

IN CONVERSATION: ALASTAIR MCCLURE ON *TRIALS OF SOVEREIGNTY: MERCY, VIOLENCE AND THE MAKING OF CRIMINAL LAW IN BRITISH INDIA, 1857-1922*

Alastair McClure

University of Hong Kong

ABSTRACT

In this interview, Alastair McClure discusses his book, *Trials of Sovereignty: Mercy, Violence and the Making of Criminal Law in British India, 1857 to 1922*, which was published by Cambridge University Press in November 2024 as part of its Legal History series.¹

Philip Gooding (PG): To begin with, what inspired you to write *Trials of Sovereignty*? What are the origins of the project, and how did it evolve over time to become the book as it is published?

Alastair McClure (AM): The book, as I think many first books are, has a relatively long and winding origin story. The seeds of the book began as a PhD thesis, which began about 10 years ago. When I was doing my research, the fields of South Asian and British imperial history were undergoing a very exciting wave of scholarship that was overturning a relatively comfortable consensus about the question of violence in Empire. Emerging scholarship questioned the extent to which violence wasn't a necessarily important site of historical analysis, and was instead making the very important argument that we need to take much more seriously the place that violence played in the founding, extension, and consolidation of colonial authority across the world, and particularly in places like South Asia.

Now, at the time when I was doing my PhD, I think the scholarship mostly took one of two approaches to the question of violence. One approach was to look to everyday acts of violence. This approach examined how pervasive and common violence was in empire, making an argument that we shouldn't think about violence as an aberration, and instead recognizing it as a structural feature of empire. A second set of scholars looked instead at periods of exceptional violence, emergency law, martial law, and extraordinary

¹ Alastair McClure, *Trials of Sovereignty: Mercy, violence, and the making of criminal law in British India, 1857-1922* (Cambridge: Cambridge University Press, 2024).

forms of legality. They pointed out that we had often thought about all those laws, those moments of exception, as temporary and as somewhat necessary in exceptional circumstances. By contrast, they argued that, on closer analysis, they were not so temporary after all. They were often permanent features of colonial law.

When I was doing the PhD, I felt that that the one of two angles approach wasn't necessary, and I wanted to, at that point, write a history of colonial violence that would bridge both every day and exceptional acts of violence. That was what I wanted to do the beginning. I would also note that I did my PhD at the University of Cambridge, and at that time, my supervisor, Shruti Kapila, and also Chris Bayly, who were both South Asian historians, were very interested in intellectual history.² There was a large number of PhD students at that time, many of them my friends today, working on key political thinkers in the South Asian context. And so, in addition to being interested in colonial violence, I was also interested in whether I could bring some of that methodological insight in intellectual history into my thesis.

The project began to come together when I started to think about different conceptual and theoretical frameworks in relation to the trial of Bahadur Shah Zafar II. Zafar was the last Mughal Emperor, and he was the symbolic leader of the 1857 uprising in India. This was the largest uprising against the British in the nineteenth-century imperial world. Zafar eventually surrendered as the uprising was collapsing, but only on the basis that his life will be spared. After much discussion, colonial officials accepted that they had to hold themselves to their promise not to kill him. Instead, they organized an incredibly spectacular trial in his Red Fort, where he was charged with treason and murder. He was found guilty in what essentially turned out to be a show trial. He was then transported to Rangoon as a political prisoner, where he died. This history ended up the basis for chapter 1 of my book.

What interested me about that trial was the fact that amongst this carnage of violence, the state decided they weren't going to kill this one figure. Of course, this wasn't because humanitarianism ran through British thinking at that time, and it wasn't because of a commitment to the rule of law or because of a fundamental sense of British honour. I knew there was a more complex explanation somewhere. And it was at that point that I started to think about what it meant if we took seriously those figures who were spared in the otherwise very violent and brutal context of empire. I then explored how that might be a novel way to approach questions of sovereignty and state violence. This led me to examine the significance of hitherto neglected topics, such as discretion, decision making, restraint, and leniency.

One of the challenges I faced as I turned my PhD thesis into a book was to situate these ideas in longer-term contexts in South Asian and British Imperial history. But I think

² Shruti Kapila, *Violent Fraternity: Indian political thought in the global age* (Princeton University Press, 2021); Christopher Bayly, *Recovering Liberties: Indian thought in the age of liberalism and empire* (Cambridge University Press, 2012).

I can sort of pinpoint an ‘aha’ moment in that period. That was when I was reading back over Gandhi’s writings between 1919 to 1922. Gandhi’s trial did not play a huge role in my PhD thesis, but as I was looking at this material, I saw that Gandhi referenced and talked about mercy quite a lot. Again, this was something that people hadn’t, as far as I knew, discussed in any detail. At one point, he spoke to the Indian public and said that mercy should be recognized as possibly acting as a blind. He said that it could lull the public to sleep, and I found this to be a fascinating way of thinking about the problem of mercy – and this is when mercy started to become one of the framing devices for the overall project.

For example, after the Amritsar Massacre in 1919, which was probably the most infamous act of colonial violence in this period, the British declared martial law in various parts of Punjab. Many people were sentenced very, very severely in martial law courts. But, soon afterwards afterwards, because of pressure from the nationalist press and the Indian National Congress, the government started to commute. It organized a sort of executive program of mercy to release lots of prisoners. As I followed this thread, I read that the viceroy explained this program of mercy by saying that, on one level, the British were being merciful, but also that the people that were being released had been tricked or misled into acts of anti-colonial action or illegality because of “clever men.” There was this idea that there were these leaders that had tricked the masses into their anti-colonial politics. What I realized was that the viceroy used the same logic and some of the same language as was used just after the 1857 rebellion. And so, I realized that the idea of mercy did something interesting and clearly quite important. At that point, I think I knew I had something that I could follow throughout the book.

PG: On the face of it, mercy seems to offer a counterpoint to the idea of violence – mercy seems kind of antithetical to the idea of violence. But you’re painting a more complicated picture about the relationship between these two phenomena here. How does your focus on mercy challenge or build on the growing scholarly focus on colonial violence? And to what extent was mercy violent in the way that it underpinned other forms of violence, such as racial inequality, disenfranchisement, and the inherent violence of colonial rule?

AM: I think it’s important to state that the book developed out of the scholarship on violence in many ways. The book wouldn’t have been written without all that work that had come before it. I think what we get by thinking about mercy in relationship to violence is that we can see that the violence of empire was very uneven. It was strategically deployed across the social order in a way that didn’t mean that everyone experienced state terror in the same way or to the same extent. My book, in various places, tracks how the state made sure its terror targeted certain people and not others at different times. Now, this does not by any means suggest that, by looking at mercy, we see a less violent empire.

My book shows that the violence of empire didn't diminish throughout this period. But what does change is the way in which mercy is applied and to whom.

Most scholars of colonial violence have, rightly, focused on the colonial state. It was through the state that violence was applied, and it was fundamental to the state's politics. But at the same time, the late nineteenth and early twentieth centuries were a key period of nationalist organizing. It was thus also a key period in which those who were the target of violence were thinking about how to approach it, how to resist it, and how to contest it. Mercy was a major theme here. The book uses this background to argue that mercy only worked when people asked the state to be merciful. So, at various points in the book, I show that the state only really offered mercy when those targeted by violence agreed to the state's terms and then asked for it. This approach gave colonial subjects some degree of agency in responding to how they navigated the system of justice.

The conditional availability of mercy was a key tool of colonial rule that officials resorted to time and time again. They did do so, not because there was a sense of benevolence or reluctance to use violence, but because colonial officials at this time were aware that a colonial state that did not rest on representative institutions or on a widening franchise had to find a way to legitimize a political order on the idea of racial difference. Mercy was key to this. Mercy, alongside the threat of terror, did critical work in creating the conditions in which people seem to reassert the basic logic of the state. In many of the cases I examined, I show that people performed their "backwardness" to be eligible for mercy. An example that I draw on in the book is men that killed their wives or other women in their houses. I show how there was a space for colonial leniency for these types of violence. But colonial judges would explain their leniency to some men on the basis that, unlike respectable British men in the metropole who were reserved and could hold in their emotions, Indian men could not do that. So, they could be given leniency, but they would have to be compared to British men as not yet as 'modern' to receive it. There's a scholar called Tina Loo who talks about this in the context of British Columbia as a form of 'savage mercy.'³ The colonial state dictated that it could be merciful to people, but only if they accepted that they were to be treated and spoken of as racially inferior.

Another example I give is of newspaper editors who wrote material that was critical of the colonial state and who were then charged with sedition. Some newspaper editors were given relatively lenient sentences, but only after they stood up in court and said that they were ignorant of the law, that what they wrote was a mistake, that they didn't mean it, and that they were a supporter of the British Empire. Thus, in both those cases – the newspaper editor or the patriarch in the house – they were given leniency only if they accepted the basic condition that would relinquish their political agency. Mercy, always backed by the threat of terror, created the conditions for colonial subjects to appear to be

³ Tina Loo, "Savage mercy: Native culture and the modification of capital punishment in nineteenth-century British Columbia," in *Qualities of Mercy: Justice, punishment, and discretion*, ed. Carolyn Strange (University of British Columbia Press, 2007), 104-129.

reasserting the logic that the colonial state needed to legitimize itself as a non-liberal colonial state.

Mercy was also violent through the colonial state's use of discretion. The book looks at how discretion enabled various figures of authority to make decisions on who was recognized as a figure deserving of leniency, and who was recognized as a figure who is deserving of terror. And that question about the ability to decide enabled people to deepen state power, as well as to further entrench social differences along lines of caste, class, and gender. What emerged over time was that these decisions became more and more standardized. Certain subjects became recognized as particularly deserving of less stringent sentences.

One of the case studies I looked at very briefly in the book, but which I discussed in more depth in another article, is whipping.⁴ Colonial officials asked, 'who was the 'whippable' subject?' And, indeed, 'whippable' was a phrase that a colonial officer used. And what came out over time through various state processes (such as subtle changes to the law, through circulars sent to colonial judges) reinforced a basic notion that "respectable" or upper caste communities should not be whipped. But figures from marginal castes, from tribal backgrounds, were recognized by judges, who have the discretion to act upon it, as the people that needed to be whipped.

And so, when examining mercy and leniency, what you see is that mercy isn't about thinking about the empire as being actually merciful. Instead, it helps us understand its terror better, showing how violence became more targeted over time.

PG: You give this sense of colonial rule being fragile, almost egotistical in the way it demanded mercy. What was it about the nature of colonial rule that necessitated mercy and discretion as important features?

AM: One way to answer that question is to bring up Douglas Hay's classic article on eighteenth-century England.⁵ This context had a deeply unequal social order and no professional police force or standing army. Hay examined how that order was maintained without it falling into revolution. He argued that mercy was key by showing that the discretion to decide mercy was shot through the law from the top right through to the very bottom. Thus, various figures of authority, from the sovereign down to the judge and the jury in the court, had a role to play in deciding when to exercise discretion. And he argued that prerogative power, which connected the subject to the sovereign in an unequal place,

⁴ Alastair McClure, "Archaic sovereignty and colonial law: The reintroduction of corporal punishment in colonial India, 1864-1909," *Modern Asian Studies*, 54, 5 (2020), 1712-47.

⁵ Douglas Hay, "Property, authority and the criminal law" in *Albion's Fatal Tree: Crime and society in eighteenth-century England*, eds. Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson, and Calvin Winslow (London: Verso, 2011), 17-64.

created vertical chains of loyalty, and that every time someone petitioned for pardon, they activated that structure.

Now, the context of nineteenth- and twentieth-century colonial India was very different, as I detail in the book. But, I argue, if we follow criminal trials, appeals, pardons, and even the politics of executions, we find a legal system in a state that is anxious about the fact that it also is weak in many ways. It did not have popular legitimacy. That is, it did not have the institutions that could insulate it from unrest; it refused to widen the franchise in a significant way; it did not allow people to actually exercise authority themselves. Instead, authority was exercised largely from colonial officials and white judges (although over time more and more Indians participated in some way). And so, the question of appeals and pardons linked the courts through to the local government, and then to the jail, the viceroy, the Secretary of State, the Privy Council in London, and finally the Sovereign. In principle, a subject could go through all those stages, and, at each of those stages, there was some discretion in deciding when and how to punish and pardon. This enabled the state to retain a greater degree of legitimacy, but it also raised an interesting question, which I think gets to the question you've asked. That is, why would a state that was clearly so violent rely on so much discretion across these various stages of the legal order?

In many cases in colonial India, discretion was wider than it was in the metropole. So, if I give you an example of, say, murder: in the English context, at this time, someone found guilty of murder could only be sentenced to death. It was the only punishment. The only way to avoid the scaffold was if an executive authority intervened after the trial. Now in colonial India, which was at this time a state much more willing to send people to the scaffold, the judge could decide to punish with death or to with transportation for life. Thus, there were alternatives to the death penalty.

This level of discretion leads us to this question of imperial governance and mercy, and I think it gets us back to the question of managing unequal order. There was the possibility for some to receive leniency in these institutions in a way that was not possible in England. Which means that, say, an elite man or a newspaper editor might still feel that there was a possibility of going to a court and getting a more lenient sentence than someone else. In an institutional structure that doesn't have popular politics, the possibility of someone in that system exercising leniency at their discretion and not punishing to the full, in a context that is very also very violent, means that there is a sort of facade of legitimacy. The people will still approach that institution. They will still submit that petition. They will still ask for mercy from someone – or at least they did for at least for some of my period of study.

Now, you also asked about anxiety and what it tells us about the colonial state. Some scholarship on colonial sovereignty has suggested that when you look at the colony, you see a place in which European and Eurocentric theoretical models on sovereignty and violence break down. I found Achille Mbembe's article on necropolitics really inspiring

here. He wrote: “the sovereign right to kill is not subject to any rule in the colonies. In the colonies, the sovereign might kill at any time or in any manner.”⁶ Now, in the context that I’m interested in, if the colony could kill at any time in any manner, why would it worry about mercy? Why would colonial officials make a system in which mercy is maintained to some degree the whole way through? And then why would there be some subjects that the colonial state felt the need to make sure they were offered mercy because it had an anxiety over punishing them in public? If it was the case that it killed them anyway, anyhow, then why would there be this massive exercise of bureaucratizing justice so some people could avoid that punishment?

So, I realized that if I took the established angle, I would fail to understand all these other questions that were coming forward, and that’s where mercy became interesting. What I argue in the book is that the state that could not kill anyone at any time. The state knew full well that killing Bahadur Shah Zafar II after the rebellion would be problematic in the context of trying to build a new order. It knew, equally, that killing Gandhi would not resolve its challenges. And so, it had to create a whole system of law, not to be actually merciful or humanitarian, but to make sure the subjects that they knew could cause them problems would participate in their institutions. Because if they didn’t participate, they were going to get closer and closer to recognizing that the colonial state, for all its violence, could not turn everyone into what Giorgio Agamben would call “bare life.”⁷ So, mercy was necessary in part to mask the fact that it could not do what Mbembe said it could do to every single subject.

PG: I want to now get Indian perspectives on this application of mercy. How did Indian populations perceive mercy? Whereas the colonial government is calling it mercy, is this how Indian populations viewed it as well? And also, how did they shape the discretionary application of mercy? Do they have a conscious agency over it? And if they did, how successful were they in acquiring it, presuming that they did?

AM: I have to admit, it’s something that I think could have been a much more prominent part of the book. The question about whether or not Indian subjects, particularly in the aftermath of the 1857 uprising, recognized British actions as genuine mercy is one that I think would need some more research. But what I would say is that there were voices very early on, sort of outliers, that immediately rejected the Queen’s proclamation, stating that it was insincere and untrustworthy. But it’s also true that the Queen’s proclamation, not just because it had an amnesty clause in it, but because it was recognized as an important political document, was basically a quasi-constitutional promise. It was talked about as India’s Magna Carta. Early liberal nationalists talked about and reference it a lot. So, I

⁶ Achille Mbembe, “Necropolitics,” trans. Libby Meintjes, *Public Culture*, 15, 1 (2003), 25.

⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998).

don't think the proclamation is just about mercy; it is also about rights. In legal terms, it stated that colonial subjects had the right to a fair trial, leading to questions about a right to a jury, a right to petition, and a right to appeal against cases to higher courts and the Privy Council. These became key issues by the early twentieth century, in particular.

So, if mercy was a question about rights, one of the rights that people increasingly sought to have recognized was the right to petition the sovereign when they felt that illegality or injustice had occurred. And that is something that, over time, the state found all sorts of ways to curtail or prevent, while also being very anxious about the prospect of a petition reaching London and about not saying publicly that colonial subjects did not have the right to petition. Officials frequently reiterated that the right to petition was an important feature of their rule – it was a core way through which they sought legitimacy. But this became increasingly tenuous over time. Thus, by the 1890s, the violence of empire and the substantive lack of mercy increasingly featured in a developing nationalist critique of colonial rule. Essentially, a 'right' to petition for mercy became viewed in nationalist critiques as something that the colonial state promised but fails to deliver.

PG: Towards the end of the book, you point to Indians' relationships with colonial mercy being quote "transformed."⁸ What caused this transformation?

AM: This is, I hope, one of the more important contributions the book makes. It demonstrates that mercy was a very, very important feature of nationalist thinking. Gandhi was probably the most influential anti-colonial nationalist thinker of this period. But there was also Bal Gangadhar Tilak who preceded him, who is credited by many to have set the stage for Gandhi to have emerged. And both of those thinkers, I show, thought very, very carefully about mercy. In my final chapters I show that early nationalist engagement with mercy was basically to say that there wasn't mercy. They argued that Britain's colonial government was a hypocritical regime.

Tilak did something fascinating. Tilak was put on trial in the late nineteenth century three times for sedition. He was a very prominent figure, a very successful newspaper editor, and he was highly critical of the colonial state. So, the colonial government put him on trial. I look at his first two trials in the book. Existing studies have focused specifically on what happened in his trial. But what I was interested in, which had not been talked about previously, was that what he did in the court, unlike others at the time, is that refused to accept the possibility of his guilt. In both cases, he was found guilty – there were various reasons why he was never going to succeed with his argument. But by refusing to accept the possibility of his guilt, he didn't give the court closure. He suggested that he could continue to fight his case on the grounds of justice after the trial ended.

⁸ McClure, *Trials of Sovereignty*, 289.

This was especially the case after the second trial. He started an intense and incredibly creative pursuit of actors in this legal (dis)order who had the discretion to potentially overturn the court's case and to accept his appeal. And that took him through the whole gambit of the legal apparatus – back to the High Court, to local government, to the viceroy, and to the Privy Council (twice). He drafted a petition to the House of Lords, and then he made a series of petitions for mercy. This took him, ultimately, to the sovereign or – or, at least, this was his aim. Because he kept stating that his appeal is not about him being guilty, he refused to play the game that, over time, he realized colonial mercy was predicated upon.

Now, he could have asked for mercy by first saying 'Yes, I was guilty of this crime, and I did this crime because I made a mistake, and I'm actually realizing the error of my ways now, and I've accepted the British Empire is a good thing and that it's bringing us progress.' He was told by an associate that if he did that, he would get an early release – he would have received 'mercy.' But then Tilak realized, basically for the first time I think in the nationalist struggle, that mercy was doing very specific political work. That the threat of terror, being sent to prison, being punished harshly, was work. Part of that work was to convince people, to compel people like him, to publicly renounce his politics and win liberty, win freedom. But it came at the cost of his politics. And Tilak basically refused to make that bargain. And he made this fantastic phrase, in which he said to do that would be to throw his whole life's work away and to live as a 'dead man.' So, Tilak was the first person to link political life and mercy, and I think that was one of the major steps in 'transforming' mercy, or acknowledging mercy in the nationalist pursuit against colonial rule.

Gandhi was the next figure in this process. Gandhi, particularly just before the non-cooperation movement, recognized that Tilak's experience was more universal than Tilak acknowledged. He followed various trials after the Amritsar Massacre and he analysed the logic of mercy – why people were being asked to relinquish their politics and accept mercy. Famously, Gandhi didn't think that the anti-colonial movement could overthrow the state through violence, and nor did he think that a violent struggle could be productive way of getting to a better politics. Instead, he realized that colonial subjects could embrace the violence of the state. They could ask for it, court it, and refuse to accept mercy. He saw a window of agency in the act of refusing. He saw the possibility of using the refusal to accept mercy as a means of reclaiming sovereignty. Essentially, he asked: What will the state do to us if we stop playing that game? And so, he massified some of Tilak's ideas to make them a broader form of anti-colonial resistance. He stated that anyone could do it: you could be rich, poor, powerful, or weak – it didn't matter, as everyone could refuse mercy.

And so, I think the transition from Tilak to Gandhi is when mercy became transformed into a formidable instrument of anti-colonial politics. It's when mercy, which had been fundamental to colonial rule since the Queen's proclamation in 1858, was

rejected, and when Gandhi and others began to create a political movement that no longer spoke the language of British subjecthood.

Transcribed by Lilia Scudamore