erosion of the kazi's standing and the decline in piety and learning of those appointed, did not disapprove of the tendency of the office or its endowments to become hereditary.[82] Local influence began to play an increased role in the determination of appointments.[83] The signatures of the mufti and of the kazi continued to appear with those of other worthies of the locality in reporting an occurence or verifying a statement of right or custom for the consideration of higher authority.[84] The authority of the kazi's seal still carried weight in

Cf. also W. Firminger, *Introduction to fifth report*, p. xliii; and *Rulers, townsmen and bazaars*.

[80] Cf. *Tafzibu'l Ghafilin*, trans. W. Hoey, 1885, 1974, pp. 55–6, for the author's charges that the Nawab's servants and favourites had eclipsed the adalats and that the kazi and mufti therefore elected to stay at home.

[81] V.T. Gune, *The judicial system of the Marathas*, 1953, p. 24. J. Malcolm, *Memoir*, I, 1832, p. 543. In Banaras Jonathan Duncan reported that the kazi and mufti of Banaras were still honoured with a *khilat* at the *Id* festival, paid from the customs receipts. RB to GG in C, 2 October 1789, BRC P/51/49, 21 October 1789, p. 173. *Khilat*: robe of honour.

[82] *Riyazu-s-Salatin*, p. 284. The Muslim literati, who filled the ranks of kazi, mufti and muhtasib, had been turning their endowments into hereditary zamindaris and extending their local influence around certain *qasbas*. Cf. *Rulers, townsmen and bazaars*. Also *Calendar of Oriental Records*, 1955, vol. I, no. 23, p. 19 for a sketch of one Abdur Razzaq, appointed kazi and muhtasib in Aurangzeb's reign, who entrenched himself in landholding and qasba influence. *Calendar of Persian Correspondence (CPC)*, vol. VII, 1785–7, p. 334 for a letter from the widow of kazi Wafayar Khan claiming that the *qazat* of Murshidabad had been hereditary in her family since the reign of Aurangzeb. *Qasba*: small town; *qazat*: post of kazi.

[83] M. Alam, *The crisis of empire*, p. 117 and n. V.T. Gune states that the kazi lost his place in the *diwan*, the pargana-level body of the ruler's officers in the Maratha administration, but found a place in the *gota*, the consultative body of landholders and holders of *watans*, hereditary offices. He continued to serve the judicial and religious needs of the Muslim community and received endowments from the government for this. *The judicial system of the Marathas*, p. 24.

[84] In an investigation into the homicide of a *fakir*, in Sindhia's domain, the *panchayat* consisted of a kazi on behalf of the Muslims, a chaudhury on behalf

the attestation of documents, such as deeds of sale and transfer of property.

My conjecture is that the position of the kazi, mufti and muhtasib in the administrative hierarchy was more vulnerable to these changes than that of the kotwal. The imperial kotwal could be replaced by an appointee of the regional ruler, or the local farmer of revenue, but the executive functions of the office remained necessary and he could appropriate many of the functions of market-regulation which used to be overseen by the kazi and the muhtasib. In addition, the kotwal had always had to negotiate with the *rais*, the merchants, and the heads of various trades for good order in the city.[85] In other words, the farming of office did not necessarily mean that the kotwal could collect fees with no accountability for his actions. The real slump in the status of his office may have come with the introduction of the British judge-magistrate.

There is still the quesion of whether the decline of centralized agency imposing fiscal and judicial checks meant an instability at the core of the regional states? Could regional rulers keep revenue farmers who were assembling military, fiscal and judicial offices in check? The picture is rather blurred. Some historians have argued that the ability of regional rulers to exercise a closer control over resources made it less necessary for them to sustain that elaborate network of overlapping agencies which characterized Mughal imperium. Certain regional states succeeded in building up their own bureaucracies;[86] but in others the handing over of bundles of rights,

of the tradesmen, and two chaudhuries on the part of the zamindars. J. Malcolm, *Memoir*, I, pp. 555–6. Cf. chapter two for instances from the Banaras Zamindari. *Fakir*: religious mendicant; *panchayat*: arbitrative assembly.

[85] *Rulers, townsmen and bazaars*. Men of influence maintained their own watchmen for their gated neighbourhoods. Cf. 'Translation of a report on the manner in which the night watch of the police is conducted in the city of Banaras' in *Selections from the Duncan Records*, Appendix I, pp. ciii–civ. The chaudhuries of the trades and professions had to give undertakings to the kotwal for the good behaviour of their 'constituency', but they were given considerable discretion in ensuring this. J. Malcolm, *Memoir*, I, pp. 555–7. Cf. also Buchanan-Hamilton in M. Martin (ed.), *Eastern India* (Bhagalpur), 1838, p. 282. *Rais*: influential residents.

[86] Stewart Gordon suggests that by 1740–50 a marked differentiation had taken place in the Peshwa's bureaucracy and the Peshwa's faujdars and kotwals were producing cases on every aspect. 'The slow conquest', *MAS*, 11, 1 (1977), p. 27. However the Maratha administration still had to proceed by negotiation

both fiscal and military-executive, to farmers of revenue meant that the institutional core of the ruler's authority was rather fragile.[87]

The Critique of Pre-colonial Rule

The transition to Company rule in Bengal has been dealt with in formidable depth.[88] Nevertheless the Company's critique of the existing forms of judicial and punitive authority is worth looking at for the different notions of rule which were being expounded. This critique was to have a great influence on nineteenth-century administrative histories of the Company, particularly those which highlighted its reforming impetus against its critics in Britain.[89] This critique also influenced more contemporary legal histories of India, which characterize the Company's judicial measures as the first steps in a liberal progression towards reason, humanity and natural justice.[90]

with the larger zamindars rather than by punitive measures. Ibid., p. 28. Gune also suggests that from the 1730s or so the Peshwa's government was using its administrative personnel to bring hereditary village officials under tighter control. *The judicial system of the Marathas*, p. 126. Cf. also F. Perlin, 'State formation reconsidered', pp. 453, 455.

[87] Cf. Philip Calkins, 'The formation of a regionally oriented ruling group'. Subrahmanyam and Bayly suggest that the volatile combination of farming rights in external trade, agrarian surplus and contracts for military service made indigenous regimes vulnerable to British private traders who could tap the same networks. 'Portfolio Capitalists', pp. 422–3. However rulers may have tried to curb this volatility by sustaining personal ties of allegiance as well. This would qualify current assumptions about the openness of the eighteenth century market for the 'perquisites of kingship' and reveal the persistence of a cultural ethos of *sifarish*, patronage, ramified by kinship and personal loyalty. Raja Chait Singh of Banaras resisted Hastings' demand that he reduce his personal military establishment and raise a body of horsemen disciplined in the European fashion. He realised that the latter could be taken over more easily by the Company than a force sustained by a complex network of alliances and retainership. Cf. S.N. Sanyal, *Banaras and the East India Company*, 1979, p. 58; and Francis Fowke to Council, 7 March 1776, Fowke papers, 32 Mss Eur, G.3, p. 22.

[88] I have relied heavily, among others, on A.M. Khan, *The transition in Bengal 1756–75*, 1969; N. Majumdar, *Justice and police in Bengal 1765–93*, 1960; W.K. Firminger (ed.), and with introduction, *The fifth report*, 1917; D.N. Bannerji, *Early administrative system of the East India Company in Bengal*, vol. I, 1765–74, 1943.

[89] J.W. Kaye, *The administration of the East India Company*, 1853.

[90] B.B. Misra argues that the changes introduced by the British sprang

Venality was the most prominent charge in the Company's critique of judicial arrangements, indicating its concern to seal off fiscal leakages attributed to 'unauthorized' fees and fines.[91] In the climate of the times, the charge also had overtones of anxiety about the way in which the Company's own employees were siphoning off revenues by levying fees and fines for settling disputes and recovering debts.[92] The argument was that judicial authority in the hands of those who lived off the profits of revenue collection would inevitably be converted to private gain. The scale of punishment would be calibrated to the profit motive and not to the public interest.[93] Heinous crimes such as murder, Company officials complained, were compromised by the 'purchase' of a pardon; on the

from principles of 'natural justice and equal citizenship'. *The central administration of the East India Company*, 1959, pp. 298, 339. 'British rule brought equality before the law', writes T.K. Banerjee in his very substantial legal history, 'the poorest peasant was entitled to all the solemn formalities of a judicial trial and the provisions for punishment made no difference between the highest functionary . . . and a sweeper.' *Background to Indian criminal law*, 1970, p. 290. 'The system of Muslim criminal justice', declared N.K. Sinha, 'does not certainly deserve to be extolled. When it was swept away the British were in a position to make their most valuable contribution to Indian administration — their system of criminal justice.' Preface to N. Majumdar, *Justice and police in Bengal*.

91 'I have made the revenue my principle object', wrote Hastings to Josias Dupre in connection with the regulations of 1772, 6 January 1773, in Gleig, *Memoirs*, I, p. 273. Shortfalls in collection were blamed on the 'arbitrary fees and fines' exacted by the zamindars, the nawab's revenue agents and the faujdari officers. The revenues also had to be protected against bandit raiding, which often assumed the dimensions of a competing claim over the revenue, and against the contributions levied by armed bands of mendicants, the *sannyasis* and the fakirs. A. Dow, *The history of Hindostan*, transl. from the Persian, new edition, vol. I, 1803, p. xxxii, for the latter. Peasants would withhold their payments, pleading losses from fakir incursions. A.M. Davies, *Life and times of Warren Hastings*, 1935, reprint, 1988, p. 104.

92 The regulations of 1772 tried to curb this in Bengal, but in the Banaras Zamindari and in Awadh, Company officials continued to dabble in revenue farming and to contract their authority for the recovery of debts. W. Bolts, *Considerations on India affairs*, 1772, p. 310. *CPC*, vol. VI, 1781–85, p. 21, for the activities of the commanders of British battalions in Awadh.

93 'A short view of the administration of Justice by the Country Government, collected from the proceedings of the Council of Control established in September 1770 at Moorshedabad', Orme Mss, India, vol. XVII, p. 4764; Sixth report of the Committee of Secrecy, 1773, in *Introduction to the fifth report*, p. xliii; J. Forbes, *Oriental Memoirs*, II, p. 25; GG's minute, 3 December 1790, BRC P/52/22, pp. 191–2; J. Malcolm, *Memoir*, I, pp. 537, 554.

other hand large fines could be levied for fornication and witchcraft, with the amount scaled to the resources of the offender.[94]

Here it is worth turning once again to Gholam Husain for the Company's charge that venality was the dominant motif in the judicial arrangements of eighteenth century Indian states. Englishmen, he complained, learnt of the institutions of the country from men who, to please their masters, never failed to show

> a deal of revenue matter in every institution and custom; and they are so firm in that opinion, that one would be inclined to believe, that the setting up of this and that institution, was for no other view but that of scraping together a few pence . . . [95]

Husain admitted that certain institutions of the Mughal past had been perverted entirely to fee-taking. But what he objected to was the obliteration of any rationale of public welfare from their history.[96] On fines for fornication for instance, he explained that the Muslim sovereigns of India disapproved of 'public women', and of fornication, and of Muslims who kept slave girls and concubines without converting them to Islam, so they punished people for such offences.[97] Evidence from the regional successsor states also makes it clear that complaints regarding witchcraft, adultery, and the enticing away of wives, were matters in which the hakim was supposed to associate his authority with the ideal of the general good.[98]

The contracting out of judicial office did make it difficult to idealize the dispensation of justice as an aspect of public welfare removed from fiscal considerations. When the Sikh chief Nihal Singh told one Sukh Dial to administer justice with mercy and religious honesty, the latter, who had bid thirteen lakhs for this office, folded his hands and said justice by contract made this difficult.[99] Even so one can make some distinction between a

94 Ibid.; also N. Majumdar, *Justice and police in Bengal*, p. 74.

95 *Seir*, II, p. 555.

96 By his interpretation, the public good hinged on issues such as sexual morality, public decorum in the marketplace, and a check on conspicuous display by those of lowly rank who should not aspire to magnificence. *Seir*, II, pp. 555–6, 565–6.

97 *Seir*, III, p. 556.

98 J. Malcolm, *Memoir*, II, pp. 53–4; R. Orme, Selections from *Of the government and people of Indostan*, p. 36; *Seir*, III, pp. 556, 565–6.

99 However it is also significant that the chief deferred payment for one year to allow him to operate without this pressure. Newsletter of 18 September

recognized judicial principle and that which was regarded as bribery and corruption. The scaling of a fine to the income of the offender, as in cases of witchcraft or fornication, had its own rationale of equity. Levying the fourth part of a debt or disputed property as the cost of approaching the hakim was accepted procedure. This might not of itself prejudice the case, though it probably encouraged a preference for cheaper agencies of arbitration. Orme declared that the value of the bribe determined the justice of the cause, but went on to say: 'This is so avowed a practice, that if a stranger should enquire, how much it would cost him to recover a just debt from a creditor who evaded a punishment, he would everywhere receive the same answer — the government will keep one-fourth, and give you the rest.'[100]

On the compromising of heinous crimes with payment, one has to make a distinction between fines appropriated by the ruler and the fine of blood payable to the heirs of the deceased in restitution for homicide. The latter was accepted practice, as the British were to discover, not only by Islamic law but by the general norms with which people sought justice for an offence 'of blood'.[101]

The issue of judicial venality also hinged on certain conceptual distinctions as to legitimate and illegitimate sources of tribute. British officials alleged that Indian rulers and zamindars merely mulcted bandit gangs and released them if their own revenues were

1813, in H.L.O. Garret and G.L. Chopra (eds), *Events at the court of Ranjit Singh, 1810–17*, 1935, reprint, 1970, p. 95.

100 Selections from *Of the government and people of Indostan*, p. 31. Richard Jenkins, the resident at Nagpur said that if public servants discovered the robbers, then one-fourth of the property recovered was taken by government, but if discovered by the efforts of the person robbed, he kept the whole. *Report on Nagpore*, 1827, p. 208.

101 *Oriental Memoirs*, II, p. 25. 'It is agreeable to the Law (i.e. the sharia) and a Maxim likewise among the Hindoos, that, in cases of Murder, if the perpetrators can find, means to satisfy the next heir of the Murdered man and obtain from him what is called a Razeenamah, no prosecution can, or ought to be carried on against him.' Magt Bakarganj, 5 January 1790, in reply to Cornwallis' questionnaire, BRC P/52/22, 3 December 1790, pp. 312–13. In some cases the patron of the deceased, or some corporate body to which he belonged, also had to be given 'satisfaction'. When a trader was murdered, Sardar Nihal Singh handed over the offenders' property to the traders of Amritsar, and also re-assured the victim's family that they would receive justice and compensation. 11 and 22 December 1810, *Events at the court of Ranjit Singh*, pp. 10, 14.

not affected, and that they even sheltered them for a share of plunder. Certainly, Balwant Singh, the zamindar of Banaras, Shuja-ud-daulah, the ruler of Awadh, and the revenue farmers becoming powerful in his territory, all recruited bands of hunters such as the Badhaks or armed camps of cattle-dealers such as the Banjaras, as an inexpensive way of supplementing their forces and claimed a share of their booty as tribute.[102] On other occasions, however, they would chastise them by raids and mulcts if they made expeditions on their own account, or if they supported some recalcitrant chief.[103] British officials criticized this flexible approach, saying it encouraged such bands to persist in predation, and that the state was violating its obligation to protect property right. In his 1786 report on the Banaras raj, Beaufoy said the subject's right to protection of life and property had been insecure under Balwant Singh because his government 'exerted its power in regulating rather than punishing the Robbers that infested the Domains and the Rajah himself was supposed to have kept a numerous Banditti in his pay.'[104] State-building in the Company's terms rested on much more regular and concentrated fiscal exactions, for instance, on the systematic levies of the subsidiary system instead of on these more sporadic expeditions.[105] The latter could too easily be turned against the ruler himself to resist tributary demands.

102 Balwant Singh also used such bands to harass those rulers whose presence in the Zamindari was unwelcome to him. *The Bulwuntnamah*, pp. 47, 51, 53. Subsequently however he drove the Badhaks out of his kingdom. Cf. A. Seton to H. Wellesley, 17 January 1803 complaining that the Gujjars and Mewatis of Northern Moradabad bribed the amils by a fourth part of plundered property and the Nawab Vizier was indifferent so long as his own revenues were unaffected. A. Seton, to H. Wellesely, 17 January 1801. Private letters from A. Seton,. H. Wellesley correspondence, Mss Eur F.178, p. 483; also R. Jenkins, *Report on Nagpore*, p. 270. 'There appears to be an established system of revenue derived from robbers which is connived in by all the Durbars throughout Hindustan', complained the Commissioner for the Sunderbans, Answers to Cornwallis' queries, 1789–90, BRC P/52/22, 3 December 1790.

103 For instance when Alivardi Khan ordered a punitive raid on the Banjaras, the faujdar of Ghazipur tried to protect them saying that they were traders of the neighbouring kingdom of Awadh. J. Sarkar, *Bengal Nawabs*, p. 16.

104 Home Misc 379.

105 Related to this was the Company's reliance on full-time standing brigades instead of on the more flexible recruitment of such 'predatory' foot auxiliaries. Raiding contingents of foresters and hunters may have also begun to lose their importance for larger battle situations by the end of the eighteenth century. However they continued to be important in local contests over

Reclaiming the Prerogatives of Sovereignty: The Reforms of 1772

The *faujdari adalats* established in each district by the regulations of 1772 were supposed to gather up the judicial powers 'usurped' by the zamindars and revenue farmers.[106] The centralization of judicial prerogative was also extended by prohibiting creditors from confining their debtors. Article 20 noted that it had been

> too much the practice for individuals to exercise a judicial authority over their debtors, a practice, which is not only in itself unlawful and oppressive, seeing a man thereby becomes a judge in his own cause, but which is also a direct infringement of the prerogative and powers of the regular Government.[107]

Items of revenue which suggested a link between judicial functions and fiscal claims were abolished. The regulations prohibited commissions on money recovered, fees on the decision of causes, and all 'heavy and arbitrary fines'.[108] So even as the Company

revenue tribute, and in zones bordering difficult hill and forest terrain, such as in the *terai* regions of Bihar, Awadh and the North Western Provinces. Cf. RB to GG in C, 22 May 1791, BRJ P/127/74, 15 July 1791, pp. 601–3.

[106] Article 11 prohibited revenue farmers from inflicting punishments or levying fines, but they could decide property cases upto the value of ten rupees. General regulations for the administration of justice, 21 August 1772, in Colebrooke, *Supplement. Faujdari adalats*: criminal courts.

[107] *Supplement*, p. 4. 'The usurped power of the officers of the collections, and of the creditors over the persons of their debtors, is abolished.' Committee of Circuit to the Council of Fort William, 15 August 1772, in *Supplement*, p. 8. Yet it was acceptable procedure, both in Islamic law and in common practice, for a powerful creditor to confine his debtor to make him pay. Ali Ibrahim Khan, the judge of the Banaras adalat, stated that Islamic law permitted the creditor to confine his debtor, provided he was fed and not maltreated. RB to GG in C, 10 June 1789, BRC P/51/39, 1 July 1789, p. 665. Cf. also Buchanan-Hamilton, in M. Martin (ed.), *The history, antiquities, topography and statistics of Eastern India*, II, 1838, 1976, p. 572, reporting that creditors were dissatisfied with this innovation because they considered it an encroachment on their prerogatives.

[108] Article 16. Article 31 forbade the forfeiture of property of those sentenced to capital punishment, without a reference to the Nizamat Adalat. The revenues derived from the *faujdari bazi jumma* (fines for offences such as fornication, adultery and abortion) were given up, Article 32. The Company also gave up revenue from the fees taken by kazis and muftis for the attestation of documents and performance of ceremonies, giving them a fixed monthly salary instead, Article 33, *Supplement*, pp. 4–5.

investigated every other possibility of tapping the fiscal resources of the province, it virtuously disclaimed any intention of 'making justice a source of profit'.[109] It was not as if the Company did not levy its own charges for the institution of a suit, particularly in the civil courts.[110] But it did assume some special fiscal responsibilities in the sphere of criminal justice, one mark of which was the institutional expense of the colonial *jailkhana*.[111]

Rule of Law and Judicial Discretion

One of the characteristic denunciations which Company officials levelled against Indian rulers was that they intervened in the judicial process in an arbitrary way. Yet judicial discretion came to form a crucial aspect of the way in which colonial criminal law braced civil pacification. This is most clearly represented in the tension between the premise of individual responsibility for a specific offence, and the deduction of criminal intention from membership of a particular community, or a suspect way of life. The reforms of 1772 included one significant foray into substantive law, in the form of Article 35, for punishing dacoits.[112] This article laid down that every dacoit

[109] Earlier too, the British supervisors sent to the districts in 1769 to explore ways of raising the revenue had, been instructed to check judicial venality: 'you should recommend the method of Arbitration to any other and inculcate strongly in the minds of the people that we are not desirous to augment our Revenues by such Impositions.' The Court of Directors had ordered the complete abolition of the fine as a penalty in the faujdari adalats. However the Committee of Circuit said they had retained it as an alternative to corporal punishment for men of 'caste and rank' found guilty of petty misdemeanours, Article 11, Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 11.

[110] A fee computed as a certain percentage of the value of a suit was taken in the civil courts. It was abolished in 1793 but reintroduced in 1795, and with it a fee on exhibits and the requirement of stamped paper. Firminger, *Fifth report*, pp. 63–4.

[111] *Jailkhana*: jailhouse. The colonial prison replaced forms of punishment which cast the prisoner back into society disgraced or mutilated. It symbolized a commitment to fixed measures of punishment and an undertaking to oversee it, even if this meant a regular expenditure on the maintenance of prisoners. There were no charges for initiating a trial in the criminal courts, and the government gave maintenance money to witnesses who were summoned. However, these provisions did not apply to a certain class of complaints characterized as 'vexatious' and 'frivolous'.

[112] This provision was formulated without assessing its compatibility with the Islamic law. Article 35 'does not appear to have been long, if it ever was,

> on conviction, shall be carried to the village to which he belongs; and be there executed, as a terror and example to others; and . . . the village of which he is an inhabitant, shall be fined . . . and . . . the family of the criminal shall become the slaves of the state; and be disposed of, for the general benefit and convenience of the people, according to the discretion of the Government.[113]

An address which Hastings made to the Council on 10 July 1773 suggests that the kazis and muftis of the faujdari adalats were not using Article 35 very enthusiastically.[114] The article prescribed capital punishment for dacoits, but

> the moulavies in the provincial courts refuse to pass sentence of death on decoits, *unless the robbery committed by them has been attended with murder*. They rest their opinion on the express law of the Koran, which is the infallible guide of their decisions.[115]

Some months later Hastings was complaining that the maulvis of the courts did not draw a distinction between the '*raiat* (peasant), who, impelled by strong necessity, in a single instance, invades the property of his neighbour and (on the other hand) the dacoit, robbers on the highway, and especially to such as make it their profession.'[116] But on what criteria, after all, did Hastings want the judge to distinguish between the one-time offender and the professional robber? Hastings was suggesting that dacoits suffer the penalties of article 35 on the basis of their public notoriety, rather than on proof of responsibility for a specific act of robbery and murder.[117] The

regularly enforced'. Yet Cornwallis cited it to argue that Parliament had allowed the Company to modify the Islamic law. Enclosure in letter from Committee of Revenue to GG and Supreme Council of Revenue, 20 October 1785, BRC P/50/61, 21 December 1785, No. 55. GG Cornwallis, minute, 3 December 1790, BRC P/52/22, 3 December 1790, paras 19–21, pp. 212–13.

[113] The regulation was justified as a necessary measure of rigour, 'since experience has proved every lenient and ordinary remedy to be ineffectual.' Article 35.

[114] Letter from WH, 10 July 1773, *Supplement*, pp. 114–19. In 1772 the Nizamat Adalat had been shifted from Murshidabad to Calcutta, and in 1773 Hastings had taken it under his own supervision. This brought him into contact with the Islamic law as administered by kazis and muftis and it was probably this which prompted the address.

[115] Ibid. Emphasis mine.

[116] Extract from progs of Governor and Council, 19 April 1774, *Supplement*, p. 122.

[117] Hastings argued that dacoit chiefs ought to be summarily condemned to death on the basis of establishing their identity; ibid.

Committee of Circuit conceded that the measure 'in some respects involves the innocent with the guilty', but retracted this admission with the argument that the dacoits of Bengal

> are not, like robbers in England, individuals driven to such desperate courses by sudden want: they are robbers by profession, and even by birth; they are formed into regular communities, and their families subsist by the spoils which they bring home to them; they are all, therefore, alike, criminal wretches, who have placed themselves in a state of declared war with our Government, and are therefore wholly excluded from every benefit of its laws.[118]

What was being suggested was that the judge should use a different and lesser standard of evidence to hang a man if he was notorious as a bandit. In addition, that the offender's family and community also be punished, on the presumption of collective criminality. Article 35 encapsulated the recurrent contradiction between, on the one hand, defining an equal and uniform liability to the law and, on the other, the pressure to retain areas of judicial discretion in the form of special criteria for conviction.

Officials of an Orientalist inclination, such as Hastings, had argued that it was the natural right of Indians to be ruled by the laws and customs with which they were familiar and that these laws were not antithetical to reason, humanity and natural justice.[119] In maintaining that the doctrines of Hinduism or Islam contained the same truths which made up the universal nature of man, Orientalist scholars provided arguments for the feasibility of establishing dominion on the basis of the laws and customs of the Indian people. 'Every instance that brings their real character (i.e. that of Indians)

[118] Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 13.

[119] Verelst, like Hastings, had opposed the introduction of English law for the inhabitants of Bengal. The natural rights of man had to be protected, but the means of doing so, had to relate to their habits of mind. *A view of the rise, progress and present state of the English Government in Bengal*, 1772, pp. 139–40. See A. Embree, *Charles Grant and British Rule in India*, 1962, pp. 148–9 for some contemporaries of Grant who held these views. Halhed, who translated a 'code' of Hindu law worked out by eleven Pandits, a project which had the patronage of Hastings, claimed that the laws, 'abound with maxims of general policy and justice, which no particularity of manners, or diversity of religious opinions can alter.' Halhed's 'Preface to a code of Gentoo laws', (the Manavadharmasastra), in P.J. Marshall (ed.), *The British discovery of Hinduism in the eighteenth century*, 1970, p. 181.

home to observation', wrote Hastings, 'will impress us with a more generous sense of feeling for their natural right, and teach us to estimate them by the measure of their own.'[120] But when certain presumptions of British justice, such as the right of habeas corpus, or individual liability to the law, had to be kept at bay or qualified, then cultural particularity was invoked with a different inflection, to stress that India stood on a lower rung of the civilizational ladder than England.[121] The Mughal precedent was cited to justify extraordinary measures to 'strike at the root of such disorders as the law will not reach.'[122] Interestingly, Hastings also argued that a lower standard of conviction for dacoity would extend, not erode the principle of due process by reducing the need to use torture to extract a confession. The difficulties of the Islamic law of evidence were such, he said, that guilt was often established on the basis of confession alone, 'and this has occurred in so many instances that I am not without a suspicion that it is often obtained by improper means.'[123]

It has to be remembered however that the standards of proof required by Islamic law were being lowered in a context in which the defendant did not have the protection of trial by jury or well-established laws of criminal procedure.[124] To permit a prisoner to be convicted on notoriety was to leave considerable discretion in

120 WH to Nathaniel Smith; ibid., p. 89.

121 'We confess', wrote the Committee of Circuit, referring to Article 35, 'that the means which we propose can in no wise be reconcilable to the spirit of our own constitution; but until that of Bengal shall attain the same perfection, no conclusion can be drawn from English law, that can be properly applied to the manners or state of this country.' Committee of Circuit to President and Council, 15 August 1772, *Supplement*, p. 13. Cf. also WH to Josias Dupre, 8 October 1772, expressing his apprehensions about the effect which judicial innovations in England might have for the Company's legal arrangements in India. Gleig, *Memoirs*, p. 263.

122 Committee of Circuit to Council at Fort William, 15 August 1772, *Supplement*, p. 13. A rigid observance of the law, Hastings stated, was a blessing in a well-regulated state, but in Bengal an extraordinary coercion was needed. WH, 10 July 1773, in *Supplement*, pp. 114–19.

123 Extract from progs of Governor in Council, 19 April 1774, *Supplement*, pp. 120–1. The use of torture in revenue and police process in India was described as a legacy of Oriental government, but it was also considered one of the peculiar characteristics of Indian crime. A specific category of offence, 'dacoity-with-torture', would be formulated for India.

124 Islamic laws of evidence began to be modified to make prosecution easier.

the hands of the Indian *darogha*, kazi and mufti of the adalat.[125] Yet judicial discretion in the hands of Indian agency was said to be always exercised with venality.[126] The issue of sentencing offenders to 'confinement at pleasure' exemplifies the way in which the principle of judicial discretion was simultaneously criticized and re-admitted in colonial law-making.

Imprisonment was not one of the fixed penalties prescribed by Islamic law.[127] But one of the forms of *tazir*, discretionary punishment, left to the judge was the confinement of the offender 'till repentance'. This meant in effect, imprisonment till the judge decided he could be released, a sentence summarized as 'confinement during pleasure'. However confinement was not only a punishment in itself but also a means of enforcing other forms of restitution — to make the prisoner pay blood-money, restore the goods he had stolen, or persuade his friends and associates to pay ransom for his release. Furthermore, the offender who escaped one of the fixed Islamic penalties on account of inadequate evidence, could be sentenced to confinement during pleasure on the basis of strong suspicion. Where the degree of suspicion was lower still, he could be confined till he found someone to stand surety for his good behaviour. If the prisoner was a stranger to the locality, or too notorious, or too poor to find a guarantor, then this could amount again to a sentence of 'confinement during pleasure'.[128] In their responses to the queries circulated by Governor-General Cornwallis in 1789–90, British magistrates criticized 'confinement during pleasure' as too lenient for offences such as dacoity, and as instrumental to corruption.[129] But they also criticized it as too severe a penalty in other cases, for it could mean a virtual life sentence.

125 Here *darogha* refers to the supervisor of the court, a position resembling that of the judge-magistrate.

126 See below.

127 Nor did the regulations of 1772 introduce specific terms of imprisonment for specific offences. They merely authorized Indian daroghas of the faujdari adalats to use 'corporal punishment, imprisonment, sentencing to the roads and fines'. Cf. Article 29.

128 Cf. *Justice and police in Bengal*, pp. 238–9, 300–1. Also, BRJ, P/127/73, 6 May 1791. The surveillance which British magistrates began to exercise over the faujdari courts had probably escalated the use of 'confinement during pleasure' because they discouraged fines.

129 Commr Bakarganj, and Magts, Birbhum and Bishanpur, BRC P/52/22, 3 December 1790, pp. 299–300, 328. Cf. also Thomas Law, *A sketch of some late arrangements*, p. x.

Here the reasoning was that such indefinite sentences removed productive hands from the community and saddled Government with the expense of maintaining prisoners.[130]

When the Indian daroghas of the adalats were dismissed in 1790 and replaced by British judges of the Courts of Circuit,[131] the cases of those sentenced to 'confinement during pleasure' were reviewed and many released for want of sufficient records.[132] Regulation 14 of 1797 prohibited the penalty of indefinite confinement. But a sense that the Bengal districts were being overwhelmed by banditry created a pressure in the opposite direction. Another provision for apprehending a person on suspicion of being a 'notorious robber', a 'vagrant' or a 'disorderly and ill-disposed' person, and confining him if he could not provide a security for his good behaviour, began to be extensively used.[133] This was supposed to be a preventive rather than punitive measure, but in effect it reintroduced 'confinement during pleasure' for cases in which guilt could not be conclusively proved.[134] Lord Moira would describe this procedure as 'an anomaly . . . wholly discordant to the legal practice of England, which knows no middle stage between conviction and acquittal.'[135]

130 Commr Bakarganj, pp. 324–5; Gaya magistrate, pp. 513–15 criticizing the too frequent use of perpetual imprisonment; ibid.

131 Cornwallis abolished the faujdari courts and substituted Courts of Circuit with two covenanted servants of Company as judges, assisted by a kazi and a mufti. Thereafter each case was tried at two levels, first by the kazi and the mufti according to the Islamic law, then by the British judges who had to consider whether the fatwa was 'in consonance to Natural Justice and at the same time in conformity to Mahomedan Law under the already proposed modifications'. If the judges disapproved, then the trial was to be referred to the Nizamat Adalat.

132 *Justice and police in Bengal*, p. 283. Cf. J. Fombelle, Magt Bhagalpur, to a police committee, 31 July 1799, attributing an increase in gang robbery to these releases: 'The refined principles of justice, upon which is founded the criminal jurisprudence of enlightened European nations, are ill-calculated for the degenerate race who are a scourge to the peaceful and the well-disposed.' In K.K. Datta (ed.), *Selections from the judicial records of the Bhagalpur district office*, 1968, pp. 249–62.

133 Reg 22, s 10, Bengal 1793; Reg 17, s 10, 1795, Banaras. (Regulation, section, clause: Reg, s, cl). Even if a person was acquitted of a specific charge, the Courts of Circuit and the Nizamat Adalat could require security for good behaviour if the trial had indicated that he was a notorious or dangerous character, and confine him for failure to provide it, Reg 53, s 2, cl 6, 1803.

134 See chapter five for a further discussion of this provision.

135 Judicial minute of 2 October 1815, *PP* 1819, vol. 13, p. 152. He attributed it to the prevalence of perjury and the difficulty of obtaining evidence.

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The judicial plan of 1772 evolved by Hastings and the Council had its critics within the Bengal establishment. In his brilliant exposition of the debates around a permanent settlement of revenue, Ranajit Guha explains that for Philip Francis it was not the law which would institute civil order, but the stabilization of the property rights of the zamindars and their co-operation in civil administration.[136] Thomas Law and Cornwallis also wanted to rehabilitate the zamindars as improving property owners, but without any feudal authority in the matter of criminal jurisdiction.[137] The themes of security for property, civil order and a 'spirit of industry' raised in discussions about a permanent setlement,[138] were invoked in criminal justice as well but with different tonalities and a different notion of agency.[139] Here civil order was conceived of as a routine state of pacification in which the state alone had the right to a legitimate exercise of violence. Rule of law had to communicate a promise of rights, but also one of subjection. Property would be secured against 'arbitrary' mulcts, but the dues of the state would have to be

136 *A rule of property for Bengal*, 1982, p. 152. For Francis, writes Sophia Weitzman, the zamindar's judicial powers were not usurped from the State, and to take them away was to violate the 'old constitution.' *Warren Hastings and Philip Francis*, 1929, p. 61.

137 *A rule of property*, pp. 111, 170–1, 176–7.

138 'An established idea of property', wrote Dow, 'is the source of all industry among individuals, and of course, the foundation of public prosperity.' Secure in their right of property the zamindars would invest capital in agriculture, choose higher-value crops, and add to their stock of labour. This, argued Francis, would also yield benefits in terms which could not be computed: 'The Employment of the poor and Idle and even of Women And Children; — the Habits of Industry which such employment creates; — the Encouragement to useful Population by furnishing it with Nourishment thro' the medium of Employment; — and the general Increase of Circulation. . .' 'Improvement by Europeans' (nd), sent to W. Ellis on 20 November 1776. This extract is from *A rule of property*, p. 105, n. 70.

139 For instance, Hastings said that by re-appointing faujdars to check banditry, cultivators could more easily pay Government's dues and a state of security would allow the improvement of the land. '(M)any villages, especially in Jessore and Mahmudshahee,' he pointed out, 'pay a regular *Malguzaree* to the chiefs of the Decoits'. Extract from progs of Governor in Council, 19 April 1774, *Supplement*, p. 125. *Malguzari*: land tax.

accepted as a fixed sum, not as an amount negotiable from *kist* to kist depending on the degree of resistance brought to revenue payment.[140] The criminal regulations of the Company were also supposed to encourage the spirit of industry but through the agency of the police and the penal regime. The 'ill-disposed and disorderly vagrant', or the 'robber by profession' would have to make reparation for his predatory existence on the industrious.[141]

The changes introduced to conceptions of sovereignty and property right had repercussions for the agencies of governance. The loose inter-dependency of official and non-official agencies which I have described for the Mughal and eighteenth century regimes gradually developed towards more bureaucratized hierarchies which centralized military and judicial functions and separated them from property relations. This will be illustrated through an exploration of the Company's changing relationship to the agency of the powerful revenue farmers of the Banaras Zamindari, culminating in 1807 with the move to deny them police powers. The shift from the designation of amil to that of *tehsildar*, from contractor in power or sharer in kingship to a bureaucratic office under the British collector, was important to the different standards of order being demanded.[142] These changes also altered the process of information-gathering which had hitherto associated local notables with the decision-making process. As C.A. Bayly puts it, the memorials and reports sent in on the basis of this consultation used to constitute 'a dialogue on rights and duties between subject and ruler', not just an administrative procedure;[143] and the terms of the dialogue were changing.

[140] *Kist*: revenue instalment. In Bengal this proposition applied pointedly to the zamindars and intermediary revenue farmers who were suspected of encouraging banditry to resist revenue payment. Cf. WH's letter of 10 July 1773, *Supplement*, pp. 114–15. In Bihar and Banaras, colonial 'due process' was directed against communities of small zamindars. Jonathan Duncan hoped that a permanent settlement would induce 'restless and intractable' Rajput communities and 'obstinate' Brahmins to stop from throwing the country into confusion. But confinement in the civil jail and criminal process in certain instances was the other line of action he adopted against recalcitrance in revenue payment. Cf. RB to GG in C, 25 November 1790, in *Banaras affairs (1788–1810)*, pp. 194–240, and chapter three.

[141] See chapters two and five.

[142] *Tehsildar*: revenue collector for the tehsil, a revenue unit.

[143] C.A. Bayly, 'Knowing the country: Empire and information in India', *MAS*, 27, 1 (1993), pp. 3–43.

The Company tapped the same pool of service literati which the Mughal state and its successors had drawn upon. But kazis and muftis were being reappointed to judicial office, not to uphold the sway of the sharia, but to associate the Company with Mughal symbols of sovereign authority and its punitive functions. Yet the Company also had to negotiate with the sense of social status and understanding about 'law' that Islamic law officers and pandits brought into the domain of colonial justice. More generally, the Company's legal procedures indicated an uneasy relationship with those functions of Mughal bureaucracy which had engaged with moral regulation, with everyday disputes centred on codes of sexual conduct and social behaviour.[144]

The institutionalization of a sphere of authority which had been left so much to discretionary exercise before, and regarded as somewhat subsidiary to the punishment of rebellious tributaries, meant the unprecedented generation of a body of records relating to criminal justice. The quarrels, disputes and injuries of even the most insignificant subjects of the Company could leave their mark on judicial records if they established a particular precedent in the law.[145] The chapter which follows uses the judicial records of the Banaras Zamindari to examine the opening phase of this sphere of civil authority slowly taking shape over the erosion of military retainership.

[144] See chapter four.

[145] In 1769 the Indian judges of the faujdari adalats in Bengal were directed to keep registers of all cases and the sentence. From 1772 such records were sent to the Nizamat Adalat through the President in Council. 'As the decrees of the Sudder (Nizamat) Adawlut in its first proceedings were likely to become a precedent for all future cases to which they might be applied', reported Hastings, 'I was at some Pains and employed much Time in revising them in the Presence of the Daroga.' Progs of Council of Revenue, 3 August 1773, in D.N. Bannerji, *Early administrative system*, vol. 1, pp. 456–7, 483–4, 493–4.