

## Introduction

When A. V. Dicey declared in 1885 that ‘England is a country governed, as is scarcely any other part of Europe, under the rule of law’, he was expressing sentiments long shared by many of his compatriots.<sup>1</sup> For liberal public intellectuals of Dicey’s generation, the constitution was pervaded by a unique spirit of legalism which was embedded in English constitutional culture.<sup>2</sup> It ensured that all powers exercised by government were given by the law and exercised in conformity with it and that all were equally answerable to the law. It also meant that no Englishman could be deprived of his liberty save for a breach of the law as determined by a court.<sup>3</sup> This principle, famously articulated in Magna Carta, was not simply an abstract right: it was practically secured by the great writ of liberty, habeas corpus, which gave the common law judges a power to free anyone imprisoned without cause. By the time that Dicey was writing, the imprisonment without trial of British political dissenters, or

<sup>1</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed. (London, MacMillan, 1897), p. 175. Cf. Francis Palgrave, *The Rise and Progress of the English Commonwealth* (London, John Murray, 1832), vol. 1, p. 281.

<sup>2</sup> See also Edward A. Freeman, *The Growth of the English Constitution from the Earliest Times* (London, MacMillan, 1872); and W. E. Hearn, *The Government of England: Its Structure and Development* (London, Longman, Green Reader and Dyer, 1867).

<sup>3</sup> Dicey, *Law of the Constitution*, pp. 179–195.

even their prosecution for such crimes as seditious libel or conspiracy, seemed to be a thing of the past.<sup>4</sup>

At the same time that this liberal view of political opposition took root at the metropolis, the number of people defined and held as ‘political prisoners’ in Britain’s African empire increased sharply. The presence of large numbers of political prisoners here raised important questions about whether enemies of the state in the wider empire would enjoy the same protections offered by the rule of law as those in the metropolis. Those who celebrated the English conception of the rule of law did not consider it to be confined to domestic shores: rather, it also had a central place in British imperial thought. Part of the moral justification of empire was that it would bring the rule of law to ‘backward’ peoples, and free them from ‘oriental despotism’.<sup>5</sup> As Lord Carnarvon put it in 1874, it was Britain’s imperial duty to give ‘our native fellow-subjects [...] struggling to emerge into civilisation’ a system of wise laws, ‘where the humblest may enjoy freedom from oppression and wrong equally with the greatest’.<sup>6</sup> This did not mean introducing English forms of government into all her possessions. Even that most impeccable liberal John Stuart Mill thought that ‘[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement’,<sup>7</sup> and there was often much handwringing over when and whether particular communities could

<sup>4</sup> T. E. May, *The Constitutional History of England since the Accession of George III, 1760–1860*, 2nd ed., 2 vols. (London, Longman, Green, Longman, Roberts and Green, 1863), vol. 2, chs. 9 and 11.

<sup>5</sup> See Keally McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law* (New York, Oxford University Press, 2016), pp. 22–23; and Thomas R. Metcalfe, *Ideologies of the Raj* (Cambridge, Cambridge University Press, 1995), pp. 37–39.

<sup>6</sup> Quoted in C. C. Eldridge, ‘Sinews of Empire: Changing Perspectives’, in C. C. Eldridge (ed.), *British Imperialism in the Nineteenth Century* (London, MacMillan, 1984), p. 185; and (partially) in Peter J. Cain, ‘Character, “Ordered Liberty”, and the Mission to Civilise: British Moral Justification of Empire, 1870–1914’, *Journal of Imperial and Commonwealth History*, vol. 40:4 (2012), pp. 557–578 at p. 563.

<sup>7</sup> J. S. Mill, ‘On Liberty’, in *Collected Works*, vol. 18, ed. J. M. Robson (Toronto, University of Toronto Press, 1977), p. 224. Cf. J. F. Stephen, ‘Foundations of the Government of India’, *The Nineteenth Century*, vol. 14 (1883), pp. 541–568 at pp. 556–557. Historians have recently drawn attention to the contradictions for liberalism which empire entailed: see Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, University of Chicago Press, 1999); and Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, Princeton University Press, 2005).

be considered ready for representative institutions. In many parts of the empire, imperial subjects were meant to be treated in the way that the metropolitan disfranchised were treated: denied a political voice, but subject to a rational, modern and equal system of laws.<sup>8</sup> Nor did it mean exporting the common law to all parts of the empire. Although settlers were said to carry the common law with them to new territories,<sup>9</sup> in conquered or ceded lands, such as Quebec or the Cape of Good Hope, existing legal regimes created by other European imperial powers were not replaced.<sup>10</sup> Within the empire, multiple forms of legal order might co-exist,<sup>11</sup> with different sets of rules applying to different peoples, as with the different regimes of ‘personal law’ for Hindus and Muslims in India which sat alongside codified versions of English law,<sup>12</sup> or the use of customary law in Africa alongside systems based on European jurisprudence.<sup>13</sup> It was thus not the details of English law which imperialists sought to export but rather its animating spirit,<sup>14</sup> at the heart of which was a commitment to ‘the rudiments of procedural fairness’, secured by a jurisdictional hierarchy with Westminster and

<sup>8</sup> For such a view, advocating a clear code of law, but administered by ‘an enlightened and paternal despotism’, see T. B. Macaulay’s speech in *Parl. Debs.*, 3rd ser., vol. 19, col. 533 (10 July 1833).

<sup>9</sup> *Blankard v. Galdy* (1694) 2 Salk. 411; *Dutton v. Howell* (1694) Show. PC 24; *Anonymous* (1722) 2 P. Wms. 75. Only so much as was suitable to local conditions was so carried. See Mary S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Harvard University Press, 2004), pp. 1–4; and Daniel J. Hulsebosch, ‘The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence’, *Law and History Review*, vol. 21 (2003), pp. 439–482.

<sup>10</sup> See Christian R. Burset, ‘Why Didn’t the Common Law Follow the Flag?’, *Virginia Law Review*, vol. 105 (2019), pp. 483–542; and Hannah Weiss Muller, ‘Bonds of Belonging: Subjecthood and the British Empire’, *Journal of British Studies*, vol. 53 (2014), pp. 29–58.

<sup>11</sup> See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, Cambridge University Press, 2002).

<sup>12</sup> See D. A. Washbrook, ‘Law, State and Agrarian Society in Colonial India’, *Modern Asian Studies*, vol. 15:3 (1981), pp. 649–721; and Eric Stokes, *The English Utilitarians and India* (Oxford, Oxford University Press, 1959).

<sup>13</sup> See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, Cambridge University Press, 1985); and Thomas Spear, ‘Neo-traditionalism and the Limits of Invention in British Colonial Africa’, *Journal of African History*, vol. 44:1 (2003), pp. 3–27.

<sup>14</sup> Metcalfe, *Ideologies of the Raj*, p. 39.

Whitehall at the top.<sup>15</sup> One of the principal benefits of being under this imperial jurisdiction was that, like their disfranchised counterparts in the metropolis, all those who became British subjects could claim the right to a writ of habeas corpus to be freed from unlawful imprisonment, or the right to sue any official at common law for invading their private rights.<sup>16</sup> In the eyes of its defenders, the common law constitution provided the tools to ensure that liberties could be secure throughout the empire.

### Habeas Corpus and the Rule of Law

For jurists like Dicey, the most important legal tool to defend liberty was the writ of habeas corpus, which secured the release of anyone whose gaoler could not show the court a lawful reason for his detention.<sup>17</sup> Seventeenth-century legislation settled that no prisoner could be detained simply for reason of state or deported to evade the reach of the writ.<sup>18</sup> In 1861, the court of Queen's Bench confirmed that the writ had imperial reach, when the British and Foreign Anti-Slavery Society sought to prevent the extradition to the United States of a fugitive slave, John Anderson, who had killed a cotton planter while escaping from Missouri. After an application for a habeas corpus on his behalf had been rejected by the Queen's Bench in Toronto (on the ground that murder was an extraditable offence

<sup>15</sup> Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, Harvard University Press, 2016), p. 17.

<sup>16</sup> *Mostyn v. Fabregas* (1774) 1 Cowp. 161, *Campbell v. Hall* (1774) 1 Cowp. 204. Colonial governors were also liable to criminal proceedings in London, though only in very exceptional cases were they held accountable, even for murders. Joseph Wall, who had been Governor of Goree, was executed in London in 1802, after a trial for the murder twenty years earlier of a sergeant at the garrison. *The Times*, 21 January 1802, p. 2; 29 January 1802, p. 3. Attempts to prosecute Governor Picton of Trinidad and Governor Eyre of Jamaica did not succeed: see (for Picton) Lauren Benton and Lisa Ford, 'Island Despotism: Trinidad, the British Imperial Constitution and Global Legal Order', *Journal of Imperial and Commonwealth History*, vol. 46:1 (2018), pp. 21–46 and (for Eyre) R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford, Oxford University Press, 2005).

<sup>17</sup> On the writ, see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Belknap Press, 2010); and Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (New York: Oxford University Press, 2017).

<sup>18</sup> Star Chamber Act 1641, 16 Car. I c. 10; Habeas Corpus Act 1679, 31 Car. II, c. 2.

under the Webster–Ashburton treaty with the United States),<sup>19</sup> a writ from the English court was directed to the sheriff of York County in Canada, confirming the power of the Queen’s judges in London to supervise the actions of her officials throughout the empire.<sup>20</sup> Although legislation in the following year qualified this power – denying courts in England the right to issue the writ to any colony or dominion with a court which could do so itself<sup>21</sup> – it confirmed that the writ would be available, one way or another, throughout the empire.

The power of the writ to supervise imperial detentions without trial was demonstrated early in Victoria’s reign, when an attempt was made to move political prisoners from one part of the empire to another. In 1837, popular rebellions in both Lower Canada and Upper Canada were suppressed after martial law was declared.<sup>22</sup> With order restored, an ordinance was passed in Lower Canada to empower the executive to transport the leaders of the rebellion to Bermuda and to punish them with death should they return without permission.<sup>23</sup> This ordinance was disallowed by the imperial government, after the Whig opposition pointed out that the detainees would be freed on a writ of habeas corpus as soon as they arrived in Bermuda, ‘as the proceeding was obviously and notoriously illegal’.<sup>24</sup> In Upper Canada, where those considered most morally guilty were to be tried for treason, legislation was passed to

<sup>19</sup> *In the matter of John Anderson* (1860) in C. Robinson (ed.), *Reports of Cases Decided in the Court of Queen’s Bench*, vol. 20 (Toronto, Henry Rowsell, 1861), p. 124.

<sup>20</sup> The Court of Common Pleas in Toronto later freed Anderson on a technicality (*The Times*, 19 February 1861, p. 7; 27 February 1861, p. 12), rendering the intervention of the Westminster court unnecessary. By then, the English Law Officers had given an opinion that he could not be extradited under the Webster–Ashburton treaty, since it could not be murder for a person to kill someone attempting to enslave them: William Forsyth, *Cases and Opinions on Constitutional Law* (London, Stevens and Haynes, 1869), p. 373, Opinion dated 28 March 1861.

<sup>21</sup> Habeas Corpus Act 1862, 25 & 26 Vic. c. 20.

<sup>22</sup> See Colin Read and Ronald J. Stagg (eds.), *The Rebellion of 1837 in Upper Canada: A Collection of Documents* (Montreal, McGill-Queen’s University Press, 1985); and F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002).

<sup>23</sup> See Jean-Marie Fecteau, “‘This Ultimate Resource’: Martial Law and State Repression in Lower Canada, 1837–8”; and Steven Watt, ‘State Trial by Legislature: The Special Council of Lower Canada, 1838–41’, in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), pp. 207–247 and 248–278.

<sup>24</sup> *Parl. Debs.*, 3rd ser., vol. 44, col. 1084 (9 August 1838, Lord Lyndhurst); PP 1839 (2) XXXII. 1, No. 53, p. 58.

empower the Lieutenant-Governor to grant conditional pardons to a second rank of rebels without such trials, if they petitioned for a pardon after being charged with treason. Under this procedure, nine men were given pardons conditional on their being transported to the penal colony of Van Diemen's Land for periods varying between seven years and life.<sup>25</sup> When the men were transported, opposition MPs in London again invoked habeas corpus to secure their liberty.

On their arrival at Liverpool, en route to Van Diemen's Land, their case was taken up by the radical MP J. A. Roebuck, who applied for a writ of habeas corpus on the ground that they had been brought to England as 'State Prisoners' without having 'been legally accused of any crime'.<sup>26</sup> The prisoners' first habeas corpus application – to the Queen's Bench – failed, after Lord Denman ruled that the Canadian statute was valid and that 'transports from the colonies on commuted sentences had been habitually received in England in their passage to the penal settlements'.<sup>27</sup> However, doubts remained over whether they could be removed from England to Van Diemen's Land,<sup>28</sup> and a second habeas corpus application was lodged in the court of Exchequer. On this occasion, Lord Abinger held that their imprisonment was lawful, since even if the pardon was void – or the men had renounced it – they were to be regarded as lawfully in custody on a charge of treason. Crucially, however, he left open the question of whether such men, who were not 'convicts', could be removed from England under the 1824 Transportation Act.<sup>29</sup> If they could not, then it

<sup>25</sup> See Rainer Baehre, 'Trying the Rebels: Emergency Legislation and the Colonial Executive's Overall Legal Strategy in the Upper Canadian Rebellion', in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), pp. 41–61; Paul Romney and Barry Wright, 'The Toronto Treason Trials, March–May 1838', in *ibid.*, pp. 62–99; and Colin Reid, 'The Treason Trials of 1838 in Western Upper Canada', in *ibid.*, pp. 100–29. See also PP 1837–8 (524) XXXIX. 833, pp. 11–12; PP 1839 (54) XXXIV 197.

<sup>26</sup> The National Archives (UK) TS 11/679. Affidavit of J. A. Roebuck, 28 December 1838. Unless otherwise stated, all archival materials henceforth cited are held at the National Archives. A list of classes is to be found in the Abbreviations of Archival Sources.

<sup>27</sup> Alfred A. Fry, *Report of the Case of the Canadian Prisoners with an Introduction of the Writ of Habeas Corpus* (London, A. Maxwell, 1839), p. 82. See also *The Canadian Prisoners' Case* (1839) 3 *State Trials* new ser., 963.

<sup>28</sup> See 'Case Respecting Certain Canadian Prisoners: Opinion of the Attorney General and Solicitor General, 24 January 1839', TS 11/679.

<sup>29</sup> 5 Geo. IV c. 84, s. 17. *In the Matter of Parker and Others (the Case of the Canadian Prisoners)* (1839) 5 M. & W. 32 at 50.

was clear that they would have to be tried for treason in England, or released. It was this dilemma that eventually forced the government in July to pardon them.<sup>30</sup> Although both the government and the judiciary in this case were content to see the men remain in prison, the logic of the decision dictated that the men had to be freed or tried. This seemed to suggest that once the law was put into operation – in this case by the Whigs and Radicals – it would be self-operating, to ensure the principles of Magna Carta were upheld even in an imperial dispute.

At the same time, however, the level of protection offered by the writ was limited by the ability of the legislature to suspend its operation, or to create legal regimes permitting detention without trial. Although this was not done on the mainland after 1818, it was done routinely in Ireland as well as in the wider empire in the nineteenth century. In addition to suspensions of habeas corpus, Ireland also saw a number of Insurrection Acts and Coercion Acts between 1807 and 1833, which gave authorities the power to use emergency powers in proclaimed areas.<sup>31</sup> Further legislation passed between 1848 and 1871 authorised the detention without trial of those suspected of plotting rebellion against the government in Ireland.<sup>32</sup> For a jurist like Dicey, coercive legislation in Ireland presented a challenge:<sup>33</sup> how could such legislation be reconciled with his vision of the rule of law? At first glance, his comment that where ‘acts of state assume the form of regular legislation, . . . this fact of itself maintains in no small degree the real no less than the apparent supremacy of law’<sup>34</sup> seemed to indicate that in the end, he was prepared to endorse a formal view of rule *by* law, according to which anything done under the authority of a valid act of parliament was legitimate. Such a position would abandon the common lawyers’ view that the rule *of* law required

<sup>30</sup> On the government’s doubts regarding the issue of transportation, see PP 1840 [221] XXXI. 219 at p. 21, No. 23. See also Cassandra Pybus, ‘Patriot Exiles in Van Diemen’s Land’, in F. Murray Greenwood and Barry Wright (eds.), *Canadian State Trials*, vol. II (Toronto, Osgoode Society, 2002), at pp. 190–192.

<sup>31</sup> 47 Geo. III (sess. 2), c. 13; 3 Geo. IV, c. 1; 3 & 4 Wm. IV, c. 4.

<sup>32</sup> 11 & 12 Vic. c. 35; 12 & 13 Vic. c. 2; 29 & 30 Vic. c. 1; 29 & 30 Vic. c. 119; 30 & 31 Vic. c. 1; 30 & 31 Vic. c. 25; 31 Vic. c. 7; 34 & 35 Vic. c. 25.

<sup>33</sup> Yet another coercion act – the Protection of Person and Property (Ireland) Act 1881, 44 & 45 Vict. c. 4 – was passed shortly before he composed his famous treatise.

<sup>34</sup> Dicey, *Law of the Constitution*, p. 227. For a recent reading of this passage, see Mark D. Walters, *A. V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, Cambridge University Press, 2020), pp. 279–285.

fidelity to a deeper set of substantive principles which had been developed by the courts over centuries.<sup>35</sup> It would suggest that, for Dicey, the principle of parliamentary sovereignty could trump the rule of law. In fact, his position was more complex.

Both Dicey and his contemporaries assumed that English constitutional practice was suffused by a culture committed to protecting the substantive values found in the common law tradition. According to this view, the same ‘spirit’ or ‘habit’ of legality which pervaded the decisions of courts adjudicating contests about the rights of individuals also pervaded wider constitutional practice. It was animated by ‘a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the Statute or the Common Law’, and which had evolved over time.<sup>36</sup> At the heart of this political morality was a notion of accountability. Although parliament was legally sovereign, it was practically constrained by the need to conform to the will of the political nation which it represented, which was politically sovereign. Ministers were not only answerable to the common law courts for any breaches of the law, but they were also accountable to parliament, ‘the constitutional representatives of the public’, for the way they exercised those powers which lay in their discretion.<sup>37</sup> In these areas, they were – as Dicey famously expounded – expected to follow settled constitutional conventions, which also ensured that the will of the political nation was observed.<sup>38</sup> In Dicey’s mid-Victorian view, the will of the nation was animated by the spirit of the rule of law, and could act as a check against the potential tyranny of the rulers.<sup>39</sup>

<sup>35</sup> For the distinction, see the discussions in Paul P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, *Public Law* (1997), pp. 467–487; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004), chs. 7–8; Jeremy Waldron, ‘The Concept and the Rule of Law’, *Georgia Law Review*, 43:1 (2008), pp. 1–62; and Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’, in James Fleming (ed.), *Getting to the Rule of Law* (New York, NYU Press, 2011), pp. 3–32.

<sup>36</sup> Freeman, *The Growth of the English Constitution*, p. 109.

<sup>37</sup> Hearn, *The Government of England*, p. 99.

<sup>38</sup> See also Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (Ann Arbor, University of Michigan Press, 2013), pp. 60–61, 66.

<sup>39</sup> In the eighth (1915) edition, Dicey bemoaned the demise of this spirit, and the rise of party spirit, which he argued could not be associated with the authority of the nation. A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th ed. (London, MacMillan and Co, 1915), p. xii.



With this perspective, Dicey regarded parliament not as a potential instrument of tyranny, but as an institution which worked to complement the common law. This meant that he, and his Whig and Liberal contemporaries, did not feel that the rule of law was undermined if parliament on occasion felt the need to confer extraordinary powers on the executive: for such powers could be conferred only by ‘formal and deliberate legislation’,<sup>40</sup> and the legislature might be trusted to do so only when the rule of law was itself under threat. Although Irish Coercion Acts made Liberals uncomfortable, they thought such legislation could be justified, since they felt that in the context of the Land Wars of the early 1880s, the very preconditions for the existence of a rule of law did not exist in rural Ireland.<sup>41</sup> Those who saw the unrest as being driven by a small number of dangerous agitators felt (in Sir Charles Dilke’s words) that ‘by locking up a small number of the chiefs the rule of law might be restored’.<sup>42</sup> For Dicey, legislation such as the 1881 Act could be ‘tolerated as a necessary evil’ when used to deal with offences ‘condemned by the human conscience’. At the same time, he argued that coercion had to be accompanied by reforms to remove grievances. Coercion had to be accompanied by ‘just legislation, [to] remove the source of Irish opposition to the law’.<sup>43</sup> According to this view, emergency legislation depriving people of their liberty was justified if it was implemented by a legislature which was committed to the broader culture of the rule of law. In an imperial context, this was to assume that emergency legislation would be used only when it was clearly necessary, and would be justifiable in a common law idiom.

## Martial Law

If jurists were concerned to explain and justify the use of legislated coercive powers in Ireland, they also sought to explain martial law powers in a way consistent with their substantive view of the rule of

<sup>40</sup> Dicey, *Law of the Constitution*, pp. 336–337.

<sup>41</sup> ‘In Munster and Connaught the ordinary law is set aside. True freedom has ceased. . . . We do not refuse to put out a fire until we have ascertained where and how it originated.’ *The Times*, 14 December 1880, p. 9.

<sup>42</sup> Dilke Memoirs, B[ritish] L[ibrary] Add. MS. 43935, f. 12.

<sup>43</sup> A. V. Dicey, *England’s Case against Home Rule* (London, John Murray, 1886), pp. 115, 120.

law. Although not used on the mainland, martial law was widely used in the nineteenth-century empire. It was used to crush slave rebellions in Barbados in 1816 and again in Demerara in 1823.<sup>44</sup> It was used to suppress rebellions in Upper and Lower Canada in 1837–1838, and to crush the Kandy rebellion in Ceylon in 1848.<sup>45</sup> In the following year, martial law was also proclaimed in Cephalonia, where Britain acted as a ‘protecting sovereign’ by treaty.<sup>46</sup> It was used on five occasions in New Zealand in the 1860s, and again in 1882. Martial law was also regularly used at the frontiers of empire, as colonial settlers came into conflict with indigenous communities,<sup>47</sup> particularly – as shall be seen in what follows – in Africa. The nature of martial law was debated in London on numerous occasions in the nineteenth century after its use in parts of the empire, most heatedly in the ‘Jamaica controversy’ which followed the proclamation of martial law by Governor Edward Eyre in Jamaica in 1865.<sup>48</sup> These debates raised questions about whether and when the military had the right to punish or imprison civilians without the due process of an ordinary trial.

By the middle of the nineteenth century, it was a settled principle in international law that when an army occupied foreign territory in wartime, it would apply martial law.<sup>49</sup> According to the Duke of Wellington, this was ‘neither more nor less than the will of the general

<sup>44</sup> See Richard Gott, *Britain’s Empire: Resistance, Repression and Revolt* (London, Verso, 2011), pp. 208, 213; Emilia Viotti da Costa, *Crowns of Glory, Tears of Blood: The Demerara Slave Rebellion of 1823* (New York, Oxford University Press, 1994).

<sup>45</sup> See R. W. Kostal, ‘A Jurisprudence of Power: Martial Law and the Ceylon Controversy of 1848–51’, *Journal of Imperial and Commonwealth History*, vol. 28 (2000), pp. 1–34 at pp. 6–7. Martial law was also used in Ceylon in 1818 after a previous rebellion against British rule.

<sup>46</sup> On its status, see Benton and Ford, *Rage for Order*, pp. 102–112. The Lord High Commissioner of the Ionian Islands exercised a ‘High Police Power’ under the Constitution of 1817 which gave him the power to proclaim martial law, institute courts martial and order the removal of Ionian citizens from one island to another. See PP 1852 (567) XXXII. 323, No. 21, pp. 56ff.

<sup>47</sup> See e.g. the use of martial law against indigenous Australian subjects in 1840, in Robert Foster, Rick Hosking and Amanda Nettelbeck, *Fatal Collisions: The South Australian Frontier and the Violence of Memory* (Kent Town, Wakefield Press, 2001), pp. 13–28.

<sup>48</sup> Kostal, *A Jurisprudence of Power*; Priyamvada Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (London, Verso, 2019), pp. 83–126.

<sup>49</sup> As Francis Lieber put it in an unpublished work, ‘The Martial Law of hostile occupation – *occupatio bellica* – is recognized by the Law of nations as a necessary element of the *jus belli*’: Francis Lieber and G. Norman Lieber, *To Save the Country*:

who commands the army'. This was not, however, arbitrary rule, for as Wellington explained, the general commanding should lay down the rules and regulations according to which his will was to be carried out, which in his experience entailed using the local laws and local courts.<sup>50</sup> Forms of military law were also used in newly settled areas at the margins of empire before the establishment of a system of civilian courts, as in the early penal colony at Botany Bay.<sup>51</sup> But what was the role of martial law in territories under British rule with settled legal systems? In the aftermath of the Demerara rebellion, Sir James Mackintosh told the House of Commons that when 'the laws are silenced by the noise of arms, the rulers of the Armed Force must punish, as equitably as they can, those crimes which threaten their own safety and that of society'; however, 'as soon as the law can act every other mode of punishing supposed crimes is itself an enormous crime'.<sup>52</sup> The notion that martial law could be permitted only when the civilian courts could not sit had a long pedigree in English legal thought, and was reiterated by the Law Officers in 1838 when commenting on the powers of the Governor of Lower Canada to proclaim martial law.<sup>53</sup> In their view, the mere fact of proclamation conferred no new powers, so that ordinary law needed to be used when the courts could re-open.<sup>54</sup> This view was questioned by other lawyers, however, who argued that the crown did have a prerogative power to proclaim martial law, which was 'another law than that which you could get from parliament' and which overrode all other law.<sup>55</sup>

The division of opinion over martial law became much more overt in the debates over its use in Jamaica in 1865, when a rebellion in Morant Bay was brutally suppressed by the military. Martial law powers remained in place here for a month, even though the unrest had been quelled within days. During this time, 439 black Jamaicans

*A Lost Treatise on Martial Law*, ed. Will Smiley and John Fabian Witt (New Haven, Yale University Press, 2019) p. 87.

<sup>50</sup> *Parl. Debs.*, 3rd ser. cxv (1 April 1851), cols. 880–881.

<sup>51</sup> See, further, Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge, Cambridge University Press, 2010), ch. 4.

<sup>52</sup> *Parl. Debs.*, new ser., vol. 11, cols. 1046–1047 (1 June 1824).

<sup>53</sup> Opinion of Sir J. Campbell and Sir R. M. Rolfe, 16 January 1838, in Forsyth, *Cases and Opinions*, p. 198. For Sir Edward Coke's view, see John M. Collins, *Martial Law and English Laws, c. 1500–c. 1700* (Cambridge, Cambridge University Press, 2016), p. 155.

<sup>54</sup> In the seventeenth and eighteenth centuries, colonial governors had frequently closed courts in order to allow martial law to be proclaimed: see Collins, *Martial Law*, ch. 6.

<sup>55</sup> PP 1850 (106) XII. 35, p. 179, q. 5455 (Judge Advocate General Sir David Dundas).

were shot or executed after martial law trials. They included George Gordon, a mixed-race member of the Jamaican assembly, and strong critic of Eyre's, who had been moved from Kingston (which was not under martial law) to Morant Bay, to be tried by the military. Eyre's actions were defended by those who saw martial law as a lawful power. His greatest legal champion was W. F. Finlason, who argued that the crown had an inherent prerogative power to proclaim martial law in times of war and rebellion.<sup>56</sup> In his view, martial law entailed 'the *suspension* of the common law, and the application to the population of absolute, arbitrary, military power', and continued in force not simply until the actual insurrection had been suppressed, but until the complete restoration of peace.<sup>57</sup> In such situations, martial law courts could be set up to deal with offences 'arising out of the rebellion'. Their actions would not be susceptible to review by the common law courts, and the officers involved would have no need for subsequent indemnification.<sup>58</sup>

This view was challenged by the members of the Jamaica Committee which sought to prosecute both Eyre and the officers who had conducted Gordon's trial. It was also challenged by Chief Justice Cockburn, in the speech he gave to the grand jury in the (failed) case brought against the officers.<sup>59</sup> Their view was that there was no such thing as 'martial law' operating beyond the reach of the common law. Although it might be necessary for the crown and its agents to act outside the law in times of rebellion or war in order to preserve the state, such actions could be justified only by the necessity of the case, which was (in cases of dispute) to be decided by a jury.<sup>60</sup> Indemnity acts could be passed to protect those who acted in good faith during

<sup>56</sup> W. F. Finlason, *A Treatise on Martial Law* (London, Stevens and Sons, 1866), pp. 9–10. Cf. W. F. Finlason, *Commentaries upon Martial Law* (London, Stevens and Sons, 1867), pp. 88–90. Whether a war or rebellion existed was a matter of fact for the crown to determine, by an act of state. Finlason, *A Treatise on Martial Law*, pp. xxii, 14, 16.

<sup>57</sup> Finlason, *A Treatise on Martial Law*, pp. v–vi.

<sup>58</sup> Finlason, *A Treatise on Martial Law*, p. xvi.

<sup>59</sup> See Frederick Cockburn (ed.), *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the Case of The Queen against Nelson and Brand* (London: William Ridgway, 1867). Though the case stalled when the jury failed to find a true bill. For an analysis of Cockburn's address, see Kostal, *A Jurisprudence of Power*, ch. 6.

<sup>60</sup> Dicey, *Law of the Constitution*, p. 273.

martial law, but their aim was less to render illegal acts legal than to protect bona fide officials from vexatious lawsuits. Nor did martial law courts have any legal authority to inflict punishment: although it might be lawful to kill rebels while restoring peace, any execution inflicted by a martial law court was 'technically murder', which would require indemnification by the legislature after the conflict had ended.<sup>61</sup> According to this liberal view, actions done under martial law remained constantly subject to review according to the ordinary standards of the common law: unlawful actions committed by military officers under the guise of martial law would be punishable unless the officer could justify his action though a plea of necessity which would convince a common law jury. While legislative indemnities could be given, under the Diceyan view, such indemnities represented a parliamentary judgment that the illegal acts committed by the executive during the emergency were necessary. They were not intended to give protection for acts done out of malice or in bad faith.

Liberal jurists may have got the better of the argument about martial law during this episode, but they failed to translate their theory into practice by securing any convictions. Nor did the debates over martial law in Jamaica settle conclusively the status of martial law, which would remain contested (as shall be seen) into the next major imperial use of martial law in the Anglo-Boer War. Furthermore, while many jurists favoured Dicey's view that martial law was 'unknown to the law of England',<sup>62</sup> officials realised that martial law powers would continue to be used in the empire. The Colonial Office itself acknowledged that a proclamation of martial law initiated a distinct legal order when, in the aftermath of the Jamaica Rebellion, it issued a Circular Despatch with rules for the guidance of officials in the colonies who had to exercise extraordinary powers. While they were designed only to offer guidance, and had 'in no respect the force of law', Lord Carnarvon's regulations sought to implement lessons learned during the Jamaica crisis, and to prevent a repetition of the kind of brutality and lawlessness seen in Jamaica in 1865. The regulations dealt with the manner of proclaiming martial law when armed resistance had broken out which could not be

<sup>61</sup> Dicey, *Law of the Constitution*, p. 276. See also Forsyth, *Cases and Opinions*, pp. 559–560.

<sup>62</sup> Dicey, *Law of the Constitution*, p. 270.

dealt with by the civil authorities without military help. They also made provision for the Governor to give instructions to officers concerning ‘the punishment of offenders belonging to the civil population’ as well as ‘the continuance, resumption, or suspension of the ordinary tribunals’. Although acknowledging that the primary object of martial law was ‘not the punishment of offences, but the suppression of revolt’, the regulations did provide for the military trial of offenders. They stipulated that unless military reasons did not admit of a trial, offenders should be punished only after a trial before a court-martial consisting three officers. The accused were to be given every reasonable facility for making their defence, and all evidence was to be sworn. Records were to be kept and transmitted to the office of the Judge Advocate-General in London. Furthermore, no sentence should be imposed beyond the period of martial law, and penal servitude was not to be imposed.<sup>63</sup>

These regulations effectively rejected the view found in a number of older authorities that martial law could be resorted to only when the ordinary courts could no longer function, and anticipated that martial law would continue to be proclaimed in the colonies without prior authorising legislation. However, they did not settle the legal status of martial law. The Jamaica controversy and its aftermath therefore left certain questions unresolved – notably whether the courts could test the necessity of military action in times when martial law had been proclaimed, and whether they could order the release of those held in custody by the military, either with or without a military trial. These questions would be revisited again on a number of occasions in the later nineteenth and early twentieth centuries, providing an acid test as to how far the liberal view of men like Cockburn and Dicey would prevail.

### Legislating for Emergencies

If the liberals of the Jamaica Committee strove hard to ensure that a substantive vision of the rule of law would prevail throughout the empire, things often looked very different when seen far from the metropolis. It was not simply that many colonial officials openly flouted the rule of law, often acting wholly outside the law to

<sup>63</sup> For the regulations, see PP 1906 (Cd. 2905) LXXIX. 503, Appendix 1.

maintain control through simple violence<sup>64</sup> or convicting perceived troublemakers on flawed evidence and with little due process.<sup>65</sup> More significantly still, in many imperial contexts, law itself became the tool of conquest and oppression. The sovereign lawmaker in the empire did not speak for its subjects in the way Dicey felt the Westminster parliament spoke for the nation: here, the interests of the imperial sovereign in maintaining order were prone to trump any concerns for common law rights. This was a much more testing environment for the common law culture of the rule of law.

At the same time that imperial authorities stressed the need for colonial rule to be formally embedded in a rule of law, they were also prepared in many areas to grant emergency powers to administrators and to create ‘states of exception’, where the ordinary requirements of the rule of law were abandoned. Historians examining the prevalence of ‘exceptional’ states of rule within the empire have drawn on Carl Schmitt’s theory of the state of exception.<sup>66</sup> In Schmitt’s formulation, states of exception are those moments when a sovereign decision-maker must act outside the frame of ordinary law to restore the order which is necessary for the legal system to operate.<sup>67</sup> In such times, the ordinary legal regime – the

<sup>64</sup> See e.g. the response to the ‘Kooka Outbreak’ of 1872 in Punjab by the local Deputy Commissioner J. L. Cowan, in Mark Condos, *The Insecurity State: Punjab and the Making of Colonial Power in British India* (Cambridge, Cambridge University Press, 2017), pp. 103–139.

<sup>65</sup> See e.g. Richard Price, *Making Empire: Colonial Encounters and the Creation of Imperial Rule in Nineteenth-Century Africa* (Cambridge, Cambridge University Press 2008), pp. 316–334; and Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge, Cambridge University Press, 2010).

<sup>66</sup> See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), pp. 19–20; and Pramod K. Nayar, ‘Introduction’, in *The Trial of Bahadur Shah Zafar* (Hyderabad, Orient Longman, 2007), pp. lxvi–lxix.

<sup>67</sup> For Schmitt’s works, see esp. *Political Theology: Four Chapters on the Concept of Sovereignty* (1922), trans. G. Schwab (Chicago, University of Chicago Press, 2005); *Constitutional Theory* (1928), trans. and ed. Jeffrey Seitzer (Durham, Duke University Press, 2008); and *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, trans. and ed. Lars Vinx (Cambridge, Cambridge University Press, 2015). For commentaries and discussions, see esp. David Dyzenhaus (ed.), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (Durham, Duke University Press, 1998); David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford, Oxford University Press, 1997); Jens Meierhenrich and Oliver Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford, Oxford University Press, 2017); and Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, University of

*Rechtsstaat* – is unable to cope. Order must be restored by the sovereign, and the sovereign (in Schmitt's famous formulation) is he who 'decides on the exception'.<sup>68</sup> Schmitt did not see the state of exception as a juridical void, for in his view the sovereign dictator took action to defend a juridical entity, the state, which he saw as a concrete manifestation of the political unity of the people which preceded ordinary law. According to his view, the sovereign dictator stepped in to preserve a higher juridical order which ordinary law was powerless to defend against its 'enemy'.<sup>69</sup> If such a theory sought to offer a juridical justification for states of emergency in nation states, it had clear limitations when applied in the imperial state: for within the empire, the political unity which was to be maintained was that imposed by the coloniser on peoples defined – at least during the emergency – as 'enemies'. Furthermore, in many areas, 'legal regime[s] of exception [...] existed in tandem with the colonial rule of law':<sup>70</sup> they operated not as exceptions in the Schmittian sense, but as part of the ordinary law imposed on subject people by an imperial ruler, whose authority rested less on the rule of law than on what R. W. Kostal has dubbed 'a jurisprudence of power', made possible by the English theory of legislative sovereignty.

As a number of historians have pointed out, within the empire, law was not simply the beneficent repository of rights and protections which metropolitan champions of the common law defended. Rather, it was a tool 'to conquer and control indigenous people by

Chicago Press, 2005). For overviews of the debates over the reception of Schmitt, see Peter C. Caldwell, 'Controversies over Carl Schmitt: A Review of Recent Literature', *Journal of Modern History*, vol. 77 (2005), pp. 357–387.

<sup>68</sup> Schmitt, *Political Theology*, p. 5. According to the Schmittian view, emergency threats can never be dealt with by ordinary law: for even if the constitution were to provide for the executive to supersede the ordinary rules in times of crisis, it would remain for the executive to decide as a matter of fact whether a situation of crisis existed for it to suspend the law.

<sup>69</sup> On the distinction between friend and enemy, see Carl Schmitt, *The Concept of the Political*, ed. and trans. George Schwab (Chicago, University of Chicago Press, 2007), pp. 25–37.

<sup>70</sup> Elizabeth Kolsky, 'The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India', *American Historical Review*, vol. 120:4 (2015), pp. 1218–1246 at p. 1223. Cf. Mark Condos, 'License to Kill: The Murderous Outrages Act and the Rule of Law in Colonial India, 1867–1925', *Modern Asian Studies*, 50:2 (2015), pp. 1–39.



the coercive use of legal means'.<sup>71</sup> In the imperial context, rule *by* law was often more important than the rule *of* law. It could be used for what John Comaroff and Jean Comaroff have described as 'lawfare': imperialism's 'use of its own rules [...] to impose a sense of order upon its subordinates by means of violence rendered legible, legal and legitimate by its own sovereign word'.<sup>72</sup> If, in one register, law was a means to control violence and protect rights, in another register it was a tool for imposing rule and asserting sovereign power. In this context, due process rights could be marginalised by the exercise of imperial sovereign will. Such was the case when, in early 1858, the Mughal Emperor Bahadur Shah II, who had been adopted as the figurehead for the rebels in the 'Indian Mutiny' of 1857 and was still the theoretical sovereign power in India, was tried and convicted by a British Military Commission in the Red Fort in Delhi for murder, rebellion and treason, in a trial designed to present a narrative of the rebellion as a 'Mahommedan conspiracy' and to justify his removal from India. In this case, '[t]he rule of law [...] spoke with the voice of the conqueror, with all the right trappings of power.'<sup>73</sup>

<sup>71</sup> John L. Comaroff, 'Colonialism, Culture and the Law: A Foreword', *Law and Social Inquiry* (2001), pp. 305–314 at p. 306. See also Condos, *The Insecurity State*. For twentieth-century studies of colonial violence, see Taylor C. Sherman, *State Violence and Punishment in India* (Abingdon, Routledge, 2010); David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London, Weidenfeld & Nicolson, 2005); Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London, Jonathan Cape, 2005); Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (Philadelphia, University of Pennsylvania Press, 2013); and Brian Drohan, *Brutality in an Age of Human Rights: Activism and Counterinsurgency at the End of the British Empire* (Ithaca, Cornell University Press, 2017).

<sup>72</sup> J. L. Comaroff and J. Comaroff, 'Law and Disorder in the Postcolony: An Introduction', in J. L. Comaroff and J. Comaroff, *Law and Disorder in the Postcolony* (Chicago, University of Chicago Press, 2006), pp. 29–30.

<sup>73</sup> Anindita Mukhopadhyay, *Behind the Mask: The Cultural Definition of the Legal Subject in Colonial Bengal (1715–1911)* (Oxford, Oxford University Press, 2006), p. 26. For the trial, see Tom Lloyd, 'Bandits, Bureaucrats and Bahadur Shah Zafar: Articulating Sovereignty and Seeing the Modern State Effect on the Margins of Colonial India, c. 1757–1858', in Crispin Bates (ed.), *Mutiny at the Margins: New Perspectives on the Indian Uprising of 1857, vol. 1: Anticipations and Experiences in the Locality* (London, Sage Publications, 2013), pp. 1–24; Nayar, 'Introduction'; and Lucinda Downes Bell, 'The 1858 Trial of the Mughal Emperor Bahadur Shah II Zafar for "Crimes against the State"', University of Melbourne PhD thesis, 2004, p. 131. For the proceedings, see PP 1859 (sess. I) (162) XVIII. 111.

Diceyan arguments about the nature of martial law, or the legal and constitutional protections for individual liberty, were entirely redundant in parts of the empire like India, which had created statutory regimes for detention without trial and martial law early in the nineteenth century. In 1818, Bengal's Regulation No. III provided for the detention of state prisoners on the orders of the Governor in Council 'for reasons of State' and 'without any immediate view to ulterior proceedings of a judicial nature'.<sup>74</sup> This was not a temporary suspension of habeas corpus, which might spring back into life when the emergency had passed – as was the norm in the motherland – but was permanent legislation, which gradually extended over all India and was to remain in place until independence.<sup>75</sup> On occasion, detainees challenged the legality of their detention under this legislation, but without success. As Justice J. P. Norman of the High Court at Fort William put it in 1870, 'the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor General in Council an exceptional power'.<sup>76</sup> This was to acknowledge the power of the sovereign to determine what was necessary to preserve order, but without Dicey's common law cultural baggage.

Nor did India have to worry about the qualms pertaining to martial law which so agitated the Jamaica Committee. Legislation had been passed in India in 1804 empowering the Governor General in Council to proclaim martial law and set up courts martial for the 'immediate punishment' of persons owing allegiance to the British government who were taken while

<sup>74</sup> PP 1821 (59) XVIII. 107 at p. 7. Similar legislation was passed in the other Presidencies: Regulation II in Madras in 1819 (PP 1821 (158) XVIII. 195 at p. 69) and Regulation XXV in Bombay in 1827 (PP 1829 (201) XXIII. 195 at p. 299). It was subsequently extended to cover all India: see Act No. XXXIV of 1850 (An Act for the Better Custody of State Prisoners), PP 1852 (338) XXXVI. 37 at p. 46, State Prisoners Act 1858, cited in John Reynolds, *Empire, Emergency and International Law* (Cambridge, Cambridge University Press, 2017), p. 85.

<sup>75</sup> For instance, it was used to hold Nilmani Singh, the Zemindar of Pachete in the 1857 rebellion: see the warrant in PP 1857–1858 (2449) enc. 445 in No. 1, p. 187; for the background, see Ata Mallick, 'The Resurgence of a Marginalized Society: 1857 Rebellion and the Santal Psychology', *Proceedings of the Indian History Congress*, vol. 76 (2015), pp. 444–454.

<sup>76</sup> *In the Matter of Ameer Khan* [1870] 6 *Bengal Law Reports* 392, Hussain, *Jurisprudence of Emergency*, pp. 92–95. Imperial legislation in 1833 had empowered the Governor General to legislate for the safety and peace of India without the concurrence of his council: 3 & 4 Wm. IV, c. 85, s. 49.

committing any overt act of rebellion.<sup>77</sup> By virtue of its provisions, in May 1857, martial law was proclaimed across northern India in response to the outbreak of the ‘Mutiny’, suspending the operation of the criminal courts and providing for martial law courts. This was followed by a raft of further enactments which increased the power to try rebels summarily in military tribunals, without legal argument or appeal. Under these enactments, the Governor General in Council was empowered to authorise ‘any person’ to issue a commission to try any Indian accused of a crime against the state, or any other ‘heinous crime’.<sup>78</sup> In December 1857, the Governor General, Lord Canning, reported to the East India Company in London that ‘[t]hese enormous powers have been largely exercised’, having been entrusted not only to military officers, but also to ‘civil officers and trustworthy persons not connected with Government, who under martial law properly so called would have no authority’, but who could be used in areas of the country where there were ‘no officers to spare for such purposes’.<sup>79</sup> Over 3,000 were executed as a result of trials before these commissions, many being strapped to the mouths of cannons and then blown to pieces.<sup>80</sup> The response of the authorities in India to the shock of the ‘Mutiny’ was to repress it brutally, abandoning any fidelity to the rule of law by the manner of the trials, and abandoning a sense of humanity in the methods of execution, which were calculated to desecrate the bodies of the condemned. The ‘Mutiny’ and its brutal repression has been seen as a turning point in attitudes towards governance in India;<sup>81</sup> and it has also been seen as influencing the way Governors in other colonies – such as Edward Eyre – reacted to the danger of insurrection.<sup>82</sup>

<sup>77</sup> Regulation X of 1804. For a critical view of the use of these provisions in 1817, see R. Spankie’s note of 27 April 1818 in William Hough, *The Practice of Courts Martial and Other Military Courts* (London, Parbury, Allen & Co., 1834), pp. 345–350.

<sup>78</sup> The relevant acts were Acts No. VIII, XI, XIV and XVI of 1857, discussed in A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, Oxford University Press, 2004), pp. 77–78. The acts granted no power to deal with ‘natural born subjects born in Europe’.

<sup>79</sup> PP 1857–1858 (26) XLIV. Pt I.1, pp. 3–4.

<sup>80</sup> For the figures, see Downes Bell, ‘The 1858 Trial of the Mughal Emperor Bahadur Shah II Zafar’, p. 131.

<sup>81</sup> See Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, Princeton University Press, 2010).

<sup>82</sup> See Jill C. Bender, *The 1857 Indian Uprising and the British Empire* (Cambridge, Cambridge University Press, 2016).

However, India was atypical in having such extensive legislative powers: unlike many parts of the empire (and indeed the metropolis), Indian legislation gave its governors a permanent, standing authority to abandon the rule of law, and implement the jurisprudence of power by making the exception routine. Furthermore, Indian subjects were not equal before the law, with ‘European British subjects’ enjoying greater rights than Indians.<sup>83</sup> Whether other parts of the British empire would show a greater fidelity to a substantive view of the rule of law than was shown by these Indian practices remained open to debate.

### *Ad hominem* Legislation

As shall be seen in this study, detention without trial and martial law were frequently used in British colonial Africa. For the most part, Africa did not see the kind of general legislation authorising the proclamation of martial law or the detention of opponents which was a feature of Indian rule. Although the second half of the twentieth century would see emergency powers codified through orders in council throughout the empire, in the era before the First World War martial law retained the ambiguous legal status which had been the subject of so much discussion after 1865. Nor was the Colonial Office keen on giving general powers to detain without trial in Africa. When the Gold Coast legislature passed an ordinance in 1889 to authorise the Governor to detain anyone as a ‘political prisoner’, it was disallowed, since it was felt that such power should not be conferred by general legislation.<sup>84</sup>

Instead, the preferred method in this part of the empire was to pass *ad hominem* legislation to authorise the detention of specific individuals. As with suspensions of habeas corpus, this kind of legislation had a pedigree dating back to the reign of William III.<sup>85</sup>

<sup>83</sup> For instance, section 81 of the Indian Code of Criminal Procedure of 1872 (Act X of 1872) gave only ‘European British Subjects’ a right to challenge unlawful detentions in the High Court. See, further, Kolsky, *Colonial Justice in British India*, ch. 2.

<sup>84</sup> CO 96/205/1270, discussing Gold Coast Ordinance No. 21 of 1889.

<sup>85</sup> An act of 1696 authorised the continued detention of five men who had been held under a habeas corpus suspension act (8 & 9 Wm. III, cc. 4–5; the legislation was renewed in 1 Anne c. 23, 1 Geo. I, s. 2, c. and 1 Geo. II, s. 1 c. 4). The last of these died in custody in 1736: see Tyler, *Habeas Corpus in Wartime*, pp. 43–47; and John Bernardi, *A Short History of the Life of Major John Bernardi* (London, J. Newcomb, 1729).

Such legislation had also been passed in Westminster more recently, with an act in 1816 to authorise the detention of Napoleon Bonaparte at St Helena. After his defeat at Waterloo, Napoleon had surrendered to the British navy, claiming to put himself under the protection of British law.<sup>86</sup> After briefly considering returning him to France, the British government spent much time pondering over whether they were permitted by international law to continue to hold him as a prisoner of war.<sup>87</sup> Eventually, it was decided to confine him at St Helena, a remote island in the South Atlantic, in order to avoid any embarrassing legal questions which might arise were he to be kept in England. When news of this plan became public, a press campaign was launched by the radical lawyer Capel Lofft, who argued that ‘*deportation, or transportation, or relegation, cannot legally exist in this country, except where the law expressly provides it on trial and sentence*’.<sup>88</sup> Fearing that a habeas corpus application might be brought, the government swiftly gave instructions that Napoleon should be dispatched immediately to St Helena, without being admitted to land on British shores.<sup>89</sup> Legislation was subsequently passed to remove any doubts about the lawfulness of his removal and detention, by deeming him to be a prisoner of war, and to indemnify those responsible for his incarceration hitherto from any possible legal liability for their actions.<sup>90</sup>

<sup>86</sup> Michael John Thornton, *Napoleon after Waterloo: England and the St. Helena Decision* (Stanford: Stanford University Press, 1968), p.28. For the legal issues surrounding his detention, see R. A. Melikan, ‘Caging the Emperor: The Legal Basis for Detaining Napoleon Bonaparte’, *Tijdschrift voor Rechtsgeschiedenis*, vol. 67 (1999), pp. 349–362; and Renaud Morieux, *The Society of Prisoners: Anglo-French Wars and Incarceration in the Eighteenth Century* (Oxford, Oxford University Press, 2019), pp. 358–368.

<sup>87</sup> On 2 August 1815, a convention was signed between representatives of the allied powers in Paris declaring that Napoleon was their prisoner, and that his custody was entrusted to the British government, which bound itself to fulfil its engagements under this treaty. *British and Foreign State Papers 1815–1816* (London, James Ridgway and Sons, 1838), p. 200.

<sup>88</sup> *Morning Chronicle*, 2 August 1815.

<sup>89</sup> Lord Melville, First Lord of the Admiralty added, ‘We may possibly have to apply to Parliament for their sanction to what we are doing respecting Bonaparte and the safe custody of his person, but we must do our duty in the meantime’, quoted in H. Hale Bellot, ‘The Detention of Napoleon Buonaparte’, *Law Quarterly Review*, vol. 39 (1923), pp. 170–192 at p. 184.

<sup>90</sup> See *Parl. Debs.*, vol. 32, col. 665 (19 February 1816); vol. 33, cols. 213ff. (12 March 1816) and 1012ff. (8 April 1816); 56 Geo. III cc. 22 and 23.

In the second half of the nineteenth century, *ad hominem* laws of the kind used against the former emperor became the favoured device in many parts of the empire to authorise the detention of rulers who obstructed imperial expansion and their removal to distant parts of the empire, such as the Seychelles. The first leader to be exiled to the Seychelles under special legislation made for the purpose was Abdullah, Sultan of Perak on the Malay Peninsula.<sup>91</sup> Abdullah's case illustrates a pattern of official conduct which would be echoed in Africa as the colonial authorities sought to remove troublesome local rulers there. Britain had recognised Abdullah's position as Sultan in the 1874 treaty of Pangkor, in return for an agreement to receive a British Resident on whose advice he was to act in 'all questions other than those touching the Malay religion and custom'.<sup>92</sup> Tensions soon grew between the Sultan and the new Resident, J. W. W. Birch, who began actively to assert what he saw as British rights under the treaty and set about reforming the collection of taxes and the administration of justice. Birch's enthusiasm for increasing British control was shared by the Governor, W. F. D. Jervois, who proposed that Perak should henceforth be governed by British officers acting in the Sultan's name.<sup>93</sup> Faced with the threat of deposition, Abdullah agreed to Jervois's proposal, which was implemented in October 1875.<sup>94</sup> However, two weeks after the proclamation was issued implementing it, Birch was murdered, while posting notices announcing it.

It was this event which would eventually lead to Abdullah's deposition and deportation, but only after a number of other steps had been taken to bring Birch's killers to account. In March 1876, several villagers were tried

<sup>91</sup> See Cheah Boon Kheng, 'Malay Politics and the Murder of J. W. W. Birch, British Resident in Perak, in 1875: The Humiliation and Revenge of the Maharaja Lela', *Journal of the Malaysian Branch of the Royal Asiatic Society*, vol. 71 (1998), pp. 74–105; and Cheah Boon Kheng, 'Letters from Exile: Correspondence of Sultan Abdullah of Perak from Seychelles and Mauritius, 1877–1891', *Journal of the Malaysian Branch of the Royal Asiatic Society*, vol. 64 (1991), pp. 33–74.

<sup>92</sup> *Enquiry as to Complicity of Chiefs in the Perak Outrages* (Singapore, 1876), p. 3. Cf. Emily Sadka, *The Protected Malay States, 1874–1895* (Kuala Lumpur, University of Malaya Press, 1968), p. 79n.

<sup>93</sup> PP 1875 (c. 1320) LIII. 55, p. 85, enc. 1 in No. 26; *Enquiry as to Complicity of Chiefs in the Perak Outrages*, p. 6; PP 1876 (c. 1505) LIV. 287, No. 49, p. 31 at pp. 35–36.

<sup>94</sup> PP 1876 (c. 1505), p. 47, enc. 10 in No. 49; p. 50, enc. 15 in No. 49; Sadka, *The Protected Malay States*, p. 90.

for the murder in a Malay court.<sup>95</sup> One of the defendants was executed after admitting that he had stabbed Birch. This did not, however, end the matter, for he also indicated that he had acted under the orders of Maharaja Lela, one of the Perak Malay chiefs.<sup>96</sup> Jervois had long suspected this man of instigating the crime, and had also harboured suspicions against a number of other leaders for resisting the British troops sent to restore order after the murder. A number of them were consequently taken into custody in Singapore, where they were held pending the findings of a commission set up to inquire into their complicity in the 'Perak outrages'.<sup>97</sup> To authorise their detention while the inquiry proceeded, an ordinance modelled on Indian legislation was passed in Singapore.<sup>98</sup> Suspicion soon fell on Abdullah,<sup>99</sup> whom Jervois wanted to summon to Singapore to answer accusations against him.<sup>100</sup> Given concerns over whether 'the Sultan of a protected State' could be held under the ordinance,<sup>101</sup> Abdullah was requested to come voluntarily to exonerate himself.<sup>102</sup> Since his status as sovereign in Perak also meant that he could not be sent back there for trial, it was decided that his case would be treated as a political one, with the executive council of the Straits Settlements sitting as a commission of inquiry into his actions.<sup>103</sup> A precedent for this mode of proceeding was found in the commission of inquiry held in India in 1873 into the conduct of the Gaekwar of Baroda.<sup>104</sup> Setting aside earlier doubts, a decision was taken to hold

<sup>95</sup> PP 1876 (c. 1512) LIV. 669, No. 26, pp. 32, 34; No. 50, p. 54. The court was appointed by Abdullah, but with British assessors appointed by Jervois.

<sup>96</sup> P. L. Burns and C. D. Cowan, *Sir Frank Swettenham's Malayan Journals, 1874-1876* (Kuala Lumpur, Oxford University Press, 1975), p. 330; and PP 1876 (c. 1512), No. 50, p. 54; enc. 1 in No. 50, p. 55 at p. 60. See also Cheah Boon Kheng, 'Malay Politics and the Murder of J. W. W. Birch', p. 85.

<sup>97</sup> PP 1877 (c. 1709) LXI. 395, enc. 2 in No. 6.

<sup>98</sup> Ordinance No. IV of 1876, CO 882/3/11, p. 2, modelled on Bombay's Regulation 25 of 1827.

<sup>99</sup> PP 1877 (c. 1709), enc. 1 in No. 14, p. 14. <sup>100</sup> PP 1877 (c. 1709), p. 90, No. 77.

<sup>101</sup> Paraphrase of telegram from the Governor, 13 August 1876. He added, 'it is doubtless necessary to try, & important to convict: but it is also very desirable to leave no door open to objections being afterwards raised on the ground that we have exceeded our powers'. Minute dated 20 August 1876, CO 273/84/10357.

<sup>102</sup> PP 1877 (c. 1709), enc. 2 in No. 77, p. 95. <sup>103</sup> PP 1877 (c. 1709), No. 27, p. 51.

<sup>104</sup> Minute dated 16 October 1875, CO 273/84/12088. On the Gaekwar of Baroda's case, see M. P. Kamarkar, 'A Study of British Paramountcy: Baroda (1870-75)', *Proceedings of the Indian History Congress*, vol. 24 (1961), pp. 225-237; and I. F. S. Copland, 'The Baroda Crisis of 1873-77: A Study in Government Rivalry', *Modern Asian Studies*, vol. 2:2 (1968), pp. 97-123; Benton, *A Search for*

Abdullah under the Straits Settlements' State Prisoners Ordinance while the inquiry proceeded,<sup>105</sup> and to exile him somewhere in the empire, if the case against him was made out, with legal cover being provided 'by virtue of a special ordinance'.<sup>106</sup>

In the ensuing proceedings, Abdullah was accused of conspiracy to murder, but was not given any form of trial. The council decided not to recall witnesses examined by the commissioners so that Abdullah could cross-examine them, since this would simply draw out the proceedings. As Jervois saw it, even if the case turned out to be 'not proven', the Sultan 'would still of necessity have to be dealt with summarily'.<sup>107</sup> Since this was not a criminal trial, but a political inquiry, it would be sufficient if the British authorities satisfied their own consciences that the evidence was strong enough to justify his removal from Perak.<sup>108</sup> The council duly concluded that Abdullah was implicated in the murder, whereupon the Colonial Office decided that he (and a number of other chiefs) should be sent to the Seychelles. The Governor of Mauritius was asked to prepare the necessary legislation to authorise their detention, and was informed 'that they are political prisoners who need not be considered objectionable as ordinary criminals would be'.<sup>109</sup> Abdullah sailed for

*Sovereignty*, pp. 250–260; and C. L. Tupper, *Indian Political Practice: A Collection of the Decisions of the Government of India in Political Cases* (Calcutta, 1895; reprinted Delhi, 1974), vol. I, pp. 49–54.

<sup>105</sup> PP 1877 (c. 1709), No. 45, p. 67.

<sup>106</sup> Carnarvon minuted on 10 October 1876, 'I believe that the Seychelles may perhaps be the safest & best. India will involve trouble with the Indian Govt: Ceylon is perhaps too near: Robben Island needs the consent of the Cape Govt: other places are objectionable as regards climate: but the Seychelles combine most considerations.' W. R. Malcolm noted on 14 October 1876 that, while Abdullah would not be in legal custody on the high seas, 'if he is placed on board a ship which goes direct to Mauritius this may be chanced'. CO 273/84/12088.

<sup>107</sup> PP 1877 (c. 1709), p. 70, No. 51.

<sup>108</sup> PP 1877 (c. 1709), p. 90 at p. 91, No. 77; p. 71, No. 53.

<sup>109</sup> Minute by R. G. W. Herbert, 22 December 1876, CO 273/85/15085; PP 1877 (c. 1709), p. 82, No. 73. At the end of the year, Maharaja Lela was sent back to Perak to stand trial, along with six others. Some officials in London were troubled by this. As R. H. Meade noted, 'It will never do to hang the tools when the legal Head of the State who gave the orders gets off with what is after all a nominal punishment' (Minute of 9 October 1876, CO 273/84/12088, cf. 23 December 1876, CO 273/85/15169). However, Jervois insisted on carrying out the sentences and the men were hanged on 20 January 1877.



the Seychelles in July 1877, the first political prisoner to be sent there.<sup>110</sup>

*Ad hominem* detention laws would see their most extensive use in Africa, where the legislation passed to authorise Abdullah's detention was often invoked as a model.<sup>111</sup> The passage of such legislation – detention by legislative fiat – was by definition an assertion of formal sovereign power: detention by force of a sovereign decree, rather than by virtue of a court's decision. As such, it savoured more of Schmitt than Dicey. Nonetheless, the fact that, in each instance, colonial administrators were compelled to pass ordinances to legalise their incarceration – in order to remove the threat of habeas corpus – was itself significant, since it opened some space for wider rule of law arguments to come into play. Colonial administrators were subject to two possible constraints. The first was an 'internal', bureaucratic constraint. Since local legislation was liable to disallowance by the Home government, ministers and officials in Whitehall and Downing Street had to be persuaded of its necessity. These officials were in effect a surrogate for the supervising parliament which Dicey had so lauded: and how far they sought to ensure that the detention of political prisoners in times of emergency was justified might depend on the degree of their own personal commitment to the rule of law, and on the weight of wider political pressures exerted on them, for instance by parliamentarians, the press and pressure groups such as the Aborigines Protection Society. The second was the 'external' constraint which might be offered by legal challenges. Although there were many practical impediments in the way of detainees getting to court, some challenges were made to the lawfulness of *ad hominem* laws, raising the question whether such subordinate legislation was compatible with the rights given by Magna Carta or the principles of the common law. How far such considerations would act as a constraint is another question, and one which will be explored in this book.

<sup>110</sup> Smith to Knutsford, PP 1890–1 (378) LVII. 513, 11 June 1891, No. 70, p. 61. On his exile, see Robert Aldrich, *Banished Potentates: Dethroning and Exiling Indigenous Monarchs under British and French Colonial Rule 1815–1955* (Manchester, Manchester University Press, 2018), pp. 107–109.

<sup>111</sup> In fact, the legislation drafted for Abdullah was itself in turn partly inspired by legislation passed at the Cape of Good Hope in 1874, to allow the continued detention there of the Hlubi chief Lngalibalele: Cape Act No. 3 of 1874, discussed in Chapter 3.

### Emergency Law in East Africa

Although the kind of emergency laws found in India were not enacted in most of Britain's African empire, one area which did make legislative provision for detention without trial was East Africa. This was an area where Indian law had long exerted a strong influence, for when the British acquired extraterritorial jurisdiction in Zanzibar, they made the Indian legal codes the applicable law.<sup>112</sup> As British jurisdiction expanded in East Africa, so Indian law followed it. It was extended first to the protectorate of Witu, which was acquired in 1890 as part of the Heligoland settlement with Germany.<sup>113</sup> Indian law was then applied in July 1897 to the East Africa Protectorate, which had been proclaimed over the territory between Zanzibar and Uganda in 1896.<sup>114</sup> It was next extended in August 1902 to Uganda, where a protectorate had been proclaimed in 1894, following the demise of the Imperial British East Africa Company.<sup>115</sup>

Indian law was occasionally used in East Africa in the 1890s to deal with political prisoners. This can be seen from the treatment in 1894 of Fumo Omari, Sultan of Witu, who had long proved a thorn in the side of the British and was now suspected of preparing for a renewal of hostilities with them.<sup>116</sup> He was arrested in November by the administrator of Witu, and sent to Zanzibar. However, consul-general Arthur Hardinge considered that his detention as a political prisoner at Zanzibar was 'open to certain objections'.<sup>117</sup> Prime among these was that Fumo Omari was a British protected person under the terms of the Zanzibar Jurisdiction Order in Council of 1893. This meant that he could not be subject to the 'native tribunals' of Zanzibar, but was under

<sup>112</sup> *London Gazette*, 10 August 1866, p. 4451; 24 October 1884, p. 4572. Appeals were to be made to the High Court in Bombay. The use of Indian law was suitable, given the large number of Indian merchants trading in the area. See Fahad Bishara, *A Sea of Debt: Law and Economic Life in the Western Indian Ocean, 1780–1950* (Cambridge, Cambridge University Press, 2017).

<sup>113</sup> Thomas R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena 1860–1920* (Berkeley, University of California Press, 2007), pp. 23–27; and *London Gazette*, 25 November 1890, p. 6460.

<sup>114</sup> *London Gazette*, 1 September 1896, p. 4931; 9 July 1897, p. 3768.

<sup>115</sup> *London Gazette*, 22 June 1894, p. 705; 15 August 1902, p. 5307.

<sup>116</sup> See the papers in PP 1893–94 (c. 7111) LXII. 529; PP 1893–94 (c. 7248) LXII. 549; *Parl. Debs.*, 4th ser., vol. 14, col. 240 (15 August 1893); FO 403/193, enc. 1 in No. 28, p. 33; FO 403/195, p. 107, No. 115.

<sup>117</sup> FO 403/196, enc. 3 in No. 204, p. 184.

British jurisdiction.<sup>118</sup> Hardinge therefore recommended that he be sent back to Witu, to be tried under a special commission for a violation of s. 122 of the Indian Penal Code, which criminalised collecting arms with the intention of waging war against the government. Although Hardinge admitted that this way of proceeding ‘may seem to imply an excessive regard for legal technicalities’, he thought it was ‘better to be over-scrupulous in such matters, than to run the risk of taking any steps which, in the presence of the various Orders in Council, could be criticised as arbitrary or irregular’.<sup>119</sup> Fumo Omari was tried at Kilalana in the Witu Protectorate in November 1894, and sentenced to transportation for life: which in his case meant remaining under house arrest in Zanzibar.<sup>120</sup>

Indian legislation was not the only tool which the British could use in East Africa in the early 1890s. Political prisoners were also detained and deported in Zanzibar under the powers of the Sultan. Zanzibar became a British protectorate in 1890 as part of the Heligoland settlement.<sup>121</sup> Although the Sultan was nominally an independent sovereign, the succession to his throne was subject to British approval, and the British were able to exert increasing control over him. An example of Britain’s use of his powers to deal with her political enemies there can be seen from the deportation in 1896 of Hilal-bin-Amr. A favourite of the Sultan Said Hamad bin Thuwaini, Hilal had antagonised Hardinge by unsettling the previously cordial relations the British had with the Sultan, and generating unrest in parts of his domains, including the island of Pemba. Since Hilal was also the brother of one of the leaders of a rebellion in Muscat, Hardinge used the pretext of a potential investigation of his role in that rebellion to propose his deportation to Oman.<sup>122</sup> When the Sultan proved

<sup>118</sup> For the order, see FO 403/183, No. 153, p. 109. <sup>119</sup> FO 403/196, No. 204, p. 180.

<sup>120</sup> FO 403/196, No. 236, p. 211. He died there on 27 August 1896: FO 403/227, No. 173, p. 171. A similar procedure had been used for his follower Mahathi: FO 403/196, No. 68, p. 47. Similarly, when a Beluchi messenger from the rebel Mubarak-bin-Rachid was caught in Zanzibar carrying a letter asking for ammunition, he was tried, as a British protected person, under s. 122 of the Indian Penal Code (and acquitted). FO 403/225, No. 300, p. 294. For earlier debates about how to deal with him, see FO 403/225, No. 106, p. 98; No. 111, p. 100; No. 113, p. 102.

<sup>121</sup> E. Hertslet, *The Map of Africa by Treaty*, vol. 2 (London, HMSO, 1894), p. 763.

<sup>122</sup> FO 403/211, No. 59, p. 58. Hardinge was also concerned about the number of troops in the Sultan’s household establishment, a military force which he wanted disbanded. FO 403/211, No. 104, p. 84; No. 146, p. 117; No. 176, p. 138; No. 181, p. 139.

reluctant to co-operate, Hardinge tried to persuade him to send Hilal away from Zanzibar on an indefinite mission either to Mecca or India. At the same time, however, he threatened to remove Hilal by force, if the Sultan did not send him away.<sup>123</sup> Realising that such a step would fatally undermine his prestige, the Sultan agreed to deport Hilal, though he continued to prevaricate until the very moment that Hilal was taken into custody in June.<sup>124</sup> Hilal was taken to Aden, where he was taken into custody by a Resident answerable to the India Office, becoming in effect the prisoner of the British.<sup>125</sup>

The Sultan's powers to detain and deport were also drawn on in 1896 during another crisis. On the death of Hamad, his cousin Said Khalid bin Barghash seized the palace and proclaimed himself successor. The British – who insisted that no Sultan could be appointed without their consent – had already decided on another successor – Said Hamoud – and were determined to remove Khalid. When he refused to budge, he was removed by force, with the help of a military ship sent from the Mediterranean. During the bombardment, the palace was destroyed, but Khalid managed to escape to the German consulate, where he sought refuge as a political prisoner.<sup>126</sup> Khalid later reached Dar-es-Salaam in German East Africa (after boarding a German vessel from the consular foreshore), and the diplomatic dispute between the two powers over his extradition eventually fizzled out. In the meantime, the British had to decide how to deal with his Arab supporters, who had been with him in the palace, and who had been arrested. The Foreign Office decided that they should be kept in detention until they had paid a fine, and then be

<sup>123</sup> FO 403/211, No. 198, p. 147; FO 403/225, No. 131 p. 118; FO 403/226, No. 97, p. 143; No. 246, p. 277.

<sup>124</sup> As Cave told Salisbury on 14 July 1896, 'The Sultan was at first vacillating, but when the crisis came, acted loyally and energetically.' FO 403/227, No. 48, p. 74. For his arrest, see FO 403/227, No. 42, p. 69.

<sup>125</sup> FO 403/226, No. 279, p. 322. The British could obtain legal authority to detain him there from the Government of India: see FO 403/225, No. 140, p. 150\*. In December 1896, Hilal was moved to Mombasa, and in August 1898, he was allowed to return to Zanzibar, ostensibly by the Sultan, but practically by Hardinge. FO 403/228, No. 46, p. 75; No. 98, p. 119; No. 244, p. 276; FO 403/262, No. 187, p. 230. Hardinge told Salisbury in October 1898, 'Hilal seems greatly aged and broken in health and spirits since his fall from power and deportation over two years ago': FO 403/263, No. 95, p. 138 at p. 139.

<sup>126</sup> FO 403/227, No. 169, p. 169; FO 403/228, No. 96, p. 116.

deported.<sup>127</sup> Hardinge suggested deporting them initially ‘to some place in British East Africa, where they would live under Government supervision, but without any uncomfortable restraint’, and then to allow them to settle in Arabia, if their conduct was satisfactory.<sup>128</sup> In fact, in May 1897, after the fines had been paid, six of the Zanzibar sheikhs were released, and seven from Oman were deported. A few propertyless ‘Comoros and Swahilis’ who had supported Khalid were punished by exile on the mainland.<sup>129</sup> Eventually in May 1898, the Sultan cancelled the banishment sentences of all but one of those who had supported Khalid,<sup>130</sup> and they were allowed to return.

Legislative provision for detention without trial in East Africa was introduced in 1897 in the Native Courts Regulations introduced by Hardinge.<sup>131</sup> Hardinge wanted to introduce to the East Africa Protectorate the kinds of powers found in India under Regulation No. III and exercised by the Sultan in Zanzibar. His draft included provisions to empower the commissioner to remove or intern any person who was ‘disaffected’ to the government or whose conduct was dangerous to peace and good order, and to proclaim martial law in any area for a renewable period of ten days.<sup>132</sup> The martial law provisions were removed from the final version, but the provisions relating to detention were retained. They were also extended to Zanzibar two years later, when the system of courts was reformed there,<sup>133</sup> and to Uganda in 1902.<sup>134</sup> A template was therefore created for legislative detentions in East Africa of the kind seen on the other side of the Indian Ocean. Nonetheless, it is significant to note that,

<sup>127</sup> FO 403/227, No. 214†, p. 228\*; No. 220†, p. 230\*. An attachment was imposed on the property to prevent any quick collusive sale: FO 403/227, enc. in No. 99, p. 121; FO 403/228, No. 99, p. 119 at p. 120.

<sup>128</sup> FO 403/228, No. 121, p. 140.

<sup>129</sup> FO 403/242, No. 114, p. 117. In the meantime, Khalid’s mother and a large number of her followers were also banished. FO 403/241, No. 82, p. 105.

<sup>130</sup> FO 403/261, No. 121 p. 179.

<sup>131</sup> Native Courts Regulations, No. 15 of 1897. See FO 403/243, enc. in No. 33, p. 44 (§ 77). See also J. B. Ojwang, ‘Kenya’, in A. Harding and J. Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey* (Dordrecht, Martinus Nijhoff, 1993), p. 106; and Simpson, *Human Rights and the End of Empire*, p. 76.

<sup>132</sup> FO 403/241, No. 120, p. 164, §§ 79, 83–84.

<sup>133</sup> FO 403/280, enc. in No. 118, p. 129. For the background, see FO 403/263, No. 79, p. 121.

<sup>134</sup> *London Gazette*, 15 August 1902, p. 5307 (§§ 25–26).

despite the existence of these powers, the authorities resorted to *ad hominem* laws even in this region to remove African potentates who stood in the way of imperial expansion.

This can be seen from the detention and deportation of Mwanga, the king of Buganda, who was deported to the Seychelles in 1901, along with Kabarega, the king of Bunyoro. These kings shared an experience which was common for many of the West African rulers we will encounter in this book, although their cases generated less debate in Whitehall and Westminster. Mwanga had inherited an unsettled kingdom in 1884, for his father's introduction of Islam and Christianity into Buganda had created a set of powerful rival religious factions in the kingdom, which competed for power.<sup>135</sup> Mwanga was himself driven out of the kingdom in 1888 by the Muslim faction, but soon recovered the throne with Christian support. Seeking to make his position secure in the midst of the continuing political turmoil, he signed a treaty in December 1890 with the Imperial British East Africa Company. Although the company's representative, Capt. F. D. Lugard, sought to settle the rifts between the various factions, relations between the Protestant and Catholic factions deteriorated into fighting by the beginning of 1892. In this conflict, Lugard was himself pitted against Mwanga, whose defeat at the Battle of Mengo was followed by a second treaty of protection with the company, in which he not only recognised its suzerainty, but also agreed to fly its flag in his capital.<sup>136</sup> As Lugard now noted in his diary, 'the British are acknowledged de facto rulers of the country'.<sup>137</sup> With the demise of the company, in May 1893 Mwanga signed a treaty in the following year with Sir Gerald Portal, the consul-general for East Africa, putting himself under the Queen's protection, and granting vaguely defined jurisdictional rights.<sup>138</sup> It was on the basis of this treaty that Britain declared a formal protectorate over 'Uganda' in June 1894.<sup>139</sup>

<sup>135</sup> See D. A. Low, *Fabrication of Empire: The British and the Uganda Kingdoms, 1890–1902* (Cambridge, Cambridge University Press, 2009), pp. 60–68.

<sup>136</sup> Treaty dated 30 March 1892, PP 1893–94 (c. 6847) LXII.335, enc. in No. 28, p. 25.

<sup>137</sup> Low, *Fabrication of Empire*, pp. 145–146. See also Mwanga's letter to the Queen: PP 1893–94 (c. 6847) enc. in No. 24, p. 23.

<sup>138</sup> PP 1894 (c. 7303) LVII. 641, enc. in No. 3, p. 18.

<sup>139</sup> *London Gazette*, 19 June 1894, p. 3509. The protectorate was over Buganda.

Like many other African leaders encountering British imperial expansion, Mwangi was unhappy with his new situation. Having been stripped of much of his political authority, in July 1897 he secretly left the royal enclosure at Mengo, and headed for Buddu, an area where there were already rumblings of revolt.<sup>140</sup> Sensing that he was now plotting rebellion, the senior British officer in the area, Major Trevor Ternan, moved to depose Mwangi<sup>141</sup> and engage him in battle. After Mwangi had fled and surrendered to the German authorities, Ternan asked them to hold him 'until some arrangements as to his extradition or otherwise can be arrived at by the respective Governments in Europe'.<sup>142</sup> His confidence that this small rebellion had been quelled was soon undermined by two events. First, in September, three companies of Sudanese troops in the recently formed Uganda rifles rose in a mutiny. Then, in December, Mwangi escaped from his German confinement, and returned to battle in Buddu.<sup>143</sup> Mwangi was now told that, if he surrendered, he would not be imprisoned, but would be allowed to live on the coast.<sup>144</sup> The offer did not tempt the deposed king, who continued to fight, despite incurring a heavy defeat in Ankole at the beginning of March 1898.<sup>145</sup>

In fact, it would take another year for him to be captured.<sup>146</sup> Mwangi continued to hold out with his followers, joining in a guerrilla campaign against the British together with both the Sudanese mutineers and his old adversary Kabarega, king of Bunyoro. Kabarega, who had succeeded to his father's throne in 1869 and had rebuilt the strength of his kingdom, had come into conflict with the British after Lugard's arrival in the area in 1890. Keen to establish a foothold in the Upper Nile basin, the British launched an attack on him in 1893, which was followed in the next year by the construction of a series of forts in the area. Five years of war

<sup>140</sup> PP 1898 (c. 8718) LX. 395, No. 3, p. 4; Low, *Fabrication of Empire*, p. 198.

<sup>141</sup> PP 1898 (c. 8718), No. 4, p. 4.

<sup>142</sup> PP 1898 (c. 8718), No. 7, p. 8. He also requested the Germans to move hold Mwangi as far as possible from Uganda, preferably on the coast: PP 1898 (c. 8718), No. 15, p. 12; PP 1898 (c. 8941) LX. 459, enc. 1 in No. 3, p. 9.

<sup>143</sup> 1898 (c. 8941), No. 5, p. 8.

<sup>144</sup> 1898 (c. 8941), enc. 1 in No. 7, p. 16. He was told that he would be treated as the Muslim Prince Mbogo had been: Mbogo was exiled to the coast in 1893, along with Selim Bey, after the latter's trial by Capt. J. R. L. Macdonald for mutiny for threatening revolt: see FO 403/184, No. 52, p. 50 with encs.

<sup>145</sup> PP 1898 (c. 8718), No. 27, p. 45. <sup>146</sup> FO 403/281, No. 119, p. 209.

ensued, in which the British sought to put in place a set of local rulers who would be compliant – without bringing Bunyoro into the protectorate – while Kabarega continued to conduct a guerrilla campaign against them. With Kabarega joining with the Sudanese mutineers and Mwanga's rebels, the British found themselves in 1899 fighting in three conflicts. However, the arrival of Indian reinforcements and Baganda co-operation secured a British victory. When Mwanga and Kabarega were captured together in April, the Foreign Secretary (and Prime Minister) Lord Salisbury noted that the 'two great causes of unrest' in the area had been removed, and the way cleared for the British to consolidate their rule in the area.<sup>147</sup>

These kings were now removed as conquered potentates, rather than being dealt with in any judicial process. Although Mwanga had signed a treaty which conferred extraterritorial jurisdiction on the British, there was never any suggestion of putting him on trial.<sup>148</sup> To begin with, there were potential legal impediments. 'The political position of the Protectorate is somewhat peculiar', Salisbury noted after Mwanga's capture, since Buganda was under the 'nominal dominion of its king'.<sup>149</sup> There were also political considerations which had long been in the forefront of British minds. When plans had been made in August 1897 to remove him, George Wilson had stressed the need to treat him with the 'consideration due to his position', given the 'influence appertaining to kingly rank in Uganda'.<sup>150</sup> As for Kabarega, there was no foundation for any jurisdiction to try him, since it was only after his capture that plans were made to assert British jurisdiction in Bunyoro, which had signed no treaty of protection.<sup>151</sup> After their capture, the two men were simply taken to Zanzibar in May 1899 and handed over to the consul-general.<sup>152</sup> They were then interned in Kismayu, for which legal authority was provided by the 1897 Native Courts Regulations. They would not stay there very long. At the start of 1900, the special commissioner for Uganda proposed that they be sent to the Seychelles. He considered it to be of the highest importance that they never return to

<sup>147</sup> FO 403/282, No. 1, p. 1.

<sup>148</sup> There were good reasons to doubt whether the British had any jurisdiction under the Africa Order in Council of 1889 to try him. No such doubts stood in the way of a consular trial of the Itsekiri chief Nana Olomu in 1894: see Chapter 6.

<sup>149</sup> FO 403/282, No. 1, p. 1. <sup>150</sup> 1898 (c. 8941), enc. 1 in No. 7, p. 16 at p. 17.

<sup>151</sup> FO 403/282, enc. 2 in No. 40, p. 61. <sup>152</sup> FO 403/282, No. 12, p. 9.



Uganda, and he considered it unsafe for them to remain at Kismayu.<sup>153</sup> Arrangements were duly made with the Governor of the Seychelles to pass the necessary legislation to authorise their detention there. In the middle of September 1901, they were sent from Kismayu via Mombasa to the Seychelles.<sup>154</sup> Mwanga died there in 1903, while Kabarega died in 1923, while on his way back to his homeland. As their experience showed, when it came to dealing with deposed rulers, *ad hominem* laws proved of more use than general legislation for detention.

### From 'Rule of Law' to 'Lawfare'

The following chapters explore the use of exceptional measures to detain and imprison political prisoners in Africa during the period of British colonial expansion, and examine how and how far colonial administrators followed the rule of law. The very concept of the rule of law was, as has been seen, an ambiguous one. It could be read as simply demanding the formal authorisation by legislation of any executive action. But it could also be seen as demanding that all legislation be interpreted in the light of a broader common law tradition which recognised substantive rights and liberties, and that all executive action be tested by reference to these common law rights. The law did not itself determine which of these approaches would be followed by officials: that was determined by the attitudes and practices of particular individuals, and reflected the constitutional culture in which they operated. How far rule *by* law was constrained by the rule *of* law in different parts of the African empire depended on context and culture.

The substantive view tended to prevail where a culture of legalism and a commitment to due process permeated political and administrative offices as well as juridical ones. This was likeliest to occur where those subjected to exceptional measures were regarded as being part of the political community, as was the case at the Cape of Good Hope. As shall be seen in later chapters, some of the most liberal attitudes towards due process and the rule of law are to be found in the opinions of lawyers and politicians in this colony. The Cape had

<sup>153</sup> FO 403/308, No. 126, p. 190.

<sup>154</sup> FO 403/310, No. 191, p. 274; FO 403/311, No. 33, p. 25.

a well-established legal system staffed by lawyers trained in English law and applying Roman-Dutch law. It also had a system of representative government after 1853 and responsible government after 1872. The Cape had a tradition of political liberalism, manifested in Ordinance 50 of 1828 which gave free persons of colour the same rights as whites and in the non-racial franchise, which gave propertied, male black Africans the vote.<sup>155</sup> This colony saw some of the strongest defenders of the common law position to be found in our period, when dealing with the detention of rebels. By contrast, where rebels were not seen as part of the same political entity, but were regarded more as Schmittian ‘enemies’, the culture of common law due process had much less purchase on administrators and judges. This was the case in Natal, where a small settler community sought to govern a much larger disfranchised African population through a system of indirect rule.<sup>156</sup> Here, both the government and the judiciary took much less liberal views of what the rule of law required, being much keener to assert control by exceptional means.

A study of detention without trial in Africa is also significant for what it reveals about the culture of the rule of law in the metropolis. Officials in London were constantly aware of expectations that their actions had to comply with the rule of law, and their consciences were often pricked by the demands of the common law tradition when dealing with African political prisoners. The degree to which they insisted on following due process was influenced not only by their own personal commitment to common law values, but also by the strength of other pressures on them, whether that of local officials calling for a tougher policy, or domestic opinion calling for fidelity to the common law tradition. This can be seen from policy in Egypt,

<sup>155</sup> Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order* (London, Leicester University Press, 1996), pp. 103–105. As Keegan points out (p. 13), there was an ambiguity in this liberalism, for its ‘rhetorical commitment to the legal formalities of equality and freedom was in sharp contrast to its fundamental compatibility with cultural imperialism, class domination and, ultimately, racial subjugation’.

<sup>156</sup> See T. V. McClendon, *White Chiefs, Black Lords: Shepstone and the Colonial State in Natal, South Africa, 1845–1878* (Rochester: University of Rochester Press, 2010); and Jeff Guy, *Theophilus Shepstone and the Forging of Natal: African Autonomy and Settler Colonialism in the Making of Traditional Authority* (Scottsville, University of KwaZulu-Natal Press, 2013).

where the British had *de facto* control after intervening in 1882 to suppress the nationalist revolt led by Urabi Pasha. Under pressure from British public opinion, officials insisted that Urabi be given a trial by the Egyptian authorities in proceedings in which British ideas of the rule of law would be observed. Four years later, however, the British themselves detained and deported the Sudanese leader Al-Zubayr Rahma Mansur without any form of due process, holding him under an *ad hominem* ordinance in Gibraltar. The different treatment these men received was largely determined by the government's awareness of the different public perceptions of the character of these men: while Britain's Liberal government felt itself to be on weak ground when it came to the detention of a popular Egyptian nationalist leader, it felt no qualms in holding a reviled Sudanese slave trader who had no public support. Where public opinion showed little interest in the fate of particular detainees – and wider cultural expectations about Britain's commitment to the rule of law consequently had little purchase – metropolitan officials were prepared to allow the formal vision to get the upper hand, particularly when under pressure with urgent entreaties from men on the ground.

Nor did the common law tradition find its champions among the metropolitan judiciary. As shall be seen, only on the rarest of occasions were judges in London asked to rule on the lawfulness of *ad hominem* laws, or on powers exercised under martial law. In these cases, judges both on the Judicial Committee of the Privy Council – the highest imperial court, but largely staffed by English judges – and in the English High Court and Court of Appeal showed themselves to be executive-minded defenders of order in the empire, rather than defenders of the common law in the tradition of Sir Edward Coke. Judges like Lord Halsbury were prone to see imperial detainees as 'enemies' as much as some colonial administrators were, and to take a formal view of the rule of law which reflected this position. Instead of treating the rule of law as a set of substantive principles which could be used to protect the rights of detainees, officials and the judiciary used a formal vision of legalism to help fashion effective tools with which the empire could conduct a form of 'lawfare'.

One of the most effective tools was the *ad hominem* ordinance. This was most frequently used in West Africa, where the nature of imperial jurisdiction was much more uncertain and contested than in areas such as the Cape or Natal. Besides dealing with troublesome subjects who resided within British colonies, administrators in West Africa also dealt with those who were not subjects, but resided in areas where Britain claimed some extraterritorial jurisdiction in ‘protected’ areas, as well as those resident in territories outside areas of British protection.<sup>157</sup> *Ad hominem* laws were often used for the very reason that jurisdiction was uncertain. They could be used as simple assertions of sovereign power over leaders whose territory was to be conquered, but over which the British had no prior claims to jurisdiction (as occurred in Asante). They could equally be used in areas where a form of jurisdiction was asserted, but where its legitimacy was so uncertain that legislative validation was needed. Detention ordinances were often resorted to when there was uncertainty about a political opponent’s status as a subject, as when the Law Officers doubted whether Africans in protectorates owed any allegiance to Her Majesty. It is therefore no coincidence that the use of *ad hominem* laws in West Africa diminished as imperial power came to be set on firmer jurisdictional foundations, after 1900.

As shall be seen, the reasons for which imperial authorities resorted to detention without trial varied widely. In areas on the edge of an expanding empire, it could be used to remove an enemy during a process of conquest. In areas such as Asante and Zululand, the colonial authorities detained and deported potentates over whom they had no jurisdiction, treating them in effect as if they had been rebels against a sovereign authority which was being asserted in the very process of conquest. Elsewhere, where there was no doubt over British jurisdiction, detention ordinances were passed to hold those who were considered politically dangerous, but who had committed no offence. This was to use law for the kinds of political purposes which were by then considered quite unacceptable at home. At the same time,

<sup>157</sup> To complicate matters further, the very conception of ‘protectorates’ was being rethought during the scramble for Africa, following the Berlin Conference of 1884–1885. See Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (Oxford, Oxford University Press, 2020), ch. 3, esp. pp. 161–163.

detention ordinances were also used for peacekeeping purposes where inter-African conflicts threatened to destabilise British interests,<sup>158</sup> or to hold those accused of serious crimes but where the legal process had failed to secure a conviction. On occasion, detention might even be used for beneficent purposes, as where administrators realised that far more severe punishments might be meted out by the ordinary criminal process than a short-term detention to allow time for ‘cooling off’.

Detentions sometimes followed after some form of investigation had been instigated, as had been the case with Abdullah of Perak. In such cases, the colonial authorities did not want to exercise simple sovereign power: they wanted to use quasi-legal proceedings – informal investigations, ‘customary’ trials, even hearings in consular courts – both to impart lessons on the local community and to show their masters in London that they had established the need for detention by some form of legalistic process. ‘Lawfare’ might involve the use of a form of trial, even if it fell far short of what English criminal procedure called for. Yet it was not only the imperial authorities who could use legal language and legal forms to fight their battles. The language of a substantive rule of law was on occasion invoked by detainees or their supporters when challenging detentions, whether by seeking review in the courts, or by using political pressure to assert the rights of detainees. As shall be seen in what follows, the amount of success they might enjoy depended in part on how strong their local resources were, and how successful they were in gaining attention in the metropolis.

<sup>158</sup> See further Van Hulle, *Britain and International Law*, pp. 191ff. on the use of force to intervene in such disputes.