

# 1 IMPERIAL MIASMA

Man is human only to the extent to which he tries to impose his existence on another man in order to be recognized by him. As long as he has not been effectively recognized by the other, that other will remain the theme of his actions. It is on that other being, on recognition by that other being, that his own human worth and reality depend. It is in that other being in whom the meaning of his life is condensed.<sup>1</sup>

## Introduction: From Fragments to an Empire

The literature on the relationship between Victorian England and imperial India is growing with a welcome contribution from Subaltern Study scholars. The latter increasingly emphasize the dynamics, the bilateral relationship between the two societies. Previous assumptions of the passive role of indigenous peoples in those processes have been overturned by varied empirical studies.<sup>2</sup> Scholars are increasingly turning their gaze to questions of empire, colonialism and post-colonialism, in order to provide an understanding of imperialism, and to the dynamics of imperialist technologies to the colonial project.<sup>3</sup> This book adds to that body of literature by examining the intimate relationship between law and imperialism, in which two case studies of legal similarity and difference, are offered here.

In *Law and Imperialism*, we consider the marked reduction of the legal status of the non-Western, by examining the active contribution of both the colonials and the colonizers, to changes at the imperial centre. The growth of Empire was not a one-way process in which British agencies constructed Indian society in their own image. Rarely has there been serious discussion about the role of India itself, which made its own significant impact on British structures, culture, discourses and behaviours, than a previous generation of historians acknowledged.

The trigger for the development of such a historical view has not been a sudden revelation, a paradigmatic breakthrough, but the accumulation of apparently significant insights. This approach aims to fill a particular lacuna in critical legal studies:

law has been to the forefront of that very relation. Yet the lack is also understandable because the engagement between law and postcolonialism would drastically disrupt legal academic renditions of the relation – disrupt not just the persistent orthodoxy of law and development, but also the newly settled consensus around law.<sup>4</sup>

My purpose, then, in *Law and Imperialism*, is to disrupt this main mode of engagement between law, empire and the colony. We offer, and indicate, from such minor details, a set of analytic and conceptual tools that are adequate to understand the enactment and function of similar legislation governing the lives of lower social strata in both societies. Such a concurrence appears in the wording of the Habitual Criminals Act of 1869 in Victorian England, and the Criminal Tribes Act of 1871 in imperial India. Simple questions arise from that legal congruence. Was the similarity of legal discourse simply a matter of exigent duplication? Alternatively, did it represent the way the governing executives perceived social collectivities in an identical way – to which a near-identical legal prescription was the solution? Asking these questions in turn raises further issues; why was this legislation (focused on lower social strata in England and India) characterized by inquisitorial assumptions of guilt prior to any evident infringement? Contrary to the new adversarial Victorian practices of legal codification, these measures appeared to be a remnant of an earlier age, when classes of persons, rather than classes of actions, were the object of legal penalty.

From these initial questions arise larger enquiries of history, of law and of imperial relations. Legal fragments, when linked with the structure of knowledge in which they are embedded, contribute to a mosaic about the rationales for the embodiment of inequality in criminal law reform in Victorian England and in imperial India. Newly assigned socio-legal statuses of criminality reified the categories of 'dangerousness' in both jurisdictions. The so-called 'criminal' tribes and castes of India,<sup>5</sup> were legally and socially constructed contiguously to the identification of 'dangerous' classes<sup>6</sup> in Victorian England. Concepts of 'race', emblematic of a demeaning social Darwinian status, played a key significant role in this process. Such 'racial' discourses enabled political elites to sanitize, to segregate through a legal prophylactic, the social contagion of a lower order species, which might undermine social stability.<sup>7</sup> Victorian law, both in the metropolis and in colonial India, aimed to contain these emerging threats and to affirm unequal statuses. Here the operative role of the law is to preserve those identities. Hence, the legal judicial reasonings and its processes had a structural function in stabilising the relationships between social unequals in the metropolis and in imperial India. It was also affected by particular contingent agencies.<sup>8</sup> The new mosaic assists in the creation of a postcolonial paradigm in which the empire did not just exist 'out there' but also 'at home' where, as an imperial social forma-

tion, it makes its presence felt in institutions and values at the heart of British society.<sup>9</sup>

### Discourse and the Assemblage of Empire

Empire (that huffer-muffer of a term, as we now belatedly understand) was not a process of intentional growth. Indeed the very term itself is essentially a weasel-word that fails to reflect the nuances, the subtleties of imperialism. It is a euphemism, a hubris that conveniently summarizes a variety of projects, of national designs and of subjectivities. Though this book focuses narrowly on the relationships between England and India in developing a dialectical understanding of both entities, those national signifiers may be misleading. 'England' in the late Enlightenment was a term used generically to cover the practices of the nascent nation-state of England, Wales, Scotland, and to a lesser extent, Ireland. The India of Warren Hastings, with its myriad of minor domains and jurisdictions – some principalities in their own right, other vassal dependencies, often owing more to accidents of territory and nominal history – was not that of the post-'Mutiny' period, when the British Empire annexed de facto what it had already achieved de jure in replacing the East India Company (EIC, 1600–1858). However, while those and similar reservations arise throughout the literature, we will continue to use that shorthand terminology while recognizing their subordination to more eclectic and larger notions of the East and of the West, of the Orient and of the Occident, as well as indicating more complex local entities.

The colonial and postcolonial realities have been obscured and misunderstood as a consequence of persistent and ingrained ideas that have structured traditional scholarship on the history and theory of criminal law. Processes of colonialism and later of the more substantive imperialism, have been open to varied historical interpretation. Several of the polarities of latter accounts latter are perversely pertinent, and have an enduring effect on this study. For instance, the early materialism of Marx's view on India has matured into a notion of cultural imperialism. Here, ideology underpinned the interests of the original international robber barons, who by accident or by design, carved out stepping stones in the construction of a globe coloured pink in Victorian Atlases, 'where the sun never sets.' From that angle, colonies were there to be exploited, furnishing cheap labour, valuable materials and in George Bernard Shaw's words a market for 'adulterated Manchester goods.'<sup>10</sup> Conversely, at the other polarity, institutional histories have been important. Such Whiggish discourses of moral progress constitute a major theme, of varying but continuing importance through the period. Pioneering evangelism did not fade during the nineteenth century as illustrated by the efforts of the Salvation Army in India and the colonial training in the

Christian public schools (hallmarked by a Spartan manliness, self-control and discipline, and an absence of emotional expression<sup>11</sup>) to which many early and later administrators owed their provenance. The direct appeal of those adventure stories where the white Englishman always triumphed and behaved impeccably, instilled middle-class values in countless public schoolboys, who would always 'play the white man.'

For others, the colonies were a site of experimentation – the later paternalistic socialist New Lanark could be developed in virgin territory. They were 'laboratories of modernity',<sup>12</sup> where the new sciences could inter alia create ethnological human zoos in which to experiment on primitive character. The Enlightenment commitment to modernity, reason and free will, had given birth to a bastard child, that of positivism. There are other versions of imperial history, some more important than others, lying between these extremities of interpretation. Some approaches have coexisted or have been discarded. Others have often been more opaque in their contribution. Whatever the connections between the colonial and postcolonial interpretations, the explicitly and unquestionable European character of law has been characteristically asserted by historians. That view consists of a series of doctrines and principles that were developed in Europe, ideas which emerged out of European history, experience and values systems that were extended to the non-Western world. But one difference does stand out legitimately in the most recent postcolonial interpretations. The colony, however circumscribed by competing definitions, and its inhabitants, contributed as an agency rather than simply as a victim. The unilinealism of colonial export has largely been dismantled. Colony was not simply an empty space to be filled and incorporated by imperial authority. Its own dynamic processes, history and subjectivity, ensured a different project and identity. From that perspective, as in Cooper and Stoler's exposition of a cultural Marxism,<sup>13</sup> the major failure of histories of empire have been the insensitivity, to the dialectical relationship between the colonizer and the colonized. Law, criminal and civil, was one major instrument in this process of colonial reconstruction. Law was a hybrid creature, and far from being peripheral to imperialism, was central to its formation. However, law had to be seen to be responsive to a variety of situations, including those involving non-Westerns in both the metropolis and in colonial India, for its own integrity and identity.

### A Word on Discourses

This book extends the aphorism of 'watching St Giles to guard St. James'<sup>14</sup> – surveying the rookeries of London's St Giles parish to prevent its dangerous inhabitants threatening the Palace of Westminster – in several ways. Firstly, it uses the term 'policing' in a Foucauldian sense,<sup>15</sup> to include not only the direct agents of the state entrusted with implementing the new forms of control but also, more importantly, different legal regulations and doctrines. Secondly, the

term 'scientific racism' is shorthand for the pathological measurements – scientific theories of racial difference, imbued with the mythology (such as that surrounding the uprising of 1857 in Cawnpur, especially of British heroism and native barbarism, confirming notions of inferiority and superiority). Such sentiments and attitudes were given further credence through the Victorian genetic and anthropometric sciences – as part of the process of governance. The St Giles dictum was conventionally applied to Victorian London, and less specifically to other British urban milieu, it was also applied generically to Britain's colonial territories; in this case, to parts of India during the replacement of EIC rule by imperial suzerainty. Further, the key term utilized throughout is the notion of 'dangerousness'. This imperial logic of the dangerous type associated in the presence of home rule in India with 'racial characteristics' mirrored the broader currents of understanding in Victorian England. Often used by Victorians as a synonym for the criminal classes, dangerousness with its evocative imagery is the key to appreciating the importance for understanding the imperial conception of the criminal tribes of nineteenth-century India. Finally, the text borrows from the language of postcolonial theory, Edward Said's imagery of the Occident and the Orient, with its insistence on the binary divisions between the Western and the non-Western, and also Homi Bhabha's ambivalence, in which the problem of identity is one of proximity to, rather than distance from, the Other.

Within the postcolonial theoretical framework, the self can be dehumanized by practices of othering. However, without the examination of these exclusionary practices, based on essentialist concepts and scientific logic which were central to the imperial project, this book would be at a loss. Central to understanding the key theoretical concerns of the book are academic discourses, such as a revisionist criminal justice history; the contribution to that eclectic body of studies from the developing body of postcolonial theory, from critical legal studies and from criminological social constructionism. These insights are relevant, not only in examining the key concerns of this book, but necessary also to uncover the ambivalent and contested sites of identity formation. Further, the book draws upon a range of published works, as well as raw empirical data from colonial legal archives, to break down binaries of imperial discourses, in order to disrupt and challenge the orthodoxy that sustained the practices of law and imperialism. It is the intimate relations between the Europeans and its racial Others which lies at the heart of this study. An introduction to theory and methodology is now in order.

### A Hybrid Approach to Understanding: Identity and Subjectivity

In this book, three key elements of methodological inquiry are adopted. The first is a comparative method; the second a critical historiographical reading of primary and secondary sources; and thirdly, a case study approach to provide