

How have the emergency laws of colonial India impacted the emergency law of the United Kingdom?

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Abstract: Coming under colonial rule in the 17th century, India became a laboratory for the development of emergency law. This thesis examines how the India laboratory impacted emergency law in the UK, exploration uncovering how colonial emergency regulations affect the contemporary legal order of the UK. Charting the historical development of colonial law, I first explore how emergency law developed in colonial India. Chapter 1 discusses emergency regulations in Company India while Chapter 2 launches inquiries into emergency regulations under the Crown. My subsequent chapters interpret Césaire's boomerang theory and then apply it to determine how regulations, developed in Company and Crown India, affect Metropolitan emergency law. Particularly I discuss Articles 15 ECHR, Article 56 ECHR and the Terrorism Act 2000. I surmise that all three aspects of contemporary law possess roots in the colonial encounter. Articles 15 and 56 ECHR were designed to accommodate rule by force in the colonies and represent prevailing understandings of colonial civilisation respectively. Meanwhile proscription under the 2000 Act mirrors its colonial predecessor, importing the form and delegitimising logic of proscription regimes once upheld under the Crown. The law is such that the UK government, as it did in colonial India, retains the capacity to outlaw, among others, those organisations concerned with the violent achievement of national liberation; even non-violent supporters of these organisations facing condemnation as terrorists under the Terrorism Act 2000. In reaching these conclusions, I follow an historical approach, establishing how law developing overseas changed the legal order of the Metropole.

Key Words: The Imperial Boomerang, Proscription, Emergency Law, European Convention on Human Rights, Terrorism Act 2000

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List of Abbreviations

- BIOT – British Indian Ocean Territory
- DORA – Defence of the Realm Act
- ECHR – European Convention of Human Rights
- ECtHR – European Court of Human Rights
- EIC – East India Company
- EOKA - Ethniki Organosis Kyprion Agoniston (National Organisation of Cypriot Fighters)
- EWCA – Court of Appeal (England and Wales)
- EWHC – England and Wales High Court
- ICCPR – International Covenant on Civil and Political Rights
- NI – Northern Ireland
- PKK - Partiya Karkerên Kurdistanê (Kurdistan Workers Party)
- UDHR – Universal Declaration of Human Rights
- UK – United Kingdom
- US – United States
- UKSC – Supreme Court of the United Kingdom
- SCOTUS – Supreme Court of the United States

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Introduction, Objectives and Methods of Research

My thesis investigates how the Imperial Boomerang has affected the emergency regulations of the United Kingdom. I shall clarify how forms of emergency law have migrated back from the colonies to change law in the United Kingdom.¹

Clinton Rossiter argues, drawing on the classical tradition of the Roman Republic, that emergencies should be temporary aberrations from normality.² Emergency law should be in force no longer than is necessary to resolve an exceptional crisis and institute a return to normality.³ Yet this perspective, focusing on the ideal Roman tradition of the emergency, is Eurocentric. According to the last global study in 1978, 30 out of 150 states upheld under a state of emergency that was not temporary.⁴ Israel has existed under a state of emergency since its establishment in 1948 and there is no sign that this will change in the foreseeable future.⁵ Meanwhile, the practice of declaring states of emergency has intensified in the US. Ex-President Biden (2021-2025) refreshed the post-9/11 state of emergency under Proclamation 7463, granting the President exceptional authority to organise the military and national guard.⁶ His successor, President Trump, has invoked emergency powers 41 times (as of June 7th) to bypass Congress and in so doing implement trade, border security and environmental reforms.⁷ Separately President Trump has also relied on emergency powers to

¹ European Convention of Human Rights 1950, Art 15 ; Union with Ireland Act 1800, Art 1

² Clinton Rossiter, *Constitutional Dictatorship - Crisis Government in the Modern Democracies* (Princeton University Press 1948), 8, ch2

³ Ibid, 8, ch2.

⁴ 'States of Emergency: Their Impact on Human Rights' (International Commission of Jurists), 413

⁵ Baruch Barcha, 'Checks and Balances in a Protracted State of Emergency – The Case of Israel' in Yoram Dinstein and Faria Domb's *Israeli Yearbook on Human Rights: Volume 33* (BRILL 2004), 133-134 ; Toi Staff, 'Herzog: 50 years after Yom Kippur War, Israel facing 'state of emergency'' (*The Times of Israel* September 2023)

<https://www.timesofisrael.com/herzog-50-years-after-yom-kippur-war-israel-facing-state-of-emergency/> - Last accessed 19/02/2025

⁶ Proclamation 7463 2001 ; Nolan Stout, 'Biden extends 9/11 state of emergency by a year' (*Courthouse News Service* 8th September 2023)

<https://www.courthousenews.com/biden-extends-9-11-state-of-emergency-by-a-year/> - Last accessed 27/07/2025

⁷ Byron Tau, Seung Min Kim and Chris Megerian, 'The 911 presidency: Trump flexes emergency powers in his second term' (*The Associated Press* June 7th 2025)

<https://apnews.com/article/trump-emergency-powers-tariffs-immigration-5cbe386d8f2cc4a374a5d005e618d76a> - Last accessed 27/07/2025

federalise local police forces and deploy the National Guard to US cities (Los Angeles and Washington D.C).⁸ In this context of a global turn toward emergency government, my thesis explores emergency powers in the UK, reviewing how the UK's emergency regulation links to the colonies.

Emergency laws concern the powers and obligations of the UK Government during an emergency. As the UK possesses an uncodified constitution, there is no document containing the fundamental law of the UK related to emergencies or the definition of 'emergency'.⁹ Emergency law in the UK is therefore more difficult to locate. I bring within this category the Defence of the Realm Act 1914 (hence DORA), the UK's first emergency code that instituted emergency government during the First World War. I also raise the European Convention of Human Rights, to which the UK was a founding signatory in 1950.¹⁰ Specifically, Articles 15 and 56 ECHR allow the UK to manage the exception at home and overseas.¹¹ The Terrorism Act 2000 is the final statute cited by this thesis.¹² It is the foundation upon which the British anti-terror regime is built and the system of proscription is established will be subjected to discussion by this thesis.¹³

⁸ David Klepper, 'Trump says he's placing Washington police under federal control and deploying the National Guard' (*PBS News* August 11th 2025)

<https://www.pbs.org/newshour/politics/trump-says-hes-placing-washington-police-under-federal-control-and-deploying-the-national-guard> - Last accessed 22/08/2025 ; Sarah Shamim, 'What is the National Guard at the heart of Trump's Los Angeles standoff?' (*Al Jazeera* 9th June 2025) <https://www.aljazeera.com/news/2025/6/9/what-is-the-national-guard-at-the-heart-of-trumps-los-angeles-standoff> - Last accessed 22/08/2025.

⁹ J.C. Johari, *New Comparative Government* (Lotus Press 2006), 167-169

¹⁰ 'Chart of Signatures and Ratifications of Treaty 005' (*Council of Europe Treaty Office* 12 December 2024)

<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty-num=005> – Last accessed 12/12/2024

¹¹ European Convention on Human Rights 1950, Art 15, Art 56

¹² Terrorism Act 2000

¹³ Ibid ; Anti-terrorism, Crime and Security Act 2001 ; Criminal Justice Act 2003 ; Prevention of Terrorism Act 2005 ; Terrorism Act 2006 ; Terrorism Order 2006 ; Counter Terrorism Act 2008, Terrorism Order 2009 ; Terrorist Asset Freezing Act 2010 ; Justice and Security Act 2013 ; Counter Security and Terrorism Act 2015 ; Counter Terrorism and Border Security Act 2019. ; Sarah Tudor, 'Terrorism in the UK: Legislation and government strategy' (House of Lords Library January 2025) <https://lordslibrary.parliament.uk/terrorism-in-the-uk-legislation-and-government-strategy/#heading-7> – Last Accessed 30/01/2025

My thesis has 4 chapters, each addressing a chronological period relevant for asking how UK law connects to that of the colonies. I define a colony as a territory subject to foreign rule, while the colonial is the legal order that forms the basis of the colony.¹⁴

My first chapter asks how the East India Company operated emergency law from the 17th century until 1858. I particularly note how the Company's Courts interacted with that regulation. I then inquire into how the operation of Company emergency law can be viewed through the lenses of sovereignty and economic interests, providing a critical dissection of whose interests the colonial emergency served.

My second chapter asks how the colonial emergency changed when the East India Company was supplanted by Crown rule in 1858.¹⁵ It asks how the Crown, at the peak of its global influence, altered prevailing styles of emergency rule in India.¹⁶ Differences between the emergency regimes of the EIC and Crown government will be emphasised. I ask as a part of Chapter 2 how economic and cultural dynamics lie at a nexus with the Crown emergency regime, continuing with the critical framing present in Chapter 1.

The investigations of Chapter 1 and 2 in sequence allow one to assess how colonial emergency law links to the UK's emergency law, it being impossible to properly understand how colonial law impacted the Metropole without first developing an extensive understanding of the former.¹⁷ India serves as my exemplar colony. The importance of the territory as the 'Jewel in the Crown' of the British Empire encourages inquiry into how the space acted as a laboratory for emergency law that would later impact the UK.¹⁸

In my third chapter, I ask how the imperial boomerang altered British emergency law in the first half of the 20th century. I utilise the theory of the imperial boomerang as refined by Arendt and Foucault, their work acknowledging the capacity of law to move from colony to Metropole. A critical framing will then be employed to determine how the emergency regulations of the period linked to the vested economic interests of the era, continuing the emphasis on legal function established in above chapters.

¹⁴ 'Colony' (Oxford Learner's Dictionary)

<https://www.oxfordlearnersdictionaries.com/definition/english/colony> - Last accessed 29/06/2025

¹⁵ Government of India Act 1858, s1-2

¹⁶ Andrew Porter, *The Oxford History of the British Empire: The nineteenth century* (OUP 2001), 401

¹⁷ Tanzil Chowdhury, 'The Terrific Boomerang' (*Goethe Institut* June 2022)

<https://www.goethe.de/ins/us/en/kul/wir/23108109.html> - Last accessed 16/01/2025

¹⁸ Judith Brown, *The Oxford History of the British Empire: The Twentieth Century* (OUP 2001), 5 ; Josephine Quinn, *How the World Made the West* (Bloomsbury Publishing 2025), introduction

My final chapter asks how contemporary UK emergency law links to the colonies. As mentioned above, the ECHR (Articles 15 and 56) and the Terrorism Act are discussed, it being analysed how these laws linked to colonial concepts, norms and practices.

Importance of Research

My project traces norms, structures and practices related to colonial emergency law back to the UK. There are several correlations between colonial and Metropolitan legal models, namely full legal transplant, conceptual similarity and similarity in rationale, that shall be noted in connecting colonial to Metropolitan law. Highlighting different degrees of connection fills a gap in the existing literature, little research having previously been done how emergency law is, at least within the UK, a mix of domestic and colonial fragments. This is not to say that no authors have written on the connections between Metropolitan and colonial law. Many have.¹⁹ However none have taken a comprehensive historical approach to the issue, studying how colonial laws evolved and then exerted an influence on the emergency regulations of the United Kingdom.

¹⁹ Caroline Elkins, *Legacy of Violence: A History of the British Empire* (The Bodley Head 2022); John Reynolds, 'The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law'; Magne Frostad, 'The «Colonial Clause» and Extraterritorial Application of Human Rights: The European Convention on Human Rights Article 56 and Its Relationship to Article 1' (2013) 4 *Arctic Review on Law and Politics* 21, 56; Vicki Sentas, 'Terrorist Organization Proscription as Counterinsurgency in the Kurdish Conflict' (2018) 30 *Terrorism and Political Violence* 298; Alfred Simpson, 'Human Rights and the End of Empire: Britain and the Genesis of the European Convention' (OUP 2010); L Moor and AB Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights' (2006) 76 *British Yearbook of International Law* 121; Mark Condos, 'Emergency, Exception, and the Colonial Rule of Law: The Case of British India' (2023) 14 *First World War Studies* 29.

Chapter 1: How did emergency law operate in India under the East India Company?

British colonial government arrived in India during the 17th century under the banner of the First English East India Company (hence EIC or the Company). The government in question employed emergency law. I firstly examine how Company emergency law functioned. I will secondly ask how the law can be understood when viewed through the lenses of economic interests and sovereignty.

Sub-Chapter A: How did emergency law function under the East India Company?

In the 18th century the East India Company acquired a state-like form of sovereignty that was whittled away by an increasingly assertive Great Britain (and later United Kingdom post 1800). Sovereignty can in this context be understood as supreme authority over a given entity.¹

In 1600 the EIC received a Charter from Queen Elizabeth. The Charter bestowed on the Company a monopoly on trade in the East Indies and the right to wage war.² While formally deriving its authority from the Crown, the Company acted independently throughout the 18th century due to its distance from the England.³ It used private armies, strategic alliances and well-placed bribes to conquer nearly all of the Indian subcontinent.⁴ During the Battle of Buxar in 1765 the Company, led by Robert Clive, defeated the Mughal Emperor in battle, forcibly appropriating his right to collect taxes from the Indian population under the Treaty of Allahabad.⁵ The EIC in practical terms acquired the Emperor's prerogative to rule the Indian subcontinent.

Swati Srivastava argues the sovereignty of the EIC was awakened through this waging of war and conduct of diplomacy during the 18th century. Demonstrating the fictitious premises of Westphalian Sovereignty that states possess exclusive control over their territory and internal

¹ 'Sovereignty' (*Cambridge English Dictionary*)

<https://dictionary.cambridge.org/dictionary/english/sovereignty> - Last accessed 22/08/2025

² 'Charter Granted by Queen Elizabeth I to the Governor and Company of Merchants and London 1600' in *Charters relating to the East India Company from 1600 to 1761* (East India Company 1887), 6

³ 'The Company that ruled the waves' (*The Economist* December 17th 2011)

<https://www.economist.com/christmas-specials/2011/12/17/the-company-that-ruled-the-waves> - 22/08/2025

⁴ Shashi Tharoor, *Inglorious Empire: What the British Did to India* (C Hurst & Co (Publishers) Ltd 2017), ch1.

⁵ Treaty of Allahabad 1765, preamble

affairs, she submits the EIC became a sovereign entity in the 17th century.⁶ The EIC after 1661 possessed the right to independently raise armies, govern and campaign in India under a Charter that could not be voided by the Crown.⁷ Repeatedly making war and peace during the 18th century, as part of their conquest of India, the sovereignty of the Company crystallised while formally remaining subject to the Crown's authority.⁸ The Crown accepted this arrangement. Half of the UK's overseas trade was dependent on the EI by 1803, allowing the Company to dictate to Parliament the nature of their regulatory relationship.⁹

Beyond its direct economic power, the Company also proved adept at capturing political institutions. The tendrils of the Company extended directly into Parliament by the late 18th century. By 1770, 23% of Parliamentarians owned shares in the Company.¹⁰ Stakeholders were resultingly overrepresented in debates and on Parliamentary committees of inquiry concerning the East India Company. They amounted to 15 of the 31 MPs on the EIC Select Committee and 6 of 13 MPs on the EIC's Secret Committee.¹¹ That degree of corporate influence discouraged legislative efforts, via Royal Charter or Statute, to regulate the Company.¹² Nabobs, men who had made their fortunes in the East India Company and then bought seats in the house of Commons, also carried a substantial voting weight by the 1780's,

⁶ Treaty of Westphalia 1648, s1-3 ; Julia Lopez, 'Political Authority in International Relations: Revisiting the Medieval Debate' (2020) 74 IO 222, 226-230

⁷ See n2, 7-8; Swati Srivastava, 'Corporate Sovereign Awakening and the Making of Modern State Sovereignty: New Archival Evidence from the English East India Company' (2022) 76 IO 690, 695-696.

⁸ Ibid, 698-699

⁹ William Dalrymple, *The Anarchy* (Bloomsbury Publishing 2019), xxx ; Sumit Guha, 'Empires, Nations, and the Politics of Ethnic Identity' in Sumit Guha's *Beyond Caste* (Permanent Black 2013), 215–216

¹⁰ H.V Bowen, *Revenue and Reform: The Indian Problem in British Politics* (Cambridge University Press 2009), 31

¹¹ Ibid, 32

¹² Mark Cartwright, 'The Fall of the British East India Company in the 19th Century' (*Brewminate* 31st July 2024)

<https://brewminate.com/the-fall-of-the-british-east-india-company-in-the-19th-century/> – Last accessed 28/07/2025 ; 'SULIVAN, Laurence (c.1713-86), of Ponsbourne Park, Herts.' (*The History of Parliament*)

<https://www.historyofparliamentonline.org/volume/1754-1790/member/sulivan-laurence-1713-86> -

Last accessed 28/07/2025

27 seats belonging to a bloc supportive of autonomous Company governance.¹³ Not counted in these statistics are the majority of MPs who held no stake in the EIC and were ignorant of Indian affairs, but nevertheless favoured continuing autonomy for the EIC as they had no interest in the government of a distant and largely unknown continent.¹⁴ Therefore even if there was no homogenous EIC lobby, Parliament was in effect captured by the EIC by the late eighteenth century. A loose collective of individuals with a direct interest in Company autonomy were complemented with a wider pool of MP's who abstained from Company regulation due to a lack of interest in the matter.

Considering this political influence, even formal Crown sovereignty was increasingly contested by the EIC during the late 18th century. The Company argued unsuccessfully in English Courts that their trade and diplomacy network in India made them sovereign there, implicitly challenging the terms of their own Charter.¹⁵ Company officials also accepted their administration in India was an aspiring sovereign entity, seeking to break away from the formal sovereignty of the Crown and Mughal Emperor.¹⁶ In his spirit, Robert Clive asserted to Parliament in 1769 that the EIC possessed full sovereignty, unencumbered by any other institution or entity.¹⁷

Yet beyond the 1770's the EIC entered a sovereign decline, the British state reasserting its own sovereignty over the Company. During the late 18th century, autonomous Company mismanagement of the Indian food supply, in the context of crop failure, had led to millions of deaths in a Bengal famine (figures are uncertain but suggest less than five million total deaths).¹⁸ In 1772 the Company went bankrupt due to the resulting shortfall in land revenues, accruing £1.5 million in debt, £1 million of unpaid tax to the Crown and collapsing 30 banks

¹³ James Phillips and Phillip Lawson, 'Our Execrable Banditti': Perceptions of Nabobs in Mid Eighteenth Century Britain' (1984) 16 *Albion* 225, 228

¹⁴ *Bowen* (n 10), 30-31

¹⁵ Philip Stern, 'A Polity of Civil and Military Power: Political Thought and the Late Seventeenth Century Foundations of the East India Company-State' (2008) 47 *J.Brit.Stud* 253, 259

¹⁶ *Ibid*, 279

¹⁷ Nicholas Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (HUP 2008), 177-178

¹⁸S. Bhattacharya, 'Regional Economy: East India' in Dharma Kumar and Meghad Desai's *The Cambridge Economic History of India: Volume 2, C.1757-c.1970* (CUP 1983), 299 ; Tim Dyson, *A Population History of India: From the First Modern People to the Present Day* (OUP 2018), 80-81

across Europe.¹⁹ Political deference to the Company was undone. An autonomous Company was dangerous to the economic interests of the United Kingdom, being both too big to fail and negligent in its financial affairs. The Crown resultingly elected to pay off the debts of the EIC, the price of this bailout being Company submission to more extensive regulation.²⁰ The Crown took advantage of a moment of weakness to assert its sovereignty over a competitor, Parliament legislating to avoid economic risk.²¹ The Company self-imploded due its own economic mismanagement; conceding to government regulation as the proper course of action when it had no other choice for ensuring its own survival.

A regulatory program was undertaken to grant the Government more extensive oversight over Company affairs. The Regulating Act 1773 assigned Company conquests to the Crown.²² Meanwhile, the East India Company Act 1784 introduced a Commission of Privy Counsellors (including a Secretary of State and the Chancellor of the Exchequer) to monitor Company Directors and their management of India.²³ A smaller three-member Board of Control (including a Minister) superintended, directed and controlled the civil and military affairs of the Company.²⁴ There was a concerted effort in Parliamentary circles to rein in the imperial excesses and corruption of the East India Company, which was seen to threaten the older English aristocracy and their pre-eminence in politics.²⁵ These Parliamentary reforms and the insertion of oversight eroded the sovereignty of the Company and brought it under national control by the late 18th century.

The impeachment of Warren Hastings, the first Governor General of the Bengal Presidency, should be appraised alongside these incidents of state intervention. In 1788 Hastings was charged with several crimes including corruption, embezzlement, theft and the destruction of India.²⁶ Prosecutor and MP Edmund Burke intended to uphold a vision of Empire rooted in

¹⁹ William Dalrymple, 'The East India Company: The original corporate raiders' (*The Guardian* 4th March 2015)

<https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders> - Last accessed 29/06/2025

²⁰ Ibid

²¹ Bruce Brunton, 'The East India Company: Agent of Empire in the Early Modern Capitalist Era' (2013) 77 *Social Education* 78, 80-81

²² Regulating Act 1773, s9

²³ East India Company Act 1784 (EICA 1784), s2-3

²⁴ Ibid, s2-3

²⁵ *Tharoor* (n 4), 34-36

²⁶ Frederick Smith, *Famous Trials of History* (Garden City Publishing 1926), 170-171

justice and respect for the legal traditions of native Indians, contrasting the vision offered by Hastings of a sovereign Company with absolute power over rebellious subjects.²⁷ The prosecution ended in Hastings' acquittal, his vision of the Company as sovereign seemingly triumphing before Parliament.

However, despite Hastings' rhetoric before Parliament, the oversight introduced by the East India Company Act 1784 was not pared back.

The sovereignty of the EIC was therefore contested throughout its history. Until the late 18th century, the Company was a *de facto* sovereign. Parliament and its legislators were captured by the wealth of the EIC, leading them to oppose the regulation of a Company that acted at an extreme and essentially uncontrollable distance from England. Yet this sovereignty was trimmed away after 1773. The economic power of the Company was nullified after it went bankrupt, weakening the hold that entity possessed over Parliament. An aversion to economic risk and the rising political influence of the nabobs at the expense of the landed aristocracy led to MP's establishing oversight mechanisms for Company governance. Company Conquests were brought under the sovereignty of the Crown through the 1773 Regulating Act. Meanwhile the Commission of Privy Counsellors and Board of Control established under the East India Company Act 1784 introduced government supervision over EIC activity. My analysis, addressing Company emergency regulation in the 19th century, therefore engages with the law in the context of a Company with limited sovereignty.

My sub-chapter raises both Common Law and statutory emergency law. Function is placed over form, my not excluding emergency regulation from analysis because it possesses the wrong label.²⁸

I first engage with literature on martial law. Citing the Common Law (described by Langbein as judge made law based off precedent),²⁹ A.V. Dicey argued in the early 20th century that martial law proper, or the state of siege (a civil law term), had no presence in the law of the United Kingdom. Governing authority could not pass to the military upon the declaration of the

²⁷ Mithi Mukherjee, 'Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23 *Law and History Review* 589, 595, 605-608 .

²⁸ Uwe Kischel, *Comparative Law* (OUP 2019), 88-90

²⁹ John Langbein, Renee Lerner and Bruce Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers 2009), 4

legislature.³⁰ Instead martial law, in times of violent resistance to law, created a legal duty.³¹ Under this duty, Crown subjects were obliged to take whatever action was necessary to restore public order.³² Necessity required parties to toe the precise line between acting insufficiently forcefully to resolve a public order crisis and acting with an excess of force, an erroneous balance attracting liability under the law.³³ Even if what was necessary manifested in military action, or repressive violence, Dicey emphasised that under the necessity standard, the authority of law, not the military, was supreme.³⁴

However, Dicey states in a footnote that the Common Law formulation of martial law, reliant on necessity, has no bearing on martial law as applied in the colonies.³⁵ India under Company rule was a colony.³⁶ Defining martial law in that space, Charles Napier, the Governor of the Sindh region, considered martial law a tool of military government. It licenced military despotism,³⁷ overriding the regular functioning of civil courts and the criminal law.³⁸ Echoing Napier's reference to military rule, Sir David Dundas, the Judge Advocate General in 1849, argued martial law granted the commanding general an unrestrained authority to exercise his will.³⁹ George Campbell, an EIC official, offered a third perspective, claiming colonial martial law granted absolute discretion to the military government.⁴⁰ There are a plurality of definitions of colonial martial law. The character of colonial martial law can be inferred from what they all reach a consensus on. Each definition indicates colonial martial law represented a form of powers so broad that talk of granted authority becomes redundant, the doctrine granting military actors an unlimited discretion in an emergency.

³⁰ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982), 189

³¹ *Ibid*, 271

³² *Rex v Pinney* [1832] 110 E.R 349 (HC)

³³ *Ibid*

³⁴ *Dicey* (n 30), 270

³⁵ *Dicey* (n 30), 387

³⁶ *Dicey* (n 30), 387

³⁷ Charles Napier, *Remarks on Military Law and the Punishment of Flogging* (T. & W. Boone 1837), 2

³⁸ William Napier, *The Life and Opinion of General Sir Charles Napier* (Volume 3, John Murray 1857), 53

³⁹ John Mayne, *The Criminal Law of India* (Higginbottom & Co 1896), 313

⁴⁰ George Campbell, *Memoirs of My Indian Career* (Macmillan and Co 1893), 231-232

Dundas and others emphasise that the emergency is a zone beyond law, with officials merely exercising discretion to restore the regular legal order.⁴¹ Yet emergencies under the EIC were not de facto zones without law, powers being codified into positive form to shape the discretion of state actors in an emergency.

According to Sherman, emergencies under the Company relied upon a coercive network. The judiciary, law, army police and penal institutions all worked together to promulgate legislation and conduct acts of exemplary state violence against those who threatened the suzerainty of the Raj.⁴²

One aspect of this coercive network was martial law. By the early 19th century martial law was a distinct tool, utilised to suppress internal dissent, separately from Articles of War and Mutiny Acts, which regulated military discipline.⁴³ Although there was uncertainty regarding the precise boundaries of military discretion under martial law, the doctrine was deemed a reactive measure that should only be used in cases of serious public disorder like rebellion.⁴⁴ It was kept as a reserve power until the 1860's, the doctrine, 'contrary to the spirit of English law' possessing an immense capacity for imposing exemplary state violence.⁴⁵ Recorded incidents that took place under martial law included summary executions and the burning of villages.⁴⁶ As such, up until the late 1860's, when it was fully supplanted by statute in India, martial law possessed the capacity to impose significant state violence in colonial India, the doctrine amounting to part of the EIC's coercive legal network.

Yet emergency law also possessed a statutory component. Regulation 10 was issued by the Supreme Council of Bengal in 1804, the executive body having been vested with legislative power after 1773.⁴⁷ Regional governors were authorised to bypass the criminal law, introduce martial rule, and establish courts martial with the authority to put to death those making war

⁴¹ Carl Schmitt, *Political Theology* (University of Chicago Press 1985), xi

⁴² Taylor C. Sherman, *State Violence and Punishment in India* (Routledge 2010), 5, 7, 10, 171

⁴³ Troy Downs, 'Bengal Regulation 10 of 1804 and Martial Law in British Colonial India' (2022) 40 LHR 1

⁴⁴ *Campbell* (n40), 231-232 ; *Downs* (n 43), 7

⁴⁵ 'Martial Law' (The Times 27 June 1867), 12

⁴⁶ 'Martial Law' (The Times 27 June 1867), 12 ; W.F. Finlason, 'Martial Law, Part 2' (The Law Magazine and Review 5 1872), 375

⁴⁷ Regulating Act 1773, s7

or overtly rebelling against the Company.⁴⁸ The exercise of these powers imposed terror by example; the prospect of capital punishment, imposed by a military court without a right of appeal deterring future anti-colonial uprisings.⁴⁹ In practice, during the 1817 Cuttack rebellion (caused by frustrations at Company corruption and rising salt prices), courts martial exceeded even their authority wide under Regulation 10, the death penalty being imposed even when the defendant had not been convicted of open rebellion or uprising.⁵⁰ Charles Callwell would classify the imposition of such legal and physical violence under law as the infliction of moral effect, exemplary coercion being used to subdue racially inferior natives while simultaneously demonstrating the superiority of British civilisation.⁵¹

Regulation 10 was later expanded upon. During the Indian rebellion of 1857, Regulation 10 did not provide sufficient powers for a government facing a widespread Sepoy uprising.⁵² The reach of the statute was limited to Bengal and solely criminalised overt rebellion.⁵³ Colonial officials and the military remained unable to punish non-violent sedition, and violence within the Ganges Basin and Central India.⁵⁴

The immediate response to this deficiency was for the military and colonial officials to fall back on the Napier-esque notion that martial law was simply the authority of the commanding General. Major Holmes, an officer in the Company Presidential armies, as one example declared without legal basis that his region of Saran was subject to absolute military rule.⁵⁵ More generally, Company unilaterally assumed the authority to detain individuals acting suspiciously and put to death individuals engaging in any kind of seditious activity.⁵⁶ 23 villagers were hanged in one raid, while fifty villagers were flogged and 50 villages were

⁴⁸ Regulation 10 1804, s2 ; *Ibid*, 9-10

⁴⁹ *Ibid*, s2

⁵⁰ *Downs* (n43), 14

⁵¹ Charles E Callwell, *Small Wars: Their Principles and Practice* (Revised edition, Watchmaker Publishing 2010)

⁵² Jill Bender, *The 1857 Indian Uprising and The British Empire* (CUP 2016), 3

⁵³ Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture and Political Economy* (Routledge 2004), 73

⁵⁴ *Ibid*, 73

⁵⁵ J.G Holmes, 'Letter to the Magistrate of Saran' (Segowlee 19th June 1857)

⁵⁶ *Ibid*, John Kaye, 'A History of the Sepoy War, Vol. 3' (W.H. Allen, 1876), 103–4.

destroyed.⁵⁷ Summary execution of rebels and the mock trial of civilians, followed by immediate execution, were also common.⁵⁸

The longer-term response was to ensure that the authority to implement such severe violence incorporated into law. More powers were provided to authorities through the State Offences Act 1857. The State Offences Act 1857 made any rebel against the Company liable for execution or banishment, while also empowering Company officials to declare a state of emergency in their region and hold courts-martial without counsel for the defence or right of appeal.⁵⁹ The authoritarian streak of the law was further developed by the Heinous Offences Act 1857 and a Military and State Offences Act 1857. The former mandated the imposition of the death penalty for 'heinous' offences like burglary and all crimes committed with the intention of assisting those making war on the state or forwarding their designs.⁶⁰ Meanwhile the latter introduced new offences of inciting mutiny and concealing offenders, which were punishable by death and a custodial sentence of up to 7 years respectively.⁶¹ The racial qualities of the law are apparent, the system of courts martial only possessing the jurisdiction to try non-white Indian natives.⁶² While no statistics are available on how frequently these powers were exercised, it is known that they empowered civil authorities with the same despotic powers relied on by the army in periods of imposed martial law, hence the moniker statutory martial law being used to describe the 1857 Act.⁶³

The result of the legal changes was an almost unlimited authorisation to use force accruing to the Company. Any form of rebellion, from stealing to violence against the person, was punishable by death.⁶⁴ Colonel James Neil, an officer tasked with suppressing rebellion in the Gangetic plain, deployed his statutory powers execute all men in villages surrounding

⁵⁷ Downs (n 43), 21-22

⁵⁸ Downs (n 43), 21-22

⁵⁹ State Offences Act 1857, s1-5

⁶⁰ Heinous Offences Act 1857, s1-2

⁶¹ Military and State Offences Act 1857, s2

⁶² Troy Downs, 'Bengal Regulation 10 of 1804 and Martial Law in British Colonial India' (2022) 40 LHR 1, 19

⁶³ Ibid, 20

⁶⁴ Rudrangshu Mukherjee, 'The Forgotten Brutality of the 1858 Mutiny' (*reddiff.com* August 2017) <https://www.reddiff.com/news/special/the-forgotten-brutality-of-the-1857-mutiny/20170814.htm> - Last accessed 20/01/2025

Allahabad.⁶⁵ He also ordered for all rebellious Sepoys to be put to death.⁶⁶ A separate but unnamed officer reported using his recently granted powers to hang 42 men by the roadside, with 12 men being executed in a separate incident for turning their face away from a group of Company troops.⁶⁷ Continuing with this theme of incredible violence designed to induce terror in colonial subjects, the burning of villages and agricultural land was systematic; the destruction being undertaken with the consent of Company authorities.⁶⁸

The escalation in levels of violence that could be authorised by the civil authorities can be rationalised through Caroline Elkins' framework of legalised lawlessness, exceptional violence being incrementally legalised when ordinary means were insufficient to establish order and control. In explanation, legalised lawlessness, as put forward by Caroline Elkins describes a situation whereby the insufficiency of existing law for maintaining public order leads to incremental legal change, more extensive physical and legal violence being incrementally legalised to supplant existing law.⁶⁹ Applying this concept, Regulation 10, even with its expansive provisions, was insufficient to maintain public order during the 1857 rebellion. As such, 'ordinary' law was replaced by the State Offences Act 1857, the wider powers granted under the act permitting more extensive morally effective violence.⁷⁰

While both martial law and statute formally applied to all Crown subjects without discrimination, practice set a precedent whereby intense legal violence was only exercised on racialised Indians rebelling against colonial rule.⁷¹ Colonialism inherently represents an exercise in maintaining racial difference.⁷² Race is a system of social categorisation developed by society,

⁶⁵ *Mukherjee* (n 64)

⁶⁶ *Mukherjee* (n 64)

⁶⁷ *Mukherjee* (n 64)

⁶⁸ *Mukherjee* (n 64)

⁶⁹ Caroline Elkins, *Legacy of Violence: A History of the British Empire* (The Bodley Head 2022), 140.

⁷⁰ Charles E Callwell, *Small Wars: Their Principles and Practice* (Revised edition, Watchmaker Publishing 2010), 41-42.

⁷¹ *Campbell v Hall* [1774] 98 E.R. 1045 (Court of the King's Bench), 1047-1048 ; *Callwell* (n 69), 41-42

⁷² Julian Go, 'Racism' and Colonialism: Meanings of Difference and Ruling Practices in America's Pacific Empire' (2004) 27 *Qualitative Sociology* 25, 40 ; George Steinmetz, 'The Colonial State as a Social Field: Ethnographic Capital and Native Policy in the German Overseas Empire before 1914' (2008) 73 *Am.Soc.Rev* 589, 592-594.

while racialisation is race's activation as an exercise of power.⁷³ Emergency law, established by the colonial power, typically creates racial difference and regimes of power discriminatory toward constructed minority groups.⁷⁴ EIC India, a colony governed by emergency law, should therefore be closely scrutinised so a judgement might be reached on how its regulation is at a nexus with race.

Emergency law was a racialising instrument, positioned to maintain British commercial interests against a native Other.⁷⁵ A series of racial divides were manifested by the Company authority; high-caste Hindus being regarded more highly (and recruited into colonial armed forces) alongside Brahmins, Bhumiars and Rajputs.⁷⁶ Meanwhile, other groups were classified as less prestigious non-martial races.⁷⁷ Racial scientists constructed this system of taxonomic classifications in which the Anglo-Saxon British were regarded as superior to all Indian natives.⁷⁸ Governance internalised this twin-stranded perception of racial superiority. Mill argued that members of backwards races, a category including Indians, possessed crude and childlike qualities.⁷⁹ Like children, they were not ready for independent government, despotism representing a tool by which the colonial population could be progressed toward civilisation.⁸⁰ Emergency regulations, including both martial law and emergency statute, enabled this racialised despotic government.

The Vellore Mutiny exemplified this despotism. In November 1806, the Company introduced a mandatory dress code for Hindu and Muslim Sepoys (soldiers in the Presidency Armies of

⁷³ Christina Amutah and Others, 'Misrepresenting Race — The Role of Medical Schools in Propagating Physician Bias' (2021) 384 *New Eng.J.Med.* 872, 872 ; Patrick Wolfe, 'Race and Racialisation: Some Thoughts' (2002) 5 *Postcolonial Studies* 51, 58

⁷⁴ John Reynolds, *Empire, Emergency and International Law* (1st edn, CUP 2017), 37.

⁷⁵ Charles Fairman, 'The Law of Martial Rule and National Emergency' (1928) 22 *A.P.S.R.* 591, 601-603

⁷⁶ Gavin Rand and Kim Wagner, 'Recruiting the 'martial races': identities and military service in colonial India' (2012) 46 *Patterns of Prejudice* 232, 237-238

⁷⁷ *Ibid*, 237-238

⁷⁸ Elise Burton and Sayori Ghoshal, 'The history of science through the prism of race' (2024) 9 *BJHS Themes* 207, 211 ; Robert Knox, *The Races of Men: A Fragment* (Lea and Blanchard 1850), 16, 162-163

⁷⁹ John Stuart Mill, *Considerations on Representative Government* (Project Gutenberg 2004), ch1

⁸⁰ *Ibid*, ch1

the EIC).⁸¹ The code had a civilising undertone. The requirements to wear facial hair in a largely 'European style (shaved with a trimmed moustache), remove all religious markings while on duty, wear leather stocks, remove jewellery and adopt hats in the European (and Christian) style communicated that what was 'soldierly' amounted to the traditions of a civilised European army.⁸² That these requirements were deeply offensive to Hindu and Muslim traditions was immaterial to those who ordered the changes, the explicit goal of the policy being to make Sepoys 'look more English on parade'.⁸³

The policy provoked a mutiny which hoped to incite a wider uprising across the Indian subcontinent.⁸⁴ 3 battalions of Madrasian infantry seized control of the Vellore fort and killed over 120 British troops also garrisoned there.⁸⁵ The rebellion was put down with despotic force before any wider uprising could occur.⁸⁶ Over 100 Sepoys were lined up against a wall and summarily shot.⁸⁷ After a formal trial, a further six mutineers were blown from guns, five were shot by firing squad, eight were hanged and five transported overseas.⁸⁸ No examples of equivalent state violence were ever perpetrated against white people. From this, it can be inferred that morally effective violence was instituted, extreme force being used against Indians racialised as colonial subjects. Future rebellion by these colonial subjects was deterred by the violence of emergency regulations. The civilising purpose of emergency law was also confirmed; despotic violence being used to prevent 'backwards' Indians from throwing off the supposedly civilising structures of imperial rule.

How judges interacted with this emergency regulation has not been inquired into.

Two streams of Courts existed in Company India. Crown Courts in the form of a Mayor's Court (1728-1798), a Recorder's Court (1798-1824) and a Supreme Court (1824-1862) operated out

⁸¹ Sumit Ghosh, 'Body, Dress, and Symbolic Capital: Multifaceted Presentation of PUGREE in Colonial Governance of British India' (2023) 22 *Textile* 334, 339, 344-345 ; Philip Mason, *A Matter of Honour* (Holt, Rinehart and Winston 1974), 237-241

⁸² *Mason* (n 81), 238

⁸³ *Mason* (n 81), 238

⁸⁴ *Mason* (n 81), 237-241

⁸⁵ *Mason* (n 81), 237-241

⁸⁶ *Mason* (n 81), 237-241

⁸⁷ John Blakiston, *Twelve Years of Military Adventure in Three Quarters of the Globe* (Henry Colburn 1829), 294-295

⁸⁸ *Mason* (n 81), 241

of Bombay.⁸⁹ Meanwhile a hierarchy of Company Courts functioned within the Bombay Presidency, a right of appeal remaining open to a (Company run) Supreme Civil and Criminal Court.⁹⁰ The Company courts were staffed by Company Officials, unlike the Crown Court which comprised a bench of fully qualified English judges.⁹¹

Addressing how Company and Crown judges interacted with emergency rules under the Common Law, those figures possessed the authority to review decisions of their executive. The Common Law in the United Kingdom is a set of judge-created rules, developed in common across all the King's courts after the Norman Conquest in the 11th century.⁹² It evolved transnationally alongside the reach of English and later British imperialism. Blackstone in this respect claimed the Common Law automatically applied to settled colonies but not conquered territories.⁹³ The latter were regions regarded as 'uninhabited' at the point the British arrived there.⁹⁴ India was not a settled colony, having instead been conquered over the 17th and 18th centuries.⁹⁵ Common Law jurisdiction thus reached India incrementally.

The Crown and its laws were first extended to India via Royal Charter. Charles II in a 1669 Charter (transferring the Island of Bombay to Company ownership) obliged Company courts to uphold laws consonant with the Common Law of England.⁹⁶ Subsequent Letters Patent

⁸⁹ Abhinav Chandrachud, *An Independent, Colonial Judiciary: A History of the Bombay High Court during the British Raj, 1862–1947* (OUP 2015), 20-21.

⁹⁰ *Ibid*, 20-21.

⁹¹ *Chandrachud* (n 88), 20-21

⁹² John Langbein, Renee Lerner and Bruce Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Aspen Publishers 2009), 4

⁹³ William Blackstone, *Commentaries on the Laws of England* (Volume I, Project Gutenberg 1765), 105

⁹⁴ *Cooper v Stuart* [1889] 14 App. Cas. 286 (PC), 291-292

⁹⁵ James Olson, *Historical Dictionary of the British Empire* (Greenwood Publishing Group July 2009), 6

⁹⁶ Martin Loughlin, 'The State, the Crown and the Law' in Maurice Sunkin and Sebastian Payne, *The Nature of the Crown* (OUP 1999), 58 ; Bruce Kercher, 'Common Law in the Colonies' in Peter Crane and Joanne Conaghan's *New Oxford Companion to Law* (OUP 2009); 'Letters Patent, Granted to the Governor and Company of Merchants and London, Trading into the East Indies, relating to the Island of Bombay' in the East India Company's *Charters granted to the East-India Company from 1601* (East India Company), 89

issued in 1726 authorised colonial courts to give judgement according to justice and right.⁹⁷ The Letters allowed Common Law principles to be upheld in Civil and Criminal disputes so far as they were applicable in colonial circumstances.⁹⁸ The Common Law thereby applied to (Indian) British subjects from 1726 onwards; remaining available as a mechanism for dispute resolution in the civil and criminal law.⁹⁹ Public law claims could be brought. Colonial judges acquired the means to review the legality of executive decisions under the Common Law to determine if they were *ultra vires*.¹⁰⁰ Courts thus possessed the means to hold Company to account if it strayed beyond granted emergency powers. The Common law, brought into India so far as was appropriate in the circumstances, created a legal space for the review of executive decisions.

Yet, the literature establishes most claims brought by Indians were unsuccessful. Demonstrating this, I first raise Habeas Corpus, a statutory writ deriving from the 1166 Assize of Clarendon.¹⁰¹ Habeas Corpus, a remedy against unlawful detention, applied in Company India.¹⁰² The King's sovereignty extended to the colonial regions so he might account for the imprisonment of his subjects and bind them to the law of the land.¹⁰³ The provision of remedy for unlawful imprisonment was rare in Company India due to the surrounding statutory context, broad 18th century executive regulation making most deprivations of liberty lawful.¹⁰⁴ Habeas Corpus thus was to a significant degree neutered, it only mandating a release from imprisonment when incarceration could not be justified in law.

Yet Crown courts in India occasionally challenged the government regarding their decisions to imprison. In one case, the King's Court of Bombay issued a writ of habeas corpus to a nobleman of the former Maratha Confederation (in the process undermining the legitimacy of

⁹⁷ 'Letters Patent Granted to the East India Company by George I' in *Charters relating to the East India Company from 1600 to 1761* (East India Company 1887), 376

⁹⁸ *Ibid*, 376

⁹⁹ *The Advocate-General of Bengal on behalf of Her Majesty v Ranee Surnomoye Dossee* [1863] II Moore New Series 22 (PC), 52 ; Motilal Setalvad, *The Common Law in India* (Hamlyn Trust 1970), 15-18

¹⁰⁰ *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] A.C. 374 (HL), 410

¹⁰¹ Habeas Corpus Act 1679, s11 ; Assize of Clarendon 1166, s19

¹⁰² *Bushell's Case* [1670] 124 E.R. 1006 (Court of Common Pleas)

¹⁰³ *R. v. Lord Warden of the Cinque Ports* in Baker, *English Legal History*, 168 ; William Forsyth, *Cases and Opinions on Constitutional Law* (Steven and Hayes 1869), 452

¹⁰⁴ Nasser Hussain, *The Jurisprudence of Emergency* (University of Michigan Press 2003), 74.

local rulers collaborating with the EIC), this triggering a constitutional crisis in which the Company ordered the court to reverse its decision.¹⁰⁵ The courts thereby encountered government resistance when they tried to uphold individual rights in an emergency.

In a second action, the *Grant* case, an Indian was ordered arrested for alleged subversive activity by a military officer acting as head of Madras police. Judge Gwillim ruled in the Supreme Court of Madras that Madras had been unlawfully subject to a military despotism, soldiers possessing no authority to deprive individuals of their liberty.¹⁰⁶ The Grand Jury agreed with Judge Gwillim, holding that a military officer had no authority to arrest individuals, aside from in aid to a civil power and pursuant to the warrant of a magistrate.¹⁰⁷

Most judges however diverged from the philosophy that Common Law rights accrued to Indians.¹⁰⁸ Chief Justice Bentick commented that political liberties like Habeas Corpus had no place in India. His perception was that the spectre of freedoms, giving Indians ideas of independence and resistance, would inevitably lead to the collapse of British rule in India.¹⁰⁹ Most judges, whether through Company bribes or intellectual deliberation, also took this position, John Hyde (a puisne judge at Fort William) commenting that none of the Company's servants were willing to enforce the rights of Indians as British subjects.¹¹⁰ Rights instead accrued to white settlers only.¹¹¹

With judges remaining hostile to enforcing individual rights on behalf of Indians, the EIC formed a despotism, amalgamating executive powers against which Indians possessed no relief.¹¹² It is thus apparent that although some judges in Crown India supported enforceable Common Law rights for Crown subjects, their ability to implement this view was hindered by the more conservative views of fellow judges. Most judges simply considered that Indians did

¹⁰⁵ Haruki Inagaki, *The Rule of Law and Emergency in Colonial India: Judicial Politics in the Early Nineteenth Century* (Palgrave Macmillan 2021), 1

¹⁰⁶ Raymond Cocks, 'Social Rules and Legal Rights: Three Women in Early Nineteenth-Century India' (2002) 23 *J Legal Hist* 77, 84

¹⁰⁷ 'India Office Collection, Home Miscellaneous Series, 431' (British Library 15th July 1807)

¹⁰⁸ 'Portland Papers' (University of Nottingham 2011), 80, 474, 1334 C4

¹⁰⁹ *Ibid*, 80, 474, 1334 C4

¹¹⁰ John Hyde, 'Hyde Books' (*HydeBooks*)

<https://hydebooks.njit.edu/index.php> - Last accessed 01/07/2025

¹¹¹ Elizabeth Kolsky, *Colonial Justice in British India* (CUP 2010), 8, 34-35.

¹¹² *Inagaki* (n 105), 2

not have an entitlement to Common Law rights. As such they did not uphold them. A despotism therefore persisted under the EIC.

The reason for this was political, an indefinite emergency arising from Indian hostility to colonial rule. While no precise date can be fixed on when the indefinite emergency in India was initiated, the EIC was well aware of its own fragility by the late 18th century. A constant dread of native rebellion arose from a weak government ruling a hostile people.¹¹³ The dread was frequently proven justified, the Anglo-Sikh Wars and the 1857 Rebellion demonstrating that Indians did have the strength to throw off colonial rule.¹¹⁴ Colonial government stood on the edge of a knife;¹¹⁵ armed force amounting to the only bulwark against the loss of the colony.¹¹⁶ The EIC embraced armaments and repressive legislation (like the 1857 Act) to compensate for its precarity, the Company refining a 'garrison state' (as termed by Condos) to win legitimacy by force.¹¹⁷ Emergency legal restrictions under this garrison state were never loosened as the threat of colonial rebellion was omnipresent.¹¹⁸ The permanent emergency was thus instituted in India as a result of the real risk of anti-colonial rebellion, government considering there to be no point at which the garrison state and related state of exception could be terminated.

Sub-Chapter B – How can the emergency law under the EIC be understood in relation to sovereignty and economic interests?

The thesis now discusses how the operation of Company emergency law can be understood in relation to sovereignty and economic interests. To do this I first analyse emergency statute promulgated under the EIC

¹¹³ 'Minute by the Governor-General and Commander in Chief on the Composition of the Army of India, 13 March 1835' (East India (European and Native Troops) 1867), 68

¹¹⁴ J.S. Grewal, *The Sikhs of the Punjab* (CUP 1998), ch6 ; John Strachey, *India: Its Administration and Progress* (Macmillan and Co 1903), 505.

¹¹⁵ 'First-[fifth] Report From the Select Committee on Indian Territories' (House of Commons Select Committee on the Indian Territories 1852-53), 116

¹¹⁶ R. Nathan and Others, *The Imperial Gazetteer of India* (The Clarendon Press 1908), 85

¹¹⁷ G.O. Trevelyan, *The Competition Wallah* (Macmillan and Co 1864), 302. ; Douglas Peers, *Between Mars and Mammon: Colonial Armies and the Garrison State in India 1819–1835* (London Tauris, 1995)

¹¹⁸ L.A Goodeve, *The Bengal Law Reports of Decisions of the High Court at Fort William* (Spink & Co, 1871), 455

The Company arranged emergency statute to enable wealth transfer, emergency law protecting the avenues of exploitation fundamental to the survival of colonialism. Demonstrating this, colonialism can only endure so long as it is profitable.¹¹⁹ British imperialism over India was no outlier from this rule.¹²⁰ Incredibly high taxes, land privatisation, import controls and laissez faire economic policy all served to enrich the England and sustain colonial government; the deindustrialisation of India pauperising Indians while transferring wealth to the UK.¹²¹ Economic vandalism of this kind required the protections and legitimating effect of law, given without such protection the infrastructure of exploitation would be thrown off by a rebellious Indian population.¹²² A Company state of exception thereby manifested. A legal regime developed, capable of imposing massive legal and physical violence (as cited above) to protect the economic interests fundamental to colonial capitalism and legitimise the avenues by which those interests were maintained.¹²³ The permanent emergency in India thus represents a manifestation of exploitative economic relations. Channels extracting wealth from the nation were protected by a coercive legal apparatus, law safeguarding Company economic interests and legitimising the aforementioned extraction.

An analysis of whom possessed sovereignty under the EIC tells us who, in practice, administered these avenues of economic exploitation.

Schmitt argues that law cannot be divorced from the personal, the sovereign deciding upon the exception.¹²⁴ Decision involves determining when the exception is initiated and what must be done to preserve the constitutional order, the sovereign possessing unlimited discretion to

¹¹⁹ Lee Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do Not) Work* (OUP 2015), ch4 ; Eric Williams, *Capitalism and Slavery* (University of North Carolina Press 1944), ch12-13

¹²⁰ Jones (n 119), ch4 ; Williams (n 119), ch12-13

¹²¹ Jabez Sunderland, *India in Bondage: Her Right to Freedom and a Place Amongst the Great Nations* (Lewis Copeland 1929), 367 ; Shashi Tharoor, *Inglorious Empire: What the British Did to India* (C Hurst & Co (Publishers) Ltd 2017) ; Kalim Siddiqui, (2020) 'The Political Economy of Famines During the British Rule in India' (2020) *The World Financial Review* 56, introduction ; Senjuti Mallik, 'The British East India Company and the Great Bengal Famine of 1770: Towards a Corporate Colonial Biopolitics' (2024) *114 Geographical Review* 464, 473-476.

¹²² Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978), 36-38 ; See n113-118

¹²³ See n41-65

¹²⁴ Schmitt (n 41) , xviii, 5.

ensure that stability is restored.¹²⁵ The sovereignty described is a borderline concept, straddling law and lawless discretion.¹²⁶ Meanwhile, Agamben clarifies that the state of exception is a period in which the regular legal order is suspended in an extraordinary situation, the government gaining a power to regulate outside the established legal order.¹²⁷ He also displays concern with how the exception can be normalised, claiming that Nazi Germany represented a 12 year State of Exception which allowed the state to eliminate political opposition and categories of citizen that could not be incorporated into the political order.¹²⁸

In the context of 19th century India, the Company Governor-General could be positioned as the sovereign who decided upon the exception. The Governor-General of India in Council was given plenary legislative power and superintendence over all government in India under the Charter Act.¹²⁹ In theory he was accountable to his fellow councillors, the Directors of the East India Company who appointed him and the Board of Control (established by the East India Company Act 1784) who oversaw (and could rescind) the EIC's choice of Governor.¹³⁰ In practice however, the sheer distance of the UK-based Directors and Board of Control from India, and resultant difficulty in communications, led to a non-interventionist policy being followed by the British state.¹³¹ The Governor was on this basis only really accountable to his fellow councillors, and even this safeguard was removed in 1833 with the passage of the Charter Act.¹³² The Governor-General was therefore largely left to run India according to his own devices and within the limits of his legal authority.¹³³

How the Governor-General administered his territory was decided to a substantial degree by what was profitable. Governor-General Charles Cornwallis (July-October 1805) introduced a 'Permanent Settlement' in 1793 to guarantee a consistent level of Company profits from land

¹²⁵ Ibid, 12

¹²⁶ Schmitt (n 41), 5

¹²⁷ 'State Of Exception and Giorgio Agamben's Philosophy' (*Philosophies of Life.org*)
<https://philosophiesoflife.org/state-of-exception-and-giorgio-agambens-philosophy/> - Last accessed 02/07/2025

¹²⁸ Giorgio Agamben, *State of Exception* (University of Chicago Press 2005), 2 .

¹²⁹ Charter Act 1833 (CA 1833), s39-44

¹³⁰ EICA 1784, s2-3

¹³¹ John Darwin, *The Empire Project: The Rise and Fall of the British World System* (CUP December 2009), 83-85

¹³² CA 1833, s39-44

¹³³ Ibid, 83-85

revenues.¹³⁴ He also removed subordinate European contractors from the process by which the Company purchased goods, bypassing their unprofitable price gouging.¹³⁵ Lastly Cornwallis increased the salaries of Company civil servants, the same technique having been adopted by Robert Clive in 1765 (then a Peer for Ireland, MP for Shrewsbury, Governor of Bengal and Commander-in Chief for Fort William) to diminish costs to the Company associated with corruption.¹³⁶ It should be noted that prior to 1773, there was no Governor-General to act as the effective head of the Company administration in India (given the Regulating Act of 1773 had not yet passed).¹³⁷ Despite this however the practice of Robert Clive still provides evidence that men of the highest offices in Company India concerned themselves greatly with maintaining Company profits; their utilising their sovereign powers to manage avenues of economic exploitation on the India subcontinent.

The broad power of Governors to manage avenues of economic exploitation were retained indefinitely. Aligning with Agamben's fears the exception became normalised in India, the Governor maintained long-term the exceptional authority required to eliminate those opposed to colonial governance. Elimination occurred during the 1857 rebellion, Governor-General Caning putting down the Sepoy Mutiny.¹³⁸ The Governor-General can be said to have acted as what Schmitt would understand to be the sovereign of India, a figure capable of taking discretionary action, without legal restraint to restore the constitutional order. Therefore, persisting in his management of the exception, the Governor-General arguably represented the Schmittian sovereign. He decided on an indefinite basis when the regular law should be suspended to ensure the security of the Indian constitutional order and maintain Company profits.

Yet, positioning the Governor-General as the sole sovereign of India may take an overly narrow definition of sovereignty, sovereign power being shared between multiple entities on the Indian subcontinent. Sovereignty as discussed by Schmitt accrues to only one party, the

¹³⁴ 'Bengal Permanent Settlement' (1793)

¹³⁵ 'Lord Cornwallis and Consolidation of British Rule' (*History Discussion.net*)

<https://www.historydiscussion.net/history-of-india/lord-cornwallis/lord-cornwallis-and-consolidation-of-british-rule> - Last accessed 03/09/2025

¹³⁶ Ibid ; Thomas Macaulay, *Essay on Clive* (George G. Harrap & Company 1910), 82-88, 143

¹³⁷ Regulating Act 1773 (RA 1773), s9

¹³⁸ 'Canning, Charles John, Encyclopaedia Britannica Volume 5' (*Wikisource* 1911)

https://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Canning,_Charles_John – Last accessed 02/07/2025

sovereign.¹³⁹ Yet in India, the Governor General (of Bengal and later India) was not the only figure responsible for government, governors in Madras and Bombay Presidencies possessing their own fiefdoms on the subcontinent.¹⁴⁰ Each had a role in deciding upon the exception within his own jurisdiction, problematising Schmitt's reliance on a single sovereign. James Bryce conceived of sovereignty differently, arguing that while there was single legal sovereign, his command authority could be divided between multiple government departments or figure, each enjoying a partial sovereignty subservient to the whole.¹⁴¹ Applying his theories to India, while the Governor-General held a veto over the making of war and creating of treaties, and held command authority over subordinate governors, a partial sovereignty was in practice left in the hands of presidency governors.¹⁴² Each one enjoyed a substantial degree of autonomy from both his fellow governors and the Governor-General; sovereignty distributing to a number of autonomous cores so that the near-absolute authority of the central Indian government (or Bengalese government prior to 1833) was 'more theoretical than real'.¹⁴³ Determining Company policy in their respective regions, all maintained a substantial degree of responsibility for ensuring Company activities were profitable.¹⁴⁴ The responsibility of government and sovereign authority that came with it was also shared by Company civil servants. Around 600 retained individual charge of customs, law and local administration in districts thousands of kilometres in size.¹⁴⁵ In other words the Company civil service shared a substantial degree of responsibility for operating the avenues of economic exploitation that served the interests of British stakeholders. Accounting for this distribution of sovereignty under a Governor-General, sovereignty in India can be referred to as a concept with multiple layers. Sovereignty was shared between the Governor-General, his Governors and the Company Civil Service, all these layers bearing a responsibility for perpetuating the economic exploitation of India.¹⁴⁶

¹³⁹ Schmitt (n 41), xviii, 5

¹⁴⁰ Regulating Act 1773, s9 ; CA 1833, s39

¹⁴¹ James Bryce, *Studies in History and Jurisprudence* (OUP 1901), 507-508

¹⁴² *Imperial Gazetteer, The Indian Empire, Volume 4: Administrative* (Clarendon Press 1909), 14-15

¹⁴³ *Ibid*, 14-15 ; Sekhara Bandyopadhyay, *From Plassey to Partition: A History of Modern India* (Orient Longman 2004), 77-78 ; See n3, s39-44

¹⁴⁴ *Tharoor* (n 4), ch1

¹⁴⁵ B.N Puri, 'The Training of Civil Servants under the Company' (1967) 45 *Journal of Indian History* 749, 749-750 ; David Gilmour, *The Ruling Caste: Imperial Lives in the Victorian Raj* (Pimlico 2007), ch1, 221-222; Colin Newbury, 'Patronage and Professionalism: Manning a Transitional Empire, 1760–1870' (2014) 42 *The Journal of Imperial and Commonwealth History* 193, 197-198

¹⁴⁶ *Bandyopadhyay* (n 143), 78

Conclusions

Emergency law under the EIC can be divided into two main strands. Colonial martial law represented a system of military discretion, the capability to impose significant physical violence by way of the military being kept as a last resort for grave crises like the 1857 Rebellion. The Vellore Mutiny in 1802 exemplified how racialised Indian bodies were subjected to state violence via martial law to deter future rebellion, hundreds of Indian rebels being executed to intimidate others who might consider subverting the structures of colonised and coloniser. Martial law also protected the civilising structures of Company regulation, being used to suppress an uprising against Anglicising dress codes. Law in this respect functioned as a technique for enforcing the civilising mission on uncompliant Crown subjects.

Alternatively, expansive and incrementally expanding forms of legal and physical violence were codified under emergency regulations. Regulation 10, the 1857 State Offences Act, and various other pieces of emergency legislation are the relevant pieces of statute. The emergency legislation granted civil authorities new powers to assemble special courts and impose severe (including capital) penalties on those rebelling against Company rule. The new powers served to grant colonial government similar authority to that already granted to the military under martial law. The extremely violent capacity of the law, resulting in mass executions of rebels and the systematic burning of villages, was also targeted at Indian subjects alone. In this change, the process of legalised lawlessness is evident, increasing levels of violence being authorised under law as previous measures were insufficient to deter rebellion. Violence imposed under law also upheld a moral effect, deterring future rebellion and demonstrating the strength of colonial rule. The emergency motivating these regulations was permanent, the threat of colonial rebellion creating a danger to Company government that never elapsed.

Addressing how the colonial judiciary interacted with despotic government, it is apparent most justices did not consider the rights of colonial subjects to be worthy of enforcement. Crown and Company courts did possess the authority to review government decisions under the Common Law. Individual judges, as evidenced by the *Grant* case and case concerning the Maratha nobleman, were willing on some occasions to uphold the writ of habeas corpus against the executive. The outcome in these cases accorded with the premise that all Crown subjects possessed equal and enforceable Common Law rights. Yet they were in the minority, other servants of the Company making clear that colonial subjects had no entitlement to political rights under the Common Law. A despotism was in this manner created on the Indian subcontinent, judges opposing the rights of British subjects in India.

Emergency regulations themselves can also be deemed a mechanism for the legitimisation and protection of Company economic exploitation. The Company required favourable access to Indian markets to maintain their own profits and make colonialism in India viable. Emergency regulations were the prop that allowed protectionist and extractive economic policies to continue operating under the auspices of Company rule. Regulations manifested as an umbrella, capable of imposing massive coercive force against dissent from extractive economic relations, while, through their positive nature, also legitimising avenues by which wealth was appropriated.

Applying the theory of Carl Schmitt and Agamben further leads one to the conclusion that the Governor-General decided upon the exception, his powers allowing him to manage the course of an emergency. Governor-General Canning is an example of this, his suppressing the 1857 Indian rebellion on behalf of the EIC. The exception, in line with Agamben's theories, also persisted into the long-term. The Governor-General of India indefinitely retained, under the Charter Act 1833, the authority to eliminate forces that opposed colonial rule on the Indian subcontinent. The absolute power of the Governor-General was also utilised to facilitate colonial extraction, Cornwallis and Clive having introduced anti-corruption and land reform policies with the aim of boosting Company revenues.

However, Schmitt's framing of sovereignty is not sufficiently flexible to recognise governance arrangements under the EIC. Under the Company, sovereignty went beyond the governor-general, with partial sovereignty accruing to presidency governors and local civil servants. One figure did not decide upon the exception. Several did, with a plurality of civil servants and regional governors retaining control over law and government in Company India. Responsibility for maintaining Company profits was correspondingly distributed among all these figures.

Chapter 2: How did Emergency Law Operate in the British Raj?

Chapter 2 of my thesis appraises how Crown emergency law, succeeding that of the Company in 1858, operated in the British Raj.¹ It builds on the prior chapter by examining how the Indian state of exception transitioned to Crown governance, similarities and differences between emergency regulation in the two periods being noted. I conduct this analysis in two sub-chapters. I firstly discuss how emergency law operated under the Crown. My second sub-chapter makes arguments on how economic and cultural dynamics were at a nexus with Crown emergency law.

Sub-Chapter A - How did emergency law function under Crown rule?

In 1858, the Government of India Act introduced Crown Rule to India. The East India Company's previous role in administering India was nullified as a result of the 1857 Sepoy rebellion and authority passed to the Crown.² The administration, alike to post-1833 Company rule, was headed by a Governor-General-in-Council appointed by the Crown; the Charter Act 1833 vesting him with supreme administrative authority and near plenary legislative power over British dominions in India.³ The only formal constraints on his legislative power were that he could not amend the 1833 Act itself, nor could he issue regulations concerning military justice, legislate incompatibly with established Prerogative powers or regulate contrary to a Sovereign Parliament (the sovereign imperial parliament possessed the legislative authority to regulate over the heads of local colonial government).⁴ Emergency law in the Raj thus continued to be based on the pillar of an empowered Governor-General.

Citing Downs, Crown emergency law also continued the trend, established under the Company administration, that India would be governed in an indefinite state of emergency. Downs raises the State Offences Act 1857. As already discussed, the legislation authorised an expanded degree of legal and physical violence against the Indian population,

¹ Government of India Act 1858, s1

² Ira Klein, 'Materialism, Mutiny and Modernization in British India' (2000) 34 Mod. Asian Stud. 545, 565-566

³ See CA 1833, s39, s43-44

⁴ Ibid, s44 ; Dylan Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 OJLS 751, 751-759

representative of legalised lawlessness.⁵ The legislation, providing severe and rapid justice,⁶ was replicated by the Crown.⁷ The Crown namely legislated the Murderous Outrages Act 1867 (repealed in 1891), introducing new powers to deal with fanatical crimes at a rapid speed and deter wrongdoing.⁸ Alleged fanatics were tried without jury or right of appeal, conviction leading to the imposition of the death penalty (or transportation for life), with all convict property forfeiting to the government.⁹ Similarity to the 1857 Act lies in the common emphasis on pared back litigant rights. Both pieces of legislation allowed courts to impose capital punishment without trial by jury or right of appeal. The repetition of legislation that pared back litigant rights and neutralised rights of appeal was repeated by the Defence of India Act 1915, the Anarchical and Revolutionary Crimes Act 1919 and the Emergency Powers Act 1939.¹⁰

Legislation under the Crown inheriting older traits is also evident concerning executive supremacy. Under late Company rule, the Governor-General-in-Council retained a near-plenary power to make regulations and possessed superintendence over government.¹¹ The executive supremacy guaranteed in this arrangement was reaffirmed post 1858 in the Defence of India Act 1915 and Emergency Powers Act 1939, wide powers being bestowed on the executive to make regulations for the Defence of India.¹² Executive supremacy was therefore a common feature of colonial government, in the emergency, between Company and Crown rule.

Replication of older legal principle can be understood through the work of Nasser Hussain. Nasser Hussain describes in his principle of 'hyperlegality' that emergencies are not typically marked by individual decisions or an exception from law, contrasting the theories of Schmitt

⁵ Troy Downs, 'Act XI of 1857: The Life and Afterlife of an Emergency Statute in Colonial and Post-Colonial India' (2024) 58 Mod. Asian Stud. 584, 587 ; See ch1, n65-67.

⁶ 'Procs. of the Council of the Gov. Gen. of India' (21 Dec. 1866, p. 245)
https://eparlib.nic.in/bitstream/123456789/753354/1/ilcd_22-02-1867.pdf – Last accessed 21/01/2025

⁷ 'Procs. of the Council of the Gov. Gen. of India', (22 Feb. 1867, p. 97)
https://eparlib.nic.in/bitstream/123456789/753354/1/ilcd_22-02-1867.pdf - Last accessed 21/05/2025

⁸ The Punjab Murderous Outrages Act 1867 (PMOA 1867), s17 ; Elizabeth Kolsky, 'The colonial rule of law and the legal regime of exception: Frontier "fanaticism" and state violence in British India' (2015) 120 Am.Hist.Rev 1221, 1223

⁹ PMOA 1867 n3, s2, s10

¹⁰ Defence of India Act 1915 (DOIA 1915), s3-6 ; Anarchical and Revolutionary Crimes Act 1919, s16-17. ; Emergency Powers Act 1939 (EPA 1939) 1939, s8-13

¹¹ See ch1 n3, s39, s34-44

¹² DOIA 1915, s2 ; EPA 1939, s2-4

and Agamben.¹³ Hussain instead establishes that emergencies are marked by the proliferation of new law and the building on of old legal principle.¹⁴ 'Hyperlegality' is relatedly marked by an expansion in the legal classification of persons, and an expanded use of special tribunals.¹⁵

The 1857 Act and subsequent legislation classified persons more extensively and manifested the special martial law tribunals characteristic of hyperlegality. In 1939 the Governor-General of India, mirroring the older 1857 Act and Charter Act, granted provincial government the authority to introduce special tribunals without a general right of appeal.¹⁶

Accompanying these tribunals were systems of classification. In 1914, the British government in India created a blacklist of spies, saboteurs and enemies of the Crown.¹⁷ Rising anti-colonial violence in Bengal then provoked the creation of a categorisation system designed to determine the tendency of any individual to subversion based on their personal characteristics.¹⁸ The system, being applied during World War 2 to regulate suspected spies and collaborators with the Japanese, also persisted after 1945.¹⁹ Political prisoners were sorted according to whether they were political offenders (potentially awaiting capital punishment) or individuals subject to indefinite detention; the latter category having several subcategories including militant anti-colonialists, members of the Indian National Congress (a popular nationalist political party) and security-political prisoners.²⁰ An 'axis of suspicion' became fundamental to population identification in India.²¹

Hyper-legal lawmaking therefore persisted from Company to Crown rule, new legislation establishing categories of security threat and a series of special tribunals to manage the emergency.²²

¹³ Nasser Hussain, 'Beyond Norm and Exception: Guantánamo' (2007) 33 *Critical Inquiry* 734, 740 ; *Schmitt* (ch1 n 41), xviii, 5 ; *Agamben* (n 128), 1-2.

¹⁴ *Ibid*, 740-741

¹⁵ Nasser Hussain, 'Hyperlegality' (2007) 10 *New Criminal Law Review* 514, 516-517

¹⁶ Emergency Powers Act 1939, s8-13

¹⁷ Yael Berda, 'Managing "Dangerous Populations": How Colonial Emergency Laws Shape Citizenship' (2020) 51 *Security Dialogue* 557, 561-562 .

¹⁸ *Berda* (n 17), 561-562

¹⁹ *Berda* (n 17), 561-562

²⁰ *Berda* (n 17), 561-562

²¹ *Ibid*, 561-562

²² John Malcolm, *The Political History of India, from 1784 to 1823*, 2 vols. (London: John Murray 1826), vol. 2, p. 201, 244-245 ; See n74-84

The above literature remains focused on substantive law, refusing to recognise how the cultural substance lying behind colonial law may have shifted drastically between Company and Crown rule.²³ I now engage with literature addressing this area.

Drawing on the arguments of Murray and French, a significant ideological shift occurred between Company to Crown rule, emergency legislation bearing a greater cultural connection to the formal rule of law under Crown administration. During the 19th century, the rule of law was taken by Dicey to mean that no individual would be punished without law, all people were equal before the law and that general principles of the law would be defined by the courts, not a single constitutional document.²⁴ Under the Company emergency legislation was proximate to racialised thinking, not the rule of law, as cited in the discussion of Mill above.²⁵ Yet this changed when the Crown took power in India. The colonial government took the opinion that colonial law implanted by the UK should be general, publicly accessible, certain and consistent, contrasting the allegedly despotic Oriental systems that UK law supplanted.²⁶ The formal rule of law was thereby an ideological pillar supporting Crown government. Non statutory martial law, suspending ordinary law and imposing a state of exception (even if favoured by Dicey as part of the Common Law tradition), undermined this rationale for empire.²⁷ It was namely impossible to claim governance in accordance with the formal rule of law when the necessity standard of martial law was vague as to what degree of force was lawful in any particular set of circumstances.²⁸ David French similarly emphasises that martial law failed to clearly stipulate what measures were permissible in any given crisis, its clarity being insufficient to reconcile with increasingly formalistic understandings of legality and the rule of law.²⁹

By contrast, emergency legislation, however draconian, was certain and accessible. Emergency statutes could override ordinary law while maintaining the veneer of legal legitimacy; the codification of extensive population control powers under the 1857 State

²³ Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Stud* 232, 236 ; Pierre Legrand, 'Siting Foreign Law: How Derrida Can Help' (2011) 21 *Duke J.Comp.& Int'l L.* 595, 607

²⁴ Tom Bingham, *The Rule of Law* (Penguin 2010), 14-15

²⁵ See ch1 n74-79

²⁶ Brian Tamanaha, 'The Rule of Law for Everyone' (St John's Legal Studies February 2003), 6 ; Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (OUP 2016), 22-23.

²⁷ See n26-n31

²⁸ *Elkins* (ch1 n 69), ch1. ; *Agamben* (ch1 n 128), 11-31 ; *Campbell* (ch1 n 39), 231-232

²⁹ David French, 'Nasty Not Nice: British Counter-Insurgency Doctrine and Practice, 1945–1967' (2012) 23 *Small Wars & Insurgencies* 744, 748.

Offences Act (and subsequent legislation) communicating to the population that the formal rule of law was being better accorded with.³⁰ CRG Murray emphasises that codified emergency law provided what appeared to be impartial legal process, the allegiance of the colonial population being won over by the face of a supposedly functional legal system.³¹ That colonial government sought to maintain an 'effective' legal system has been confirmed by the words of Lord Hawke, his claiming that policy in Crown India was shaped by the twin goals of maintaining law and order (against uprising) while also administering the territory in a manner concordant with justice.³² Law therefore served an important propaganda function. Crown rule inclined toward emergency legislation and away from martial law to better secure the allegiance of the local colonial population; fusing adherence to a formal conception of the rule of law with the promulgation of draconian emergency powers.³³ The emphasis on the rule of law was not tangible under prior Company governance.

It can be analogised from Kipling's defence of empire that links between the rule of law and imperialism were culturally resonant in the British cultural consciousness, codified rules being regarded as improvement to Indian religious law. Demonstrably, codified legislation surpassed older (Hindu and Muslim) religious law covering family and personal matters, a prevalent part of the Mughal constitution alongside customary law.³⁴ To the colonial mind codified law represented a 'civilised despotism' in the colonial legal sphere.³⁵ It defined the identity of Indians and their offences under law.³⁶ In so doing it integrated into society the legal process that was lacking under the supposed native despots that previously governed India.³⁷

The process integral to a 'civilised despotism' connected to the notion of the civilising mission. The civilising mission was advocated for by British imperialists from the 18th-20th centuries; Churchill, James Mill, and Macaulay all being key thinkers (among others) who reinforced the

³⁰ Ibid, 748.

³¹ CRG Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' (2019) 30 King's Law Journal 426, 432-433.

³² HL Deb 13th April 1949, vol 161, col 1199

³³ Murray (n 31), 432-433

³⁴ Mark Brown, 'Colonialism and Penalty' in Chris Cunneen and Others' *The Routledge International Handbook on Decolonising Justice* (Routledge 2023), 384-385

³⁵ 'Minutes of Evidence before the Select Committee on the Affairs of the East India Company' (Irish University Press Series of British Parliamentary Papers 1970), 84

³⁶ Hussain (ch1 n 104), 65.

³⁷ Hussain (ch1 n 104), 65.

notion that the colonies were governed in the interests of their subjects.³⁸ Kipling, who was himself a prominent defender of Empire (enjoying a reputation as the Poet of the Empire) in the 19th century argued in favour of these views robustly.³⁹ He claimed colonial peoples, including Indians, had to be developed, under British tutelage, to an Anglo-Saxon standard of civilisation, empire playing a paternalistic role in educating the lesser peoples who fell under British authority.⁴⁰ The Crown's codification of new emergency law was indissociable from this notion of improving Indian society in the English image, already conceptually developing at the time of the Vellore Munity as discussed above.⁴¹ Law was fundamental to the civilising mission, it representing the sum and substance of what the Indians were to be taught.⁴² It was further trope of British colonial thought that Anglo-Saxon civilisation was superior and Indians thus had to be educated to that standard via the exercise of legally authorised (physical) violence.⁴³ Violence deriving from codified emergency, including torture, police violence and military force, thus served an educative function, any degree of violence being justifiable as a means of that protecting the Indian population from their own barbarity.⁴⁴ The formula led to any level of violence being justifiable as part of the civilising mission.⁴⁵ The promulgation of emergency law under the Crown thus served both educative and symbolic functions, representing the sum of what Indians were to be taught and an instrument through which Indian civilisation could be violently elevated.

I have yet to engage with literature on the structure of colonial rule in Crown India. Addressing this gap, the Governor-General did not de facto govern India as a total authority in the manner

³⁸ Andrew Roberts, *Churchill: Walking with Destiny* (Penguin 2019), ch5 ; Thomas Macaulay, 'Minute on Indian Education' (Selections from Educational Records February 1835), 109-110, 115-117 ; James Mill, *The History of British India* (Baldwin, Cradock and Joy 1817), 467, 646

³⁹ David Gilmour, *The long recession: the imperial life of Rudyard Kipling* (Farrar, Straus and Giroux 2002), x, xi ; 'Rudyard Kipling: 1865-1936' (BBC)

https://www.bbc.com/poetryseason/poets/rudyard_kipling.shtml - Last accessed 31/07/2025

⁴⁰ Rudyard Kipling, 'The White Man's Burden' (1899)

⁴¹ See ch1 n80-87

⁴² E. Stokes, *The English Utilitarians and India* (Clarendon Press 1959), 302

⁴³ Deana Heath, *Colonial Terror, Torture and State Violence in Colonial India* (OUP 2021), 44-45

⁴⁴ Suchitra Vijayan, 'Violence is a legacy of empire that didn't end when empire ended – A conversation with Deana Heath' (*The Polis Project* May 14th 2021)

<https://www.thepolisproject.com/listen/violence-is-a-legacy-of-empire-that-didnt-end-when-when-empire-ended-a-conversation-with-dr-deana-heath/> - Last accessed 01/06/2025 ; Ibid, 44-45

⁴⁵ Ibid

alluded to by Schmitt's arguments on a sovereign decisionmaker. Recalling the understanding of sovereignty put forward by Bryce, the Governor-General instead represented the manager of a multi layered system with partial sovereignty accruing to various civil actors.⁴⁶ The most powerful were the class of regional governors who ruled expansive Indian territories as personal fiefdoms.⁴⁷ Particularly, the governors of Madras and Bombay retained their administrative powers over their regions.⁴⁸ They in other words possessed a partial sovereignty with which they could manage the emergency and decide upon the exception within their jurisdiction.⁴⁹ Continuing from Chapter 1, these powers were largely exercised to maintain the profitability of Crown India as a colony.⁵⁰ After the advent of Crown rule, the British Civil Service also took over the administration of Indian government.⁵¹ The responsibilities of individual civil servants were substantial, holding within their portfolio the duty to attend to the profitability of their district, preserve its fiscal self-sufficiency and maintain the rule of law.⁵² Taking all of the above into account, the Governor-General did not have a monopoly on sovereign decision-making in Crown India. Alike to Company rule, partial sovereignty was distributed through the administrative structure of the Raj. It accrued to regional governors and civil servants, both of whom possessed limited powers to manage the exception and maintain colonial profits.

Beyond the concept of sovereignty, but still important when the structures of the Raj state are subject to analysis, were the officers of the British Indian Army and the British Army in India. The former group of officers were placed in charge of native troops, while the latter were officers of the British Army assigned to India.⁵³ These two collections of British Officers were deeply entrenched in the politics and government of Crown India, as they had been under Company rule.⁵⁴ Officers seconded to political roles in government and tribal diplomacy were

⁴⁶ Bryce (ch1 n 141), 507-508

⁴⁷ Elkins (ch1 n 69), ch1. ; Douglas Peers, 'Conquest Narratives: Romanticism, Orientalism and Intertextuality in the Indian Writings of Sir Walter Scott and Robert Orme', in Michael Franklin's, *Romantic Representations of British India* (Routledge 2006), 239

⁴⁸ See CA 1833, s43

⁴⁹ See CA 1833, s43

⁵⁰ Tharoor (ch1 n 4), ch1

⁵¹ 'Macaulay Committee Report on the Civil Service, Appendix to the Fulton Report' (1854), 119-128

⁵² Elkins (ch1 n 69), 99.

⁵³ T.A Heathcote, 'The Army of British India' in David Chandler and Ian Beckett's *The Oxford History of the British Army* (OUP 1992), 362-363

⁵⁴ See ch1 n112-118

instrumental in forming Crown foreign policy.⁵⁵ Meanwhile the regular army constructed a lobby, led in the 20th century by Lord Kitchener, that promoted security issues and favoured military aggression as a means of achieving career success.⁵⁶ Colonial armed forces on this basis possessed an influential lobby by the late 19th century, their political and cultural influence shaping colonial policy towards belligerence. The lobby manifested in the preponderance of aggressive policies. The invasion of Afghanistan in 1878 serves as an example. In this case the Governor-General of India, the Earl of Lytton, relied on military force as a first resort to solve a foreign policy problem, in this case the influence of the Russian Empire in Afghanistan.⁵⁷ Colonial belligerence of this kind was simultaneously pervaded by racial anxiety.⁵⁸ Crown officials saw themselves as the drivers of the UK's civilising mission and the thin white line against native barbarism.⁵⁹

Colin Murray argues that to hold this native barbarism at bay, colonial military establishments promoted emergency statute at the expense of martial law. Metropolitan martial law, as already mentioned, obliged armed forces to resolve crises in public order with strictly necessary force.⁶⁰ Tracing emergency law at the start of the 20th century, the Diceyan view of martial law became less attractive in the Metropole. It was supplanted by emergency statute there (including the Defence of the Realm Act 1914, addressed in Chapter 3).⁶¹ Colonial military forces also took a strong dislike to martial law arrangements during the 19th century. While any unlawful counterinsurgency action was typically legalised post-facto via indemnity

⁵⁵ M.E Yapp, *Strategies of British India* (Clarendon Press 1850), 9

⁵⁶ David Gilmour, *Curzon* (John Murray 1994), 251–5, 296–317; Hew Strachan, *The Politics of the British Army* (Clarendon Press 1997), 78-80

⁵⁷ Douglas Peers, 'State, Power, and Colonialism', in Douglas M. Peers and Nandini Gooptu (eds.), *India and the British Empire* (OUP, 2012), 16–43 ; Michael Barthorpe, *Afghan Wars and the North-West Frontier 1839–1947* (Cassel 2002), 66-67

⁵⁸ Mark Condos, *The Insecurity State: Punjab and the Making of Colonial Power in British India* (1st edn, CUP 2017), 220

⁵⁹ Harold Nicholson, *The Later Years, 1945-1962* (Atheneum 1967), 237 ; A.H.M. Kirk-Greene, 'The Thin White Line: The Size of the British Colonial Service in Africa' (1980) 79 Afr.Aff 25, 26

⁶⁰ Colin Murray, 'Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses' (2019) 30 K.L.J 426.

⁶¹ Daniel Skeffington, 'Emergency powers in the United Kingdom' (*The Constitution Society* 9th June 2022)

<https://consoc.org.uk/emergency-powers-in-the-united-kingdom/> - Last accessed 1/06/2025 ; Dicey (ch1 n 29), ch8, ch10

statute, military officers still did not regard the doctrine of martial law favourably during the late 19th century.⁶² The underlying tension of potential legal liability for an excess or lack of force remained.⁶³ Officers opined that ‘true martial law’ permitted the application of all force required, including collective punishment and aerial bombardment, to subdue and deter anti-colonial dissent.⁶⁴ Common Law martial law was a hindrance on their tactical flexibility in comparison, its necessity standard being an impediment to the application of the extreme violence characteristic of morally effective violence.⁶⁵ The military establishment on this basis favoured emergency legislation, imposing no ‘necessity’ limitation on the degree of force that could be deployed against insurgents.⁶⁶

A wider conception of the discretion the military enjoyed during colonial emergencies was also supported by English lawyer W.F. Finlason. Using the framework of martial law, he argued that during an emergency colonial armed forces could exercise their discretion to meet danger with terror.⁶⁷ All colonial subjects in a rebellious area could be treated under strict military discipline, in other words as presumed rebels.⁶⁸ Any infractions against the ruling power, including seditious publications and rebellion, were to be with immediate death or any lesser degree of punishment chosen by an officer.⁶⁹ The degree of violence authorizable under Finlason’s interpretation of martial law, encompassing collective punishment, goes beyond the ‘necessity’ standard fundamental to Dicey’s martial law.⁷⁰ According to Finlason, exemplary brutality, illegal under the peacetime Common Law was justifiable in times of ‘universal insurrection’.⁷¹ During these periods, the ‘safety of the state’ was prioritised over the ‘security of the individual’, justifying the discarding of evidentiary laws and criminal burdens of proof in prosecutions.⁷² Circumstances of rebellion also obliged colonial subjects to rally round the flag, even

⁶² Murray (n 60)

⁶³ Murray (n 60)

⁶⁴ A.W. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004), 61-71

⁶⁵ See n43-55

⁶⁶ Ibid, 61-71

⁶⁷ W.F. Finlason, *A Treatise On Martial Law: As Allowed By The Law Of England, In Time Of Rebellion* (Stevens and Sons 1866), 64

⁶⁸ Ibid, 64-65

⁶⁹ Finlason (n 67), 65

⁷⁰ Dicey (ch1 n 29), ch8, ch10

⁷¹ Finlason (n 67), 65

⁷² Finlason (n 67), 65, 69

observing neutrality during a rebellion amounting to complicity in that uprising.⁷³ All able-bodied males could therefore be treated as rebels when located in a rebel zone regardless of their conduct, their being arrestable and subjectable to summary punishment on the mere suspicion of wrongdoing.⁷⁴

Finlason's doctrine of martial law essentially matched military practice in colonial India. An uprising by the Nahmdhari Sect took place in 1872 against both colonial authority and imported social practices; rituals like meat consumption and cow slaughter being an anathema to Sikh traditions.⁷⁵ The uprising involved 125 people attacking a slaughterhouse in Malerkotla, accompanied by a separate assault against a fort loyal to the British in Ludhiana.⁷⁶ Replicating the state terror justifiable under Finlason's Martial Law, rebels were summarily executed to deter future rebellion. 66 Sikhs were blown from a gun, while thousands of Indians were forced to witness these executions in a form of psychological reprisal designed to deter to future rebellion.⁷⁷ Responses to uprisings in Crown India therefore involved a degree of violence that reflected Finlason's doctrine of martial law, imposed coercion being intended to inspire terror among the population and deter future anti-colonial uprisings.

Therefore, officers in colonial India, whether under emergency statute or martial law practice, possessed a nearly unlimited discretion in dealing with colonial rebellions.⁷⁸

Crown counterinsurgency operations were themselves highly racialised, the British Indian Army regarding insurgents as savages requiring violent repression. Demonstrating this, the duty of keeping public order in Crown India fell to the British Indian Army.⁷⁹ The institution

⁷³ Finlason (n 67), 70

⁷⁴ Finlason (n 67), 70

⁷⁵ T.M Munkundan, *The British Origin of Cow Slaughtering in India* (Society of Integrated Development for Himalayas), 13-14

⁷⁶ Ibid, 13-14 ; Terence Thomas, 'Old Allies, New Neighbours: Sikh's in Britain' in Gerald Parsons' *The Growth of Religious Diversity: Britain from 1945* (Volume 1, The Open University 1993), 221-222 ; Raakhi Jaaga, 'What is the history of the Kuka martyrs' day?' (*The Indian Express* 18th January 2025)

<https://web.archive.org/web/20250118091001/https://indianexpress.com/article/explained/explained-history/what-is-the-history-of-the-kuka-martyrs-day-9784916/> - Last accessed 29/07/2025

⁷⁷ Ibid

⁷⁸ J.Coates, *Suppressing Insurgency: An Analysis of the Malayan Emergency 1948-54* (Boulder 1992), 46

⁷⁹ Amar Farooqui, 'Divide and Rule': Race, Military Recruitment and Society in Late Nineteenth Century Colonial India' (2015) 43 *Social Scientist* 49, 52- 56

recruited Sepoys along racial lines. It admitted into ethnically homogenous units only those races deemed to be of martial stock, mostly Punjabis by the late 19th century.⁸⁰ Emergency law, whether statutory or martial, was enforced by the British Indian Army utilising extremely coercive counterinsurgency tactics as described above.⁸¹ Charles Callwell, publishing in 1896 at the zenith of the British Empire, confirmed that violence should be imposed on rebels disproportionately and without discrimination.⁸² Employing this notion of moral effect to deter anti-colonial rebellion, Crown forces did not make any distinction between combatants and the general Indian population.

In this respect Crown forces during the 1857 Rebellion engaged in collective punishment by shooting civilians en masse and burning their settlements.⁸³ The extreme degree of violence was influenced by the alleged rape of British white British women by Indian men; sexual violence breaking down colonial hierarchies related to race and encouraging a vengeful response.⁸⁴ Actions inflamed by this vengeance instilled terror over the Indian populace, deterring future rebellions and demonstrating the superiority of colonial rule under Britain.⁸⁵ Counterinsurgency violence thus bore a similar substantive character under Company and Crown rule, emergency law in both cases manifesting extreme violence and moral effect against anti-colonial rebels.

In Crown India racial ideas, similarly to other colonies, took on an especially strong resonance in justifying the violence. Sentiment across the empire in the 19th century, fuelled by Social Darwinism and notions of racial hierarchies, dehumanised native rebels as savages incapable of reason.⁸⁶ The constructed image of the savage permitted the total annihilation of the enemy using 'savage' methods that would have been unlawful if exercised against a white population,

⁸⁰ Ibid, 52-56

⁸¹ See n57-71

⁸² *Callwell* (ch1 n 67), 41-42.

⁸³ Heather Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857-1914* (Manchester University Press 2004), 39-40

⁸⁴ Sadaf Zarreen, 'How The British Silenced The Voices Of Their Women After The 1857 Sepoy Mutiny' (*Youth Ki Awaaz* 19th June 2018)

<https://www.youthkiawaaz.com/2018/06/imperial-fears-and-fantasies-under-the-shadow-of-1857/> -

Last accessed 02/06/2025

⁸⁵ *Elkins* (ch1 n 69), ch1.

⁸⁶ Benjamin Kidd, *Social Evolution* (Macmillan and Co 1894), 45-48; Kim A Wagner, 'Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency' (2018) 85 *History Workshop Journal* 217, 222, 224. ; *Mill* (n 78), ch1

tactics like village burning and cattle lifting being endorsed as necessary measures when dealing with a 'savage race'.⁸⁷ Indigenous persons were demonised, imagery surrounding the wild and violent behaviour of the natives being evoked to twist the roles of oppressor and victim.⁸⁸ The killings of those who opposed colonial government were in this manner framed as defensive.⁸⁹

The case study of the Amritsar Massacre demonstrates how 'defensive' violence was intended to preserve the colonial state. In 1919, a peaceful assembly of individuals in Amritsar was continuously fired upon by the British Indian Army over the course of several minutes.⁹⁰ Defences offered by Colonel Dyer, Conservative MP's and the conservative media (including the Daily Mail), that the violence has taken place with the intention of preventing the collapse of British rule in India, reaffirmed the prior cited reversal of oppressor and victim roles characteristic of savage narratives, the British claiming that they were the saviours of India rather than its repressor.⁹¹ In conceding that the violence perpetrated was intended to defend the colony, it was admitted by Colonel Dyer that the salvation of British India required a local population terrorised into submission.⁹² In other words morally effective violence was required to perpetuate British colonialism, the inspiration of terror among the populace being a fundamental component of morally effective violence.

The notion that the Officer on the ground, Colonel Dyer intended to impose morally effective violence is evidenced by his conduct.⁹³ The Colonel imposed rules in Amritsar classified as a regime of racial humiliation by India Secretary Montagu (a Minister of the Imperial Government in London responsible for the administration of India); the rules in question establishing a

⁸⁷ Ibid, 224

⁸⁸ Anna Mollers, 'The figure of the 'savage' and landed property in colonial contexts' (*Strukturwandel Des Eigentums* October 2nd 2023)

<https://sfb294-eigentum.de/en/blog/the-figure-of-the-savage-and-landed-property-in-colonial-contexts/>

- Last accessed 02/06/2025

⁸⁹ Ibid

⁹⁰ Nigel Collet, *The Butcher of Amritsar: General Reginald Dyer* (Hambledon Continuum 2005), 259-262

⁹¹ Ibid, 197, 296 ; Collet (n 229), 267 ; Elkins (ch1 n 69), 138, 141-142 .

⁹² Praveen Swami, 'Jallianwala Bagh Revisited' (*Frontline* November 1997) ; Nick Lloyd, *The Amritsar Massacre: The Untold Story of One Fateful Day* (Bloomsbury Publishing 2011), 157, 178

⁹³ Nigel Collet, 'My Review of Nick Lloyd's Book on the Amritsar Massacre' (*Our Tribes* July 2012)

<https://ourtribes.wordpress.com/2012/07/17/my-review-of-nick-lloyds-book-on-the-amritsar-massacre/>

-Last accessed 25/01/2025

regime of public flogging and mandating Indian men to crawl along certain streets in symbolic submission to white British women.⁹⁴ These acts are the commands one would expect from an individual trying to impose morally effective violence, violence and humiliation being used to communicate the subservient position of the natives and deter future rebellion.

The motive of imposing moral effect to defend of colonial rule was officially condemned by a subsequent investigatory commission put together by the Government of India (and Dyer was subsequently relieved of his command), the length of firing by forces in Amritsar being noted as a grave error.⁹⁵ Yet this verdict had no binding effect, the Commission lacking the authority to make sweeping changes to British imperial policy.⁹⁶ Morally effective violence remained imperial policy, systematic violence and burning of settlements being used (as one example) against the Irish nationalist movement in 1920 during the War of Independence.⁹⁷ In general, it was feared that any disobedience to colonial rule would cascade into full scale rebellion in India and the breakdown of colonial capitalism.⁹⁸ Any rebellion was therefore met with performative violence imposing moral effect, its excesses restoring subject obedience to the colonial state.⁹⁹ On this basis, it can be said that morally effective violence on show at Amritsar was not an isolated incident, but an example of systematic policy under the Crown.

Another colonial method of control, beyond raw violence, was proscription, groups and literature being proscribed to delegitimise Indian nationalism. Demonstrably, in the 19th and 20th centuries Crown India saw the rise of a nationalist movement advocating for Indian self-

⁹⁴ Ian Colvin, *The Life of General Dyer* (William Blackwood & Sons Ltd 1929), 197, 296

⁹⁵ HC Deb 8 July 1920, vol 131, col 1722; William Hunter and Others, 'Hunter Report on the Amritsar Massacre' (H.M Stationary Office 1919), 30-31, 115-116

⁹⁶ Ibid

⁹⁷ 'The Sack of Balbriggan to be commemorated' (*Irish Independent* 19th September 2003)

<https://www.independent.ie/regionals/dublin/fingal/the-sack-of-balbriggan-to-be-commemorated/27776467.html> - Last accessed 02/02/2025 ; Peter Ellis, *Eyewitness to Irish History* (Wiley 2004), 244 ; Gerry White and Bredan O'Shea, *The Burning of Cork* (Mercier Press Ltd 2006), 139

⁹⁸ Nasser Hussain, 'Towards a Jurisprudence of Emergency: Colonialism and the Rule of Law' (1999) 10 *Law & Crit* 93, 112-113

⁹⁹ Kim Wagner, 'Calculated to Strike Terror': The Amritsar Massacre and the Spectacle of Colonial Violence' (2016) 233 *Past & Present* 185, 224

determination.¹⁰⁰ British government in India reacted by instituting proscription, imposing restrictions on individual membership of groups and the freedom to publish without censorship.

Peacetime censorship was instituted under the 1898 Code of Criminal Procedure and the Indian 1910 Press Act.¹⁰¹ Under the latter local government regulated printed materials that seduced military personnel from their allegiance to the Crown, encouraged disaffection toward colonial government or convinced individuals to interfere in the maintenance of sound administration, law and order.¹⁰² Local government could confiscate securities (deposits of funds) and printing presses from any entity that published unlawful material.¹⁰³ Local government also possessed the authority to request from a magistrate warrants for the seizure of unlawful materials.¹⁰⁴

Censorship also continued during wartime. Functionally replicating the Indian Press Act 1910 and imposing restrictions on subversive materials, the 1915 Defence of India Act authorised restrictions on publishing. The 1915 Act allowed the Governor-General of India to make regulations for the suppression of any materials that were 'false', encouraged strife between different classes or were likely to encourage disaffection or alarm.¹⁰⁵ In this context of widespread proscription, literature promoting anti-colonial liberation was banned regardless of whether an immediate (or violent) threat was posed to the infrastructure of colonial government.¹⁰⁶

The authority of the colonial state to proscribe went beyond literature. Under the Criminal Law Amendment Act 1908, Indian state governments were granted the authority to ban organisations if they did (or aimed to) interfere in the administration of law, law and order, or the public peace.¹⁰⁷ Proscription rules also did not distinguish based on whether proscribed groups posed a violent or revolutionary threat to the colonial state. From 1934 to 1942, the

¹⁰⁰ Daniel Argov, *Moderates and Extremists in the Indian Nationalist Movement, 1883-1920* (Asian Publishing House 1967), ch2-ch5

¹⁰¹ The Code of Criminal Procedure 1898, s99A ; Indian Press Act 1910 (IPA 1910) , s4

¹⁰² Ibid, s4-6

¹⁰³ IPA 1910, s4-7

¹⁰⁴ IPA 1910, s4-7

¹⁰⁵ DOIA 1915, s2

¹⁰⁶ David Kilcullen, *Counterinsurgency* (OUP 2010), 4. ; Vicki Sentas, 'Terrorist Organization Proscription as Counterinsurgency in the Kurdish Conflict' (2018) 30 *Terrorism and Political Violence* 298, 302.

¹⁰⁷ Indian Criminal Law Amendment Act 1908, s16

Communist Party of India was proscribed under the Criminal Law Amendment Act 1908.¹⁰⁸ Another outlawed group was the Indian National Congress, proscribed in 1930 after Gandhi's Salt March and banned again (after being legalised in 1931) from 1942-1945 in reaction to the Quit India Movement.¹⁰⁹

Relatedly thousands of pieces of 'seditious' nationalist and anti-colonial literature were proscribed by the government of Crown India.¹¹⁰ By banning activity contrary to the interests of the colonial state, proscription criminalised avenues of civic activism, the desire for anti-colonial liberation being delegitimised by a criminal label.¹¹¹ These actions were taken in contradiction to liberal principle, one's liberty to associate with whom one wished and publish freely having been departed from in Crown India

Yet these restrictive measures were not explicitly terror related. Terrorism as a distinct concept crystallised in The Anarchical and Revolutionary Crimes Act 1919. The Rowlatt Committee was assigned by the Governor-General of India to investigate the widespread criminal conspiracies associated with the Indian revolutionary moment.¹¹² It found that India had been swept by a wave of assassinations and conspiracies to commit violence.¹¹³ Administrative and judicial figures working for colonial institutions were the typical targets of violence.¹¹⁴ The widespread sedition could not be controlled with ordinary legislation due to the difficulty of obtaining evidence for prosecutions and the ineffectiveness of local police forces. Invoking the

¹⁰⁸ Saswati Sarkar, Shanmukh, and Dikgaj, 'The Communist betrayal of the Indian Freedom Struggle – the groundwork' (*Springer Belur*)

<https://springerbelur.com/the-communist-betrayal-of-the-indian-freedom-struggle-the-groundwork/> -

Last accessed 13/06/2025

¹⁰⁹ 'Indians campaign for independence (Salt Satyagraha), 1930-1931' (Global Non Violent Action Database)

[https://nvdatabase.swarthmore.edu/content/indians-campaign-independence-salt-satyagraha-1930-](https://nvdatabase.swarthmore.edu/content/indians-campaign-independence-salt-satyagraha-1930-1931)

[1931](https://nvdatabase.swarthmore.edu/content/indians-campaign-independence-salt-satyagraha-1930-1931) - Last accessed 03/02/2025 ; 'Gandhi-Irwin Pact, 1931' (*InsightsIAS*)

<https://www.insightsonindia.com/modern-indian-history/national-movement-1919-1939/gandhi-irwin-pact-1931/>

¹¹⁰ *Publications Proscribed by the Government of India* (The British Library 1985), 1-191

¹¹¹ Sutha Nadarajah and Dhananjayan Sriskandarajah, "Liberation Struggle or Terrorism? The Politics of Naming the LTTE" (2005) 26 TWQ 87, 89-91 ; *Sentas* (n 106), 302

¹¹² Sidey Rowlatt, Basil Scott, C.V Sastri, Verney Lovett, P.C Mitter and D.V Hodge, 'Sedition Committee 1918: Report' (Superintendent Government Printing 1918), i

¹¹³ *Ibid*, ch1-15

¹¹⁴ *Rowlatt* (n 112), ch1-5

concept of terrorism, Committee described elaborate conspiracies to commit violence from Bengal to Bombay, these plots forming due to organised recruitment of insurgents by revolutionaries and incitement from a revolutionary press.¹¹⁵

To deal with the threat of 'terror' the Committee made several recommendations. Jury trial and the right to appeal convictions were to be ended during emergencies upon the declaration of the Governor-General.¹¹⁶ The Committee then endorsed a power to exclude the public from hearings concerning revolutionary activity; further recommending new powers to restrict the behaviour of individuals and make arrests into non-penal custody.¹¹⁷ These measures were necessary to protect jurors from intimidation by 'terrorists', preserve the deterrent effect of punishment and stop public agitation building up around judicial hearings.¹¹⁸

The 1919 integrated these recommendations. The 1919 Act introduced schemes of control orders, arrest without warrant and indefinite detention for those reasonably suspected of being concerned in anarchical or revolutionary activity.¹¹⁹ The 1919 Act also established a system of counter-revolutionary courts held *in camera* (in private without public and media access) and without juries.¹²⁰ The courts were neither bound by laws of evidence or required to provide the defendant with legal representation in cases concerning control orders.¹²¹ These powers were intended, at least from the intentions expressed by members of the Rowlatt Committee, to provide a counterweight against violent resistance to colonial structures, labelled as terrorism.¹²²

After the passage of the 1919 Act, the use of the term terrorism proliferated. The terrorist label was assigned to Indian revolutionary activity throughout police records of the 1930s.¹²³ Sir Charles Tegart, the Commissioner of Calcutta Police, spoke about 'Terrorism in India' in a 1932 speech.¹²⁴ By 1937, terrorism had replaced older labels like sedition and political

¹¹⁵ *Rowlatt* (n 112), 111-118, 19, 193-194

¹¹⁶ *Rowlatt* (n 112), ch16-17

¹¹⁷ *Rowlatt* (n 112),ch16-17

¹¹⁸ *Rowlatt* (n 112), ch16-17

¹¹⁹ Anarchical and Revolutionary Crimes Act 1919 (ARCA 1919), pt 1-3

¹²⁰ *Ibid*, pt2

¹²¹ ARCA 1919, pt2

¹²² *Rowlatt* (ch2 n 88), ch1-5

¹²³ Joseph McQuade, *A Genealogy of Terrorism: Colonial Law and the Origins of an Idea* (CUP 2020), 18

¹²⁴ Charles Tegart, 'Terrorism in India' (New Age Publishers 1953)

criminality as the primary lens through which acts of anti-colonial violence were understood.¹²⁵ McQuade understands the growing reliance on the term as an attempt to legitimise emergency measures in the eyes of Parliament and Indian public opinion; terrorism acting as a matrix through which a supposedly liberal polity could suppress anti-colonial political opponents.¹²⁶

Gearty describes the proliferation of the terrorism concept as representative of the duplicity of liberalism. Despite being promulgated by a liberal colonial power, the 1919 Act and surrounding concept of terrorism departed from liberal principles as they applied to violent anti-colonialists.¹²⁷ Mere suspicion that an individual would engage in violent anti-colonial resistance would be sufficient grounds for arrest, the law placing strict limitations on the ability of anti-colonists to express themselves freely and advocate for such resistance.¹²⁸ If identified by the Crown, suspected 'terrorists' faced further harsh treatment. Suspects, as detailed above, were ineligible for jury trial.¹²⁹ They were also subjectable to arrest without warrant, potential indefinite detention, and were left without the political character of their activities being recognised.¹³⁰ Traditional elements of the rule of law applied in the UK were departed from as they applied to Indian 'terrorists', a recognition of overseas political violence, jury trial and commitment to individual liberty amounting to hallmarks of UK domestic law at the time.¹³¹

According to Gearty, these double standards are inherent to liberalism, the colonial 'other' being treated according to standards unacceptable at home.¹³² In this case therefore fighting a terroristic 'enemy within' compromised the overseas enforcement of liberal principles present in UK domestic law, the former not applying overseas in an example of liberal duplicity.¹³³

¹²⁵ *McQuade* (n 123), 18

¹²⁶ *McQuade* (n 123), 179

¹²⁷ See n22-27 ; *Bingham* (ch2 n 24), 91-95

¹²⁸ See n112-122

¹²⁹ See n112-122

¹³⁰ See n112-122

¹³¹ Extradition Act 1870, s2-3 ; *In Re Castioni* [1891] 1 Q.B. 149 (Queen's Bench Division), 156, 164-166 ; An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber 1641

¹³² Conor Gearty, *Homeland Insecurity* (Polity 2024), 203-204

¹³³ Conor Gearty, 'The rise and rise of global anti-terrorism law' (*LSE* 26th November 2024)

Sub-Chapter B – How can emergency law under the Crown be understood at a nexus with cultural and economic dynamics?

Crown government in India was only viable so long as it was profitable.¹³⁴ So wealth might be efficiently transferred, protectionist policies favouring British industries continued, the UK in one example having sold one billion yards of textile to India while strangling India's own textile industries with tariffs.¹³⁵ Simultaneously, Indian persons were pauperised by Crown policy.¹³⁶ Dadabhai Naoroji MP elaborated on a wealth drain from India, £3 million (not adjusted for inflation) being taken out of the country annually (over 30 years) at 12% compound interest.¹³⁷ The drain required protection against resistant and exploited Indian subjects.¹³⁸ Emergency law, including terror-related regulation, thereby manifested alongside violent counterinsurgency practices, being relied upon to quash any anti-colonial dissent. The legal regime persisted indefinitely, there being no point at which resistance to colonial economic arrangements elapsed.¹³⁹ The legal character of emergency law also legitimised the entire system of economic extraction, laws validly made possessing a legitimising aura in themselves.¹⁴⁰ Crown emergency law thus shielded the economic interests of the UK in India indefinitely. Authorised physical and legal violence suppressed those who might have struggled against colonial economic exploitation, while the normative character of emergency law legitimised the transfer of Indian wealth.

The above literature considers how Indians were subsumed to the economic interests of the UK via emergency law. It does not note the way emergency law framed the Indian population.

<https://www.lse.ac.uk/research/research-for-the-world/politics/global-anti-terrorism-law> - Last accessed 04/08/2025 ; McBride (n 24), 22-23. ; Dylan Lino, 'The Rule of Law and the Rule of Empire: A.V Dicey in the Imperial Context' (2018) 81 *Modern Law Review* 739, 742-743

¹³⁴ Richtie Owendale, 'Macmillan and the wind of change in Africa, 1957–1960' (2009) 38 *The Historical Journal* 455, 459

¹³⁵ *Tharoor* (ch1 n 4), 32; Jon Wilson, *India Conquered: Britain's Raj and the Chaos of Empire* (Simon & Schuster 2016)

¹³⁶ Angus Maddison, *Class Structure and Economic Growth: India and Pakistan since the Moghuls* (Taylor and Francis 2006), 63

¹³⁷ HC Deb 14 August 1894, vol 28, col 1056-1057

¹³⁸ Kyrre Lind, 'The Nagar Rebellion 1830-31: Administration and Rule in an Indian Native State' (University of Oslo 2004), 58-66

¹³⁹ See ch1 n112-117

¹⁴⁰ *Weber* (ch1 n 121), 37

Edward Said can be used to frame colonial emergency law as an extension of Orientalist theory, the systematic imposition of counterinsurgency violence reminding Indians that they were incapable of ruling themselves. In explanation, under Orientalist theory, easterners from the Middle East and Asia did not possess the same ability to politically organise as western civilisations.¹⁴¹ Even though Edmund Burke (an orator and Anglo-Irish statesman) regarded India as a territory that pre-colonisation possessed a complex legal system and sophisticated jurisprudence, this was an atypical view.¹⁴² Most associated 'Orientals' (an artificial category generated from colonially produced knowledge) with primitiveness and violence.¹⁴³ 'Orientals' without would intervention be left in the thrall of depots, incapable of ruling themselves and requiring UK assistance to govern.¹⁴⁴

Crown government of India was structured around this philosophy. Royal proclamation stated that the UK controlled India for the benefit and advancement of the national population.¹⁴⁵ Even after the principle of national self-determination was alluded to in Wilson's 14 Points and enshrined in the Atlantic Charter in 1941, a paternalist attitude persisted.¹⁴⁶ The UK's duty to lead India was implied by declarations that a political and economic partnership should continue post 1945 between colony and Metropole.¹⁴⁷ The UK would retain its role as the tutor of 'Oriental' peoples.¹⁴⁸ Accounting for this broader Orientalist mindset it can be inferred emergency law was a method by which Indians were reminded of their inadequacies. Force authorised under emergency law was justified by the inept nature of Indians as 'Orientals', violence 'civilising' Indians so that they might in the future be able to govern themselves.¹⁴⁹

¹⁴¹ Edward Said, *Orientalism* (Penguin Books 2003), 31-33

¹⁴² Rob Goodman, "'The Low Principles of Jurisprudence': Legal Indeterminacy in Edmund Burke's Impeachment of Warren Hastings' (2020) 82 Rev.Pol 459, 474-476.

¹⁴³ Edward Said, *Orientalism* (Penguin Books 2003), ch1 ; Seyed Mohammad Marandi and Hossein Pirnajmuddin, 'Constructing an Axis of Evil: Iranian Memoirs in the "Land of the Free' (2009) 26 The American Journal of Social Sciences 23, 24

¹⁴⁴ Said (n 112), 31-33 ; Goodman (n 314), 474-476 ; Said (n 112), 31-33 ; Bernard Cohn, *Colonialism and its Forms of Knowledge: the British in India* (Princeton University Press 1996), 65

¹⁴⁵ 'Proclamation by the Queen in Council, to the princes, chiefs, and people of India' (His Majesty's Stationary Office 1908), 2

¹⁴⁶ Fourteen Points 1918, s5, s10-13 ; Atlantic Charter 1941, Art 3

¹⁴⁷ HL Deb 20 May 1942, vol 122, cols 1089-1090 ; Nigel Fisher, *Harold Macmillan: A Biography* (St Martins Press 1982), 82 ; Margery Perham, 'The Colonial Empire, The Need for Stocktaking and Review, A Challenge That Can Be Met (Times March 13 1942), 5

¹⁴⁸ Ibid

¹⁴⁹ Deana Heath, *Colonial Terror, Torture and State Violence in Colonial India* (OUP 2021), 44-45

The evident implication is that Indians were, left to their own devices, unable to rule themselves. The exercise of violence deriving from emergency law therefore served a demeaning function in reminding 'Orientals' of their supposed inherent incapacity to govern.

Conclusions

Now conclusions must be reached on how emergency law operated in the Raj. It is apparent that emergency statute underwent both a continuation and evolution from Company to Crown rule. Emergency regulations continued to regulate the emergency during Crown rule, executive heavy government and an exception favouring speedy justice developing from replicated Company legislation in the Defence of the Realm Act 1915 and Emergency Powers Act 1939. These developments took place in the context of a permanent emergency. Hyper-legal lawmaking from 1857 onward, involving the continual establishment of special tribunals and more frequent classification of groups threatening the colonial state, was motivated by the constant risk of colonial rebellion in India.

Ideological networks surrounding emergency law did change between the Company and Crown rule. A more intense conception of the savage arose, racialised and Social Darwinist thinking syncretising to create the image of the savage as the proper target of emergency regulations. Against the savage, no counterinsurgency options were off the table, village burning and cattle lifting being two of the tactics that could be ideologically justified and accommodated within the broad terms of emergency law. Secondly, the promulgation of emergency law symbolised an affirmation of a formalised conception of the rule of law, the codification of law, even in an emergency, being seen as an indicator that the UK's civilising mission has succeeded in supplanting the despotism that had wracked the Indian subcontinent. The civilising mission itself held that Indians should be educated via the imposition of legalised violence, this violence being intended to raise Indians to a British standard of civilisation.

Alike to governance under the EIC, sovereignty under the EIC was also multi-layered (rather than relying on a single decisionmaker), partial sovereignty accruing to the Governor-General of India, his subordinate governors and the civil servants assigned to India. These figures concerned themselves with maintaining the profitability of their respective regions

In examining the influence of the military lobby in colonial India, martial law met with its death knell under the Crown government. The military establishment possessed a disinclination towards Common Law martial law, its necessity standard limiting force permissible under law. The military instead sought to annihilate the enemy while remaining unaccountable to courts of law. Emergency legislation enabled colonial armed forces to satisfy these aims, its broad terms assigning discretion to military forces without an accompanying necessity standard to

narrowly bind their conduct. Martial law, in accordance with the wider understanding of the doctrine offered by Finlason, was also deployed in the practice of the British Indian Army. The force engaged in summary executions and brutal violence in a bid to terrorise the Indian population and deter future rebellions. British discourses switched the oppressor and subject dichotomy inherent to this colonial violence; it being claimed that the violence was a necessity when dealing with a savage race.

The case study of Amritsar demonstrated the Crown's broader tendency toward systematic performative violence as part of 'defensive' counterinsurgency, emergency law acting as technique through which the authority of the colonial state was restored during periods of lawbreaking.

Proscription finally featured as a mechanism by which the Crown tried to repress subversion. Organised political groups like the Indian National Congress were banned. Seditious literature was criminalised in a depoliticisation of anti-colonial texts. Proscription served a delegitimising function in treating opponents of colonial rule and those who distributed prohibited texts as criminal offenders. Emergency law of this kind later developed into anti-terror legislation in the Anarchical and Revolutionary Crimes Act 1919. The label of terrorism was widely applied to anti-colonial violence by the 1930's to win support for the repressive policies of colonial government; the stigmatisation of revolutionary violence making its suppression more palatable to Parliament and moderate Indians. The 1919 Act and widening terrorism concept paid no regard to traditional liberal principles in their expansion of arrest powers, stripping back litigant rights and failing to recognise political violence overseas. Colonies were seen as a foreign space populated by others, liberal principles self-destructing in the fight against a 'terroristic' other.

In terms of economic dynamics, emergency legislation manifested as an umbrella, legitimising and protecting an exploitative wealth drain. Alike to the situation under the EIC, this arrangement was permanent, the fragility of colonial governance and omnipresent risk of colonial rebellion meaning there was no point at which the umbrella of emergency legislation could be lifted without the economic interests of the UK being threatened.

Differing from its EIC predecessor, however, was the cultural matrix tinging Crown emergency rules. While the EIC, exercising authority under powers granted by the Crown, possessed no overarching rationalisation for its rule beyond profit, Crown rule differed. It implicitly communicated via emergency law the inability of Indians to rule themselves, exceptional violence being justified as a necessary measure to educate Indians to such a level that they might be able to govern independently. The conception of Crown emergency law was thus

thoroughly Orientalist, law communicating to Indians that they were incapable of self-rule and required the guiding hand of the United Kingdom.

Chapter 3: How did Crown emergency law move from the colonies to the Metropole?

Having established the qualities of emergency law in Crown India, my thesis proceeds to discuss how its norms and practices moved into the Metropole. As part of this discussion, the imperial boomerang must be discussed in a sub-chapter, it being the application of this theory to imperial norms and practices that will demystify how colonial emergency regulation arrived in the UK. After refining an interpretation of the boomerang suitable for discussing the transmission of legal norms and practices, my second sub-chapter will address how colonial law impacted the Metropole, the First World War and 1926 General Strike being treated as case studies. Completing this two-step analysis requires this thesis to first consult the origins of the imperial boomerang framework, those origins lying with Aimé Césaire.¹

Sub-Chapter A – How can the theory of the Imperial Boomerang be properly conceptualised?

Césaire argued that colonial governance has a terrific boomerang effect on Metropolitan jurisdictions. In explanation, Césaire argued, from a geographic positionality sensitive to the Global South experience of colonialism, that European colonialism influenced the Metropole.² While it is generally uncontroversial that colonialism can unleash significant violence upon native populations, Césaire went further to claim that colonial warfare and the violent structures of the colonial state also had a rebound effect.³ He posited that the brutality inherent in colonialism corrupts the colonist, colonisers being driven towards savagery due to the violence inseparable from the colonial project.⁴ The degradation is the inverse of the traditional civilised/savage dichotomy, where it is the coloniser who elevates the native through his tutelage.⁵ The imperial boomerang was thus originally conceptualised as a phenomenon that

¹ The Associated Press, 'Aimé Césaire, Martinique Poet and Politician, Dies at 94' (*The New York Times* April 2008)

<https://web.archive.org/web/20210822233239/https://www.nytimes.com/2008/04/18/books/18cesaire.html> - Last accessed 11/02/2025

² Mara Viveros-Vigoya, 'The Political Vitality and Vital Politics of Césaire's *Discourse on Colonialism*: A Reading in Light of Contemporary Racism' (2020) 68 *The Sociological Review* 476, 479-480.

³ Dierk Walter, *Colonial Violence: European Empires and the Use of Force* (C Hurst and Co Publishers Limited 2017), ch1 ; Martin Thomas, 'Colonial Violence: European Empires and the Use of Force' (2019) 95 *Int'l Aff.* 472, 472

⁴ Aimé Césaire, *Discourse on Colonialism* (Monthly Review Press 2000), 35-36.

⁵ Rudyard Kipling, 'The White Man's Burden' (1899)

destroyed the colonising power, the Metropole being degraded in the moral sense by the violence of colonialism.

Yet this project cannot proceed using Césaire's definition alone. Césaire focuses on the political rather than the legal, not charting how legal norms can move from the colonial space to the Metropole. This was a necessary result of Césaire's focus, which sought to examine colonialism and how it impacted the Metropole, not the movement of law per se.⁶ Legal norms are distinguishable from political ideas in their codification into positive form.⁷ Not referencing Césaire, Arendt, in her own work, does not shy away from the territory of legal norms and their transfer. She argues that imperial legal structures, utilised in the British Empire, did not track back to the Metropole due to firewalls put up by domestic governance toward colonial practices.⁸

While further analysis of the scholarship indicates Arendt's conclusion, that the imperial boomerang did not affect the UK is of doubtful veracity, Arendt does widen boomerang theory to encompass legal norms. Foucault similarly argues (again not referencing Césaire) that techniques of governance, including law, can migrate from the colonies back to the Metropole.⁹ What both cited authors communicate is the notion that colonialism, in legal terms, is not a one-way street. As well as the Metropole imposing its own legal systems on native land, the laws and institutions created by colonialism will eventually reach back and impact the colonial power itself.¹⁰ The theory presented can be applied in the context of British colonialism in India. One is lead to the hypothetical premise, to be validated with evidence, that emergency law applied to India may have made its way back to and changed the law of the Metropole.

Sub-Chapter B – How did colonial law come ashore in the 20th century via the Imperial Boomerang?

Having clarified a theoretical framework, it shall now be applied to come to an understanding on how emergency law from Crown India reached the Metropole.

The scope of my review shall firstly cover the First World War and the immediate post war period and World War 2, these being times of radical constitutional change for the United

⁶ Césaire (n 6), 8-9

⁷ John Gardener, 'Legal Positivism: 5 ½ Myths' (2001) 46 Am. J. Juris 199, 1

⁸ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Modern Classics 1951), 201.

⁹ Michel Foucault, *Society Must Be Defended* (Picador 2003), 103

¹⁰ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387, 390-391

Kingdom. Namely, with the outbreak of the war the government passed the Defence of the Realm Act 1914 (DORA).¹¹ DORA authorised the UK Cabinet to make regulations concerning the duties of the Admiralty and the Army Council for securing the Public Safety and Defence of the Realm.¹² The regulatory power, supplanting Common Law Martial Law, was expanded on further in the Defence of the Realm Consolidation Act (DORCA), which allowed Cabinet to regulate directly for public safety and the defence of the realm, without linking that power to a military duty.¹³ The totality of these DORA and DORCA powers radically altered the UK's constitutional arrangements for the period of the wartime emergency. According to Simpson, the UK Cabinet became the legislature, with Parliament becoming a legislatively unimportant constitutional organ where MP's solely expressed the views of the public.¹⁴ Rossiter sums up this state of affairs as a cabinet dictatorship, capturing the total degree to which the executive could regulate the lives and liberties of British subjects.¹⁵ World War One was thus a time of unprecedented constitutional change for the UK, the executive taking on supreme powers to regulate the polity through DORA and DORCA. Similar powers were bestowed on the UK executive during the Second World War, the Emergency Powers Act 1939 granting Cabinet the power to regulate for the public safety, defence of the realm, and efficient prosecution of the war.¹⁶

It remains an open question however, how extensively the legal structures and norms of Crown India influenced this radical constitutional shift.

Some authors say not at all. Caroline Elkins submits that DORA was not linked to colonial India, but legislation in colonial Ireland, emergency statute promulgated there serving as DORA's progenitor. In the 19th and early 20th century, the time period immediately preceding the promulgation of the Defence of the Realm Act, Ireland acted as site of legal experimentation for the controlling UK government.¹⁷ Part of this experimentation was the

¹¹ Defence of the Realm Act 1914, s1

¹² Ibid, s1

¹³ Defence of the Realm Consolidation Act 1914, s1

¹⁴ Alfred Simpson, *To the Highest Degree Odious: Detention Without Trial in Wartime Britain* (OUP 1994), 6-7

¹⁵ *Rossiter* (intr n 2), 153-154

¹⁶ EPA 1939, s1

¹⁷ Jane Ohlmeyer, 'How Ireland served as a laboratory for the British empire' (*The Irish Times* December 27th 2023)

<https://web.archive.org/web/20240318085533/https://www.irishtimes.com/opinion/2023/12/27/jane-ohlmeyer-ireland-served-as-a-laboratory-for-the-british-empire/> - Last accessed 21/02/2025

Coercion Acts. The Protection of Person and Property Act 1881, one of the Coercion Acts, established a framework for administrative detention (detention without charge or trial) in Ireland.¹⁸ The Local Disturbances and Dangerous Associations Act 1833 further allowed the Dublin Castle Administration (headed by a Chief Secretary for Ireland, a cabinet level UK official) to declare a regional state of emergency, authorising martial law trials without appeal and the suppression of meetings upon the order of a magistrate.¹⁹ Beyond these, an 1882 Prevention of Crime Act introduced curfews, censorship, juryless trials for certain offences (bypassing the right to an independent jury trial present in English law) and wider powers to suppress meetings.²⁰

Elkins, citing Dicey, endorses the proposition that these Coercion Acts granted the British administration despotic power, the legal provisions, potentially deployable across all of the UK, violating the perceived freedoms of Englishmen.²¹ Elkins claims that it was these despotic powers that formed the basis of DORA, the UK having incorporated colonial statutory traditions on executive-heavy government into its Metropolitan legal order.²² DORA executive supremacy on this basis had its roots in the despotism previously established in Ireland.

However, Simpson rejects links between colonial Ireland and the Metropole, claiming that DORA was a product of the Metropolitan legal order, not substantially dependent on any external template. Simpson submits that despite Diceyan rhetoric, the despotisms created by DORA and the Coercion Acts were different in kind.²³ While DORA established full executive supremacy, the legislation granting cabinet the power to make law as if it were a legislature, the Coercion Acts did not come close to this level of executive empowerment.²⁴ The provision of new powers to suppress meetings, suspend rights and generally govern in an exception lacked any inclusion of plenary legislative power.²⁵ Implied in Simpson's argument is the matter of substantive similarity. It is tenuous to claim that the Coercion Acts were the

¹⁸ Protection of Persons and Property (Ireland) Act 1881, s1

¹⁹ Tom Quinlan, 'The Registered Papers of the Chief Secretary's Office' (National Archives Journal of the Irish Society for Archives 1994), 3-4 ; An Act for the More Effective suppression of Local Disturbances and Dangerous Associations 1833, s2, s5, s11

²⁰ *Bushell* (ch1 n 102), 5 ; Prevention of Crime Act 1882

²¹ See n374, 117

²² *Elkins* (ch1 n 69), 115-116.

²³ *Simpson* (ch2 n 61), 80-90.

²⁴ Alfred William Brian Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1996) 41 *Loy.L.Rev.* 629, 640

²⁵ See n331-341

progenitors of DORA when the former lacked the clauses on legislative supremacy foundational to the 1914 Act. Having made this point Simpson claims that DORA and DORCA related to the Coercion Acts only in the conceptual sense, the notion of a Metropolitan emergency code being adapted from the 1833 Suppression of Disturbances Act.²⁶ It is therefore apparent, utilising Simpson's argument, only a very conceptual understanding of the imperial boomerang links DORA and Irish colonial legislation, the idea of an emergency code moving from colonial Ireland to the Metropole.

Widening the scope of analysis to consider the emergency regimes in Crown and Company India, it is apparent that substantive similarity connects colonial emergency legislation and that of the Metropole. Legislation in both spheres created executive supremacy, the substantive similarity that was absent with the Coercion Acts manifesting with respect to Crown and Company emergency law.

Addressing the colonies first, the government in India was autocratic. The Governor-General retained, until Indian independence, the capacity to exercise near-plenary legislative power and absolute administrative authority under the Charter Act and succeeding Government of India Act.²⁷ Governance in India as early as Company India, and persisting afterward, was on this basis slanted towards the executive and the ability to swiftly introduce radical constitutional change while managing the permanent emergency.

DORA allowed the UK government to essentially make any regulation it wished concerning defence and national security.²⁸ The boundary between legislative and executive activity was blurred, the executive being empowered to make law as a legislature might do. The similarities between this arrangement and legislative practice in the Crown are evident, both governments being empowered legislate in the exception, contrary to what a strict separation of powers might demand.²⁹

Yet colonial legal structures did not translate into the domestic space automatically. Rather the concept of an emergency code, as practiced in colonies like India and Ireland, was adopted and refined in a UK at war.³⁰ Parliament granted the UK Cabinet a colonial-esque executive

²⁶ *Simpson* (ch2 n 64), 80-81

²⁷ See CA 1833, s39, s43-44 ; Government of India Act 1935, s12, s19, s32, s37, s42-43, s45

²⁸ See n13-17

²⁹ James Madison, 'The Federalist Papers: No. 51' (*The Avalon Project* 1788) ; Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54 B.C.L.Rev 433, 457-458

https://avalon.law.yale.edu/18th_century/fed51.asp - Last accessed 13/02/2025

³⁰ *Simpson* (ch2 n 64), 80-81.

supremacy as a response to the declaration of war against the Germany; leaving the government to assign itself the powers it deemed necessary to win the war.³¹ What did not transfer to the Metropole therefore, was the immediate rationale for colonial emergency legislation, a fear of native rebellion having no relevance to the UK in the early 20th century.

Metropolitan emergency law during The First World War also took on a colonial-esque permanent character, triggered by the threat of Communism and mass labour movements to capitalist interests.

To provide historical context, during the First World War the UK was unambiguously a capitalist society. However, it appeared in the 1920's that this might change. The subservience of British workers to capitalists appeared more fragile after the overthrow of the Tsar by the Bolsheviks in 1917 and popularisation of Communism internationally through the Communist International.³² A wave of revolutions occurred across Europe with support for socialism as an all-time high.³³ A 1919 Spartacist Revolution was put down in Germany (with its leaders Rosa Luxemburg and Karl Liebknecht killed)³⁴ and a Hungarian People's Republic came to power in 1918.³⁵ People's Soviets came together in Russia, Ireland, Ukraine, Bremen and Bavaria, workers seizing democratic control of the means of production.³⁶

The UK Communist Party was seen as a body threatening revolution in this period of political tension. Paranoia swept through the middle and upper classes, alongside some portions of

³¹ '6161' (London Gazette 5th August 1914)

³² Robert Service, *The Last of the Tsars: Nicholas II and the Russian Revolution* (Macmillan 2017), ch3-4 ; H. Pelling, *The British Communist Party: A Historical Profile* (1958), 5

³³ David Motadel, 'Waves of Revolution' (*History Today* 4th April 2011)

<https://www.historytoday.com/archive/waves-revolution> - Last accessed 04/06/2025

³⁴ Sebastian Haffner, *Die deutsche Revolution 1918/1919* (Knauer 1991), 153–154

³⁵ Peter Pastor and Bera Kiralay, *War and Society in East Central Europe* (Columbia University Press 1988), 34

³⁶ John Dorney, 'The General Strike and Irish Independence' (*The Irish Story* June 2013)

<https://www.theirishstory.com/2013/06/06/the-general-strike-and-irish-independence/> - Last accessed 01/08/2025 ;

David Lee, 'The Munster Soviets and the Fall of the House of Cleeve' (Made in Limerick), 287-306 ; Robert Nielsen, 'Irish Soviets 1919-23' (*Whistling in the Wind* October 2012)

<https://whistlinginthewind.org/2012/10/08/irish-soviets-1919-23/> - Last accessed 01/08/2025 ;

Alexandre Skirda, *Nestor Makhno: Anarchy's Cossack* (AK Press 2004), 333

the European peasantry, regarding the dangers of Bolshevism to the established class order.³⁷ Politically motivated use of ordinary law to harass, obstruct and surveil members of the UK Communist Party resultingly increased post-war.³⁸ Ordinary law was in other words 'accelerated' by the government to tackle a threat to the state, characteristic of hyper-legal lawmaking described by Hussain. Much like Crown emergency law, which safeguarded the wealth extraction of British capitalists from India, this use of rules in an emergency can be understood as an attempt to safeguard existing economic interests through the development of a legal umbrella. A regime of legally authorised surveillance and harassment was imposed on Communists who might threaten existing capitalist interests, ordinary legislation being accelerated to meet the threat of Communism.

The more permanent character of emergency law in the Metropole also becomes apparent when one examines literature on the regulation of unions post 1918. These unions and the broader labour movement (including the organised parties of the working class, i.e Labour)³⁹ were not in a favourable position politically. The war devastated the UK economy; having diverted over 25% of wartime GDP into the war effort while losing 10% of domestic and 25% of overseas assets.⁴⁰ The country had also accrued £7 billion in debt because of wartime spending.⁴¹ Workers resultingly possessed a poor quality of life. Mine workers experienced an even more severe decline in conditions post-war relative to their peers, the re-entry of German coal into the market and falling UK output leading to mine owners cutting wages and extending hours in an attempt to maintain profits.⁴² Concerned with the threat of disgruntled workers and

³⁷ Keith Ewing and Conor Anthony Gearty, *The Struggle for Civil Liberties Political Freedom and the Rule of Law in Britain, 1914-1945* (OUP 2001); Ian Kershaw, *To Hell and Back: Europe 1914-1949* (Penguin 2015), 133-134, 296-297

³⁸ *Ewing and Gearty* (n 39), ch3

³⁹ Ian Adams, *Ideology and Politics in Britain Today* (Manchester University Press 1998), 144–145

⁴⁰ Nicholas Crafts, 'Walking Wounded: The British Economy in the Aftermath of World War 1' (*Vox EU* August 2014)

<https://cepr.org/voxeu/columns/walking-wounded-british-economy-aftermath-world-war-i> - Last accessed 09/03/2025

⁴¹ Jenny Cosgrave, 'UK finally finishes paying for World War I' (*CNBC* March 9th 2015)
<https://www.cnbc.com/2015/03/09/uk-finally-finishes-paying-for-world-war-i.html> - Last accessed 04/06/2025

⁴² Jessica Brain, 'The General Strike 1926' (*Historic UK*)
<https://www.historic-uk.com/HistoryUK/HistoryofBritain/General-Strike-1926/> - Last accessed 09/03/2025

the aforementioned rise of Communism internationally, the Second Lloyd George Ministry elected to expand its own emergency powers.⁴³ Government extended the lifespan of DORA until 1920, and introduced new statutory powers for use against those threatening ‘the essentials of life of the community’.⁴⁴

The entrenched emergency framework, retained against unending economic ‘threats’ to the state, was used against labour movements exercising their class-based interests.⁴⁵ Glasgow 1919 saw the use of DORA against 40,000 striking workers.⁴⁶ Meanwhile the new Emergency Powers Act was wielded by the police to disperse TUC strikers with considerable violence during the 1926 General Strike.⁴⁷ From 1 May to the 19 October, the Home Secretary prohibited 22 meetings across England and Wales, while from 19 October to the 17 November forty further meetings were prohibited (across the same geographic area) through authority devolved to Chief Constables.⁴⁸ Police baton charges across the country were marked by serious violence, force being used against workers trying to improve their own economic position.⁴⁹ Legal and physical violence imposed under entrenched emergency law thus served to preserve existing economic interests, vested interests being protected, under permanent legislation, against strike action which might have helped introduce a more egalitarian economic balance.

Enduring into the 1920’s as a method of repressing labour movements and Communists, it is therefore evident that post-war emergency law closely resembled its colonial predecessor in permanence and tendency to protect existing economic interests; an emergency not existing due to a particular crisis, but the continuing presence of long-term threats to capitalist profit making.⁵⁰ The underlying function of emergency law, protecting the interests of economic elites, migrated from colonial India to the Metropole; law in both cases taking the necessary

⁴³ Roy Douglas, ‘A Classification of Members of Parliament Elected in 1918’ (1974) 47 *Historical Research* 74, 74

⁴⁴ ‘No 31773’ (The London Gazette February 1920), 1671 ; The Termination of the Present War Act 1918, s1 ; Emergency Powers Act 1920, s2

⁴⁵ André Keil, ‘A Very British Dictatorship: The Defence of the Realm Act in Britain, 1914-1920’ (2023) 14 *First World War Studies* 51, 66.

⁴⁶ Gordon Barclay, ‘“Duties in Aid of the Civilian Power”: The Deployment of the Army to Glasgow, 31 January to 17 February 1919.’ (2018) 38 *Scottish Historical Studies* 261, 261-292

⁴⁷ HC Debates, 26th November 1926, cols 862-864

⁴⁸ HC Debates, 17th November 1926, cols 1847-1848

⁴⁹ HL Debates, 28 October 1920, col 110 ; HC Debates, 26th November 1926, cols 862-864

⁵⁰ Keil (n 47), 66

steps to suppress those acting for radical economic change. In the former case the relevant actors were those who ought to end the economic exploitation of colonialism in India. In the latter case, the extra-parliamentary political left, comprising of labour movements and the Communist Party, took the brunt of emergency legislation.

I now turn to legislation asking how the courts interacted with these emergency powers.

Appraising the literature, it is evident that during wartime courts did not keep the government to the limits of their legal powers. Courts during both World Wars and the Irish war for Independence refused to find government action *ultra vires* despite it being exceeding (or not fulfilling criteria set out in) the plain words of statute.⁵¹ A lack of confrontation between courts and the executive characterised litigation during wartime, Lord Atkin claiming, in the 1942 *Liversidge* judgement, that wartime courts had become more executive minded than the executive.⁵²

Before I move to discuss the line of case law that demonstrates this, three principles are of significance. First is the principle of legality. It stipulates that courts will not interpret legislation contrary to fundamental rights unless clear and unambiguous words are used.⁵³ Secondly, courts in the UK display fidelity to the rule of law (the notion that all entities in the UK enjoy the benefits of the law, publicly made and administered in the court), which itself regards as sacrosanct the notion that Parliament is sovereign, and can make or unmake any law it wishes.⁵⁴ The judiciary may not intervene and strike down primary legislation based on any conception that fundamental rights have been breached.⁵⁵ The final principle concerns statutory interpretation. The natural and ordinary meaning of legislation represents the intention of Parliament; it bring constitutionally improper for the assertions of the executive to have any impact on the meaning assigned to statute.⁵⁶

During wartime, courts developed novel judicial strategies to legitimise government detention and other practices that placed restrictions on civil rights, even if those practices should have

⁵¹ *R. v. Central Tribunal ex parte Parton* (1916) 32 T.L.R. 476, 476-777 (High Court), 56 ; *R v Secretary of State for Home Affairs, Ex Parte Lees* [1941] 1 K.B. 72 (HC), 78-80

⁵² *R. v. Denison* [1916] 32 T.L.R. 528 (HC) ; *Liversidge v Anderson* [1942] A.C. 206 (HL), 244

⁵³ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115 (HL), 131-132

⁵⁴ *Bingham* (ch2 n 24), 19

⁵⁵ *Bingham* (ch2 n 24), 182-186

⁵⁶ 'Pepper v Hart – A Re-Examination' (2001) 21 O.J.L.S 59, 66, 68 ; *Brady v Gibb* [1921] 37 T.L.R. 975 (CA), 975-977 ; *Macarthy's Ltd v Smith* [1979] I.C.R. 785 (CA), 796

been *ultra vires* when the regulations were taken according to their ordinary meaning.⁵⁷ The diarchy between courts and government, although colonial in structure, involved significant judicial enthusiasm toward the executive.

A typical example of this judicial activism was the *Brady* case, taking place during the Irish War for Independence. In this case, an individual was detained in England under the Restoration of Order in Ireland Act 1920, on suspicion of committing acts prejudicial to the restoration of order in Ireland.⁵⁸ Reading the Act according to its literal meaning, provisions authorising detention were only applicable in Ireland, the statute stating as such in its text.⁵⁹ Brady's detention in England should have been unlawful, given detention took place outside the area in which powers granted were effective. Yet the court, departing from canon of reading texts according to their ordinary meaning, constructed a different interpretation of the statute. The court concluded that given the statute had failed to exclude England from its jurisdiction, powers granted also applied there, leaving the detention of Brady *intra vires*.⁶⁰ Ignoring ordinary textual meaning, the court departed from the intentions of a sovereign Parliament to meet the security needs of government, permitting the executive a wider legislative remit than it was entitled to under the Restoration of Order in Ireland Act.⁶¹

That this example of overly generous statutory interpretation is representative of a wider trend reaffirmed by the *Halliday* case, the court taking a broad interpretation of the government's legal powers out of an institutional desire to win the war. In *Halliday* it was in issue whether the DORA power to issue regulations for the public safety and defence of the realm authorised *intra vires* a regulation permitting the preventive detention of persons possessing 'hostile origins or associations'.⁶² The court assumed the exigencies of the wartime situation meant the primary legislation should be interpreted to give effect to government policy and facilitate a preventative approach to justice.⁶³ Thereby, the court concluded regulations authorising detention were valid when made under DORA, even without specific wording in the primary

⁵⁷ Rachel Vorspan, 'Law and War: Individual Rights, Executive Authority and Judicial Power in England during World War One' (Fordham University School of Law 2025), pt 1-3.

⁵⁸ Restoration of Order in Ireland Act 1920, s1-4

⁵⁹ *Duport Steel Ltd v Sirs* [1980] 1 W.L.R. 142 (HL), 157

⁶⁰ *River Wear Commissioners v Adamson* [1877] 2 App. Cas. 743 (HL), 764-765, 776 ; *Johan Steyn, Steyn* (n 75), 65-66

⁶¹ *Ibid*, 975-977

⁶² *R v Halliday* [1917] A.C. 260 (HL), 264-276

⁶³ *Ibid*, 269-270

legislation alluding to a power to detain.⁶⁴ The court followed a rubric of interpretative accommodation, a wider power to detain being interpreted into DORA as the judiciary concluded that the scope of liberty protected by law reduced with the existence of a national emergency.⁶⁵ To reach this outcome, UK courts applied their own institutional logic. Wartime victory, as an executive policy goal, affected the standards applied in jurisprudence; support for the executive bypassing the search for Parliamentary intention as the guiding principle of legislative interpretation.⁶⁶

The implications of this institutional mentality were indicated by Lord Shaw, a judge on the House of Lords Appellate Committee. Lord Shaw dissented in *Halliday*, arguing a regulation authorising executive detention could only derive from primary legislation expressly authorising such conduct.⁶⁷ In line with the principle of legality, freedoms could not be curtailed through vague and ambiguous wording.⁶⁸ The alternative would allow the British subject to be regulated out of all his liberties (such as those guaranteed under Habeas Corpus Act and Bill of Rights) without Parliament having supplied proper wording authorising that effect.⁶⁹ In the majority ruling, this is exactly what occurred, ambiguous primary legislation in tandem with a wartime judicial mentality providing a pathway to the imposition of administrative detention.

A judiciary 'at war' alongside the executive also manifested during the Second World War. I refer to the case of *Liversidge v Anderson*. The applicant in *Liversidge* had been (prior to release) administratively detained under Regulation 18B.⁷⁰ The instrument (promulgated under the Emergency Powers Act) permitted indefinite detention if the Home Secretary reasonably suspected an individual to possess hostile origins or associations; or otherwise be concerned in acts prejudicial to the public safety or defence of the realm.⁷¹ The applicant sued in tort for false imprisonment, the discussion before the court concerning whether the decision of the Home Secretary to detain on the basis of a reasonable suspicion was subject to court

⁶⁴ *Halliday* (n 62), 269-270

⁶⁵ *Ex Parte Milligan* [1866] 71 U.S. 2 (SCOTUS), 137, 139-141

⁶⁶ Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Cornell University Press 1976), 91

⁶⁷ *Halliday* (n 62), 291-292

⁶⁸ *Halliday* (n 62), 131

⁶⁹ Habeas Corpus Act 1679, s1 ; Bill of Rights 1688, introduction ; David Foxton, 'R. v Halliday ex parte Zadig in retrospect' (2003) 119 L.Q.R. 455, 485-487

⁷⁰ *Simpson* (n 14), 353

⁷¹ Defence Regulation 18B 1939, s1

review.⁷² Typically, the answer to this question would have been yes, Lord Atkin in dissent citing a plurality of statutes where the qualifier 'reasonable suspicion' had been interpreted to guarantee an objective (court) review of decision-making external to the decisionmaker.⁷³ On this logic, the government did not have a 'limitless power to imprison'. The courts, with the power to review whether the Home Secretary's suspicion had reasonable grounds, [stood] between the subject and any attempted encroachments on his liberty by the executive'.⁷⁴

The majority departed from norms of statutory construction, uncoupling the standard of suspicion from the question of independent review by claiming that the Home Secretary could in isolation form a reasonable suspicion in favour of detention.⁷⁵ Simpson commented the effect of this ruling was such that courts only possessed the authority to intervene in a government decision if it could be proved (nearly impossibly) that the Home Secretary had made a detention order in bad faith.⁷⁶

Where the evidence of a 'warlike' judicial approach and interpretative accommodation makes its appearance in *Liversidge* however, is not in the legal premise of a reasonableness standard unencumbered from court review, but the secondary reasoning that the majority judges used to support it. Between them, the judges working in the majority were well aware of the subservience of courts to a sovereign Parliament (capable of legislating however it wished),⁷⁷ and the breath of powers to make regulations granted under the Emergency Powers Act 1939 (allowing the government to make regulations expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war ... and for maintaining supplies and services essential to the life of the community').⁷⁸

In this context, the *Liversidge* majority emphasised that in wartime legislation should be interpreted to promote its efficacy regardless of the rights implications of this approach, subsuming the principle of legality by which ambiguous legislation would not be interpreted in a manner contrary to basic rights.⁷⁹ By (as described above) departing from the ordinary meaning of reasonable suspicion, the court also stepped away from finding the intentions of

⁷² *Simpson* (n 14), 353

⁷³ *Liversidge* (n 52), 228-237.

⁷⁴ *Liversidge* (n 52), 244

⁷⁵ *Simpson* (n 14), 362

⁷⁶ *Simpson* (n 14), 362

⁷⁷ *Dicey* (ch1 n 29), 189

⁷⁸ Emergency Powers Act 1939, s1

⁷⁹ *Liversidge* (n 52), 221-222, 251-252, 265-266

the Parliament as expressed in Regulation 18B itself. They instead allowed the policy aims of government, namely to facilitate wartime detention, to influence the meaning of legislative provisions. Finally, the *Liversidge* majority also speculated courts would have to review confidential information if they were called upon to determine if the Home Secretary possessed a 'reasonable suspicion' in any given case.⁸⁰ Courts were ill-suited to handle or make decisions with sensitive evidence. The expertise of the Home Secretary in security matters and the risk of classified data leaking deterred the court from getting involved in issues of national security (courts in the 21st century adjudicate on confidential material in closed sessions).⁸¹ The emergency and related security considerations thus affected the breadth of rights protected by law, the government in a crisis being allocated a nearly unlimited power to detain regardless of legality or the intentions of the UK government. In other words interpretive accommodation was practiced, the definition of reasonable suspicion being altered in light of the wartime emergency to justify greater restrictions on individual liberty.

Metropolitan judges therefore established institutional approaches to the emergency different from those formed in the colonial space. Under the EIC, judicial actors were likely to simply deny that colonial subjects possessed any access to fundamental rights, seeing these entitlements as the privileges of white settlers alone. Metropolitan judges did not deny that British subjects possessed rights under statute and individual liberty in areas not regulated by law. However, interpretive accommodation was applied to expand the space covered by law, government powers to detain being interpreted more widely in reaction to the emergencies that were World War 1, World War 2 and the Irish War of Independence. Individual liberty during these periods correspondingly shrank.

Judges took a belligerent attitude to executive security needs and interpreted law as such, departing from the principle of legality and the principle that legislation should be interpreted in accordance with the intentions of Parliament. The need to prosecute the war effort warranted a less demanding construction of statutes and a looser determination of whether regulations were *intra vires*. Courts utilised a policy-centric method of statutory interpretation to assign powers to government not justified under a literal interpretation of the legislation.⁸² The intentions of Parliament were in this sense disregarded in case law like *Liversidge* and *Brady*, courts stepping away from analysing legislation based on the meaning of its words and

⁸⁰ *Liversidge* (n 52), 221-222, 251-252, 265-266, 279-280

⁸¹ *Liversidge* (n 52), 221-222, 251-252, 265-266, 279-280 ; Justice and Security Act 2013, s6-14

⁸² Michal R. Belknap, 'The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case' (1980) 89 MLR 59, 59

instead factoring into their statutory interpretation concessions to government policy goals. The emergency powers allocated to the government therefore expanded through this judicial-executive cooperation, courts bypassing the principle of legality and customary search for Parliamentary intention while interpreting vague and potentially draconian legislative powers.⁸³

Conclusion

In this chapter, I first refined a theory of the imperial boomerang. I concluded that legal norms could transfer between colony and Metropole, Arendt's theory of the imperial boomerang being applicable to the UK's relationship with colonial India.

Applying this theory, the Metropole was affected by the imperial boomerang during and after the First World War. Taking DORA and DORCA into account, British wartime government was a cabinet dictatorship. While not copying the templates provided by colonial emergency legislation, either from colonial Ireland or Crown India, the UK government did replicate in DORA the concept of an emergency legal code. DORA also replicated the substance of the emergency law of Crown India. The Charter Act granted near-plenary legislative powers that were substantively similar to those guaranteed under DORA and DORCA, both Acts using a different legislative template to achieve the same constitutional outcome. However, even in replicating colonial executive supremacy, the UK retained independent agency, having introduced its constitutional reforms out of an indigenous desire to win a war, not the colonial desire to prevent native rebellion.

The UK, emulating Crown India, also adopted a permanent state of exception. The Emergency Powers Act and accelerated use of ordinary legislation were targeted at threats to vested economic interests. Targeted actors can be placed into two groups.

British Communists were regulated in a hyper-legal fashion under ordinary legislation, 'accelerated' law being used to harass the group due to domestic fears that their revolutionary politics might disrupt the UK's capitalist society.

Meanwhile British Trade Unionism and the organised labour movements, put under pressure in the ruined economy of post-war Britain, were subject to new emergency legislation post-war. The continuing profits of the mining industry were protected by the Emergency Powers

⁸³ See *Simpson* (n 14), 363

Act 1920 against strike action; considerable violence being meted out against strikers to preserve existing economic arrangements during the 1926 General Strike.

Acknowledging these incidents, my thesis considers Metropolitan emergency law to resemble its predecessor under the Crown, both sets of law being concerned with protecting existing economic arrangements from long-term threats to profitmaking. It is therefore valid to argue that the function of UK emergency law remained consistent from Crown India to the Metropole; emergency law in both contexts securing, through the imposition of violence, the subservience of the wider population to elite economic interests.

Lastly I reached conclusions on how Metropolitan courts interacted with emergency law wartime. I previously submitted that courts under the EIC took a stance occasionally obstructive to colonial government, on some occasions enforcing rights like habeas corpus even when it was politically inconvenient to do so. Most justices under the EIC considered Indians to have no enforceable rights, however. Reviewing the literature, courts took a different approach to emergency statute during both World Wars. Courts engaged in a belligerent and activist approach, interpreting legislation to prevent the frustration of wartime government objectives. Interpretive accommodation narrowed the scope of liberty even when the intention of Parliament, according to the ordinary meaning of legislation, pointed to a statutory meaning that did not align with government policy. The *Brady*, *Halliday* and *Liversidge* cases established this trend, the urgency of wartime struggle and need to concede to government requirements during conflict motivating the general alignment between courts and government. A diarchy was thereby established, the government passing broad emergency legislation, legitimised by a Sovereign Parliament, and courts accommodating that method of rule within the law.

Chapter 4: How has the imperial boomerang altered the UK's contemporary emergency constitution?

Chapter 4 asks how the imperial boomerang affects contemporary emergency law in the UK. I shall address several laws changed by the imperial boomerang. Sub-Chapter A covers the European Convention of Human Rights. Article 15 ECHR accommodates colonial rule by force within a human rights framework. I then discuss Article 56 ECHR, which incorporates civilisational ideas into the Convention and further accommodates colonial rule by force. Lastly, I refer to proscription under the Terrorism Act 2000. Proscription represents a modern manifestation of colonial counterinsurgency, capable of depoliticising militant liberation organisations. The Terrorism Act 2000 also redeploys the terrorism concept created in colonial India; this redeployment possessing roots in the hostile (and western) perceptions of irregular Palestinian violence that arose during the 1970's.

Sub-Chapter A – How does the colonial effect Articles 15 and 56 of the European Convention on Human Rights?

The UK helped draft and is a signatory to the European Convention on Human Rights, a treaty which has been incorporated into UK law.¹ To address how Articles 15 and 56/63 (which I will refer to henceforth as Article 56, for ease of reference) have been impacted by colonial legal structures, norms and practice, I will analyse both clauses in sequence. I address Article 15 first.

Article 15 *ECHR* allows states to derogate from some of their human rights obligations during an emergency threatening the life of the nation. No derogation however is permissible for the non-derogable rights as set out under Article 15(2) *ECHR*, namely the right to life, the prohibition of torture, the prohibition of slavery and forced labour, and the right to not be punished without law.² The ECtHR clarifies a criterion by which the existence of an emergency can be assessed. A valid emergency amounts to an actual or imminent situation, affecting a whole population, that threatens the organised life of the community in a manner that cannot be addressed without recourse to emergency legislation.³ The ECtHR has never set out the explicit requirement that a valid emergency must be temporary. In *Brannigan* the court did not

¹ Eleni Frantzou, 'Human Rights and British Values: The Role of the European Convention on Human Rights in the UK Today' (UCL December 2013), 2 ; See n10 ; Human Rights Act 1998, s3

² European Convention of Human Rights 1950, Art 15 ; *Ibid*, Art 2, Art 3-4, Art 7

³ *The Greek Case* App no 3321/67, 3322/67, 3323/67, 3344/67 (European Commission of Human Rights 1967), 70

object to an over-decade long emergency in Northern Ireland, brought about by the threat of Republican violence.⁴ In *A*, the legality of permanent emergencies was expressly affirmed, the ECtHR ruling that the threat of international terror groups like Al Qaeda, possessing no foreseeable end date, was an emergency threatening the life of the nation.⁵ Beyond asking whether an emergency threatening the life of the nation was valid, as set out above, the ECtHR also considers if emergency measures were necessary in the exigencies of the situation. Evaluating necessity requires a multifactorial analysis into the circumstances surrounding emergency measures and the nature of the emergency measures themselves.⁶ Relevant considerations include the proportionality of the measures taken to deal with an emergency, whether measures were in accordance with the law and if ordinary means could have been utilised to deal with the crisis.⁷

It is my submission that the function of Article 15(1), to subordinate the ECtHR to the national executive during a crisis, was framed around colonial practice, both the case law of the ECHR and the *travaux préparatoires* for the Convention pointing toward the validity of this conclusion.

Travaux préparatoires

The *travaux préparatoires* of Article 15 indicate that the United Kingdom aimed to introduce an emergency clause modelled on the International Covenant on Civil and Political Rights (ICCPR). From the 9 May to 20 June 1949, a draft covenant on human rights was introduced (to later become the International Covenant on Civil and Political Rights), which featured a clause permitting states to derogate from certain human rights obligations, to a degree that was necessary in the exigencies of the situation, during an emergency threatening the interests of the people.⁸ The UK pressed for a nearly verbatim copy of this clause to be inserted into the ECHR as the draft treaty was being reviewed by the Committee of Experts.⁹

⁴ Susan Marks, 'Civil Liberties at the Margins: The UK Derogation and the European Court of Human Rights' (1995) 15 OJLS 69, 77-78

⁵ *A and Others v The United Kingdom* App no 3455/05 (ECtHR 19th February 2009), 72

⁶ European Convention of Human Rights 1950, Art 15

⁷ See n5, 73 ; *Mehmet Hasan Altan v Turkey* App no 13237/17 (ECtHR 10 September 2018), 32 ; *Ireland v United Kingdom* App no 5310/71 (ECtHR 18th January 1978), 72-73

⁸ 'European Commission of Human Rights: Preparatory Work on Article 15 of the European Convention on Human Rights' (Council of Europe 22nd May 1956), 3

⁹ *Ibid*, 5

France and Italy initially opposed specific derogation clauses, as they were allegedly prone to abuse and interpretation problems in comparison to general rights limitation clauses.¹⁰ These difficulties were put aside however in order to regulate, via specific emergency clause, those exceptional crises in which the state would have to go beyond limiting rights to full derogations.¹¹ Emergency clauses were described in an annex as 'essential for the safety of the people and the existence of the nation', a great emphasis being placed on emergency clauses as a remedy for exceptional crises that threatened an entire political community.¹² At the Conference of Senior Officials, taking place from 8 to the 17 June, a further amendment was made to the draft Convention's definition of an emergency, the words 'life of the nation' substituting for 'interests of the people'¹³. While it is not recorded in the *travaux préparatoires* who insisted on this amendment it is known the United Kingdom applied political pressure for an identical wording change to the final text of ICCPR Article 4.¹⁴ The similarity of change thus makes it likely that the UK was also responsible for the wording change in the case of the draft ECHR.¹⁵

Asking why the UK insisted on the insertion of an express derogation clause referring to treats to the life of the nation, minimal reasoning is provided in the *travaux préparatoires* themselves. The UK insisted to fellow committee members that the inclusion of an express derogation clause was useful for ensuring the proper protection of human rights in exceptional crises, it being noted in a Committee of Experts Report that the UK seemed more interested in placing clearly defined limits on rights than in defining the rights themselves.¹⁶ In an annex cited in Council of Europe documents referring to the textually identical ICCPR, it is further suggested that the wording 'emergency threatening the life of the nation' was included to put a high threshold on when an emergency could lawfully be triggered, preventing abuse and the invocation of emergency powers in non-emergencies.¹⁷ From the above, it can be inferred that Article 15 ECHR was primarily concerned was preventing the abuse of emergency powers and making clear that emergency powers could only validly be used against exceptional crises

¹⁰ *Council of Europe* (n8), 13

¹¹ *Council of Europe* (n8), 7

¹² *Council of Europe* (n8), 13

¹³ *Council of Europe* (n8), 9

¹⁴ Commission on Human Rights, 'Report to the Economic and Social Council on the eighth session of the Commission, held in New York, from 14 April to 14 June 1952' (United Nations Economic and Social Council 1952), 40

¹⁵ International Covenant on Civil and Political Rights 1966 Article 4

¹⁶ 'Doc. CM/WP 1(50)2' (Council of Europe), 15, 20 ; 'Doc. CM/WP 1(50)15' (Council of Europe)

¹⁷ *Council of Europe* (n 8), 14 ; See n14, 15, 20

of a grave magnitude, the UK insisting on wording relating to the life of the nation to achieve these ends.

However, there are difficulties with exclusively relying on the above Council of Europe documents.

Travaux préparatoires are a record of public treaty negotiations, in which numerous states participated. Due to the publicity of this setting, it is unrealistic to expect that states will be fully frank in setting out their reasoning for inserting wording into the Convention, especially if the motivation in question would be perceived as immoral or is politically sensitive. While weight should be put on the *travaux préparatoires*, it should not be analysed at the expense of sources outside the public eye which provide evidence of the more illicit motivations of the UK government.

Contextual evidence suggests these illicit motivations exist. That the UK put great emphasis on Article 15 ECHR as a vital mechanism for the protection of rights during the exception, despite the clause acting as a mechanism permitting derogation from rights, smacks of ill-candour. Emergency clauses themselves, rather than their absence, are frequently responsible for human rights violations, making it highly unlikely that the UK insisted on such a clause as a good faith mechanism for rights protection.¹⁸ Searching for motive, the UK made no express mention in negotiations of how Article 15 ECHR would apply to the colonies. The omission is startling, given the span of Britain's remaining imperial possessions in Africa, the Middle East, and Asia post-war. They swallowed up £2 billion a year in spending and tended to govern through emergency legislation, a matter relevant to Article 15 ECHR as an emergency clause. The importance of emergency law to colonies in particular makes it all the more surprising that the latter were not mentioned in the same breath as Article 15 during treaty negotiations.¹⁹ Reynolds, however, does address the links between the UK's colonies and the drafting of the Article 15 ECHR.

Reynolds argues that Article 15 ECHR was framed by the UK's experience in the colonies, the clause legitimising both emergency government and colonial rule by force. The 1920s and

¹⁸ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *The Yale Law Journal* 1011, 1089-1095 ; 'Report to the Committee of Ministers submitted by the Committee of Experts Instructed to Draw Up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms' (Doc. CM/WP 1 (5) 15, A 924, IV TP 2 – 55), 30

¹⁹ Robert Skidelsky, *John Maynard Keynes, Vol. 3: Fighting for Freedom, 1937–1946* (Viking Adult 2001), 403–58

1930s saw growing nationalist sentiments across the UK's colonies.²⁰ These encouraged a new administrative rationality to manage anti-colonial dissent; tools like proscription and special tribunals having become more commonplace.²¹ In India (as elsewhere), this new rationality was accompanied by the language of terrorism, the concept being utilised to delegitimise anti-colonial resistance and legitimise government departures from liberal principles as applied to 'terrorists'.²²

The UK's unwillingness to fund illegitimate and expensive colonial regimes subsequent to World War 2 (national debt sitting at 270% of GDP and the country becoming bankrupt due to high wartime spending), led to a reorientation in colonial policy in India from the arrangement described above.²³ No longer capable of suppressing local resistance to colonialism without unaffordable fiscal and reputational costs, the UK partitioned India into the two independent Dominions of Pakistan and India in 1947.²⁴ With nationalist forces triumphing forming India and Pakistan, and the rest of the Empire appearing vulnerable to nationalist separatism, Whitehall tried to reclaim the initiative in its remaining imperial territories through special powers resembling those deployed in India.²⁵ As an exemplar, powers bestowed to suppress uprisings in Malaya included capital punishment, the ability to hold summary trials and the authority to implement the large-scale deportation of subversives, this echoing the Defence of India Act which authorised the execution of subversives, their transportation for life, and the establishment of special courts.²⁶

Article 15 ECHR did not restrain but legitimised these illiberal practices. E.C Burr, an official from the Colonial Office, stating in a note that the Convention operated as a 'loop-hole' for Britain's rights obligations in the colonies.²⁷ The 'loop-hole' allowed the UK to derogate from

²⁰ *Reynolds* (intr n 19), 16

²¹ *Ibid*, 16

²² See ch2 112-128

²³ 'Post-World War II debt reduction' (*Office of Budgetary Responsibility* July 2013)

<https://obr.uk/box/post-world-war-ii-debt-reduction/> - Last accessed 09/07/2025

²⁴ Judith Brown, *Modern India: The Origins of an Asian Democracy* (OUP 2020), 330 ; Barabara Metcalf and Thomas Metcalf, *A Concise History of Modern India* (CUP September 2006), 212

²⁵ Frank Furedi, *Colonial wars and the politics of Third World nationalism* (St Martin's Press 1994), 4-5. ; *Ibid*, 4-5

²⁶ Karl Hack, 'Everyone Lived in Fear: Malaya and the British way of counter-insurgency' (2012) 23 *Small Wars and Counterinsurgencies* 671 ; *Kishori Lal vs Emperor* [1945] 47 BOMLR 625 (Bombay High Court); EPA 1939, s5, s8-9

²⁷ E.C. Burr, 'Note from E.C. Burr to Dr. Edith Mercer, 13 February 1952, CO 936/156'

many of its human rights obligations while in theory remaining committed to upholding the ECHR overseas, the UK acquiring the reputational benefits of formally upholding human rights, while simultaneously retaining an opt out that would rid the Convention of its substance when its obligations became politically inconvenient.²⁸ Providing this opt-out gave the UK license to establish rule by force in the colonies, there being very few substantive human rights obligations, post an Article 15 ECHR derogation, left to restrain the conduct of the state. Article 15 ECHR and the surrounding rubric of emergency created an avenue through which rule by force could be sustained lawfully, emergencies no longer amounting to exercises in imperial hegemony but instead representing law and order in confrontation with 'terrorist' violence.²⁹ Lord Layton affirmed to the Consultative Assembly (on 8 September 1949) the Convention's importance as an instrument for suppressing threats to stability from 'without and within', Article 15 ECHR legitimising the imposition of extreme force in the name of counterinsurgency.³⁰

Practice in Article 15 derogations largely makes out Reynolds' claim that Article 15 acted as a means of legitimising colonial rule by force. Within the first year of the Convention's introduction, the UK had derogated from its obligations in Uganda, Malaya, Singapore, British Guiana and Kenya.³¹ In all cases derogation was intended to remove political threats to the British Empire or comprised a response to anti-colonial dissent.³² These incidents of anti-colonial resistance were euphemistically referred to in derogation notices (to the Secretary General of the Council of Europe) as constitutional crises or attempts to subvert the lawfully

²⁸ *Reynolds* (ch1 n 73), 128-129, 131

²⁹ *Reynolds* (ch1 n 73), 115. ; *Reynolds* (intr n 20), 18

³⁰ 'Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights' (Volume I, Martinus Nijhoff 1975–1985), 30

³¹ *Reynolds* (ch1 n73), 132-133

³² 'Background to 1953-55 Crisis' (*BHP Focus on History* 7th October 1999)

<https://web.archive.org/web/20140407065931/http://www.uganda.com/back1955.htm> - Last accessed 07/06/2025 ; Michael Mann, *The Sources of Social Power, Volume 4: Globalisations, 1945-2011* (CUP January 2013), 16 ; Tan Jing Quee, Tan Kok Chiang & Hong Lysa, *The May 13 Generation: The Chinese Middle Schools Student Movement And Singapore Politics in the 1950s* (Strategic Information and Research Development Centre 2011), 4 , 19-20 ; Associated Press, 'MI5 files reveal details of 1953 coup that overthrew British Guiana's leaders' (*The Guardian* August 2011) <https://www.theguardian.com/world/2011/aug/26/mi5-files-coup-british-guiana> - Last accessed 07/06/2025 ; '1954: British crackdown on Kenya rebels' (*BBC* 24th April 1954) http://news.bbc.co.uk/onthisday/hi/dates/stories/april/24/newsid_3705000/3705049.stm - Last accessed 07/06/2025

constituted government.³³ Legal and physical violence, imposed through emergency law, was characteristic of UK government responses to these rebellions.³⁴ The violence, in line with the above analysis, was whitewashed as human-rights compliant through Article 15. From 1955 to 1967, the trend of overseas derogation continued, emergencies being declared in Aden (twice from early 1958-October 1959 and then from 1963-1966), Guiana, Marutius, Nyasaland, Cyprus and Northern Rhodesia.³⁵ All cases but those in Rhodesia and Guiana involved situations where organised violence was deployed against a ruling colonial government. In the case of Aden for instance, the earlier derogation notice specifically lists the throwing of bombs, attacks on oil infrastructure and violence against both police and army as justifying a derogation from Convention rights.³⁶

In response to this violence, counterinsurgency tactics were authorised and legalised through Article 15. The Aden derogation in 1963 authorised the employment of military force against Marxist and Socialist insurgencies, Hawker Hunter attack aircraft and Saladin armoured cars being among the equipment used to prop up the government of the South Arabian Federation.³⁷ The Rhodesia and Guiana emergencies were by contrast declared in response to strikes by the African Mineworkers' Trade Union and the General Workers Union respectively, the latter strike being accompanied by violence and arson of a racial character.³⁸ What is evident is the usage of human rights law to legitimise colonial repression, violent responses to anti-colonial uprisings being ensconced within a framework supposedly designed to uphold 'rights and freedoms'.³⁹ Article 15 ECHR, as well as being framed by the UK's presence in the colonies, was deployed to perpetuate that presence, rule by force and counterinsurgency against anti-colonial dissent being accommodated by the provision.

³³ *Reynolds* (ch1 n 73), 132-133

³⁴ See n53

³⁵ 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005): United Kingdom' (*Council of Europe Treaty Office* 10th May 2025)

<https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0> – Last accessed 10/05/2025

³⁶ *Ibid*

³⁷ Martin Kitchen, *Empire and after: a short history of the British Empire and Commonwealth* (Simon Fraser University 1994), 126-128 ; Joseph Kostiner, *The Struggle for South Yemen* (Croom Helm 1984), 115-116 ; Eugene Rogan, *The Arabs: A History* (Penguin 2018),

³⁸ See n35 ; HC Deb 24 October 1956, vol 558 cols 629-31

³⁹ See n2, preamble

The UK's rule by force in the colonies, as well as framing the ECHR as deployed overseas, had a rebound effect on the Metropole, the *Ireland* case demonstrating that Article 15 allowed colonial methods of emergency management to be deployed in Metropolitan conflicts. Proving this, during the 1970's Northern Ireland was a hub of insurgent violence, the Provisional IRA carrying out thousands of bombings and shootings to further the goal of a United Irish Republic.⁴⁰ Loyalist violence, on a lesser scale, also took place within Northern Ireland to defeat Irish unification, indiscriminate attacks occurring against Catholic civilians on a frequent basis.⁴¹ In response, the UK government issued new Orders-in-Council in 1971, establishing schemes for discretionary incarceration and administrative detention under the Special Powers Act 1922 (SPA).⁴² Around 1,800 persons were detained through regulations made under the SPA.⁴³ The deployment of the SPA represented counterinsurgency built on the UK's prior colonial model, minimum force being used to detain suspected dissidents alongside a broader counterinsurgency campaign led by the British Army.⁴⁴ The UK government claimed Article 15 ECHR made the carceral element of this counterinsurgency lawful. They claimed an emergency threatening the life of the nation existed in Northern Ireland due to IRA violence, which made the Special Powers Act 1922 and derivative regulations a necessary derogation from the right to liberty.⁴⁵ The ECtHR agreed with the UK government in *Ireland*, holding that there was both an emergency threatening the life of the nation and that the formulated derogations from the right to liberty were within the margin of appreciation granted to government.⁴⁶

Article 15 ECHR, drafted to accommodate UK rule by force in the colonies, thereby had a rebound effect. A form of internal colonisation occurred where international legal mechanisms, designed to accommodate colonial practice, legitimised colonial-esque detention practices

⁴⁰ Robert White, *Out of the Ashes: An Oral History of the Provisional Irish Republican Movement* (Merrion Press 2017), 337

⁴¹ David McKittrick, 'Will loyalists seek bloody revenge *The Independent?*' (12th March 2009) <https://www.independent.co.uk/voices/commentators/david-mckittrick-will-loyalists-seek-bloody-revenge-1643076.html> - Last accessed 03/08/2025

⁴² *Ireland* (n 7), 26 ; Special Powers Act 1922, s1

⁴³ 'Operation Demetrius' (*History Ireland*) <https://historyireland.com/operation-demetrius/> - Last accessed 07/05/2025

⁴⁴ 'The Troubles' (*National Army Museum*) <https://www.nam.ac.uk/explore/troubles-1969-2007> - Last accessed 06/07/2025

⁴⁵ *Ireland* (n 7), 70

⁴⁶ *Ireland* (n 7), 74

when they were deployed in the Metropole. Also recreated through Article 15 ECHR was the permanence of the colonial emergency. As cited above, government via exceptional measures was the norm in Crown India. Article 15 ECHR gave rise to another form of permanent emergency in Ireland, the British government lawfully sustaining an emergency regime in Northern Ireland from 1973 to 1984.⁴⁷ The colonial practice of the permanent emergency was thus brought home, Article 15 acting as the Treaty through which a colonial concept was legitimised.

Not touched upon in this discussion is the question of how Article 56, known as the colonial clause, links to the colonies. I thus turn to address that matter by looking at the case law and *travaux préparatoires*.

Article 56 declares that a state may by notification Convention jurisdiction, alongside the right of individual petition, to territories for which the Metropole is internationally responsible.⁴⁸ The absence of notification relatedly pares back jurisdiction otherwise available under Article 1, so that the state may only be responsible for the acts of its own officials in relevant overseas territories.⁴⁹ Even when such a notification is made, however, the extent of rights protection offered in territorial dependencies is limited that which is suitable with regard to local requirements.⁵⁰ In light of this, the diminished rights protection created by non-notification options and suitability metrics in Article 56 can on the face of it be represented as an escape clause for human rights obligations. Rights obligations would not be enforceable overseas pending an Article 56 notification, non-notification allowing the UK to escape the substance of its human rights obligations through deliberate inactivity.

Travaux préparatoires

Examining the treaty negotiations, Article 56 appears to be the result of a compromise between the political aims of British and Belgian delegations. At the Committee of Experts (a multinational body which voted on the initial text of the Convention) from August 2 to 8, the Soviet Union and other parties possessed differing visions for Article 56. The first, supported by a majority of the drafting committee, made extension of Convention jurisdiction to territories

⁴⁷ See n53

⁴⁸ European Convention of Human Rights, Article 56

⁴⁹ L Moor and AB Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights' (2006) 76 British Yearbook of International Law 121, 148. ; *Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (ECtHR 23rd March 1995), 25

⁵⁰ *Ibid*, 25

for which a party was internationally responsible dependent on local consent to that jurisdiction.⁵¹ The second was proposed by the (Stalinist) Soviet Union, suggested that the overseas expansion of human rights jurisdiction be mandatory, this clause in the universality of its human rights application demonstrating the conditionality supported by the colonial powers.⁵² The USSR both ideologically opposed colonialism and had a geopolitical interest in undermining the colonies of western states aligned with the US, mandatory human rights enforcement being an avenue by which western governments could be embarrassed by the repressiveness of their own colonial rule.⁵³

The UK, in the fifth session of the Committee of Experts and 6 August 1950 Report to the Committee of Ministers, elaborated on why it favoured a consent-based clause. It argued that the UK's overseas possessions, with their own constitutional arrangements, could not simply be brought into the Convention's jurisdiction through the UK becoming a party to the Convention.⁵⁴ If the Convention implemented mandatory overseas jurisdiction, the UK would be obliged to secure local consent for ECHR jurisdiction in every colony prior to the UK ratifying the treaty.⁵⁵ If any colonial government refused, the UK could not ratify the Convention, the impracticality of this arrangement leading the UK to assert it would withdraw from the Convention drafting process without a clause establishing non-mandatory overseas jurisdiction.⁵⁶

The threat to withdraw from the convention was likely genuine. The Colonial Office had significant reservations with the UK's involvement in the human rights project to begin with, seeing it as a regrettable exercise that was contrary to the UK's interests in the colonies.⁵⁷ Sir David Maxwell Fyfe, the UK Rapporteur on the drafting of the ECHR, reaffirmed in a speech to the Legal Committee (17-23 August 1950) that the Convention as a whole would be

⁵¹ 'Preparatory Work on Article 63 of the European Convention on Human Rights' (Council of Europe March 1978), 7.

⁵² *Ibid*, 7

⁵³ Vladimir Lenin, *Imperialism, the Highest Stage of Capitalism* (1917), ch7, ch10 ; 'Decolonization Amidst Cold War Tensions: The Role of Superpowers' (*PolSci.Institute* March 23rd 2024)

<https://polsci.institute/international-relations-world-history/decolonization-cold-war-superpowers/> - Last accessed 07/07/2025

⁵⁴ *Council of Europe* (n 51), 23

⁵⁵ *Council of Europe* (n 51), 23

⁵⁶ *Council of Europe* (n 51), 23

⁵⁷ *Simpson* (ch2 n 64), 824.

jeopardized if the majority of the Assembly of Experts voted for mandatory colonial jurisdiction.⁵⁸

Maxwell Fyfe also embellished his reasoning in favour of a consent-based clause with civilisational logics. In a paternalistic flourish, he claimed that the Convention had to recognise different stages of civilizational development.⁵⁹ Local governments would possess the discretionary authority to consent to Article 56 jurisdiction when the population was sufficiently developed for it, law ceding space to take into account the advancement of colonial peoples.⁶⁰ A mix of civilisational thinking and desire to secure local consent to the ECHR thus framed the UK's acceptance of Article 56 ECHR. The UK demonstrated great concern for the autonomy of its colonies and their development, threatening to leave the Convention if its demands regarding the former were not met.

The Belgian delegation was also influential in incorporating civilisational logics into the Convention, pushing for the insertion of the suitability clause into Article 15. At the fifth session of the Committee of Experts, the Belgian delegation suggested that a new clause be inserted into the Convention. It stipulated that the Convention should apply within international territories in accordance with local needs and civilisation of native populations, which had not yet reached the stage of development necessary for the full enjoyment of democratic freedoms.⁶¹ Belgium maintained this line throughout treaty negotiations, insisting on a clause referring to standards of civilisations or 'local requirements' in the fifth session of the Committee of Ministers.⁶² With respect to this, Belgium ended compromising with the UK delegation, including both a local requirements clause and a jurisdiction extension clause in a Convention draft (7 August 1950).⁶³

That the suitability clause was tied to civilization thinking was confirmed by the Belgian representative at the Legal Committee, Mr Rolin. Mr Rolin discussed how civilisational logics governed Belgium's conception of Article 56 ECHR, arguing that the political rights inherent to the Convention would have to vary in their application depending on the 'degree of evolution' of different colonial territories.⁶⁴ That this would change the European Convention of Human

⁵⁸ See n51, 34

⁵⁹ *Council of Europe* (n 51), 33

⁶⁰ *Council of Europe* (n 51), 33

⁶¹ *Council of Europe* (n 51), 9

⁶² *Council of Europe* (n 51), 19

⁶³ *Council of Europe* (n 51), 23

⁶⁴ *Council of Europe* (n 51), 30-31

Rights into a 'Declaration of Human Rights for Europeans' (in the words of Leopold Senghor, the French representative at the Committee of Experts) was of no consequence to the drafters, an amendment ratified by the Assembly of Experts to remove Article 56 ECHR in its entirety being rejected by the Committee of Ministers.⁶⁵ Eurocentric civilisational thinking was therefore indissociable from Article 56 ECHR.

Summing up, Belgian and British delegations, concerned with civilisational logics and respecting colonial autonomy, shaped Article 56 ECHR in light of these prerogatives (Belgium concerning itself only with the civilisational logics). Or this is at least the conclusion one reaches when looking at the *travaux préparatoires* in isolation, evidence casting doubt on the sincerity of the UK's pledge that it represented a guardian of colonial autonomy.

Firstly, colonies were autonomous to varying degrees across the Empire, a lack of independence in many cases undermining the claim that colonial government possessed autonomy that needed protection. As conceded by Maxwell Fyfe, British colonies possessed their own constitutional arrangements which were highly divergent in the degree to which they granted autonomy to colonial peoples. In terms of lawmaking, settled colonies retained their previous laws.⁶⁶ Meanwhile conquered or ceded territories, until a local legislature was granted, could be legislated for by the Crown, so long as fundamental principles and primary legislation produced by the Imperial Parliament were not contradicted.⁶⁷ Several other distinctions were relevant to the autonomy of colonial government however, going beyond the question of whether a territory was conquered or settled.

By the 20th century, the most governing responsibility was delegated to Crown subjects in territories deserving of 'responsible government' (a category indissociable from those territories with a white majority) like Canada and New Zealand, governments in these areas being appointed by independent and local legislatures.⁶⁸ These territories were known as Dominions, 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British

⁶⁵ *Council of Europe* (n 51), 31, 36, 38

⁶⁶ *Milirpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Supreme Court of the Northern Territory), 201 ; *Campbell* (ch1 n 71), 1047-1048

⁶⁷ *Ibid*

⁶⁸ John Lambton, *Lord Durham's Report on the Affairs of British North America* (Clarendon Press 1912), 321 ; *Statute of Westminster 1931*, s2-4

Commonwealth of Nations'.⁶⁹ Government in these dominions was not conducted directly by the Crown, or a local governor with substantial constitutional powers, political aristocracies typically using their autonomy to administer representative democratic systems (excluding South Africa, which although independent, systematically discriminated against black citizens.).⁷⁰

The opposite of this arrangement was that which was present in Crown colonies. In Crown colonies, Governor-Generals appointed directly by the Crown (such as those in Mauritius and India) typically enjoyed wide and authoritarian powers of control over their fiefs.⁷¹ Crown rule was imposed on territories in line with racial, national and religious preconceptions; a territory only being 'suitable' for Crown rule if it was perceived to be so backward or riven by social divides that no group was capable of running a representative system in the interests of the population as a whole.⁷²

Lastly, addressing broad categories, the UK also possessed Protectorates within its imperial structure. Protectorates were created from a treaty between the UK and a weaker territory.⁷³ In these relationships, it was usual for the protectorates to retain a significant level of responsibility for their own domestic government, while the UK remained in charge of foreign and defence affairs of the territory.⁷⁴ They were common in Africa, Asia and the Pacific, where protectorates were utilised as buffer states (against other European powers) and sites of resource exploitation.⁷⁵ In one example, Iraq in the early 20th century was a UK Protectorate. Despite the country receiving de jure independence in 1932, administrative autonomy under a Hashemite monarchy was tied to close political and military relations with the UK.⁷⁶ The 1955

⁶⁹ 'Imperial Conference 1926: Inter-Imperial Relations Committee, Report Proceedings and Memoranda' (HM Government 1926), 3

⁷⁰ Walter Williams, *South Africa's War Against Capitalism* (Praeger 1989), 23-27

⁷¹ Sionaidh Douglas-Scott, 'The Constitutional Status of the British Empire and Commonwealth' in *Brexit, Union and Disunion: The Evolution of British Constitutional Settlement* (CUP 2023), 225

⁷² John Ward, *Colonial Self-Government: The British Experience 1759–1856* (Macmillan 1976), 83

⁷³ Scott (n71), 225

⁷⁴ Scott (n71), 225

⁷⁵ Scott (n71), 225-226

⁷⁶ Faisal Al-Hashemi, 'Request of the Kingdom of Iraq for Admission to the League of Nations' (*Assyrian Information Management* 16th August 1932)

<https://www.atour.com/government/un/20000609a.html> - Last accessed 09/06/2025

Baghdad Pact pledged that the UK would come to Iraq's assistance if Iraq were attacked.⁷⁷ The UK also possessed the treaty rights to utilise several military bases in Iraq, with Iraq's defence remaining dependent on UK assistance, via agreement, until the 1958 Iraqi revolution, which led to these treaties being annulled.⁷⁸

Considering all of the above, the constitutional organisation of British imperialism was very haphazard.⁷⁹ Empire was a series of hybrid components. Colonial governments emerged from political compromise, the perceived levels of civilisation of any given population and an absence of forward planning.⁸⁰ Colonial governments were therefore to varying degrees independent from the United Kingdom. In cases of Crown colonies, where there was no real local government independent from UK control, the UK could not assert that a refusal to extend human rights jurisdiction was intended to protect the autonomy of local government, the UK having appointed the local government largely to uphold its own interests in the region.⁸¹

In searching for an alternate explanation for the UK's insistence on an optional extension clause, Foreign Office documents are insightful. A minute by Alex Dudley (Foreign Office official) argued that the UK required a colonial clause to avoid the embarrassing process of colonial governments making reservations to the ECHR.⁸² The clause was also required to avoid the clauses on human rights enforcement and individual petition (the right of an individual to take a case to the ECtHR) as they applied to colonies.⁸³ When one asks why reservations and rejected rights to individual petition would be required by the colonial government, the answer is that governance in the colonies was not on the whole respectful of colonial subjects' human rights. Indeed, this is not unexpected. My above arguments concerning emergency government in Crown India demonstrated that colonial emergency rule

⁷⁷ 'The Baghdad Pact (1955) and the Central Treaty Organization (CENTO)' (*US Department of State, Office of the Historian*)

<https://web.archive.org/web/20111224041218/http://history.state.gov/milestones/1953-1960/CENTO> -

Last accessed 07/07/2025

⁷⁸ Treaty of Alliance Between His Majesty in Respect of the United Kingdom and His Majesty the King of Iraq 1930, Art 5 ; Anglo-Iraq Treaty of 1948, Art 3 ;Special Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Iraq 1955, Art 4-8 ; Courtney Hunt, *The History of Iraq* (Greenwood Press 2005), ch7

⁷⁹ Ged Martin, 'Was there a British Empire?' (1972) 3 *Historical Journal* 562, 562

⁸⁰ *Douglas-Scott*, (n 71), 238

⁸¹ *Moor and Simpson* (n 49), 140

⁸² 'NA FO 371/88658/US1005/31' (United Kingdom Foreign Office)

⁸³ 'NA FO 371/88658/US1005/31' (United Kingdom Foreign Office)

systematically imposed morally effective violence to uphold the authority of the colonial state, while utilising the language of terrorism to undermine traditional liberal principles as applied to 'terrorists'.⁸⁴ These realities were channelled into the drafting of Article 56 ECHR, the clause being orientated around accommodating the colonial rule by force. Obtaining the consent of local governments acted as a fig leaf to cover this reason for Article 56 ECHR's promulgation

The accommodation of colonial rule by force created exceptional spaces in the colonies, the UK government deciding when the exception was lifted. The UK was left unaccountable for the human rights record of local colonial government through Article 56; Article 56 ECHR extending jurisdiction for human rights review to the colonies, based on the particularities of local circumstances, only after the UK government notified the Secretary General of the Council of Europe of relevant extensions.⁸⁵ The effect of non-action was the creation of exceptional spaces, fully or partially outside human rights jurisdiction for extended periods. In the spirit of Schmitt, the sovereign executive was in effect deciding upon the exception, decision taking the form of deliberate non-action. In this respect, several territories did not have human rights jurisdiction extended to them for years after the Convention had come into effect. Grenada and the Seychelles, as two examples, received notification from the UK in 1967, an exceptional space having lingered in these territories for 14 years.⁸⁶ The UK has on this basis maintained the capacity to create exceptional spaces through non-notification under Article 56 ECHR, human rights being fully or partially excluded from the jurisdictions of several colonial territories, for an extended period of time, at the decision of a sovereign executive.

The creation of these exceptional spaces reflected civilisational hierarchies in the mind of European colonisers. E.C Burr of the Colonial Office elaborated in 1958 that civilisation emanated outwards from Europe.⁸⁷ As such it was natural that a Treaty of Human rights, for a civilised and democratic society, would not be applicable, in its fullest extent or even in part,

⁸⁴ See ch2 94-130

⁸⁵ Anne Isabelle-Richard, 'The European Convention of Human Rights' Colonial Clause and the End of Empire' (*Verfassungsblog On Matters Constitutional* January 2022)
<https://verfassungsblog.de/the-european-convention-of-human-rights-colonial-clause-and-the-end-of-empire/> - Last accessed 19/04/2025

⁸⁶ 'Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005): United Kingdom' (*Council of Europe Treaty Office* 10th May 2025)
<https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0> – Last accessed 10/05/2025

⁸⁷ *Simpson* (ch2 n 64), 1054.

to more backward colonies.⁸⁸ Civilisational supremacism surrounding Europe and the UK was not an uncommon belief among political elites of the early 20th century (having emerged in the 15th and 16th centuries).⁸⁹ Post-War European Unity movements (like European Movement International) regarded Europe as the source of universal values, with a mission of spreading European Civilisation to the rest of the world.⁹⁰ Winston Churchill, a supporter of closer Anglo-European ties based on shared Christian and Humanist values (although not a federal Europe involving the United Kingdom), took similar views.⁹¹ He argued that the nation had an obligation to rule the peoples of the colonies in their best interests and toward European civilisation.⁹² The junior status of colonial peoples would persist until British government had developed the population to a point where they were sufficiently civilised to rule themselves (in the words of Malcom Macdonald, Secretary of State for the Colonies in 1939).⁹³ The exercise of Article 56 ECHR, designed to cut off (and eventually create) human rights jurisdiction overseas, can be theoretically considered a mechanism through which this civilising mission could be performed, the interests of colonial peoples demanding the UK spread its ideology of enforceable human rights overseas (through notification); albeit only for so long as the colonial peoples in question could be considered ready for that law.

Examining Colonial Office files, it is apparent that reputational, not civilisational, considerations motivated the extension of Convention jurisdiction to the colonies. The Colonial Office, writing in 1951, expressed that it was desirable for as many colonies as possible to have ECHR jurisdiction extended to them.⁹⁴ When one considers the UK's seat at the United Nations, the UK would acquire international credit for (on the face of it) upholding human rights both at home and overseas.⁹⁵ Further, extending human rights jurisdiction overseas also appealed to those who held a benevolent view of British colonial government, extension

⁸⁸ *Simpson* (ch2 n 64), 1054.

⁸⁹ *Quinn* (n 18), ch30

⁹⁰ International Committee of the Movements for European Unity, 'Cultural Report—Congress of Europe, The Hague,' (CAC, Sandys Papers, box 9/3/1 May 1948)

⁹¹ Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (OUP 2017), 99 ; Andrew Roberts, *Churchill: Walking with Destiny* (Penguin 2019), 900 ; *Ibid*, 112-113

⁹² *Ibid*, 900 ; *Ibid*, 112-113

⁹³ HC Deb 30 November 1939, vol 355, col 408

⁹⁴ 'Convention on Human Rights in CO 936/157' (Colonial Office)

⁹⁵ *Ibid*

supposedly bringing rights and European civilisation to less sophisticated colonial territories.⁹⁶ Finally, the extension of Convention jurisdiction had rational appeal to the UK government. The Convention indirectly rejected anti-colonial ideas, not containing articles on the self-determination of colonial peoples, challenging the very foundations of colonial rule, that were placed in the draft United Nations human rights covenants.⁹⁷ In sum therefore, there were multiple reputational reasons for why the UK government elected to extend Convention jurisdiction to overseas territories. The UK government had an interest in the rejection of ideas concerning self-determination, while it also sought to garner its reputation, both at the UN and to those supportive of the civilising mission, by extending human rights jurisdiction overseas.

The enthusiasm with which Article 56 ECHR was received by the UK is evident in the relative speed at which the UK made Article 56 ECHR notifications for its overseas territories. On 23 October 1953, just over a month after the Convention came into effect, the UK government made an Article 56 ECHR notification for 40 different political entities, including Jamaica, Kenya and Uganda.⁹⁸ Most of the UK's possessions in Africa were covered by the Convention (the only exception being Anglo-Egyptian Sudan, which was already making a transition to full self-government after an agreement made in February 1953).⁹⁹ That the extension of the Convention represented an attempt to garner the UK's international reputation and undercut accusations of human rights hypocrisy, not a genuine attempt to uphold human rights, can be inferred from the facts. With regard to the exercise of Article 15 in Kenya and Uganda, the UK extended human rights jurisdiction to these territories only to immediately derogate from substantive obligations under the emergency clause.¹⁰⁰ The UK in this respect attempted to have it both ways, accruing the reputational benefit of extending human rights to the colonies while in practice escaping substantive obligations, through Article 15, when anti-colonial

⁹⁶ See n 467 ; 'Application of Council of Europe Convention on Human Rights to High Commission Territories and Federation of Rhodesia and Nyasaland: Letter in DO 35/7008'.

⁹⁷International Covenant on Civil and Political Rights 1966, Art 1 ; International Covenant on Economic, Social and Cultural Rights 1966, Article 1 ; Isidore Bonabom, 'The Development of a Truth Regime on 'the Human': Human Rights in the Gold Coast (1945-57)' (DPhil Thesis, University of Sussex November 2011), 110-111, 154-155

⁹⁸ See n 532

⁹⁹ Christof Heyns, 'African Human Rights Law and the European Convention' (1995) 11 SAJHR 252, 255 ; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government concerning Self-Government and Self-Determination for the Sudan 1953, Art 1-9

¹⁰⁰ *Reynolds* (ch1 n 73), 132-133

resistance manifested. Taking these examples as representative of a wider trend, the exercise of Article 56 ECHR post war thus did not represent an ideological crusade or civilising mission, but a pragmatic exercise in politics; the UK extending human rights jurisdiction to numerous colonial possessions to gain the credit for doing so, while in practice ridding themselves of any substantive human rights obligations.

Even if the exercise of Article 56 ECHR was not in practice related to the civilising mission, this does not subtract from my earlier conclusion that the Article was framed by civilisational hierarchies.

These civilisational hierarchies internalised within Article 56 ECHR have boomeranged back to effect the Metropole, their applying to Manx litigation in a manner that implies the superiority of western European civilisation. Article 56 ECHR does not linger as a mere colonial relic.¹⁰¹ In the *Tyrer* case, binding on UK courts, the ECtHR had to decide whether Article 56 ECHR permitted the continued practice of corporal punishment (birching) in the Isle of Man, subsequent to due regard being given to local circumstances.¹⁰² The court held that the popularity of birching among the Manx, as a deterrent to crime, did not present valid circumstances under Article 56 ECHR; birching not being a requirement for the maintenance of law and order on the Isle.¹⁰³ Secondly, utilising the notion of a European community of nations, the court established that the Isle of Man possessed the liberal heritage fundamental to the ECHR.¹⁰⁴ This was unlike 'certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention', the court implying that a less civilised territory was entitled to a diminished portfolio of human rights¹⁰⁵. Even if, as later held by the court, civilisational hierarchies did not alter the binding nature of Article 3 in overseas dependencies, a broader premise is still apparent regarding the enforceability of other rights. It may be inferred that a diminished portfolio of enforceable human rights, subsequent to an

¹⁰¹ Matthew Happold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 H.R.L.Rev 77, 88

¹⁰² *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 (HL), 313 ; *Case of Tyrer v the United Kingdom* App no 5856/72 (ECtHR 25th April 1978),15-18

¹⁰³ *Ibid*, 18

¹⁰⁴ Jens Theilen, 'Locating Progress in the European Convention on Human Rights' (*Völkerrechtsblog* 19th September 2023)

<https://voelkerrechtsblog.org/locating-progress-in-the-european-convention-on-human-rights/> - Last accessed 19/04/2025

¹⁰⁵ *Ibid*

Article 56 notification, is talismanic of a less civilised society. The holding that the Isle of Man possessed no circumstances relevant to Article 56 ECHR stood for the inverse principle that higher civilisations are obligated to maintain a stringent adherence to Convention rights.

The *Py* case confirmed the validity of this premise. Addressing New Caledonia, a colony of the French Republic with a substantial (non-white) indigenous population, the Kanaks, the court again invoked civilisational hierarchies.¹⁰⁶ In relation to New Caledonia, the French Government had barred those who had been permanently resident in New Caledonia for less than ten years from participating in elections.¹⁰⁷ The applicant brought a claim on the basis that this measure infringed the right to free elections in which the people can freely express their choice of legislature.¹⁰⁸ The court held that New Caledonia, possessed an ‘incomplete and transitional’ form of government wracked by a violent political history.¹⁰⁹ Having expressed this euphemism regarding the sophistication of Caledonia’s form of social organisation, the court held disproportionate restrictions on an individual’s right to vote, namely the bar on residents voting if they had been resident for less than ten years, were justifiable.¹¹⁰ Civilisational hierarchies come to the fore in this reasoning, a non-European polity undergoing the decolonisation process being deemed unsuitable for the full application of human rights law. Accounting for these cases, the imperial boomerang of civilisational hierarchies has thus altered the degree to which state parties under the Convention are obliged to uphold human rights law subsequent to an Article 56 notification. More ‘backward social’ orders like New Caledonia, in the eyes of the court, entitled to a less extensive portfolio of rights than more civilised territories like the Isle of Man.

Sub-Chapter B – How does the colonial impact the Terrorism Act 2000

The final section of my thesis addresses proscription under the Terrorism Act 2000, asking how it links to the UK’s experience in the colonies.

The Terrorism Act established proscription. It introduced several precursor offences (offences that criminalise terror-related acts short of violence) including being a member of a proscribed

¹⁰⁶ Alice Bulland, *Exile to Paradise: Savagery and Civilization in Paris and the South Pacific, 1790-1900* (Stanford University Press 2000), ch1-10

¹⁰⁷ *Py v France* App no 66289/01 (ECtHR 6th June 2005), 16

¹⁰⁸ European Convention of Human Rights 1948, Protocol 1, Article 3

¹⁰⁹ *Py*, 16

¹¹⁰ *Py* (n 143), 16

group and expressing an opinion supportive of a proscribed organisation.¹¹¹ Section 3 classifies a proscribed organisation as one that commits, participates in, glorifies, encourages or otherwise concerns itself with terrorism.¹¹² However, not every organisation that fits this criterion will be considered a proscribed organisation, proscription status ultimately depending on the Home Secretary passing an order setting out that a given organisation meets the above criteria (valid subject to an appeal via the Proscribed Organisations Appeal Commission and higher courts).¹¹³

Courts may not overrule the decision of the Home Secretary unless one of the standard grounds of judicial review are satisfied. A proscription decision will be unlawful if it is outside the powers granted to government (or takes legally irrelevant considerations into account and vice versa), it is so unreasonable that no reasonable decisionmaker could come to it, the decision is procedurally improper or is disproportionate when the rights enshrined in the Human Rights Act are considered (pertinently the rights to free assembly and expression).¹¹⁴ With regard to irrationality and *Wednesbury* unreasonableness, courts have stepped in only when the proscribed organisation in question has renounced violence and given up its military capacity, any movements that participate in violence in this respect being organisations potentially concerned with terrorism.¹¹⁵ Proportionality challenges have also been launched to the proscriptions of Hamas and Palestine Action, the latter of which has been deemed a disproportionate restriction on freedom of expression by Volker Türk, the UN Human Rights Chief.¹¹⁶ However, neither of these actions have not reached a final decision at time of writing, so judgments on the efficacy of the proportionality safeguard cannot be reached.

¹¹¹ 'This is the Thought Police: The Prevent duty and its chilling effect on human rights' (Amnesty International November 2023), 13 ; Terrorism Act 2000, s11 ; Counter-Terrorism and Border Security Act, s1

¹¹² Terrorism Act 2006, s21 ; Terrorism Act 2000 (TA 2000), s3

¹¹³ Ibid, s3, s5-6

¹¹⁴ *R v Lord President of the Privy Council, Ex parte Page* [1993] A.C. 682 (HL), 701 ; *Alconbury* (n 102) , 320 ; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223, 230-231 ; See n86, 410 ; *Smith and Grady v United Kingdom* App no's 33985/96 and 33986/96 (ECtHR 27th September 1999), 500 ; Human Rights Act 1998, Sch 1

¹¹⁵ *Lord Alton of Liverpool and others v Secretary of State for the Home Department* [2008] 1 W.L.R. 2341 (CA), 2353-2355

¹¹⁶ 'Harakat Al-Muqawamah Al-Islamiyyah and Secretary of State for the Home Department: Submissions in Support of Deproscription' (*Riverway Law* 2025)

What is known is that appellate courts are not entitled to disagree with a proscription decision on its merits alone, alike to the general prohibition in judicial review of courts reviewing government decisions on merits.¹¹⁷ The rule, accompanied by court deference to matters of national security, makes it extremely difficult for an organisation to be removed from the list of proscribed organisations via an appeal to the Proscribed Organisations Appeal Commission. Only 4 deproscriptions have occurred in the history of the proscription process, compared to the 84 organisations, including Palestine Action, currently gracing the UK's proscription lists (as of 7 July 2025).¹¹⁸

The Terrorism Act 2000 thus provides a power to crack down on violet groups with few legal constraints.

Finding how the powers in the 2000 Act relate to the colonies requires the application of boomerang theory.

Chapter 2 has demonstrated that proscription and anti-terror regulation were practiced in the colonies as an example of liberal duplicity, liberalism tolerating restrictions overseas that would not be countenanced at home.¹¹⁹ Related are Sentas' claims that proscription was developed as a tool of counterinsurgency. The capacity to proscribe subversive organisations and literature granted colonial government the power to stamp out both the ideological desire for anti-colonial liberation and the physical violence that accompanied it.¹²⁰

The departure from liberal principle inherent in colonial anti-terror law and proscription regulations has boomeranged back to impact the 2000 Act. The 2000 Act has widened the

<https://hamascase.com/summary/> - Last accessed 04/08/2025 ; Volker Türk, 'UK: Palestine Action ban 'disturbing' misuse of UK counter-terrorism legislation, Türk warns' (*Office of the High Commissioner for Human Rights* 24th July 2025)

<https://www.ohchr.org/en/press-releases/2025/07/uk-palestine-action-ban-disturbing-misuse-uk-counter-terrorism-legislation> - Last accessed 04/08/2025 ; *Ammori v Secretary of State for the Home Department* [2025] EWHC 2013 (Admin), [70]

¹¹⁷ TA 2000, s5-6 ; See n135, 2355-2356 ; See ch4, n13, 969

¹¹⁸ 'Proscribed terrorist groups or organisations' (*Gov.UK* 27th February 2025)

<https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version#list-of-proscribed-international-terrorist-groups> – Last accessed 08/07/2025 ; Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2025 No. 803, s2

¹¹⁹ See ch2 112-133

¹²⁰ *Sentas* (intr n 19), 302.

remit of terrorism to cover offences related to identity and expression as well as action, this marking an evolution from the Anarchical and Revolutionary Crimes Act which solely took steps to suppress terrorist conduct.¹²¹ Specifically the 2000 Act has criminalised the expression of support for proscribed organisations, inviting such support, and displaying an item (like a sign) that would make a reasonable person think one support a proscribed group.¹²² The rationale for these measures is the need to suppress terrorist ideology.¹²³ With the expansion of proscription to cover far-right political groups like National Action, and direct action groups like Palestine Action, neither of which utilise violent methods, the liberal principle of freedom expression has been placed under threat from a quasi-colonial expansion of state power, the freedom to express oneself having been reduced to delegitimise, as terrorists, those advocating on behalf of non-violent civil society groups.¹²⁴ The result has been the arrest of hundreds of peaceful protesters under terrorism legislation, the placement of a chilling effect on freedom of speech related to these groups, and potential future convictions for terrorist offences. The liberal duplicity of counter-terrorism legislation again makes itself apparent in the withdrawal of democratic rights from designated enemies within in the context of a supposedly democratic society.¹²⁵

The width of the definition of terrorism cited above also has ramifications when the right to resist is considered. Proscribed organisations, under the statutory definition, retain their

¹²¹Conor Gearty, 'How is Terrorism Defined' (*Lets Talk Palestine Podcast* 7th July 2025)

https://www.youtube.com/watch?v=thY_SuguZrw – Last accessed 02/09/2025

¹²² TA 2000, s12-13

¹²³ *R v Choudary and Another* [2018] 1 W.L.R. 695 (CA), 711

¹²⁴ Rivkah Brown & Simon Childs, 'The Government Has Been Expanding the Definition of Terrorism for Years. Here's How' (*Novara Media* 23rd July 2025)

<https://novaramedia.com/2025/07/23/the-government-has-been-expanding-the-definition-of-terrorism-for-years-heres-how/> - Last accessed 05/08/2025 ; Richard Hames and Simon Childs, 'Does the Palestine Action Ban Signal the Decline of Liberalism in Britain?' (*Novara Media* 24th July 2025)

<https://novaramedia.com/2025/07/24/does-the-palestine-action-ban-signal-the-decline-of-liberalism-in-britain/> - Last accessed 05/08/2025

¹²⁵ Sammy Gecsoyler and Nadeem Badshah, 'More than 100 arrested across UK at protests related to Palestine Action' (*The Guardian* 19th July 2025)

<https://www.theguardian.com/uk-news/2025/jul/19/palestine-action-protests-uk-london-arrests> - Last accessed 05/08/2025 ; Ben Quinn, 'Half of arrests at Palestine Action ban protest were 60 or over, data shows' (*The Guardian* 10th August 2025)

<https://www.theguardian.com/uk-news/2025/aug/10/police-arrest-hundreds-london-protest-over-palestine-action-ban> - Last accessed 02/09/2025

terrorist character when they carry out their activities against unrepresentative, colonial, occupying or apartheid government.¹²⁶ The capability of the 2000 Act to protect non-representative governments makes it so essentially any organisation engaged in armed conflict can be delegitimised as a terrorist group regardless of the merits or justice of that struggle; the Home Secretary possessing a near-absolute discretion, alike to a sovereign Governor-General, to decide which groups are proscribed, influenced by the requirements of UK foreign policy.¹²⁷

There is no exception in the definition of a proscribed organisation for those groups that engage in lawful resistance against the forcible denial of self-determination to oppressed peoples; such a right to resist being an established part of international treaty and customary international law.¹²⁸ Unincorporated international law cannot be taken as a source of domestic rights and obligations, as this would undermine the role of Parliament in legislating for the UK.¹²⁹ Nor can courts adjudicate upon the meaning of international law unless it possesses a foothold (legislatively or otherwise), in domestic law, courts being limited in cases of non-incorporation to pronouncing on whether the executive has taken a tenable view of its international legal obligations in any given case.¹³⁰

Several figures have commented on this basis that the Home Secretary has been left with an overly broad power to proscribe organisations considered legitimate internationally. Precursor offences concerning speech and expression are in principle applicable to those advocating for groups forcibly upholding the international right of self-determination. Considering this, that the practically unchecked power of the Home Secretary to proscribe can render national liberation groups and even non-violent supporters of those organisations criminals, to be

¹²⁶ *R v F* [2007] 3 W.L.R. 164 (CA), 172

¹²⁷ Mark Muller, 'Terrorism, Proscription and the Right to Resist in the Age of Conflict' (2008) 20 Denning L.J. 111, 122, 124, 127.

¹²⁸ Universal Declaration of Human Rights 1948, Preamble ; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1998), 200 ; Shahd Hammouri, 'The Palestinian People have the right to resistance by all means available at their disposal' (Law for Palestine October 2023), 10-26

¹²⁹ *J.H Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others and Related Appeals* [1990] 2 A.C. 418 (HL), 499-501

¹³⁰ *The Law Debenture Trust Corporation v Ukraine* [2024] A.C. 411 (SC), 486-491 ; *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] A.C. 777 (SC), 786-787

tarnished long-term with a record as a terrorist if convicted.¹³¹ Given the UK government has never endorsed the international right to resist, this theoretical application of precursor offences to non-violent supporters has matured into the *de facto* proscription of several groups considered by various parties to be national liberation movements.

To provide examples, the Tamil Tigers and the PKK, viewed by Tamil nationalists and Kurdish nationalists respectively, as national liberation movements, have been proscribed under the Act as violent terrorist organisations.¹³² The application of precursor offences to the supporters of these liberation organisations follows the colonial logic of utilising minimum force under law; those who oppose the forcible denial of self-determination being criminalised even when their acts cause no harm to others. The criminalisation in question also follows colonial precedent by stigmatising agents advocating for resistance; the labelling of groups as terrorist organisations acting as an ideological and political tool by which the disfavour of society can be communicated and certain causes delegitimised.¹³³ Proscription, the fulcrum of the UK's counterterrorism capabilities, can thus be understood as a criminal law tool that replicates the form, delegitimising effect and minimum-force based logic of counterinsurgency.¹³⁴ Proscription retains an anti-liberation imprint, those who support militant self-determination movements potentially having their political cause delegitimised and criminalised by precursor offences, echoing Crown India where proscription was also practiced to criminalise those engaging in anti-colonial politics. Proscription therefore mirrors prior counterinsurgency practice, a form of proscription making its way back from the colonies to the Metropole.

Yet the existing literature, omitting mention of the imperial boomerang, ultimately stops short of answering why the UK adopted a new system of proscription in 2000.

The late 20th century saw the concept of terrorism proliferate internationally. A spate of aircraft hijackings by the PLO in the late 1960's and 1970's, alongside hostage taking during the

¹³¹ HL Deb 6th April 2000, vol 611, cols 1439, 1447 ; HC Deb 14 December 1999, vol 341, col 187, 192-194 ; Ibid, Counter-Terrorism Act 2008, s44-45

¹³² Ahmed Hashim, *When Counterinsurgency Wins: Sri Lanka's Defeat of the Tamil Tigers* (University of Pennsylvania Press 2013), 85 ; Jessica Stanton, *Violence and Restraint in Civil War: Civilian Targeting in the Shadow of International Law* (CUP 2016), 217-219 ; TA 2000, sch2 ; The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2020, s2

¹³³ *Sentas* (intr 21), 302, 128-129

¹³⁴ Lee Jarvis and Tim Legrand, 'The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons' (2018) 30 *Terrorism and Political Violence* 199, 201.

1972 Munich Olympics led to growing western concern with international terrorism.¹³⁵ Europe also possessed indigenous insurgent groups, the actions of the IRA in Ireland, ETA in Basque Country, Red Brigades in Italy and Red Army Faction in Germany having inspired the vision (whether accurate or not) of a connected multi-national terror network linked to Palestinian militancy.¹³⁶ Presenting the Palestinian-led terror threat as an existential challenge to the west was encouraged by a State of Israel keen to distract from the plight of Palestinians repressed under permanent occupation in Gaza and the West Bank.¹³⁷ Cold War concerns about Soviet funded insurgents and a growing academic field of terrorism studies further catalysed the new focus on counter-terror measures across the west.¹³⁸

In 1999, Home Secretary Jack Straw stated that the Terrorism Act constituted a response to this 'growing' threat of domestic and international terrorism.¹³⁹ Terror incidents in Yemen, Uganda, and the US Embassy bombings in Kenya and Tanzania were pointed out as incidents that indicated the continuing threat of international terrorism to the UK.¹⁴⁰ Stress was placed by the government on the permanence of the new terror threat. In a White Paper on the Terrorism Act 2000, the government recalled that 94 incidents of international terrorism took place in the United Kingdom between 1976 and November 1998, killing 296 people.¹⁴¹ The UK government concluded that dedicated and permanent powers were needed to combat the threat of terrorism in the UK, for which there was no end in sight.¹⁴² The UK Government thus drew up the 2000 Act as a specialised legal code, a 'necessary' response to organisations which as a collective and in the long-term posed a security threat to the United Kingdom.¹⁴³

¹³⁵ Gearty (ch2 n 132), 89-95

¹³⁶ Gearty (ch2 n 132), 99

¹³⁷ Gearty (ch2 n 132), 95-103

¹³⁸ Gearty (ch2 n 132), 95-103

¹³⁹ HC Deb 16 March 1999, vol 327, cols 999-1000

¹⁴⁰ Ibid, 1000 ; Henry Munson, 'Lifting the Veil — Understanding the Roots of Islamic Militancy' (*Harvard International Review* May 6th 2006)

<https://web.archive.org/web/20101028072952/https://hir.harvard.edu/religion/lifting-the-veil/?page=0,1>

– Last accessed 13/06/2025 ; 'Allied Democratic Forces' (*Global Security.Org*)

<https://www.globalsecurity.org/military/world/para/adf.htm> - Last accessed 13/06/2025 ; Brian Whitaker, 'Kidnap Terror Ends in Death' (*The Guardian* 30th December 1998)

<https://www.theguardian.com/world/1998/dec/30/brianwhitaker1> - Last accessed 14/06/2025

¹⁴¹ 'Legislation Against Terrorism: A consultation paper' (The Stationery Office December 1998), 8-9

¹⁴² Ibid, 8-9

¹⁴³ Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) 50 *Crim.L.R.* 55, 9.

The temporality of this response, echoing previous anti-terror legislation, was thoroughly colonial in its permanence. The Terrorism Act 2000 had several predecessors. Namely, the 2000 Act was preceded by the Prevention of Terrorism Act 1974, the Prevention of Terrorism Act 1989 and Northern Ireland Act 1996.¹⁴⁴ The 1974 and 1989 Acts in theory ascribed to the paradigm of the temporary emergency, given they included sunset clauses. A sunset clause is a provision holding that a law will expire at a pre-determined time unless it is renewed.¹⁴⁵ The 1974 Act required the former Act to be reapproved by Parliament every 6 months (later updated to a year), while the 1989 Act required annual reapproval via Parliamentary order.¹⁴⁶ Sunset clauses of this kind are typically used to ease the passage of controversial bills through Parliament, on the assumption that controversial measures will be more palatable to legislators if their effect is temporary.¹⁴⁷

It is to be conceded that the review and reapproval of legislation, in principle, can have value. Legislators are granted another chance to look at potentially draconian legislation and scrutinise if the initial justifications for it still prevail. Implicit in this exercise is the application of Parliamentary scrutiny, re-approval allowing MPs to iron out difficulties with law and re-stamp it with democratic legitimacy.¹⁴⁸ Yet this theoretical benefit of reapproval did not manifest for the 1974 and 1989 Acts.

In the case of the Prevention of Terrorism Acts, Parliamentary procedure guaranteed that the reapproval of the relevant legislation was highly likely, regardless of the merits of the statute or the political need for its renewal. Demonstrably, the reapproval mechanism for both acts relied on secondary legislative procedures. The 1974 Act relied on the negative resolution procedure, which mandates neither house object to the legislation and the 1989 Act relied on the affirmative procedure, renewal requiring positive approval from both the Commons and

¹⁴⁴ POTA 1974 ; POTA 1989 ; NIA 1996

¹⁴⁵ Kristen Underhill and Ian Ayres, 'Sunsets Are for Suckers: An Experimental Test of Sunset Clauses' (Columbia University 2021), 8-11

¹⁴⁶ Prevention of Terrorism Act 1974, s12 ; Prevention of Terrorism Act 1989, s27

¹⁴⁷ Ibid, 8-11

¹⁴⁸ Nicholas Winterton, 'Select Committee on Modernisation of the House of Commons: Written Evidence' (*Modernisation of the House of Commons Select Committee* March 2006)

<https://publications.parliament.uk/pa/cm200506/cmselect/cmmodern/1097/1097we13.htm?> Last accessed 08/07/2025

the Lords.¹⁴⁹ The fact that both Houses were obliged to either accept legislative renewal or reject the statutes in full, without line-by-line scrutiny or legislative ‘ping-pong’, meant that Parliament did not apply to much attention to the question renewing the 1974 and 1989 Acts.¹⁵⁰ The all or nothing approach to legislative approval made a rejection of terrorism legislation an extremely unlikely occurrence, with the contrary outcome, statutory renewal, amounting to a process of doubtful democratic quality due to the lack of Parliamentary scrutiny involved.¹⁵¹

The ingrained continuation bias in the relevant Parliamentary procedure was reflected in the continuous re-legislation of the Terrorism Acts. The 1989 Act was only superseded by permanent legislation in 2000, lasting 11 years on the statute books. Meanwhile the 1974 Act remained on the books for 26 years, being renewed 25 times, with minimal Parliamentary debate on each occasion, before it was finally replaced.¹⁵² The paradigm of the temporary emergency was diminished, the colonial model of the permanent emergency being applied via continuously refreshed Terrorism legislation. The permanent emergency, as established above, can be classified as a concept that originated, and has boomeranged back from, the colonial space, Company and then Crown India having been made subject to permanent emergency rule. However, even cosmetic adherence to the temporary emergency paradigm was nullified by the Terrorism Act 2000. By 2000, the attention of Government and the Houses of Parliament was drawn to the seemingly permanent threat that was international terrorism.¹⁵³ The 2000 Act was resultingly designed as a permanent piece of legislation the colonial concept of the permanent emergency informing the drafting of new legislation. Making this assessment, it is valid to say that the 2000 Act drew on colonial concepts, the notion that an emergency could be indefinite having originated in the colonies.

Conclusion

Having discussed the Terrorism Act 2000, conclusions must now be reached on how UK emergency law has been impacted by the imperial boomerang.

¹⁴⁹ Prevention of Terrorism Act 1989, s27 ; Prevention of Terrorism Act 1974, s12 ; ‘Democracy Denied? The urgent need to rebalance power between Parliament and the Executive’ (House of Lords Delegated Powers and Regulatory Reform Committee November 2021), 11-12

¹⁵⁰ ‘Government by Diktat: A call to return power to Parliament’ (House of Lords Secondary Legislation Scrutiny Committee November 2021), 10

¹⁵¹ Ibid, 10

¹⁵² ‘Terrorism Prevention and Investigation Measures Bill: Public Bill Committee, First Sitting’ (House of Commons June 2011), 24

¹⁵³ See n155

Firstly, addressing the Article 15 ECHR, the *travaux préparatoires* are of limited use for deducing how the clause links to the colonies, colonial India particularly. The reasons provided for why Article 15 was included in the Convention, namely the better protection of rights in the emergency the prevention of abuse of emergency powers, smack of ill candour. Emergency powers frequently lead to the abuse of rights, not their better protection and the treaty drafting took place in a public forum, where more illicit motivations for Article 15 were likely to go unmentioned.

One of these illicit motivations was facilitating colonial rule by force. Reynolds argues that rising anti-colonial nationalisms in late 1940s encouraged the UK government to take up new emergency powers to preserve their hold on overseas possessions. Article 15 acted as the avenue through which colonial rule by force, in the style of Crown India, could be legitimised through a legal framework. Article 15 (ECHR) practice confirms that clause was intended to perpetuate colonial rule by authorising extreme violence, derogations triggered against anti-colonial dissent manifesting in regions like Aden and Kenya.

The substance of Convention obligations were hollowed out by the development of Article 15. Having extended human rights jurisdiction to the colonies through Article 56, the UK could enjoy the reputational benefits of this extension while retaining a convenient derogation option to rid themselves of responsibility for fulfilling those obligations.

The capacity to sustain colonial rule by force, inherent to Article 15 later rebounded to the Metropole. Systematic detention in Northern Ireland under the Special Powers Act 1922, a form of colonial counterinsurgency, was legitimised in the Metropole via Article 15 ECHR.

Turning to Article 56 ECHR, *travaux préparatoires* indicate the clause was shaped by the Belgian and British delegations. The British and Belgian delegations were transparent about the colonial interests that lay behind the drafting of the clause, this reducing, but not eliminating, the need to put weight on other sources of information to find out how Article 56 ECHR links to the colonies. The Belgians sought a mechanism through which the lesser civilisation of colonial possessions could be recognised in law, Article 56 ECHR's clause on 'local requirements' being a concession made to this ambition in the finalised treaty. The British delegation was more interested in the 'notification' clause however, the provision on the face of it representing a technique for protecting the autonomy of overseas possessions. However, this expressed motivation was not entirely sincere. The UK possessed a constitutionally diverse portfolio of overseas Dominions, Crown Colonies and Protectorates. Crown Colonies particularly did not require their autonomy to be protected by law, given they had very little autonomy from the United Kingdom to begin with.

Examining Colonial Office documents, it instead is apparent that Article 56 ECHR, like Article 15 ECHR, was designed to accommodate rule by force in the colonies, the ability to prevent human rights jurisdiction reaching overseas creating exceptional spaces decided upon by the Metropolitan government. In theory this exception creating power could be rationalised using civilisational discourses, UK political elites holding the perception that the less civilised colonies were not suitable locations for the enforcement of a full component of human rights. In practice, the exercise of Article 56 ECHR can be understood through reputational considerations. The UK sought to trigger Article 56 ECHR for as many colonial jurisdictions as possible, to acquire the credit for extending human rights jurisdiction and simultaneously undermine the more anti-colonial UN-led human rights regimes. Extension took place while the UK continued to evade genuine human rights accountability through the simultaneous triggering of Article 15 ECHR.

Returning to the civilisational hierarchies established by the Belgian delegation, it is evident that these rebounded to affect the UK in the *Tyrrer* and *Py* cases. The Isle of Man, unlike the Kanak (and colonial) territory of New Caledonia, was deemed under Article 56 to be a civilisation possessing the liberal heritage necessary for the full enforcement of Convention rights, New Caledonia as a colonial society not possessing the same required heritage. In these findings, the presence of civilisational discourses within the contemporary law of the ECtHR is evident, colonial notions of civilisational hierarchies having rebounded into domestic law.

Finally addressing the Terrorism Act 2000, conclusions must be reached on how it links to proscription in Crown India. Proscription is a colonial method of regulation. It originated in Crown India as a technique to delegitimise as criminal anti-colonial subversives and their desire for national liberation. The concept of terrorism is also a rebound from Crown India. The Anarchical and Revolutionary Crimes Act set a precedent for delegitimising 'terrorist' acts that was widened under the Terrorism Act 2000, the latter legislation establishing offences related to 'terrorist' speech and expression. When combined with the proscription of non-violent organisations, recently including far-right political groups and direct-action groups, Metropolitan freedom of expression and assembly is significantly undermined in its application to actors deemed terrorists; peaceful advocacy in their support having become unlawful under UK law. The duplicity of terror law has boomeranged back from the colonies, the expansion of state power inherent in the Terrorism Act 2000 undermining liberal principles as they apply to 'enemies within' designated as terrorists.

Mirroring colonial proscription, the power to proscribe groups is further exercised without regard to the right to self-determination, supporters of liberation movements like the PKK and

Tamil Tigers potentially facing criminal liability upon a proscription decision by the Home Secretary. In Crown India, anti-colonial groups like the Indian National Congress were similarly proscribed, modern proscription having retained the anti-liberation imprint of its predecessor. Political violence based on the principle of self-determination can on this basis delegitimised, alongside violence by other groups, under the Terrorism Act. Modern liberation organisations that engage in violence can be criminalised and stigmatised by legislation replicating both the form and effect of prior colonial proscription.

Yet, despite the substantive connections to colonial practice, the Terrorism Act was passed for reasons that had nothing to do with the Empire. It was legislated to compensate for the perceived risk of international terror. PLO activities and violence by European insurgents contributed to the sense that international terrorism amounted to a singular and existential threat to western civilisation. The interest of the State of Israel in distracting from its own repression of Palestinians, and broader west fears of Soviet-supported insurgencies helped further entrench this vision of international terrorism, associated with Palestinian violence, in the psyche of the west.

The UK could not ignore this radical shift in how global political violence was perceived. The US Embassy bombings and other attacks in Yemen and Uganda served as high-profile examples of the enduring risk of terrorist attacks prior to 2000, while 94 other terrorist incidents had occurred from 1976 to 1998: the persistent nature of these incidents stressing to the UK Parliament and Government the apparent need for permanent terrorism legislation.

The temporality of the 2000 Act eventually passed was thoroughly colonial. Building on the *de facto* permanence of the Prevention of Terrorism Act 1974, the 2000 Act scrapped sunset clauses (and the associated legislative renewal) completely. It became permanent legislation in reaction to the permanent emergency that was terrorism. The model of the permanent emergency thus fully supplanted the previous paradigm of the temporary emergency at the dawn of the 21st century. Anti-terror law moved in a colonial direction, the permanent proscription legislation of Crown India, without sunset clauses, being replicated in contemporary UK emergency law.

Conclusion

My thesis set out to explore how the imperial boomerang has affected the emergency law of the United Kingdom. I took a multi-stage approach to this question, first establishing how emergency law developed in the colonies, then moving to discuss how colonial provisions returned to the United Kingdom. My approach breaks down the traditionally compartmentalised way in which individuals think about law, the orthodox perception being

that laws are created by specific peoples at specific times without extensive outsider influence.¹⁵⁴

A wider understanding of transnational legal influence is required to properly understand how law takes shape; the exchange of legal ideas not being limited to two geographically proximate jurisdictions but also occurring between legal orders located further afield from each other. I thus communicate the reality that emergency law cannot be confined to sets of historically distinct norms and practices; colonial law having instead laid the groundwork for the UK emergency constitution as it is today.

My first chapter sought to explore how the relevant colonial law first took root. I noted that emergency law under the EIC possessed two strands. One strand was a largely discretionary martial law, capable of imposing massive violence on those rebelling against colonial rule. Violence was imposed in a racialised manner. The Indian races were considered children who had to be educated under despotic government, via violence, toward a higher level of civilisation. The Vellore Mutiny serves as an example of how the idea of the civilising mission was internalised within the exercise of emergency law, martial law and morally effective violence being deployed to prevent Indian subjects throwing off a civilising policy of Anglicisation introduced within the Presidency Armies.

The second strand of emergency law under the EIC was statutory. Beginning with Regulation 10, Company emergency regulations established regimes of legal and physical violence as mechanism by which morally effective violence could be imposed on the Indian populace. Examining Condos' work, this regime never elapsed, there always being a risk of colonial rebellion that justified keeping emergency regulations in place.

Turning to my second sub-question of how this emergency law was at a nexus with sovereignty and economic dynamics, emergency regulations served to protect exploitative economic relations on the Indian subcontinent. India was an immense source of wealth to the UK, a trove of resources and productive industries. Economic exploitation of the colony was protected and legitimised by emergency regulations, emergency law serving an umbrella function in its deployment over the Indian subcontinent.

The emergency itself was, in Schmittian terms, decided upon by a Governor-General. The 1833 Charter Act set up the Governor-General as the legislative and administrative supremo in India. He was responsible for ensuring the continued profitability of colonial India, the policies of Governor-General Cornwallis, introducing tax reforms and anti-corruption

¹⁵⁴ Samuel Huntington, *The Clash of Civilizations and Remaking of World Order* (Touchstone 1997), ch1-3 ; Quinn (n 9), 1-13

measures, acting as an exemplar of how the highest office in India was tasked with reducing costs to the Company.

Yet going beyond Schmitt to a wider understanding of sovereignty proffered by James Bryce, the Governor-General cannot be deemed the sole sovereign in Company India. subordinate Governors (in Madras and Bombay) and regional civil servants all acquiring partial sovereignty in the own adjudication of local emergency government. As such, they also acquired a share of the responsibility for ensuring colonial India continued to generate profits for the Company. The exception surrounding these responsibilities was able to persist on both the local and continental level, confirming Agamben's fear that an emergency, once instituted, can become permanent

In my second chapter, I asked how emergency law further developed under in the British Raj. My thesis demonstrates that broad emergency legislation was the norm under Crown rule, the States Offences Act 1857, Murderous Outrages Act 1867 and other legislation all assigning to the Crown a broad discretion to impose morally effective violence on those undermining the authority of the colonial state. The colonial emergency introduced a state of hyperlegality, establishing a series of special tribunals and a long-term 'axis of suspicion' by which security threats to the colonial state could be classified.

Emergency legislation, the basis of this hyperlegality, was promulgated by the Crown government due to its concern with the formal rule of law. Martial law and its vague necessity standard did not clarify what degree of force was lawful in the resolution of any given public order situation. Legal opaqueness undermined the formal rule of law, compromising the legitimacy of Crown rule which prided itself on adherence to the rule of law. Emergency law by contrast did spell out exactly what level of force was legal in any given situation. Emergency statute served an important propaganda function and tried to win the allegiance of colonial subjects by communicating to them that that ordinary legal forms were being accorded with, even during the emergency. The rule law was on the surface upheld under Crown rule.

Adherence to the rule of law linked to the notion of civilised despotism. Codified emergency law was seen as an improvement on Indian religious law. It supposedly established a civilised despotism, providing Indians with identity and an indication of what offences they might be liable for under law. Violence deriving from this civilised despotism and its law was considered a necessary component of the civilising mission; coercion inherent to emergency law serving to raise Indians to a higher level of civilisation.

Sovereignty under the Crown, alike to the arrangement under the Company, was distributed between the Governor-General of India, regional governors and his civil servants. Separately, officers of the British Indian Army and British Army in India formed a vocal lobby advocating

for the adoption of emergency statute over Common Law martial law. Officers disliked the limitation that a necessity standard placed upon their capacity to exercise counterinsurgency violence. Martial law, in accordance with Finlason's broader understanding of the doctrine, was instead practiced terrorising rebels against the Crown. Summary executions and the burning of villages, among other extremely coercive tactics, were used to annihilate racialised Indians; repression by the colonial government being deemed warranted when utilised against a supposedly savage race.

Proscription also manifested under the Crown, government employing statutes like the Indian Press Act 1910 and Criminal Law Amendment Act 1908 to criminalise and delegitimise those opposing colonial government; either in print or through organising in a collective. The concept of terrorism was also worked within this delegitimising trend by the Anarchical and Revolutionary Crimes Act 1919, the legislation exhibiting a liberal duplicity by removing from 'terrorists' (anticolonial insurgents) the political recognition of overseas violence and legal privileges (like jury trial) enshrined within the UK's Metropolitan constitution.

Exploring how Crown emergency legislation was at a nexus with economic and cultural dynamics, the Crown's legal network served to legitimise and protect avenues of economic exploitation. The violence inherent to emergency regulations also communicated to Indians their supposed incapacity to rule themselves, force being used to 'educate' Indians to a level of civilisation equal to that of the British. In other words, law deployed Orientalist logics in Crown India.

The next two chapters in my thesis sought to set out how emergency law from the colonies impacted the legal order of the Metropole.

DORA and DORCA granted Cabinet plenary legislative and administrative powers during the First World War. 'Cabinet Dictatorship' mirrored government of Crown India, the two forms of emergency government involving vast executive powers based on emergency codes. Yet the UK Government possessed reasons unrelated to the colonies for importing colonial concepts. The British government namely elected to grant Cabinet the legislative authority required to deal with the wartime threat of Germany. Similarity in terms of rationale lastly connects the emergency legislation of the UK Metropole and Crown India, both collections of laws serving the common purpose of protecting establishment economic interests against more popular forces (labour movements, communists and the Indian population respectively) that might inconvenience those interests.

In my final chapter, I asked how the emergency constitution of the contemporary UK has been affected by the imperial boomerang. To do this one must develop an understanding of how the UK's colonial history framed the European Convention on Human Rights.

Referring to Reynolds, emergency government, relying on special tribunals and tools like proscription, was increasingly commonplace in the colonies post 1948 when the UK sought to reclaim the initiative against the rising tide of nationalist forces and anti-colonial insurgencies. The UK sought to legitimise coercive emergency responses within a human rights framework.

Article 15 represented a legal structure around which colonial counterinsurgency and rule by force could be framed as an exercise in law and order against 'terrorism'. *Travaux préparatoires* for Article 15 omit evidence relating to this point, the openness of the drafting forum driving the UK government to be less transparent regarding its motives for emergency clauses. Practice by the UK confirms that Article 15 protected and perpetuated structures of colonial rule, derogations being triggered in several jurisdictions including Aden, Guiana, Mauritius and Rhodesia in response to strike action by local unions or outbreaks of anti-colonial violence.

The colonial framing of Article 15 had ramifications for the Metropole. The UK practiced a form of internal colonisation in Northern Ireland during 1971. A new set of powers to detain were brought into effect under the Special Powers Act 1922, these measures being introduced to combat the threat of insurgent violence posed by the Provisional IRA. The colonial-esque regime of detention powers were deemed lawful by the ECtHR in light of the UK's decision to derogate from its rights obligations through Article 15. The colonial framing of Article 15 led to the accommodation of a colonial-esque regime of incarceration in the Metropole, the boomerang of law designed for the colonies having affected what could be considered lawful legislative practice in the UK.

Article 56 ECHR was drafted for a different set of reasons to Article 15 ECHR. The Belgian delegation advocated for a local requirements clause in recognition of the alleged lesser civilisation of its colonial possessions. The UK had a different rationale for Article 56 ECHR. Arguing a notification clause was required to protect the constitutional autonomy of the UK's colonial possessions (not entirely honest reasoning when one considers the lack of autonomy in Crown colonies), Article 56 ECHR also accommodated colonial rule by force without human rights accountability, non-notification removing human rights jurisdiction from the UK's overseas possessions. Only reputational considerations encouraged the UK to make Article 56 notifications for tens of colonies in the late 1940's and 50's. The UK sought to buttress the legitimacy of its own colonial governments and challenge the principles of self-determination enshrined within the UDHR by extending Convention jurisdiction to the colonies, any substantive Convention obligations being nullified through the simultaneous exercise of Article 15 ECHR.

The civilisational hierarchies implicit within Article 56 rebounded to affect the Metropole. The *Tyrer* and *Py* cases demonstrate that in ECtHR jurisprudence, enforcement of a full complement of human rights is indissociable from liberal heritage and a supposedly higher civilisation within a nation. Disadvantaged under this hierarchy are colonial territories like New Caledonia which possess a substantial Kanak (and non-white) population, these places supposedly lying outside the liberal heritage of Europe and thus losing access to a full portfolio of human rights.

The Terrorism Act 2000 also bears the imprint of colonial India. The practice of prohibiting subversive groups and literature, even when no violence had been committed, could be found in Crown India under the Criminal Law Amendment Act, Indian Press Act, and other wartime legislation. Proscription was recycled into UK law through the 2000 Act; this legislation having also replicated the terrorism concept that originated in Crown India. The power to proscribe organisations, left at the discretion of the Home Secretary and with limited avenues for judicial redress, replicates the liberal duplicity of colonial anti-terror law. Freedom of speech and assembly is denied, within a supposedly liberal society, to violent, direct action and political groups deemed the enemy within.

Similarly to its colonial progenitor the 2000 Act can also be utilised to stifle the desire for anti-colonial liberation, the Home Secretary possessing a near absolute discretion to proscribe, among other groups, any violent liberation group and those who advocate for it.

Indeed, the Home Secretary has exercised her discretion thusly on multiple occasions, the proscription of the PKK and Tamil Tigers (as examples of a general trend) stigmatising groups that engage in political violence against repressive government. By delegitimising these groups through the terror label, the 2000 Act mirrors the depoliticising effect of the Crown proscription regime and associated terror legislation. The imperial boomerang is evident, the notion that violent groups can be criminalised and delegitimised for opposing repressive government moving from Crown India to the Metropole. The long-term risk of international terror pushed the UK government to the cast aside superficially temporary anti-terror legislation and sunset clauses in favour of permanent proscription regulations; a colonial-esque permanent system of emergency law and its associated rights restrictions having arrived in the UK consequently.

In terms of where my research should go from here, it would be a valuable inquiry to evaluate how the Civil Contingencies Act links to the colonies.¹⁵⁵ This appears *prima facie* to be an investigation with significant potential in terms of the imperial boomerang, the Civil

¹⁵⁵ Civil Contingencies Act 2004

Contingencies Act allowing the same kind of governance by executive decree that the emergency legislation facilitated in Crown India.

In my future PhD studies, I will also be redeploying my previously stated critical framing, that law can be heavily linked to the economic. Namely, I will be exploring how International Humanitarian Law surrounding and technology can be linked to arms corporations, my addressing the nexus between the law and the private sector.

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