Preface

When T.B. Macaulay enthused about formulating a penal code for India, it was as a project which had interested 'reflecting and reading men' in Europe since Beccaria's treatise.[1] And yet he also said it was an enterprise 'which specially belongs to a government like that of India: to an enlightened and paternal despotism.'[2] Authoritarian government and its corollary, the absence of a developed and contentious Indian public opinion around questions of criminal law, was what Macaulay counted on to give him a free field for experimentation.[3] The existing body of criminal law which he wanted to sweep away has been described as an Anglo-Muhammadan construct,[4] assembled over the preceding half century from various modifications of the Islamic law, supplemented by Company regulations, and clarified by various 'constructions' and circular orders. Macaulay and the other law commissioners criticized this penal law for its variation from one Presidency to another, imprecision, and the inconvenience of working through references to Islamic law.[5] Yet these imperfections could also be

[1] Minute by T.B. Macaulay, 4 June 1835, Board's Collections (BC) F/4/1555, no. 63507, 1836–7, India Office Library and Records (IOL); also T.B. Macaulay to James Mill, 24 August 1835, in T. Pinney (ed.), *Letters of T.B. Macaulay*, III, 1976, pp. 146–7. Henceforth, all manuscript references pertain to the IOL, unless otherwise stated.

[2] 1833, *Hansard debates*, cited in Janaki Nair, *Women and law in Colonial India*, 1996, p. 29.

[3] J.F. Stephen praised the 'simple natural' style of legislation in the Indian Penal Code but admitted it could not be employed in England: 'It is useful only where the legislative body can afford to speak the mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion.' *A history of the criminal law of England*, III, 1883, p. 302.

[4] Cf. R.W. Wilson, *An introduction to the study of Anglo-Muhammedan law*, 1894.

[5] Indian law commissioners to Governor General in Council (GG in C), 14 October 1837, *Parliamentary papers (PP)*, 1837–8, vol. 41, pp. 466–8.

viewed as the historical trace of the points of retreat and accommodation in the formation of the colonial state.

Such reminders could hardly be flattering for a colonial authority now intent on projecting itself as a firm and impartial law-giving despotism. Yet, the draft penal code of 1837, which the law commissioners presented as the product of universal principles of jurisprudence, also had to build some discursive bridges with the religious and social norms of the subject population.[6] At the same time the story of early colonial law was never only that of an accommodation with existing legal norms. The Company's regulations had formalized substantial areas of executive and judicial discretion, and some of these provisions were also assimilated in the draft penal code, even though the law commissioners proclaimed the ideal of curtailing arbitrary authority.[7]

This book explores the penal law of early Company rule in India to understand the range of social transactions which shaped the process of colonial state-formation. Law-making is treated as a cultural enterprise in which the colonial state struggled to draw upon existing normative codes — of rule, rank, status and gender — even as it also re-shaped them to a different political economy with a more exclusive definition of sovereign right.

Earlier histories of British criminal law in India concentrated on its institutional structure. They also tended, by and large, to evaluate it as a modernizing endeavour, an aspect of the liberal reformist tendency of British rule. Criticism was usually reserved for aspects of the judicial structure considered expensive, time-consuming, and conducive to litigiousness. I argue that the legislative initiative cannot be traced only to various crises of colonial order, nor only to the inadequacy of particular laws, but that it also sprang from a constant reworking of the ambitions and perspectives of political authority and the forms in which this was to be communicated.

British definitions of criminal liability conceptualized a realm of juridical power, founded, in theory at least, on a notion of indivisible sovereignty and its claims over an equal abstract and universal legal subject. Integral to this notion of sovereign right was the contention that legitimate violence was the sole prerogative of

[6] Cf. Radhika Singha, *A despotism of law*, Ph.D., 1990, pp. 182–90 for a fuller treatment of this theme.

[7] Cf. chapter five.

the state. The criminal regulations of the Company most clearly and rapidly outlined this claim, orienting it to the civil pacification of India. While the actual disarming of Indian society could be cautious and halting,[8] the ambition behind the idea of civil authority indicates that the Company's state was not just another imperium laid over a segmented political formation.[9]

In the view of British magistrates and judges, the Islamic law, which they claimed to be using for criminal justice, concentrated too narrowly on the consequences of the criminal act and on claims made by the injured parties for compensation or retaliation. What they wanted to communicate was the idea that the criminal act affected the interests of all, i.e. the public interest which the state represented, and punishment would be meted out in those terms. The criminal regulations of the Company formalized the claims of state upon individual subject, cutting through identities and claims which came in the way. This brought the law into contest with other sources of identity, other claims to a legitimate exercise of violence.

Law-making was therefore a process fraught with the potential of conflict. But in the early years of Company dominion it was expounded with a Burkean rhetoric of reconciliation with the 'laws and customs of the people'.[10] As a mercantilist corporation

[8] The values of armed honour were deeply ingrained in certain communities, in their pattern of settlement, domestic architecture, dress, and codes of rank and status. Disarmament also posed the problem of insufficient resources to defend the Company's subjects against armed attack. British magistrates were warned that there was no general sanction for knocking down *garhis*, fortifications. However, magistrates did begin to pass regulations against the carrying of arms in the larger towns, as in Banaras after the communal riots of 1809. Cf., *A despotism of law*, p. 90.

[9] Frykenburg's perception of Company imperium as a structure completely dependent upon local and traditional power does not give sufficient weight to the centralization of armed force as it changed the old order, or to the ideological dimensions of rule of law. 'Village strength in South India', in R.E. Frykenburg (ed.), *Land control and social structure*, 1969, pp. 243–4; 'Company Circari in the Carnatic', in R.G. Fox (ed.), *Realm and region in traditional India*, 1977, pp. 117–64, 163.

[10] J.H. Harington argued that the framers of the Bengal 'code' of 1793 had approached legislation in the spirit of Burke, with an attitude of reconciliation towards the past, rather than in the spirit of the revolutionary French government. For that reason, he said, the Company had chosen to work through the Islamic law in its criminal courts. *An elementary analysis of the laws and regulations*, 1805–17, vol. I, section IV, pp. 297–8.

committed to retailing profits overseas, the Company could not seek legitimacy through a comprehensive espousal of the distributive rituals of indigenous kingship.[11] Moreover these rituals underwrote a concept of sovereignty within which the attributes of kingly power, the right to wield force, administer justice and award punishment, could be layered or farmed out along with fiscal rights. This was a notion antithetical to the more bureaucratic and centralizing drives of the Company's administration and its concern to seal seepages of revenue along the branch lines of lordship. In place of this distributive component of kingship, what the Company built upon was a stronger core of institutional authority — the Bengal army and the judicial and magisterial structures of civil authority. Certain aspects of its claim to legitimacy were expounded through the assertion of a difference from past regimes. These were characterized as arbitrary despotisms while Company governance, though authoritarian — for that was what Orientals were used to — was said to be bound by law. In other respects, however, the Company searched for cultural moorings in the traditions of rule associated with the Mughal state and its regional successors. The criminal law, its machinery and procedure, was therefore tied up with earlier institutions, personnel and legal–sacral texts.

In his pioneering work on legal systems at the interface of state and society, Cohn emphasized a clash of values and a bipolarity of authority and norms between the indigenous and colonial legal systems.[12] He attributed the 'failure' of the British legal system in India to this clash.[13] The way in which the colonizers themselves constructed Indian tradition has been the focus of more recent work inspired by Said's *Orientalism*, such as that of Lata Mani, who evaluates the production of an official discourse on sati,[14] and of Gyan Prakash, who examines the way in which British officials

[11] The whiff of parsimony clung about Company rule despite the splendour of its military victories. The historian constantly encounters this allegation in the matter of well-paid posts for Indians, patronage for Indian artisans, and expenditure on public works and charity.

[12] Cf. B.S. Cohn, *An anthropologist among the historians*, 1987.

[13] Ibid., pp. 479, 589, 615.

[14] Lata Mani 'Production of an official discourse on sati', *Economic and Political Weekly* (*EPW*), XXI, 17 (26 April 1986), women's studies, WS 32–40; and 'Contentious traditions', in K. Sangari and S. Vaid (eds), *Recasting women*, 1989, pp. 88–126.

went about making the religious law on slavery 'visible'.[15] The fundamental premise is that the colonizers constructed their knowledge of indigenous tradition in ways which confirmed and extended relations of domination and subordination. These studies have undermined simple polarities between the 'traditional' and the 'modern' or the 'introduced'. They have shown how certain aspects of law and tradition were privileged over others, and how symbols were lifted out of one context and placed in another, giving them a new meaning. Foucault's power–knowledge paradigm has inspired the study of other facets of colonial criminal justice.[16] The categorization of certain communities as criminal tribes,[17] and the conceptualization of a prison regime,[18] have been evaluated as part of a project of disciplining and controlling the indigenous population.

I found it more useful to examine the construction of the colonial legal subject on an ideological terrain in which the state negotiated with existing normative codes to reorder them to law and civil authority, but also to establish circuits of communication with the ruled. Such strategies could have unpredictable consequences, reintroducing denominators of social and ritual identity into procedures which sought to define a universal legal subject. In the process, the field of meaning invoked by the citation of a particular symbol of traditional authority could not always be controlled and restricted to the specific objectives of the state. Nevertheless, the Company's subjects were also impelled to accommodate themselves to the law, whether as a frame of reference to make their claims upon the ruling power, or to devise ways to avoid an encounter with its agencies.

The artefacts and images of colonial civil authority, the permanent gallows, *phansitola*, *phansichauk*, and the jailroad left their mark on the municipal map.[19] The baleful figure of the police *darogha* in popular skits, the jail sentence parodied as a festive journey to one's *sasural*, and the punishment of hard labour as

[15] G. Prakash, *Bonded histories*, 1989.

[16] Michel Foucault, *Discipline and punish*, 1977.

[17] Sanjay Nigam, 'Disciplining and policing the "criminals by birth" ', *Indian Economic and Social History Review* (*IESHR*), XXVII, 2 and 3 (1990).

[18] A. Yang, 'Disciplining "natives" ', *South Asia*, x, 2 (December 1987), new series, pp. 28–45.

[19] *Phansitola*, *phansichauk*: gallows quarter, gallows crossing.

sarkar ki naukari, indicate that the imagination of power was being re-shaped at various social levels.[20] The black humour which could characterize such assessments is evident in a sketch of a British trial executed by an Indian buffoon, a professional entertainer.[21] The prisoner, about to enter on his defence, is interrupted by a servant who announces that dinner is ready. The judges start up and pronounce the prisoner guilty, condemn him to be hanged, and run off to table.[22] Colonel Fitzclarence who described this skit said its very performance demonstrated the mildness of British rule, but it may have been an indictment of the far greater frequency with which the Company used capital punishment in comparison to Indian rulers.

The book begins with the Company's judicial reforms of 1772 in Bengal to understand the novel conceptions of sovereign right being set out. Shifting northwards along the axis of conquest, the next two chapters use the Banaras zamindari as a case study to examine the way in which civil authority and due process were evoked through a re-alignment of existing agencies of rule and a deployment of the cultural material at hand. The law relating to homicide is taken up to examine changing perceptions about the justice expected from the ruler. Criminal law defined a monopoly for the colonial state in legitimate authority to take life. It thereby implicated the judicial process in an effort to dominate a very complex terrain of claims and expectations. The Islamic law, as interpreted by the kazis and muftis in the criminal courts, was modified to this end, a process which has been assessed in an elegant and lucid monograph by Jorg Fisch.[23] Both his study and the relevant section of my book draw heavily upon Harington's early nineteenth-century exposition of this theme.[24]

[20] Cf. Report of third judge, Calcutta Court of Circuit (CC), 15 October 1800, BC F/4/98, for an early characterization of the jail as sasural. *Sasural*: father-in-law's residence, used sardonically to suggest a lavish welcome. *Sarkar ke naukar*: employees of government, used in ironical self-reference by prisoners. *Darogha*: police constable.

[21] Cf. Lt. Col. Fitzclarence, *Journal of a route across India*, 1819.

[22] Ibid.

[23] J. Fisch, *Cheap lives and dear limbs*, 1983.

[24] J.H. Harington, *Elementary analysis*, vol. I. J.H. Harington, registrar, then puisne judge and chief judge of the Sadar Diwani and Nizamat Adalat, 1796–1811, also orientalist and for some years honorary professor of the laws and regulations of the British government in India in the college of Fort William, *Dictionary of National Biography*, XXIV, pp. 389–90.

However, I have tried to cover this ground from the historian's perspective, whereas Fisch does so as a legal scholar examining the evolution of colonial criminal justice as a response to specific needs of law and order. His method assumes a basic conflict of interest between the victim and offender, and between the individual and society.[25] However, once we place these abstract categories in their historical and social setting it is difficult to understand their 'interests' through such oppositions. Cultural norms regarding family, community or patronal circle, and codes of sexual and social conduct, might well be shared between victim and offender. In addition, there are aspects of the colonial judicial process which make it problematic to identify the female subject squarely as victim or offender, because they elided her agency and subjectivity.[26] In the phraseology of colonial law, the claims of the state were public claims, in the sense of upholding the general interest,[27] but lawmakers also had to contend with other formulations of societal good. For instance, indigenous potentates inflicted fines for witchcraft or fornication on behalf of public welfare, exercises which Company officials criticized as purely extortionate.[28]

Fisch also seeks to skirt the zone of the ideological, whereas this is insistently present for the historian. For instance, he chooses equality before the law as one of the 'more workable and less ideological categories' for a comparison between two legal systems.[29] But the historical conjuncture at which an aspect of inequality is addressed brings us back again to the ideological. Slavery for instance continued to be recognized as a civil status till 1843, though the Company's regulations made the master criminally liable for inflicting death or serious injury upon his

[25] *Cheap lives*, pp. 8, 10.

[26] See chapter four.

[27] As for instance when the tax demands of the state were described as 'the financial claims of the public', Regulation 2, section 1, 1793 (Reg, s).

[28] See chapter one. Reg 8 of 1799 declared that the killing of a person on the allegation of witchcraft or sorcery was punishable as murder. However British magistrates could not entirely resist the social pressure for punitive action against alleged sorcerers. In the Kumaon hills they made those accused of sorcery give a penal bond that they would not molest the complainant with incantations. Cf. Gowan, Commissioner Kumaon, to Batten, Asst Commr Gharwal, 12 July 1837, Commr's office Kumaon (COK), Pre-Mutiny records, Judicial letters issued, Book V, Uttar Pradesh State Archives, Lucknow (UPSA).

[29] *Cheap lives*, p. 12.

slave. Conversely, Fisch rejects the concept of humanity as too general to be of use in comparing legal systems, but this concept has provided a focus for rich historical investigations of the penal reform movement in Europe and the anti-slavery campaigns.[30]

The state's claim to a monopoly of legitimate violence also had to be exerted against patriarchal claims to control the labour, demeanour, sexual and reproductive capacity of the women of the household. The fourth chapter deals with the way in which patriarchal authority had to be re-conceptualized in conformity to rule of law, as the condition for authorizing its sway over a 'personal' and 'domestic' sphere. In place of a wider kin authority over the women of the family, criminal regulations outlined a narrower commitment to the husband's conjugal rights in the person of his wife. At the same time, a need to embed judicial procedures within a sense of social and moral order pushed magisterial authority to the support of the male 'head of the household' in managing a more diverse range of relationships. There were social pressures on the Company's government to make this endorsement, even though it had displayed some hesitation about assuming all the functions of moral regulation exercised by indigenous rulers.

This book discusses some of the issues involved in giving legal definition to the boundaries of the household and to norms about domestic relationships. An important concern at this time was of maintaining the productive stability of the labouring household against the threat posed by 'vagrancy' and famine.[31] Yet as long as the Company extended legal recognition to slavery there was a tension between the ideal of maintaining the integrity of the household, and the existence of a public traffic in women and children which seemed to flow in and out of it. Once legal recognition was withdrawn from slavery, the guardianship of

[30] A. Haskell, 'Capitalism and the origins of the humanitarian sensibility', *American Historical Review*, part I, 90, 2 (April 1985), pp. 339–61, part II, 90, 3 (June 1985), pp. 547–66. R. McGowan, 'A powerful sympathy', *Journal of British Studies*, 25, 3 (July 1986), pp. 312–34. Fisch himself has been most skillful in the suspect zone of the ideological, in showing the subsidiary significance of humanity in early British evaluations of the Islamic law, their far greater concern to plug the loopholes it allowed to the offender, and yet the weight given to humanitarian concern in subsequent accounts of their intervention.

[31] M. Anderson, 'Work construed', in P. Robb (ed.), *Dalit movements and the meanings of labour in India*, 1993, pp. 87–120.

fathers over children and of husbands over wives could be endorsed within a more safely domesticated household.

The recognition of slavery as a civil status till 1843 indicates that so long as the state's claim to a monopoly over force was not challenged, it could manoeuvre around the issue of legal equality. The book examines the extent to which concessions were made to 'rank and respectability', and to the authority of husband over wife, and master over servant, but also how a different standard of criminality came to be formalized around the unstable configurations of the thug gang or the 'dacoit tribe'. Instead of the principle that guilt stemmed from individual responsibility for a specific act, guilt was deduced here from membership of a 'criminal community'. Though it was acknowledged that these criminal communities were often knit into systems of power and patronage wielded by contentious landholding elites, these were not made the target of such special laws. An unequal application of the law was not the only issue here. I argue that these laws were also an aggressive abbreviation of judicial procedure which gave the stamp of due process to crude devices of policing and prosecution.

But the point at which these devices were given formal legal shape was also crucially related to a political elaboration of paramountcy expounded through the rhetoric of authoritarian reform. From the 1830s the mission of paramountcy was propounded through the notion of a universal standard of humanity. Themes such as sati, infanticide, the traffic in slavery, and 'cruel and barbaric punishments' were invoked to lay down norms of governance for Indian chiefs and rulers without an expensive commitment to direct administration. The strategic imperative, the search for defensible frontiers, has provided one explanation for the dynamic of imperial expansion. Other themes which have been addressed in this connection are the quest for trade and the drive to secure revenues for an expensive military machine.[32] I have suggested that

[32] R. Mukherjee, 'Trade and empire in Awadh 1765–1804', *Past and present*, 94 (1982), pp. 85–102. He also emphasizes the de-stabilizing effect of the subsidies exacted by the Company. Eric Stokes argued that the quest for political profit by private interests in the Company created a 'local sub-imperialism' which generated war and expansion. 'The first century of British rule in India', *Past and present*, 58 (February 1973), pp. 136–60, 142–3. Cf. also P.J. Marshall, 'British expansion in India in the eighteenth century', *History*, 60, 198 (February 1975), pp. 28–43; and C.A. Bayly, *Imperial meridian*, 1989, p. 10.

a geographically extensive and socially intensive dynamic of rule of law provides another facet to the expansionary momentum which drew Indian states into the fiscal and military orbit of the Company. In a sense colonial definitions of sovereignty and order were implicated in the creation of the constantly 'troublesome frontier' of British dominion, at which contending notions of territoriality, rule and allegiance had to be dealt with. Attempts to restructure trade routes, to control commodities such as opium and gain access to natural resources also threaded colonial charges of lawlessness against these polities.

The changes anticipated from the ending of the Company's trade monopoly and the closer association of its government with Parliament brought the sense of an 'age of reform' to the colony as well. This opened a conceptual space for wide-ranging discussions about the forms and symbols of rule. Among these the book examines the redefinition of relations of personal subordination such as slavery, the elaboration of the political terms of paramountcy, and a cluster of changes related to issues of penal policy. The Company's criminal regulations had tried to alter the scale of censure associated with certain acts to extend its own legal claims. However, in assessing the form and measure of punishment colonial lawmakers also had to take account of norms regarding behaviour appropriate to age, rank and gender. I have argued that, from the 1830s, official debates on penal policy indicate a stronger effort to reorder the identity of the offender in a more uniform and standardized way as the object of punishment. The punitive possibilities of separating the offender more rigidly from all the rhythms of the social and the familiar began to be explored through two related strategies: narrowing the role of public punishment in the penal design, and directing a closer attention to the jail regime — to the details of daily routine, labour and diet. To standardize the treatment of prisoners the state also explored various projects of modernity, drawing upon metropolitan experiments in penal technology such as the treadwheel, and upon medical expertise and statistical information for an improved and yet avowedly humane prison discipline. Yet officials still struggled to anchor such projects within acceptable social and cultural forms; as when magistrates instructed to substitute cooked food served in messes in place of the money or rations distributed to prisoners, all proceeded by drawing up lists of castes which could eat together.

In India the emergent colonial state therefore sought reference points to indigenous 'law' with a persistence which drew the impatience of later writers of its history. But interwoven with this was an effort to enforce expanded concepts of state authority. Historians used to differentiate phases of the Company's administrative policies and certain key figures according to whether they followed an Orientalist policy of working through a reference to indigenous political, legal and social traditions, or asserted new principles of rule more boldly, that is the so-called Anglicist policy.[33] But there was little difference, for instance, between Hastings the Orientalist and Cornwallis the Anglicist about extending the legal and punitive claims of the state.[34] What was debated was the strategy to be used. Ought the government to transact with traditional symbols of power, constantly trying to reinterpret them in ways more appropriate to the new premises of sovereign right? Or should the Company press forward, establish its own symbols of legitimacy, and actively encourage a different sort of public opinion around them? In the epilogue I have argued that the Company's law-making in the 1830s indicates an effort to make its public authority more self-sustaining *vis-à-vis* Indian elites. The debates in official circles about the forms of public authority sharpened to a different pitch, even though the extent of institutional change was constrained by retrenchment, and by a continued anxiety about social reaction.

The Territorial and Administrative Framework

The boundaries of the Bengal Presidency which provide the administrative framework for this book extended over the regions of Bengal, Bihar and Orissa (1765), incorporated the Banaras zamindari in 1795, and reached westwards upto the Jamuna in the next phase of expansion (the Ceded and Conquered provinces, 1801–3). However, some of the areas subsequently added to the Presidency were not brought under the Bengal regulations, on the

[33] Eric Stokes, for instance, contrasted Hastings who wished to use Indian agency, with Cornwallis, who substituted British officials at the higher levels, and sought to align them, 'not only as individuals, but as a system of government to English constitutional principles.' *The English Utilitarians and India*, reprint, 1982, pp. 1–4, 7.

[34] See chapter three, also A. Aspinall, *Cornwallis in Bengal*, 1931, pp. 166–7.

argument that a simpler system resting on local usage was more appropriate for recently annexed territory, or unsettled areas, though officers were supposed to observe the spirit of the regulations.[35] However, such non-regulation tracts could become 'in fact a theatre for experiments of incipient legislation', as Shore noted for the Sagar and Narbada territories.[36]

At the district level the first criminal court was that of the magistrate, whose jurisdiction was very limited at first, but was substantially extended in 1818. For more serious offences the magistrate committed prisoners for trial before the judges of the court of circuit who toured the district twice a year. The superior criminal court of the Presidency was the Nizamat Adalat at Calcutta, the court of revision and reference. Islamic law officers were appointed to the courts of circuit and to the Nizamat Adalat, usually from the kazi and the muftis of the district at the time of cession, who had to attend the trial and give a *fatwa* on the guilt or otherwise of the prisoner and on his sentence.[37] This framework was put in place under Cornwallis in 1790 and substantially modified only in 1829 under Bentinck, when the courts of circuit were abolished. Thereafter, criminal cases were supposed to be handed over to the commissioners of revenue and circuit, but since they were too burdened by revenue business, criminal justice was handed over to the district and sessions judge. Till 1834 the legislative activity of the three presidencies proceeded in considerable independence of each other, but the Charter Act of 1833 vested the Governor-General in Council with sole legislative authority for British territory in India, and added a law member to this body. The date which I have put down as a formal concluding point is that of Macaulay's draft penal code of 1837, though the discussion of penal policy and the abolition of slavery extends the time frame into the 1840s.

[35] The non-regulation tracts of the Bengal Presidency were Delhi (1803), Sagar and Narbada (1818), Assam, Arakan and Tenasserim (1824).

[36] F.J. Shore, Offg Commr, Sagar and Narbada territories to Secy, Sadar Board of Revenue, Allahabad, 7 May 1836, Home Misc. vol. 790, p. 422. The procedural flexibility enjoyed by the British political officers who administered this area allowed them to take short-cuts in the trial and conviction of suspected thugs, innovations subsequently given formal legislative expression. See chapter five.

[37] *Fatwa*: formal legal opinion by a *mufti*, a scholar of Islamic law.