PERCEIVING CRIMES AND CRIMINALS: ERRATIC LAW MAKING IN THE EARLY 19TH CENTURY BENGAL*

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It is our suggestion that certain manners of perceiving the Indians involved with criminal law - both the enforcers of the law and those against whom the criminal law was enforced - were central to the law making process of the colonial rulers in Bengal during the early period of colonialism. For the purpose of this article, the early period in terms of transforming the criminal law is taken to be the 1790s to 1820s. It was during this period that most norms of criminal law were changed. From the 1820s, the amendments were mostly procedural in nature. These changes of the early period were later modified, enlarged, systematised and enacted as the Penal Code in 1860. The foundation of the Penal Code was, however, laid during the period under discussion.

The perceptions of the colonial lawmakers was an important, if not central, variable in the law making process. This claim is substantiated in this article through an analysis of the actual crimes that were thought to have been committed and assessment of reactions of the concerned officials vis-à-vis these 'facts' of crime. We shall highlight the disjunction between the 'official facts' (crimes) and official reactions (enacted norms) to these facts to indicate how the law making process was riddled with contradictions. The disjunction can be understood only if we look at the law making and law enforcing processes as value-laden exercises – an erratic and, sometimes, random, process.

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* This is an edited version of parts of chapters 1 and 5 of my unpublished Ph.D. Dissertation, *The Transformation of Colonial Perceptions into Legal Norms: Legislation for Crime and Punishment in Bengal, 1790s to 1820s*, School of riental and African University, London, 1994. Though a number of years have elapsed since the writing of the above dissertation, there hasn't been any noticeable scholarly writing on this issue and, hence, there was no felt need to modify my arguments.

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This article, thus, is structured around perception of facts; how justification of punishment is presumed to be deterrent and then how such justification is relegated to insignificance; how increase and decrease in incidences of crime were noted but used to buttress perceptions; and in lieu of conventional conclusion we narrate two incidences of law making to indicate how perceptions overtook the apparent empiricist and rational-modernising paradigm implicit in most of the established analysis of this process in the relevant literature.[1]

PERCEIVING 'FACTS'

In the official deliberations on law making of the period, the contours of an empiricist rationality are clearly marked. Relevant facts were collected, collated and analysed. The central feature of this process of collection and analysis of facts was the frequent circulation of sets of questionnaires among judicial officials.[2] The responses were minutely detailed in official proceedings. In addition, other occasional comments and impressions of concerned officials were also recorded and assessed. Regulations were, then, issued - ostensibly based on these facts, responses and assessments. Such a procedure was seen, not only by the Company's officials but also by later commentators, as the embodiment of a rational-modern law making process.

However, by locating and scrutinising this discourse of law making within the official facts - the empirical evidence around which it was

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1 See Shahdeen Malik, "Historical Discourse on Colonial Criminal Law, 44:1 (1999) *Journal of the Aisiatic Society of Bangladesh, Humanities*, pp15-41.

2 Governor General Cornwallis's minute and the responses of his 25 Magistrates to the questionnaire circulated among them. This questionnaire and the responses are contained in over 900 pages in *MSS Eur D 231* in the India Office Library and Records. These queries were sent out to the Magistrates in 1789 and were returned and compiled in 1790. For various treatments of these records see, Firminger W K (ed), *Fifth Report of the Select Committee*, Calcutta 1917, vol 2, at pp 566-91; Majumdar N, *Justice and Police in Bengal, 1765-93: A Study of the Nizamut in Decline*, Calcutta 1960, at pp 250-66; Aspinall A, *Cornwallis in Bengal: The Administrative and Judicial Reforms of Lord Cornwallis in Bengal*, London 1931, at pp 46-52, and pp 63-73; and Fisch J, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law*, Wiesbaden 1983, at pp 38-42.

See also *Selection of Papers from the Records at the East India House, Relating to the Revenue, Police, and Civil and Criminal Justice under the Company's Government in India*, 2 vols, London 1820, for similar questionnaire circulated in 1813.

woven - we shall indicate how this discourse actually overlooked these facts and how it was trapped in the world of perceptions. The empiricist forays into the world of actual criminal activities - figures of crimes, assessments of criminal behaviours and impacts of the newly created norms on 'law and order' - ultimately, did not constitute the central features of the law making process. More often these 'facts' were deployed to justify the perceptions, and 'contrary evidence' was readily ignored. Consequently, the discourse in law making was rational-modern on the surface, but below the surface it was essentially a process of assertion and reassertion of the superior-inferior dichotomy between the worlds of the colonisers and the colonised.

It is also our contention that the relevant literature frequently elevates this surface-rationality to the centre of the colonial law making process and, consequently, marginalises the impact of the *a priori* perceptions of the colonial lawmakers. For example, Radhika Singha has focused on the issues of power, control and establishment of sovereign authority as the central impetus for framing of these new norms. She has argued, with the examples of the new rules prohibiting *dharna, kurh* and *sati*, that law making took into account the various cultural and religious sensibilities of the Indians.[3] In law making, Singha suggested, a negotiation with the past laws and religious-cultural practices had shaped the contours of the process. But this harmonious modification of indigenous laws and customs should not, she reminds,

> detract attention from the novel conceptions of sovereign right being defined through the legal relationship between the colonial power and its Indian subjects. This conception of sovereignty was one which negated the legitimacy of all other authorities in the exercise of force and violence in public life.[4]

Implicit in this quote and other similar accounts is the paradigm of law making as a deliberately rational exercise in which various options and conflicting concerns are scrutinised, debated and a balance between the differing views sought. At the same time, the pre-eminent goal of establishing the sovereign authority of the Company is also seen to be realised. In this vein, from her discussions of the process of law making, Radhika Singha infers that this process of law making was negotiatory- various options, impacts and repercussions of the intended measures were

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3 Singha R, "The privilege of taking life: Some 'anomalies' in the law of homicide in the Bengal Presidency", (1993) 30 *Indian Economic and Social History Review,* p 181.

4 Ibid, at p 181.

appraised and evaluated[5] before the norms were enacted.[6]

Such an assumption about law making as a rational process involves, we contend, first, essentialising the 'rational deliberations', and siting them at the centre of the process.[7] Secondly, at least by implication, the outcome of the process, i.e., the enacted legal norms, is also seen as essentially rational, logical and modern.[8] The 'colonial' aspect of the process is located in depicting these norms as establishing and enhancing the 'authority' of the colonial rulers. It seems to us that the practice of linking of the notions of enhanced sovereignty or authority of the state with the expansion of the spheres of legal regulations is largely Kelsonian.

The Kelsonian notion of *Grundnorm* and effective legal order which over-rides and takes precedence over all other relations of dominations can be the essential characteristics of a formal modern legal system within a modern-nation-state. However, all attempts to create and enlarge the parameters of the legal order by itself does not indicate enlargement of the state's authority, especially in the colonial world of the early nineteenth century. The state then infringed the legal order (created by it) much more than it does in the present world. In the Kelsonian notion of a modern

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5 For example, commenting upon the official discussion on *sati*, Radhika Singha writes, ibid, at p 207, - "The issue of the woman's consent figured prominently in the debate over further measures against the rite" - to essentialise the negotiatory aspects of the official discourse.

6 T Asad has impressed the influence of the Durkheimian legacy of collective conscious/consciousness and collective representation in presenting consensualist accounts of belief/religions on the British Anthropology in his "Anthropology and the Analysis of Ideology", (1979) 14 *Man*, (New Series) p 607.

The frequent deployment of 'negotiatory' constructions of the law making process in the literature, eg R Singha's, may suggest that the influence of the Durkheimian paradigm was not limited to anthropology alone, particularly in view of the fact that most of the recent writings on the history of colonial law and law's influence on the society have come from the labours of anthropologists and sociologists.

7 In this context it is important to note the central premise of the essay, above n 2, at p 184: "This article examines the conceptual tensions which arose within colonial law from the effort to tap sources of 'tradition'' to make the new terms of public authority both intelligible and acceptable to the subject population."

8 K N Chaudhuri has cited examples from trials in the English law courts to highlight those aspects of the 18th century common law which were not 'sensitive' to negotiatory compromises. See Chaudhuri K N, "From the barbarian and the civilized to the dialectics of colour: an archaeology of self-identities" in Robb P. (ed), *Society and Ideology: Essays in South Asian History***,** Delhi 1993, at pp 31-2.

legal system, the state is presumed to act within the legal system. Such precondition for the validity of the Kelsonian analysis of law was certainly absent in colonial Bengal. Locating issues of authority, however, by itself is not enough for a Kelsonian analysis of the whole process of law making and law enforcement.[9]

We do not imply that the law making process did not strive to attain specific goals, but emphasise that the achievements of the rational ends do not, by themselves, imply consistency and congruence of articulated concerns and principles in the enacted norms. We also do not imply that 'deliberations and discussions' were not important to the processes of criminal law, but suggest that in these dialogues within the official circles a particular construction of persons, their habits, traits and fears, rather than the emerging notions of crime, causation, and punishment, were more important to the law making and law enforcing processes.

The peripheral nature of the rational edifice of the law making process can be ascertained by looking into its different constituents. Our scrutiny will show that the relevant facts, despite the empiricist underpinning of those facts in the official deliberations, did not constitute the core of criminal justice policy and the norms often did not relate to these factual situations.[10] The disjunction and even, at times, the dichotomy between the official facts and the promulgated norms will sustain our thesis of the centrality of perceptions in the legal processes.

Various aspects of these disjunctions can be elaborated by (a) focusing on the inter-relationship between the official notions of the deterrent impact of punishment and the actual infliction of punishment, and (b) highlighting the dichotomy between empirical evidence and norms purporting to be based on such evidence. This article is, therefore, organised around these facets of the disjunction to indicate the erratic and random nature of law making in the early colonial Bengal.

Punishment as deterrence

Experience and observation as the principal determinants of actions are the cornerstones of the post-Enlightenment construction of crime and

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9 See the assessment of Poulantzas's treatment of Kelson's theory in Jessop B, Nicos *Poulantzas: Marxist Theory and Political Strategy,* London 1985, particularly chapter 2: "Existentialism, Marxism and Law", pp 26-50.

10 'Facts', 'factual situations' and similar expressions are used to reflect the official statements concerning the situations -- we do not inquire in to the reality of the facts and situations.

punishment. Punishment, particularly after Beccaria,[11] was no longer seen as a right of God, nor as a matter of retribution, but justified primarily for its deterrent impact. The deterrent impact of punishment prescribed by the criminal law was seen to be twofold: (a) specific deterrence by way of preventing the individuals concerned from committing further crimes, and (b) general deterrence by way of warnings to potential criminals.

The principle of deterrence assumed that every person would be able to balance the expected benefit from crimes ('pleasure') against the loss ('pain') of freedom through punishments prescribed for the crimes, and would thus decide against committing crimes. For the concept of deterrence to be meaningful and effective, it must, first, presuppose a certain degree of awareness among the citizens (prospective criminals) about the acts which are punishable and the nature of punishments prescribed for individual crimes. Secondly, punishments ought to be proportional to crimes, with lesser crimes attracting milder punishments, while more severe sanctions are to be reserved for relatively more serious crimes.

The Company officials were clearly concerned about the deterrent impact of punishment. Whether the particular punishments were deterring the criminals or not was often central to their deliberations about crime and punishment. Conversely, punishment did not figure as a right of God or retribution. Nevertheless, retributive implications of the act of punishing criminals were never far from the surface of the statements frequently deployed to contrast the Company's concerns for 'good government' with

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11 Beccaria C., *On Crimes and Punishments*, 1764, translation by Paolucci, Indianapolis 1963.

The impact of Beccaria's thesis in Fort William can be gauged from, for example, Charles Poole's Report on his *Examination of Doctrines of Mohamed as applicable to the Crimes of Murder with a view to the formulation of a just scale of punishment*, in *HMS* vol 419, pp 3-79. In this Report, Charles Poole clearly deployed the expressions of Beccaria (scale of punishment) and attempted to refute Becaria's stance on the death sentence. In doing so, he quotes Beccaria at length, at pp 24-5.

It is worth noting that the Report C Poole inferred that in Mohammedan Law practically murder was the only crime which is punished by a sentence of death, "whilst in England" he pointed out, ibid, at p 16, "from the high state of civilization, nearly 170 offences have been enumerated for which a man is liable to suffer death."

Home Miscellaneous Series above and below is referred to as *HMS* below, with appropriate volume and page numbers

the practices of the past 'despotic rulers'.

The deterrent aspect of punishment was clearly elaborated in the Report of H Strachey, for the Division of Calcutta, of 24 March 1803:

> A robber, even in Bengal, is I presume a man of courage and enterprise, who, though he roughly estimates the risk he is to run, by continuing his depredations on the public, is rather apt to underrate that risk, small as it is, in reality.
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> Each individual ... perhaps calculates the chance of his being brought to justice, and imprisoned for seven or eight years, as ten to one in his favour. If ... we could bring the chance to ten to one against his escaping ... he would ... be more effectually deterred from committing robberies..[12]

This central justification of punishment, i.e., primary and secondary deterrence, was frequently asserted by a host of judicial officials. To borrow the language of the Governor General, writing in October 1815:

> The only legitimate object in the trial and punishment of offenders ... is the suppression of crimes by terror of example. The utility of punishment is therefore diminished (except as it deprives the object of it of the means of again committing a similar offence[13]) if the effect of it in the way of example is by any means weakened.[14]

This and similar other statements from concerned Company officials clearly reiterate[15] the rationale of the post-Enlightenment 'classical

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12 Firminger, W. K. (ed), *The Fifth Report from the Select Committee of the House of Commons on the Affairs of the East India Company,* Calcutta 1917, vol 2, Appendix No 11, at p 645.

13 Clearly emphasising the primary deterrent rationale of punishment. The parenthesis is in the original.

14 "Minute by the Governor General on the Judicial Administration of the Presidency of Fort Williams, dated 2 October 1815" in *Modification of the Judicial system in the Bengal Provinces,* Fort William 1815, IOLR/W/1763, at p 65.

15 For example, the Resident at Delhi, C T Metcalfe wrote:

> For my own part, I confess that the benefit of the community was the sole object of all the punishments that I ever inflicted: which object was to be gained by double means -- the actual removal of the individual from society by confinement, and the operation of example to deter others from crime.
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> in Minutes of C T Metcalfe in *Modification*, above n 13, at p 56.
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> Similarly, Judge and Magistrate E Colebrook wrote on 17 September 1801: "The proper aim of human punishment is the prevention of crime ..." in his "Report of the Moorshedabad Court of Circuit on the Completion of the Jail Deliveries of that Division for the first session of 1801" in *Board's Collection,* IOLR F/4/128/2391 at p 17.

school'[16] regarding the deterrent justification for punishment.

As indicated, deterrence presupposes some understanding or familiarity with the mechanism of the criminal justice system, particularly the degree of punishments for various crimes. To assume that the punishment of the new criminal law norms was prescribed to deter but not to derive retribution or enforce the right of God, it was essential that the criminals, both actual and potential, comprehended the threatened punishments. This was also recognised by the Company officials and the Regulations were publicised in local languages.

More importantly, Governor General Wellesley felt the need to assess the familiarity of the people with the Company's regulations and inserted a query to elicit opinions in this regard in his Enquiry of 1801-1802. In this rather long questionnaire consisting of 40 'interrogatories', Wellesley inquired C in question No.11 C "Are the principal inhabitants of your jurisdiction as well acquainted as individuals in general can be supposed to be informed of the laws of the country?"

Five responses to this questionnaire were received from the Courts of Appeal and Circuit of the five divisions, and 30 other responses were obtained from the Judges and Magistrates of 30 zillahs.[17]

Each volume in the series titled *Board's Collection* at the India Office Library and Records is made up of several loosely connected documents such as extracts of several letters received by the Board of Directors of the East India Company from the Political Department at Fort William over a number of years. Some of these volumes are paginated while others are not. This particular volume, i.e., 128, contains tracts 2370 to 2393 and were recorded as received in London during 1802 to 1803.

Further reference to the Board's Collection will be in the form of BC, followed by relevant volume, tract number and page number where tracts were paginated, otherwise we shall refer to paragraph number.

16 William F P and McShane M D., *Criminological Theory*, New Jersey 1988, particularly chapter 2: "Classical School".

17 The responses were signed by two judges each for the Courts of Appeal and Circuit of Murshidabad (T Pattle & R Rocke), Patna (C Keating & A Seton) and Benares (J Neave & P Treeves) divisions while the response from Calcutta Circuit Court was signed by three judges (W A Brooke, H Ramus & C A Bruce) and there were four signatories to the response from Dacca Division's Court of Circuit (C F Martyn, W C Blaquiere, A Macklar & E Thorton). Judge and Magistrates of 30 Zillahs also responded, making a total of 35 responses.

The questionnaire with the returned responses are in Bengal Civil Judicial Proceedings of 8 July 1802 in IOLR P/147/55-57 and also printed as *Papers Relating to the East India Company, (Parliamentary Papers*) London 1813, Part I

"The inhabitants of this Zillah are almost totally ignorant of the Regulations", wrote J Wintle, the Judge and Magistrate of Backergunge in his response of 7 January 1802.[18] More detailed was the response of the Senior Judge T Pattle of the Moorshedabad Court of Appeal and Circuit:

> If by the laws of the country be meant the *Koran* and *Shaster*, the principal inhabitants of our jurisdiction are as well acquainted with the code of their respective religion as individuals in general can be supposed to be informed. If the Regulations of the Government be also meant, we believe that they are known to few....[19]

The majority of the responses indicate that the Company's judicial officials were convinced that their subjects were not familiar with the Company's regulations.[20]

In response to this query the judicial officers emphasised that the 'natives' did not know about the rules and regulations of the Company. At the same time, however, the same officials also pointed out that the 'natives' had a detailed and elaborate understanding of the rules of Mohammedan criminal law. This world of confusion -- asserting diametrically opposed views about the 'native subjects' -- is best captured in

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with the full title of "Copy of Interrogatories proposed by the Governor General in Council in the Year 1801, to the Judges of Circuit and Zillah Judges in Bengal; respecting the effects of the New System of Revenue and of Judicial Administration established by the British Government in that Country; with the Answers at large of those Judges, and of other official person to whom those Interrogatories were sent".

I have used the printed version containing 290 pages. Subsequent references to this document are in the form of *PP, 1813*, with appropriate page numbers.

It needs mentioning that the questionnaire sent to the Circuit Court was a little different from the one sent to the Zillah Judges. However, the queries we have analysed are same for both sets of questionnaire. See also, Fisch J, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law*, Wiesbaden 1983, fn 155 at p 58.

18 *PP, 1813*, at p 110.

19 *PP, 1813*, at p 169. Judge and Magistrate of Zillah Moorshidabad also suggested, at p 205, that the inhabitants of the Zillah were familiar with the norms of *Koran* and *Shastra*, but not with the Company's Regulation.

20 C Keating and A Seton of the Patna of Court of Appeal and Circuit wrote:

As far as we can judge, the principal inhabitants within our jurisdiction have but very faint and imperfect notions, either of principles of British jurisprudence or of the laws of the country as they now stand...

in *PP, 1813*, at p 219. Similarly E Roberts, Judge & Magistrate of Sylhet responded, albeit very precisely, at p 128: "By no means."

the comments of James Wordsworth, the Judge and Magistrate of Rangpore. He wrote that the inhabitants of Rangpore were well acquainted with codes of their respective laws, while the Company's Regulations were known to a few and "the grand masses of the people are totally illiterate and ignorant (of the Regulations)."[21] However, in explaining the increase in the number of 'crimes of enormity' committed in his zillah during the period between 1793-1801,[22] J Wordsworth wrote:

> It is remarkable, that no great increase occurs before the year 1798, prior to which, I am inclined to believe, that the majority of the ill-disposed part of the inhabitants of this district was in a great measure deterred from the commission of crimes, by the dread of incurring severe and uncertain punishments, and that they consequently desisted until they were able to ascertain the effects of the system of criminal jurisprudence established in 1793, as far as regarded the apprehension, conviction, and punishment of delinquents.[23]

In the logic of J Wordsworth, the increasing knowledge about the new criminal justice system resulted in an increase in the number of crimes committed.[24] There are, thus, interesting inversions in the logic of deterrent impact of punishment in this report of the Judge and Magistrate

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21 *PP, 1813*, at p 212.

22 The increase in the number of crimes of enormity, to the judicial official, is reflected in the increase in the number of 'offenders' tried for these offences, as recounted in the following table supplied by James Wordsworth, for the zillah of Rangpore:

Table 1

YEAR	PERSONS TRIED
1793	215
1794	245
1795	357
1796	279
1797	299
1798	714
1799	511
1800	1,054
1801	1,157

in *PP, 1813*, at p 212.

23 *PP, 1813*, at p 212.

24 *PP, 1813*, at p 212.

of Rangpore. Prospective criminals were, thus, deterred from committing crimes by the dread of 'severe and uncertain punishment'. He, however, also asserts the contrary -- "In my opinion, the Regulation which declares persons convicted of the crime of perjury liable to be marked in the forehead, has produced little or no effect by way of example or determent",[25] and even transportation as punishment had failed as the crimes "have greatly increased since the introduction of this punishment by the British Government."[26]

The rationale for punishment was clearly recognised to be deterrence. But at the same time the deterrent impact of punishment was seen as not being operative or effective. Similar to the opinion of J Wordsworth, the Judge & Magistrate of Midnapore wrote, on the one hand: "... their knowledge (of law and Regulations) is extremely limited."[27] On the other, he also asserted that one of the principal causes for the increase in crime was that "... the natives have attained a sort of legal knowledge, as it is called, that is to say, a skill in the arts of collusion, intrigue, perjury and subornation, which enables them to perplex and baffle us with infinite facility."[28]

These aspects of internal contradictions have often been overlooked in accounts of law making in early colonial Bengal. A coherence in the law making process, or an underpinning of a consistent approach to criminal law and punishment in such a discourse can only be presumed, as has been done in the relevant literature, but not substantiated. The convoluted, contradictory and disjointed deliberations of the deterrent impact of punishment can be impressed by citing the remarks of Senior Judge T Pattle who denied or doubted any impact of punishment when he wrote:

> The causes to which we ascribe the increase (in the number of crimes[29]), are

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25 *PP, 1813*, at p 215.

26 *PP, 1813*, at p 215.

27 *PP, 1813*, at p 18, parenthesis added.

28 *PP, 1813*, at p 25.

29 Parenthesis added. This increase in the number of crimes is inferred by the Senior Judge based on the following number of persons tried by his Court during the previous seven years:

the want of a preventive police, and the inefficacy of imprisonment as a punishment, of either reformation or example."[30]

It needs mentioning, however, that for some of the judicial officials the inhabitants of their own zillahs and jurisdictions were well 'acquainted' with the laws. The Judge & Magistrate of Hoogly wrote that the principal inhabitants of his zillah "... are better acquainted with the laws of the country than the individuals in any other of the districts."[31] But such comments are few and this knowledge, as indicated above from the comments of the Judge and Magistrate of Midnapore, was thought to facilitate the cause of the criminals. Similarly, the Judges of the Dacca Court of Circuit and Appeal asserted that the dacoits were very apt at manipulating the defects of the Muslim law of evidence to avoid conviction.[32]

This frequent juxtapositioning of knowledge about law and the deterrent impact of punishment, we suggest, clearly undermine the notion of rationality and modernity of these rules and the underlying process of law making. As indicated, the judicial officials frequently asserted that the 'natives' were neither aware of, nor knowledgeable about, the regulations concerning crime and punishment. W T Smith, Judge and Magistrate of Zillah Ramghur even asserted: "Such is the uncivilised state of this district, that the natives cannot be expected to be conversant in the laws of their country as individuals are generally supposed to be."[33] He even felt that

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Table 2:

YEAR	PERSON
1783-94	1,671
1794-95	1,593
1795-96	1,885
1796-97	1,578
1797-98	2,170
1798-99	2,422
1799-1800	2,023
1800-01	2,120

in *PP, 1813*, at p 171.

30 *PP, 1813*, at p 171.

31 *PP, 1813*, at p 42. And the short assertion of the Judge and Magistrate of Nuddea, at p 51: "In my opinion they are."

32 *PP, 1813*, at p 87.

33 *PP, 1813*, at p 238. Underline added.

"the natives, not capable of deciding right from wrong, take up arms in his[34] defence; the country is thrown into a state of rebellion, and the innocent suffers for the guilty."[35] Such a depiction of the people or the understanding of the basis of their actions, not only casts doubt on the formal rationality of underlying discourse in law making that is essential for the enacted rules to be adjudged 'modern and systematic'. It also negates one other fundamental proposition of the modern law - the rationality and free will of the individuals. If the individuals are denied the capacity to balance the pain and pleasure of punishment and crime respectively, then the edifice of the criminal rules as rational-modern measures against crimes becomes superfluous. Rules enacted in the backdrop of such confusion and denial can only be random and erratic.

We have indicated that some of the judges and magistrates ascribed knowledge of rules and regulations to the 'natives'. But we have also pointed out how such knowledge is described as a cause of crime. J Paterson, the Judge and Magistrate of Dacca Jelalpore thought that the '*gomastas* and certain natives' of his jurisdiction were 'sufficiently acquainted' with the Regulation "to make the law a stalking horse for the purpose of fraud and oppression."[36] Thus, the opposite of the proposition of 'no knowledge regarding laws' is also frequently seen as the cause of facilitating or increasing crimes.

Such confusing and contradictory tenors of official discussion, deliberation, and assessment cannot justify an analysis of these rules in terms of their being conditioned and/or influenced by an inconsistent approach or consideration. Consequently, the rules were often enacted randomly.

INCREASE AND DECREASE IN THE NUMBER OF CRIMES

What crimes were being committed and by whom during the period under discussion, are queries which can hardly be responded to in a comprehensive manner. This is primarily due to the absence of extensive or consolidated records on these issues, particularly before 1818.[37]

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34 W T Smith is referring to the superior/leader of the 'native gang' in whose defence the followers will resort to arms.

35 *PP, 1813*, at p 261.

36 *PP, 1813*, at p 151.

37 The Court of Appeal and Circuit of Patna Division, for example, wrote on 19 November 1801 that the official records before 1796 "does not admit of our

Secondly, the concerned officials themselves doubted the veracity of their own figures of crimes.[38] Thirdly, the scattered 'official records' containing the evidence of the types and numbers of crimes and criminals cannot be divorced from "the procedural and power grids through which [these] 'facts' are admitted into the record."[39]

Nevertheless, the 'crime figures'[40] are relevant for our purpose as much of the official deliberations on crime, punishment and criminal law revolved around the statistical evidence.[41] Regulations and norms were often purported to be enacted to 'suppress' the crimes 'revealed' through the statistical evidence.

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submitting, with sufficient accuracy ... detailed information..." on the number of crimes committed, persons convicted or acquitted. See *PP, 1813***,** at p 221.

The Parliamentary Papers, from 1818 onwards, provides relatively detailed statistics of crimes and we shall refer to those in the following chapter.

38 The Judge and Magistrate, for example, of 24 Pergunnahs, in *PP, 1813***,** at p 69, remarked: We have reason to believe that the police *darogahs* were by no means regular in reporting the crimes committed within their respective jurisdictions; and that number were perpetrated which never came to the knowledge of the magistrate.

39 Amin S, "Approver's Testimony, Judicial Discourse: The Case of Chauri Chaura" p 166 in Guha R (ed), *Subaltern Studies V*, New Delhi 1990, at p 167.

40 It unclear why the issues of numbers and figures of crimes and criminals have not been discussed in any detail in the relevant literature. Academic attention have so far been limited to only fragmentary statistical evidence concerning dacoits, thugs and violence linked to sannyasi and fakir. For discussion of specific types of 'criminal activities' see, Gosh, J M, *Sannyasi and Fakir Raiders in Bengal*, Calcutta 1930; Chaudhuri S B, *Civil Disturbances during the British Rule in India (1756-1857)*, Calcutta 1955; Das B S, *Civil Rebellion in the Frontier Bengal*, Calcutta 1973; Gupta A, *Crime and Police in India, upto 1861*, Agra 1974.

Mukerjee A, "Crime and Criminals in Nineteenth Century Bengal (1861-1904)", (1984) 21 *Indian Economic and Social History Review*, p 153 provides figures for certain categories of crimes for the second half the nineteenth century; see also Chakrabarti R, "Pax Britannia and the Nature of Police Control in Bengal Rural Society c 1800-1860", (1986) 105 *Bengal Past and Present*, p 78; Chatterjee B, "The Darogah and the Countryside: The Imposition of Police Control in Bengal and its Import (1793-1837)", (1981) 18 *Indian Economic and Social History Review*, p 19; Floris G A, "A Note on Dacoits in India", (1962) 4 *Comparative Studies in Society and History*, p 187; Freitag S B, "Crime in the Social Order of Colonial North India", (1991) 25 *Modern Asian Studies*, p 227.

41 Sec 12 of Regulation IV of 1797 had laid down the detailed mode of recording the incidence of crimes.

Crime figures were crucial to law making as the number of crimes thought to have been committed often shaped the rules which were enacted. These figures also led to the amendments of the previously enacted norms as and when those rules were deemed inadequate to 'suppress the crimes or criminal groups'. In official correspondence from *muffisil* to *sadar,* reports of 'heinous' crimes were often accompanied by suggestions for enacting new norms or amending the existing ones. In fact not only in responses to specific queries from the Governor General in Council or circulars from *Sadar Nizamut Adawlut*, but also on their own initiative the Magistrates and Judges often wrote about measures they thought necessary to fight against the crimes brought to their knowledge by the latest evidence. In these correspondences the 'number of crimes' being committed was the pivotal justification for their proposed measures.

As the judicial officials placed a lot of importance on these crime figures, we shall scrutinise these from their perspective and see how this 'evidence' was deployed to rationalise law making.

Official inquiry regarding the number of crimes was important to the law making process and direct questions in this regard were included. For example, the 21st query of the Wellesley questionnaire wanted to know:

> Are you of the opinion that the number of crimes committed annually in the division under your jurisdiction has increased or diminished since the year 1793, and to what cause do you ascribe the increase or diminution?

Fisch has pointed out 17 answers suggested an increase, while 13 indicated a decrease in the number of crimes committed within their respective jurisdictions. Furthermore, two magistrates were of the opinion that there had been no considerable change.[42] Some of the answers provided detailed statistics of crimes committed within their jurisdiction "while others gave only a rough estimate."[43]

These deliberations, however, provide very interesting examples, again, of both juxtapositioning of facts to suit the suggestions, and ignoring the facts if those were inconsistent with the suggestions or proposals put forward by the officials themselves.

The disjunction between official facts and official reaction or suggestion emanating from these facts clearly indicate the continued significance of *a priori* perceptions, despite the contrary evidence. This can be best highlighted by focusing on the deliberations concerning 'increase or

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42 Fisch J, above n 17, at pp 58-9. Some of the respondents, eg the Judge and Magistrate of Hoogly, T Brook, did not record any answer to this query.

43 Ibid, at p 59.

diminution' of crimes. One of the reports that provided detailed statistics was that from the Patna Court of Appeal and Circuit. These figures were compiled from the number of persons "committed by the several magistrates" i.e., the magistrates of the zillah courts under the jurisdiction of the Patna Division's Court of Appeal and Circuit. The tables in Appendix A of the Patna Division Court's Report provided an exact picture as to the number of "delinquents found guilty and punished" for the various categories of crimes. From this Appendix, for the zillah of Behar, we get the following figures of convictions:

Table 3: number of delinquents found guilty and punished for different crimes for the zillah of **Behar**.[44]

Assault, Battery, etc	35	6	26	32	24	123
Burglary	14	15	16	19	19	83
Robbery, Dacoity	3	2	39	10	45	99
Murder, Accessory	15	9	12	13	4	63
Theft	20	28	24	40	65	177
TOTAL	102	73	134	117	166	592[45]

It needs mentioning that we have omitted the numbers for some other crimes such as adultery, arson, fornication, forgery, rape, homicide etc from the above table as the numbers of conviction for these crimes were insignificant. For example, there were only 2 convictions for adultery in each of the years 1797 and 1798, and none for the other years. Similarly for forgery and rape there was only 1 conviction each during these 5 years. There were only 4 convictions for homicide in 1797 and 5 for 1798 and none for other years. The 'TOTAL' row in the above table, however, included the number for all different categories of crimes omitted as a separate entry. Another important point is that these are the figures for those crimes, as the Report emphasised, for which an increase was noticed,

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[44] Compiled from *PP, 1813,* at p 227. The Judges, however, also mention, at p 221, that "As it specifies the number of crimes of each class, as also the number of delinquents convicted in each year at each station, our superiors will, we presume, derive more information from a reference to it, than from general observations submitted in any forms." Underline added for emphasis.

It is, thus, not clear whether the numbers are of convicts or crimes. A co-relation between the number of crimes and conviction is possible. Despite the confusion, it is important to note that these figures were central to the deliberations as the Court pointed out that much more relevant information can be derived from these than 'general observations submitted in any form.'

[45] The row totals 592, but it does not reflect the column total as certain categories of crimes, as explained in the text, have been omitted.

"since those offences in which a decrease has taken place are omitted, as being less immediately connected with the question." [46]

A later report from the Court of Appeal and Circuit of Patna also provides figures of *prisoners committed and tried* for different districts of Patna Division during 1808-1813. From this statement we can arrive at the following table for the zillah of Behar: [47]

Table 4: Prisoners committed and tried in **Behar**

Crime	**1808**	**1809**	**1810**	**1811**	**1812**	**1813**
Murder, Homicide	16	14	13	10	9	18
Robbery, Dacoity	14	8	14	23	13	7
Forgery, Coining	1	1	-	4	5	1
Burglary, theft	9	7	8	30	35	32
Boundary frays	2	6	6	6	7	-
Perjury	5	5	6	4	3	-
Miscellaneous	23	32	26	41	43	92
TOTAL	**70**	**73**	**73**	**118**	**117**	**153**

TOTAL OF ALL PERSONS COMMITTED FOR TRIALS IN BEHAR DURING 1808 - 13 = 604

Except burglary and theft during 1811-12, it is difficult to suggest a substantial increase in trials for any other crime during these six years. However, as we detailed in Chapter 6 below, the rhetoric of law making did not coincide with this evidence of crime figures.

This table, obviously, does not indicate the number of crimes committed. However, another statement provided by M A Mackey, the Judge and Magistrate of Behar, dated 9 August 1814 provided an indication of the fact that for each crime several persons were thought to be involved. M A Mackey's statement is in **HMS,** vol 775, at pp 281-3.

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46 *PP, 1813*, at p 222.

47 *HMS*, vol 775, at pp 20-21.

Table 5: Behar Zilla

Crime	1812 crime arrested		1813 crime arrested		1814 (Jan - July) crime arrested	
Murder	12	16	11	30	4	16
Robbery	12	255	1	20	-	-
Affray Assault	5	64	2	40	4	95

The discrepancy in numbers between this statement of M A Mackey and the one provided by the Patna Court of Appeal Circuit for the years 1812 and 1813 is probably due to the difference in categorising crimes: the Court of Appeal and Circuit lumped murder and homicide in one category and robbery and dacoity in another, while the Judge and Magistrate of Behar only counted murder and robbery.

This table clearly indicates that except theft the increase in other convictions was not substantial. However, A Tufton, the Judge and Magistrate of Behar not only asserted that the number of crimes has increased in his jurisdiction, but also suggested a host of very draconian measures to combat crime:

> For theft, committed without threats or violence ... for shoplifting; and for stealing cattle[48]; for the first offence, five years of imprisonment and hard labour. For the second, fourteen years imprisonment and hard labour. For the third, perpetual imprisonment, hard labour, transportation, and loss of caste. .....
>
> For burglary,[49] without forcible entry, threats or violence, for the first offence, fourteen years imprisonment and hard labour; for the second, perpetual imprisonment, transportation, hard labour and loss of caste.[50]

These draconian suggestions for increased terms of imprisonment and transportation for theft and burglary without violence, in the backdrop of the inconsequential increase in the number of convictions becomes more whimsical when we find the same magistrate asserting that the criminals are "so well used in jail, [that] confinement is no punishment, but tends to

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48 For stealing cattle, there was a total of 4 convictions during the 5 years from 1796 to 1800 in Behar. *HMS*, vol 775, at p 227.

49 As the table above indicates, the numbers for burglary was fairly constant over the five year period.

50 *PP, 1813*, at p 249.

confirm them in their bad habits."[51] He also suggests that the "criminals seldom or never reform in this country, [therefore] temporary imprisonment is almost always insufficient."[52]

Such perceptions of criminals and the proposed punishments can hardly be seen to be based on the figures and statistics carefully and laboriously compiled. This disjunction between the empirical evidence and suggestions or proposals purported to be linked to such evidence is noticeable in responses of other officials as well. The Judge and Magistrate of Patna, J S Douglas also concluded that the number of crimes in his jurisdiction had increased and particularly thefts were very frequent while housebreaking and robbery "happens now and then."[53] The relevant figures for this zillah, however, cannot be related to his proposition:

Table 6: selected numbers of conviction for the zillah of Patna:[54]

CRIME	1796	1797	1798	1799	1800	TOTAL
Assault, Battery	8	26	19	--	21	74
Burglary	3	3	9	4	--	19
Robbery, Dacoity	-	1	4	20	5	30
Murder, Accessory	1	1	5	1	1	9
Theft	90	28	31	41	40	230
TOTAL	119	63	88	82	83	435[55]

The figures for 1798, 1799, 1800 are almost identical and can hardly

[51] *PP, 1813*, at p 246.

[52] *PP, 1813*, at p 249.

[53] *PP, 1813*, at p 230.

[54] Derived from *PP, 1813*, at p 226. Similarly, the figures of prisoners committed for trial in the zillah of Patna during the later years of 1808-13 also do not indicate any substantial increase in crimes. The following table for zillah of Patna is also derived from *HMS*, vol 775, at p 20-21.

Table 6A: selected numbers of conviction for the zillah of Patna:

CRIME	1796	1797	1798	1799	1800	TOTAL
Assault, Battery	8	26	19	--	21	74
Burglary	3	3	9	4	--	19
Robbery, Dacoity	-	1	4	20	5	30
Murder, Accessory	1	1	5	1	1	9
Theft	90	28	31	41	40	230
TOTAL	119	63	88	82	83	435[54]

[55] See above n 44, for the discrepancy between and row and column totals.

justify the image of rampant crime and lawlessness portrayed in the report of the Magistrate.

Outside the Division of Patna, reports from zillahs of Backergunge (Dacca Division), Nuddea (Calcutta Division), and Bhaugulpore (Moorshedabad Division) included detailed statistics. J Wintle, Judge and Magistrate of Backergunj had supplied the following table of number of crimes committed in his jurisdiction during 1797 to 1800 and the *first half of 1801*.

Table 7: Figures of crimes for the zillah of Backergunj[56]

CRIMES	1797	1798	1799	1800	1801
Murder	2	19	22	22	21
Dacoity	11	15	17	19	39
Dacoity and Murder	1	7	9	8	5
Theft	2	13	8	5	4
Perjury	2	1	8	--	12
TOTAL OF ALL CRIMES[57]	**21**	**59**	**67**	**57**	**95**

This table, supplied by J Wintle, indicates a decrease only in the number of thefts. Other figures, particularly the total of all crimes show a clear increase. However, J Wintle had surmised that the number of crimes in his jurisdiction has diminished "in comparison to what I understand were formerly committed. .... The diminution is to be ascribed to ... my own diligence ...[58] The disjunctions between 'facts' and 'inferences' are only too obvious here.

The numbers supplied by the Judge and Magistrate of Bhaugulpore seem to support his inference that the number of crimes in his zillah had diminished.

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56 *PP, 1813*, at p 112.

57 We have lumped the insignificant numbers for other categories of crimes such as receiving stolen goods, bribery, forgery, wounding and resistance of court's authority together in the TOTAL OF ALL CRIMES.

58 *PP, 1813*, at pp 111-2.

Table 8: crimes committed in the zillah of Bhaugulpore:[59],

CRIMES	1793	1794	179	1796	1797	1798	1799	1800	1801
Murder	6	10	5	7	4	6	9	6	3
Wounding	2	4	--	--	--	6	3	3	--
Robbery	1	--	1	--	--	--	--	--	--
Theft	30	51	25	65	21	40	22	35	48
Dacoity	--	--	2	1	1	4	3	11	7
TOTAL	**39**	**70**	**47**	**98**	**36**	**63**	**39**	**57**	**60**[60]

At issue is not the fact that some of the reports did reflect their own evidence. This congruence between the evidence and suggestion in some of the reports do not detract from our proposition that these statistics, figures and number were not pivotal to the law making process. Moreover, the disjunction between 'facts' and proposals becomes more stark when we look at suggestions by the judicial officials for future measures.

Assessing these suggestions for future measures (in response to the second part of the query: to what cause do you ascribe the increase or diminution), Fisch has drawn our attention to the fact that:

> "[w]hether [sic] causes for the success or failure were given or proposals for the future made, their tendency was always the same: to render the law more severe, to improve the efficiency of the administration of justice and of the police.[61]

It could hardly be otherwise -- particularly if we scrutinise the comments of the responding officials. As we have mentioned in the previous chapter, the central tenets of the official deliberations often

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59 *PP, 1813***,** at p 190. The 'total'' also includes numbers for other crimes such as perjury, causing of abortion, setting fire to houses (28, 8, and 11 respectively over the 9 years), as well those such as bribery, and 'entertaining a thief in his service' etc each of which are recorded to have been committed only once during these 9 years.

60 *PP, 1813***,** at p 190. The #total$' also includes numbers for other crimes such as perjury, causing of abortion, setting fire to houses (28, 8, and 11 respectively over the 9 years), as well those such as bribery, and #entertaining a thief in his service$ etc each of which are recorded to have been committed only once during these 9 years.

61 Fisch J, above n 17, at pp 59-60.

revolved around the 'characteristics' of the natives. Sometimes, it seems, the descriptions of the natives led to very interesting expressions, if not rules. The Judge and Magistrate of Nuddea, C Oldfield explained the increase in crimes in the following words: "..3dly The dastardly conduct of the native in general ..4thly The rascality of the class of people employed as choekeedars or watchmen..."[62] A sense of helplessness, perhaps, overwhelmed C Oldfield, confronted, as he was, with so much 'dastardly conduct' and 'rascality', that he almost had to concede: "..but to point out the means of suppressing these (ie crimes) I am afraid, is beyond my power."[63] A similar tone of noble resignation is noticeable in the report of the Dacca Court of Circuit and Appeal when the Judges wrote, concerning the crime of perjury: ".. were hardly know what to recommend with much hope of success, whilst the morals and religion of the natives of this country remin in the present corrupt state."[64] Despite such apparent impossibility of properly dealing with natives' crimes, the inevitable suggestion is:

> ... It only remains then to try what an increase in the severity of the punishment will do, and ... persons convicted of perjury should, we are of opinion, be declared punishable with imprisonment for such a term of years as to render them liable to transportation.[65]

Whatever the diagnosis, the prescription often was the same. E Thorton, the Judge and magistrate of Twenty Four Pargannah listed the diminished power of Magistrates, delay in trials, absence of regulations for punishing the sale and purchase of stolen property, etc as the main causes for the increase in crimes.[66] However, as for further measures, needless to say, the suggestion was for more severe punishment:

Convinced, that unless some severe examples are made, no effectual check can be given to the commission of dacoits, we submit ... the expediency of sentencing to death the perpetrators of every dacoity, in which, murder, wounding, or any cruel treatment whatsoever, shall have been inflicted ... that in all instances when dacoity shall not have been attended with any of these circumstances, the perpetrators be transported for life.[67]

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62 *PP, 1813*, at p 52.

63 *PP, 1813*, at p 52.

64 *PP, 1813*, at p 80.

65 *PP, 1813*, at p 80.

66 *PP, 1813*, at p 69.

67 *PP, 1813*, at p 73.

This above suggestion is forwarded, despite the fact that the same Judge also claimed that "the capital crimes of all descriptions, and that of dacoity in particular, have decreased considerably during the last two years".[68]

The perceived need for more and more severe punishment often obliterated the distinction between grades or categories of crimes, or between different participants. The Judge and Magistrate of Backerganj suggested C ".. all accomplices as well as principals in murder ... should be sentenced to suffer death."[69] Similarly, different categories of crimes are also not distinguished C same punishment may encompass different types of crimes. S Middleton, the Judge and Magistrate of Jessore suggested:

> ... upon a robber or nightly theft being proved, the sentence should be never less than seven years, and transportation for the term. People convicted of murder, burning or other acts of inhuman cruelty, should be punished with death; and this not to be inflicted solely on the person committing the act, but the gang present and aiding ...[70]

It was not only in responses to the official inquiries such as that of Governor General Wellesely, but also on numerous other occasions various judicial officials proposed various measures and offered suggestion on some pretext or other. Many of these suggestions are so replete with contradictions and disjunctions that the process of law making clearly becomes whimsical, erratic and random. Judge E Colebrooke, on his report of 17.9.1801 (on completion of the Moorshedabad Court of Appeal and Circuit's tour of the zillah courts of the division) suggested far reaching changes/amendments in the law to deal with *dacoity*. He apparently bases his suggestion on the 'fact' of "undiminished prevalence of dacoity". His 'fact' of prevalence of dacoity is surmised in the following table.[71]

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68 *PP, 1813*, at p 69.

69 *PP, 1813*, at p 80.

70 *PP, 1813*, at p 13. Underline added for emphasis.

71 Compiled from *BC*, vol 128, tract 2391, p 4-5.

Table 10: Dacoity in various zillahs of Murshidabad Division during 1800 and first half of 1801 (Jan-June)

Zillah	**Robbery**	
	1800	1801
Bhauglepore	3	5
Purneah	6	3
Dinajpore	16	11
Ramhur	6	14
Rajshahi	10	17
Moorshedabad	18	13
TOTAL	**59**	**63**
No of Prisoner held	371	293

The 'fact' in the above table hardly justifies the rhetoric of punishment deployed by Judge E Colebrooke. From the above table, a nominal increase in dacoity in 3 of the 6 zillahs under the Moorshidabad Division is noticeable. It was not so much the increase in number of dacoity but the mere 'prevalence' of it (only 3 in Bhauglepore and 6 in Purneah during the year 1800, for example) seems to justify any measure against the crime. These crimes, to Judge Colebrooke, seemed to justify any measure, however unorthodox, as he proposes:

Crimes are not to be punished in proportion to their moral guilt but in proportion to the necessity and difficulty of preventing them ... on the principle that equal crime may undergo unequal punishments, or the lesser crimes the greater punishment and on this principle the facility with which any species of crimes is perpetuated and the difficulty of detecting the offender, are reasons for aggravating the punishment.[72]

Having, thus, established that the ease with which crime can be committed and the difficulty regarding conviction should determine the quantum of punishment, he proceeds to suggest: "... one more expedient, the *ultimato. Ratio Legum*, the punishment of death"[73] not only for the principals responsible for the crime, but the "whole gang in one indiscriminate sentence of death."[74] Elsewhere in the report he reiterates this suggestion by asserting that the sentence of death should be imposed

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72 *BC*, at pp 21-21.

73 *BC*, at p 23.

74 *BC*, at p 28.

on all the members, irrespective of "whether he shall have taken an active part in the crime, or merely kept watch at the door."[75]

Norms defining behaviour and its consequences can be suggested on several grounds or justifications. Our scrutiny, however, indicates clear discrepancy and incongruence between the assumed principles and perceptions; facts and suggestions; deterrence as the justification for punishment and punishment for almost for its own sake; and blurring of distinction and degree of punishment for different 'crimes' and various categories of criminals.

FROM CRIMES TO LAWS

The disjunctions and contradictions outlined in the above sections, obviously, did not prevent promulgations of Regulations. Regulations often followed individual reports and suggestions from judicial officials. These suggestions were frequently borne out of heir specific experience. Subsequent regulations were reactions to such specific situations. These reaction-Regulations then went through several amendments over the years to gradually enhance the criminality of the acts and prescribing punishments, often by imposing more and more severe punishments with each amendment, for the prohibited acts. Two examples below will indicate such process of enacting Regulations to suggest the random nature of law making.

Treason: A letter from Shams ul Dowla, brother of Nawab Nusrat Jang (Naib Nazim of Dacca) was found by the East India Company soldiers in the Beneras house of Vizir Ally, the son of Asaf ul Dowla (Nawab of Oudh) in it, Shams ul Dowla had urged "the Prince or Sovereign of Persia ... to invade the province of Bengal."[76]

Shams ul Dowla was arrested in Murshidabad and further search produced a number of other papers and letters from which it appeared that Shams ul Dowla had addressed letters to Zemaun Shah also, urging him to invade the Company's territories and that with a view of favouring the operations of the Shah, he had taken measures in concert with persons at Muscat for the introduction of a body of Arabs into the province on ships from that port and had also arranged to form a Confederacy among the

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75 *BC,* at p 45.

76 *HMS,* vol 584, p 227, at p 228. Pages 227-251 of this volume contain the Proceedings of the Judicial Department of 10.12.1800 on the trial and sentence of Shams ul Dowla.

Zamindars in Bengal, and to induce them to rise in rebellion whenever he should give them the signal for that purpose.[77]

It was also discovered by the Government that "several Arab Shaiks came from that port (Muscat) to Calcutta, at the latter end of the year 1796, and in 1797, that they had on the board armed men and military stores"[78] and also that they had orders to obey the commands of Shams ul Dowla.

The agent employed by Shams ul Dowla to take his message of rebellion to various zamindars did not do so, and as such no zamindars were involved in this 'conspiracy'. Further, "[a]s far, however, as the Government were able to judge from the evidence before them, they saw no reason to believe that the Nawab (Nusrat Jang) had any knowledge of the design of Shums ul Dowla."[79]

On the basis of this evidence, Shams ul Dowla along with one Mirza Jaun Tuppish[80] was charged and tried for treason. They were sentenced in conformity to the Mohammedan Law to imprisonment until Government should be satisfied with the sincerity of their repentance. From the terms of this sentence, it is in the power of the Supreme Authority to render it in its operation a sentence of imprisonment for life, and the Governor General in Council conceives that both Shams ul Dowla and Mirza Jaun Tuppis should for the purposes of public example be detained in the confinement during their lives.[81]

The prosecution in this case had urged for the imposition of a sentence of death. However, there was no specific legal sanction against rebellion in the Muslim law[82] and the Moulvis would only authorise a sentence of imprisonment.[83]

Following the sentence of imprisonment until repentance by the fatwa, the Governor General informed the Board that with a view of deterring persons from engaging in treasonable designs against the British

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77 *HMS* vol 584, at pp 228-29.

78 *HMS*, vol 584, at p 230.

79 *HMS*, vol 584, at p 231.

80 The records do not indicate the relationship between the two or the specific role of Mirza Jaun Tuppish.

81 *BC*, vol 128, tract 2371, para 14.

82 Schacht J, *An Introduction to Islamic Law*, Oxford 1964, at p 187.

83 Fisch had pointed out that the absence of a death sentence did not mean that Muslim rulers of Mughal India refrained from summarily executing their political enemies. See, Fisch J, above n 17, at p 80.

Government by the establishment of a more adequate punishment for such offences, (he had) directed the Nizamat Adawlat to prepare and transmit to him draft of a Regulation for the trial of persons charged with the crimes against the state formed in conformity to the principles of the English law of Treason, as far as that law might appear to be applicable to the circumstances of the British Government. [84]

Regulation IV of 1799 titled "A Regulation for the trial of persons charged with crimes against the State" was subsequently promulgated to provide for a sentence of death on conviction. Later, in 1804, Regulation X [85] provided for the suspension of the ordinary Criminal Courts and declaration of Martial Law in areas of war or rebellion. Persons convicted of the crime of offences against the state shall now be tried by a Court Martial and "shall be liable to the immediate punishment of death and shall suffer the same accordingly by being hung by the neck till he is dead ... (and) ... shall also forfeit to the British Government all property and effects ..." [86] Fisch points out that

The Islamic law knew no special sanctions against rebels, ... once they were subdued. The consequence of the regulation [87] was that a power which formerly had been mainly used for immediate revenge could now tend to a more systematic elimination of enemies of the state. [88]

As for events surrounding Shams ul Dowla: Nusrat Jang, the Naib Nazim of Dacca, repeatedly requested the Governor General to release Shams ul Dowla and finally the Governor General decided on the following conditions of release:

a) that Nusrat Jang should be the security for his brother;
b) Shams ul Dowla should live in Dacca, and not leave the city without permission;
c) Shams ul Dowla's allowance would be reduced from Rs 1000 to Rs 750 per month;

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84 *BC*, vol 128, tract 2371, para 15.

85 This Regulation was titled as "A Regulation for declaring the powers of the Governor General in Council to provide for the immediate Punishment of certain Offences against the State by the sentence of Court Martial". See Field C D, *The Regulations of the Bengal Code*, Calcutta 1875, at p 342.

86 Section III of Regulation X of 1804. See Field C D, above n , at p 343.

87 Fisch refers to Regulation X of 1804 in Fisch J, above n 17, at p 80. There were, however, earlier regulations, ie Regulations IV of 1799 and XX of 1803 on offences against the State.

88 Id.

d) his correspondence be restricted to members of his family, and

e) he should not employ any Vakeel to represent his interests. [89]

However, the Board of Directors by their letter dated 14 September 1803, prohibited the release of Shams ul Dowla without their consent. [90] Later, in 1806, release of Shams ul Dowla was agreed upon by all parties. It was decided that Shams ul Dowla would be escorted by the Guards of the Company to Dacca and would then be released there into the custody of his brother. But Nusrat Jang suggested that his own men should be sent to Calcutta to escort his brother back to Dacca so that Shams ul Dowla should be spared the agnonimy of being escorted by Sepoys of the Company. Nusrat Jang's escort, he pleaded, would restore Shams ul Dowla to the social prestige he deserved. [91]

Nusrat Jang then sent a party of men to escort Shams ul Dowla from Calcutta. However, this party of intended escorts were judged to be too pompous and too festive, and as such inappropriate. The records state:

The Governor General in Council therefore determined to suspend the release of Shums ul Dowla until the return to Dacca of the party dispatched by Nawab Nusrat Jang, and until the Nawab should manifest a sense of his error. [92]

Shams ul Dowla was subsequently released 'without pomp and ceremony'. After his return to Dacca, the records note, Shams ul Dowla's conduct "continued to be entirely correct and exemplary, and in strict conformity to the condition of his release." [93]

These events were the catalyst for the introduction of the English notion, in India, of crime of treason as specific offences against the State. Unlike the Mohammedan law, treason was henceforth to be punished by an immediate sentence of death. Moreover, this crime 'justifies' suspension

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89 *HMS*, vol 584, pp 46-7.

90 *HMS*, vol 584, p 243.

91 *HMS*, vol 584, at p 250.

92 *HMS*, vol 584, at p 251.

93 Id. Chatterjii N, "Shamsuddaulah's intrigues against the English", (1937) 53 Bengal Past and Present, p 31 provides some further details of what he terms as 'a dangerous conspiracy'. From this account we find that Zauman Shah, the ruler of Kabul and Shaik Khulfaun, the Viceroy of Muscat, and some zamindars of Bihar did undertake certain preparations to respond to Shams ul Dawla's appeal.

For the spelling of names, I have followed the *BC* and *HMS*, and not Chatterjii's version which do not mention the trial and sentence.

of the general edifice of legality in the forms of criminal procedures in the 'ordinary courts'.

These Regulations clearly consolidated the reordering of 'protected interests' through the mechanism of criminal law. Interests of state now superseded all other interests as attempts to undermine the state were to be dealt with more swiftly (by suspending the procedural framework of trails in criminal courts) and most severely.

The state's priority was reflected in the Regulations in various forms, stretching from ensuring profitability of the commercial activities of the state to procuring supplies for the army by the threat of criminal sanctions. For example, Regulation XI of 1806 provided for detailed rules to ensure procurement of all the necessary supplies to the Company's army in the course of its expeditions. Section 3 of this Regulation empowered the Collector to issue "... the necessary orders to the landholders, farmers, *tehsildars* or other persons in charge of the lands, through which the troops are to pass, for providing the supplies required and for making any requisite preparations of boats or temporary bridges or otherwise for enabling the troops to cross such rivers or *nalas* as may intersect their march without any impediment or delay..." [94]

Needless to say, prioritising of the interest of the state over others were not accomplished solely through the promulgation of the Regulations. Symbols, signs and rhetoric (including pardon) of the criminal justice system, as Douglas Hay had shown convincingly, played a significant role. [95] A parallel to Hay's thesis can be clearly seen in the reactions of the Governor General to the escort sent by Nusrat Jang. Shams ul Dawla's sentence of imprisonment was reduced, his repentance was accepted as sincere and he was to be sent to Dacca. But the conditional release had to continue to manifest his repentance. Later his behaviour was judged to be 'entirely correct'. But his repentance and his submission to the authority of the Governor General could not be questioned in any manner. Consequently, the pomp and festivities of the escort could not have been allowed to turn, even symbolically, his release into an act of victory. Both in punishing and in releasing, the State had to maintain its unquestioned supremacy over its subjects, more so for an important subject such as Shams ul Dowla.

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94 Field C D, above n 84, at p 364.

95 Hay D, "Law and Property in Nineteenth century England" at p. 11, in Hay D, Linebaugh R, Rule J G, Thompson E P and Winslaw (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England,* London 1975.

King's Witness: Regulation VI of 1796, similarly, can be seen as a reaction to a specific situation. A Welland, the Magistrate of Juanpore wrote to J H Harington, the Registrar of the Nizamut Adawlut, detailing a robbery committed in the house of one of the zamindars, Bussent Singh.[96] A number of persons were arrested for the robbery with murder, and detained. The Magistrate was convinced of their guilt. However, "I am apprehensive ... there may not be sufficient evidence to convict them."[97] Apparently there were no witnesses to identify the arrested persons as the perpetrators of the crime and no one was seized during the commission of the crime. The Magistrate therefore suggested:

From the above it may appear to the Court that there can be no other mode of convicting the perpetrators of this horrid massacre but by encouraging and obtaining the evidence of some of the parties concerned. I beg leave therefore to recommend that I may be empowered to write a *purwannah* of encouragement to Hindoo Sing whom the plaintiff suspects to have been personally engaged with the defendants, and he imagines that by a free pardon being offered him he may be induced to recount all the circumstances attending it, so as to convict the principal person at whose instance the assault formed and committed.[98]

Following on this suggestion, a draft regulation was proposed by the Nizamut Adawlut and later approved by the Governor General. Section of this Regulation VI of 1796 empowered the Magistrates to offer pardon to suspected criminals in exchange of their becoming 'King's witness'.[99]

Law making was, thus, frequently reactive to specific situations. Such a process invariably led to constant amendments and re-amendments of rules -- defining and redefining crimes; imposing and re-imposing punishments

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96 *Bengal Judicial Consultation: Criminal*, IOLR P/128/28, letter dated 21.5.1796, at pp 46.

97 Ibid, at p 648.

98 Ibid, at pp 648-9.

99 Ibid, at pp 652-57, 662. Section 4 of this Regulation regarding pardon was amended by Regulation XIV of 1810 -- *A Regulation for defining the powers of the Court of Nizamut Adawlut in cases of pardon and mitigation of punishment; and for declaring the competency of the Courts of Circuit to admit prisoners to bail in certain cases during a reference of their trials to Nizamat Adalat*. Later, Regulation X of 1824 -- *A Regulation for modifying and amending the rules at present in force in regard to the pardon of persons charged with or suspected of criminal offences* -- further amended the rules and this Regulation stayed in force until the Repealing Act XVII of 1862. See Field C D, above n 84, at p 33, p 82 and p 122.

and, ultimately, belying a modern-rational law making process. What needs to be reiterated here is that an attempt has been made in this paper to cull certain numbers and figures about crimes from various official records to see whether the process of law making reflected the emerging principles of criminal jurisprudence -- the principles which were readily proclaimed to be determinant. Our scrutiny shows that the enacted norms often reflected *a priori* perceptions. There were ostensible concerns about facts and principles and deliberations on those scores, but these were often over-ridden by impulses, anxieties and apprehensions. It were these later impulses which were more readily translated into Regulations.

It may be convenient to recall that the East India Company imposed a new regime of legal norms concerning crimes and punishments in the early colonial Bengal. These new norms were substantially at variance with the then existing ones.[100] This variance between the new and old systems of laws has attracted several explanations. But the over-riding paradigm of variance in these explanations has been presented as a conflict between, on the one hand, a pre-modern and often illogical legal system and, on the other, an emerging modern, rational process of law making. We have, however, argued that the new law making process of the new colonial rulers were rational and modern only on the surface.

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[100] Such a theme is not necessarily confined to history of colonial law only. Laws from outside were also imposed on many European countries -- ".. state law is an imposition, but a progressively more powerful one, that cannibalises custom, remaking it and redefining it (when not obliterating it) in the process" is Douglas Hay's summation of this process in the context of English criminal law in his "The Criminal Prosecuting in England and its Historians", (1984) 47 *Modern Law Review*, p 1 at p 6, citing Gatrell V A C, Lenman B and Parker G (eds), *Crime and the Law: the Social History of Crime in Western Europe since 1500*, London 1980.