Modern Asian Studies (2024), **58**, 584–610
doi:10.1017/S0026749X23000537

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Act XI of 1857: The life and afterlife of an emergency statute in colonial and post-colonial India

Troy Downs

Independent scholar
Email: troy.downs57@gmail.com

(Received 28 January 2023; revised 7 December 2023; accepted 12 December 2023)

Abstract
This article seeks to assess the legal legacy of one of British India's most significant emergency acts: Act XI of 1857, also known as the State Offences Act. Although introduced during the Indian Uprising of 1857, it will be argued that the extra-judicial provisions contained in this act exerted a strong influence on the legal character of post-1857 'special' or exceptional colonial criminal legislation, an influence that continued to be reflected in the punitive emergency laws set in place in post-colonial India. The long-term historical significance of Act XI will be illustrated by examining some of the more notable pieces of punitive or repressive legislation enacted in colonial and post-colonial India, namely the Murderous Outrages Act of 1867, the 1915 Defence of India (Criminal Law Amendment) Act, the Anarchical and Revolutionary Crimes Act of 1919, the Defence of India Act, 1962, and, more recently, the Terrorist and Disruptive Activities (Prevention) Act of 1985.

Keywords: Act XI of 1857; the Indian Uprising of 1857; British colonial criminal law; emergency legislation

Introduction

The frequent enactment of emergency legislation in colonial India lends weight to Bernard Cohn's assertion that when faced with a crisis the British had the capacity to quickly transform themselves from 'benevolent despots' to 'not-so-benevolent Old Testament avengers'.[1] The intensity of state-sanctioned violence and repression was far greater during the nineteenth century, when the British lashed out against real or perceived threats to their rule, than during the twentieth century, where a constant balancing act was required between an overreliance on repressive measures and a desire by the British to secure the support of influential local landholders, Indian politicians, and the wider Indian public for incremental constitutional reform.

[1]Bernard S. Cohn, *Colonialism and its forms of knowledge* (Princeton: Princeton University Press, 1996), p. 65.

The willingness on the part of the British to resort to such coercive legal apparatus to preserve their governance over India led to a sustained campaign of lawfare waged against all those identified as being 'disloyal' Indian subjects of the British Raj. The concept of lawfare as applied in the colonial setting comprised a concerted effort on the part of a colonial state to 'conquer and control indigenous peoples by the coercive use of legal means'.[2] Thus, as they did elsewhere in their empire, the British engaged in what Caroline Elkins has called 'legalized lawlessness': the reliance upon emergency and arbitrary powers in order to stamp out unrest.[3]

This article seeks to tease out the legal legacy of one such colonial emergency statute that dates back to the time of the Indian Uprising of 1857: Act XI, also known by its short legal title, the State Offences Act.[4] The object in doing so is to highlight the continued significance of this act's extra-judicial features to illustrate how its legal powers, in particular its deployment of stripped down and hollowed out criminal court trial procedures, were often reproduced in their totality, or more commonly in some revised format, not only in subsequent colonial legislation of a similar nature, but also in emergency laws enacted in India in the post-colonial era. The exploration of this historical continuum will be undertaken via a series of case studies of some of the more well-known emergency acts of colonial and post-colonial India, beginning with Act XI itself. It will be argued that, in common with the 1857 Act, subsequent emergency laws placed equal weight on the need for 'speedy' trials by some form of special commission or tribunal that functioned independently of judicial review. Under such legislation the legal rights normally extended to the accused, such as the right to be tried by a jury, were dispensed with and the speed with which sentences were enforced were considered by government officials to serve as a deterrent to others from engaging in activity that in any way challenged the sovereign authority of the state. It is important to bear in mind that prior to 1857 the British had implemented a number of repressive laws with equally extended legal lives in the East India Company (EIC) territory of the Bengal Presidency. The more notable among these were the Bengal State Offences Regulation X of 1804, conferring the legal authority to quickly apply the powers of martial law, and the Bengal State Prisoners Regulation III of 1818 that enabled the rapid arrest and detention without trial of Indians considered by the British to be troublesome political agitators.[5]

[2]John L. Comaroff, 'Colonialism, culture, and the law: A foreword', *Law and Social Inquiry*, vol. 26, no. 2, 2001, p. 306.

[3]Caroline Elkins, *Legacy of violence: A history of the British empire* (London: The Bodley Head, 2022), pp. 129–162.

[4]As given in the 1897 Indian Short Titles Act.

[5]The texts of these pre-1857 emergency laws are reproduced in Akshaya K. Ghose, *Laws affecting the rights and liberties of the Indian people* (Calcutta: Mohun Brothers, 1921), pp. 10–103. On the British use of the powers of Bengal Regulation III of 1818, see Durba Ghose, *Gentlemanly terrorists: Political violence and the colonial state in India, 1919–1947* (Cambridge: Cambridge University Press, 2017); and Anandaroop Sen, 'Insurgent law: Bengal Regulation III and the Chin-Lushai expeditions (1872–1898)', *Modern Asian Studies*, vol. 56, no. 5, 2022, pp. 1515–1555.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

Act XI of 1857

A suite of arbitrary emergency statutory measures were enacted in great haste by Charles Canning, the governor general of the EIC, at the very beginning of the Indian Uprising of 1857. The reliance upon such extraordinary legislation was symptomatic of a wider sense of anxiety felt by officials when confronted by the intensity and geographical scale of this insurrection.[6] To the British, the violent insurgency that had suddenly erupted throughout much of northern Indian and in various parts of central India during the summer months of 1857 was nothing less than a life and death struggle, a 'war of extermination',[7] that needed to be met head-on with every available counter-insurgency measure to hand. The uprising itself had been sparked by Indian fears of religious defilement. These fears stemmed from the circulation of a rumour among Hindu and Muslim mercenary troops recruited by the EIC that the cartridges of the new Enfield rifled musket had been contaminated by the British with a mixture of cow and pig fat for the express purpose of converting them to Christianity. Long-standing grievances over the terms of their military service in the armed forces of the EIC added further to the sense of unease. In addition, resentment by magnates and other substantial Indian landholders over lost status and income prompted many to seize the opportunity to rise up against the British. Such sentiments, alongside the actions of the more militant and well-armed sections of Indian society in the countryside, who sought to extend their territorial sway or to plunder others at a time when it seemed that the British rule had been permanently erased, added a substantial civil component to the insurgency.[8]

One of the first pieces of punitive penal colonial legislation passed in 1857 by Canning was Act XI.[9] Its importance stems from the fact that it served as a legal template for the majority of the special acts that followed it.[10] Significantly, unlike the other special acts enacted in 1857, it was a permanent, rather than a temporary, statute. In other words, while it was initially passed as a response to the sudden outbreak of insurrectionary violence, the British intended it to be used as a means to combat future outbreaks of civil unrest. Under it, ordinary criminal procedures were suspended. Those convicted of waging war, engaging in rebellion, or abetting such acts

[6]For an overview of historical literature on this subject, see Joshua Ehrlich, 'Anxiety, chaos, and the Raj', *The Historical Journal*, vol. 63, no. 3, 2020, pp. 777–787.

[7]William Forbes-Mitchell, *Reminiscences of the Great Mutiny* (reprint; Delhi: Discovery Publishing House, 1989), p. 99.

[8]Peter Smithurst, *The Pattern 1853 Enfield Rifle* (Botley: Osprey Publishing, 2011), pp. 34–39; Sabyasachi Dasgupta, *In defence of honour and justice: Sepoy rebellions in the nineteenth century* (Delhi: Primus Books, 2015). On the military and civil dimensions of the insurrection, see Eric Stokes, *The peasant and the Raj: Studies in agrarian society and peasant rebellion in colonial India* (Cambridge: Cambridge University Press, 1978); Ranajit Guha, *Elementary aspects of peasant insurgency in colonial India* (Delhi: Oxford University Press, 1983); Eric Stokes, *The peasant armed: The Indian Rebellion of 1857*, (ed.) C. A. Bayly (Oxford: Clarendon Press, 1986); Tapti Roy, *The politics of a popular uprising: Bundelkhand in 1857* (Delhi: Oxford University Press, 1994); Rudrangshu Mukherjee, *Awadh in revolt, 1857–1858: A study of popular resistance*, new edn (Delhi: Permanent Black, 2002).

[9]The text of Act XI is available at https://commons.wikipedia.org.wiki/File:The_Acts_of_Legislative_Council_of_India_in_1857.pdf, [last accessed 11 February 2021].

[10]Only two of the special acts did not cite or refer in some way to Act XI: Act XV, which dealt with censorship of the press, and Act XXV, which was concerned with the forfeiture of property belonging to Indian army officers and soldiers convicted of mutiny.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

could be sentenced to death, or to serve out a life sentence as a convict in an overseas British penal colony, or be incarcerated in a jail in India for up to 14 years with hard labour; those found guilty of harbouring such individuals could face a fine and imprisonment for up to seven years. Act XI permitted the creation of commissions consisting of military officers or civil officials who would operate judicial courts within districts declared to be in a state of rebellion. By doing so the act complemented and bolstered the application of the martial law powers of Regulation X of 1804 in force during the 1857 Uprising. Special commissioners could also be drawn from supposedly 'trustworthy' members of the local European community, the latter consisting of 'independent English gentlemen not connected with the East India Company, indigo planters and other persons of intelligence and influence'.[11]

Commissioners possessed the ability to not only try and convict Indians within the territory of British India for acts of rebellion, but also could do so for 'any other crime against the State, or murder, arson, robbery, or any heinous crime against person or property'. Those exercising these extensive penal legal powers were 'vested with absolute and final powers of judgement and execution'. Trial proceedings were to be carried out without juries and or any right of appeal, and sentences imposed would be 'final and conclusive'. It was also made clear that such sweeping legal powers would not be used in the 'trial or punishment of Her Majesty's natural-born subjects born in Europe, or of the children of such subjects'. This racialized exemption reinforces the argument made by Elizabeth Kolsky that the law in colonial India placed Europeans above its ambit, and that its enforcement could—and did—have the capacity to promote racial inequality.[12]

The desire for the trial and punishment of offences of a political nature to be applied in a more consistent manner throughout British India was first articulated in section 109 of the draft version of the Indian Penal Code drawn up in the late 1830s.[13] Under this section those convicted of waging war, or abetting those doing so, could receive a capital sentence or a life sentence in jail with or without transportation to a penal colony, and have all their property and possessions seized by the state. This section was essentially a condensed version of the legal powers specified in Act XI. A more recent piece of colonial legislation that had a more direct bearing on the character of Act XI was Act XXXVIII of 1855. This act provided the emergency legal mechanisms required to try and punish rebellion and other 'heinous' criminal offences committed in districts of the Bengal Presidency affected by the *hool* or uprising of the Santal tribesmen. Their insurrection was itself the product of severe economic distress caused by

[11]Governor General in Council to the Court of Directors, EIC, Fort William, 11 Dec. 1857. Home Dept., no. 144, *Correspondence Relating to the East Indies (Mutinies)* (London, 1858), p. 3.

[12]Elizabeth Kolsky, *Colonial justice in British India: White violence and the rule of law* (Cambridge: Cambridge University Press, 2010), pp. 23, 86, 232. Unlike Act XI, Europeans could be arrested and detained under the Bengal and Madras State Prisoner Regulations of 1818 and 1819. However, senior British government officials were reluctant to detain British European subjects under these regulations for fear of the legal challenges and possible political repercussions that might arise from doing so. Telegram from the Secretary of State for India to the Viceroy, London, 18 Jan. 1929. Govt. of India, Home Dept., Political, 1929, File no. 90, p. 3, National Archives of India, New Delhi (hereafter NAI). All such material has been accessed via the NAI's internet portal site: https://www.Abhilekh-Patal.in, [accessed 14 February 2024].

[13]*A Penal Code Prepared by the Indian Law Commissioners* (Calcutta: Bengal Military Orphan Press, 1837), p. 29.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

a loss of customary land rights.[14] Act XXXVIII appears to have served as a suitable, if only partial, legal precedent for Act XI. Indeed, several sections of the 1855 Act are found repeated almost word for word in the text of the 1857 Act.

On 16 May 1857, less than a week after the initial outbreak of mutiny among Indian troops of the EIC garrisoned in the northern Indian town of Meerut, Barnes Peacock, the legal member of Canning's Legislative Council based in the city of Calcutta (the modern day city of Kolkata), presented the prototype of Act XI in the shape of a draft bill 'for the trial and punishment of offences against the state'.[15] The word 'treason' was removed from the bill at the insistence of Arthur Buller, a judge of Calcutta's Supreme Court. During the drafting process Peacock had taken this word from the British-governed Madras Presidency's Regulation I of 1834. This regulation dealt with the crimes of treason and rebellion. Those individuals convicted of such crimes could receive a capital sentence. However, no such sentence could proceed without the sanction of the governor of the presidency and his council.[16] Regulation I of 1834 was itself a further refinement of Regulation X of 1802 which had been created for the trial of political crimes directed against the EIC.[17] The 1834 Regulation was considered necessary because Regulation X of 1802, following the precedent of Muslim law adhered to more generally in this presidency, as it was within the EIC's presidencies of Bengal and Bombay during this period, failed to specify any form of punishment for treason or rebellion. Given that in 1857 no comprehensive penal code had yet been introduced, Peacock thought it prudent that the draft bill should possess a legal effect similar to legislation already in use. Peacock also made reference to the treason provision included in Act V of 1841.[18] This was a British India-wide statute introduced in order to ensure 'greater uniformity of the process upon trials for state offences'. Under it, one or more judges could form a commission to try offences against the state, such as treason or rebellion. The act provided for what amounted to a rather convoluted sentencing review procedure involving the judges of the highest criminal court in each presidency who, after reviewing the initial court sentence, were to report their legal opinion to their respective executive government and then wait for the latter's response before finally ordering any sentence to be carried out. The only change Peacock made to short-circuit this protracted legal process was to delete the provision that trials for treason or rebellion be subject to review by a senior court. However, he had no objection to Buller's amendment and, in fact, by accelerating the judicial procedure still further, he considered it to be an improvement.

[14]For an insightful recent examination of the internal dynamics of the Santal Uprising, see Peter Stanley, *Hul! Hull: The suppression of the Santal Rebellion in Bengal, 1855* (London: Hurst and Company, 2022).

[15]All references made to the deliberations of the Legislative Council on Act XI's draft bill have been cited from the *Proceedings of the Legislative Council of India from January to December 1857* (Calcutta: Baptist Mission Press, 1857), vol. 2, pp. 259, 266, 275, 279–286.

[16]*The Sessional Papers Printed by Order of the House of Lords in the Session of 1837–38* (London: His Majesty's Stationery Office, 1838), p. 71.

[17]Richard Clarke, *The Regulations of the Government of Fort St. George in Force at the End of 1847* (London: J. and H. Cox, 1848), p. 86.

[18]*East India Acts Passed by the Right Honourable the Governor-General of India in Council for 1841 and 1842* (London: East India House, 1844), pp. 6–7.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

Another amendment proposed by Peacock was to jettison the specification that no sentence of a court could be carried out without the prior sanction of government, a provision also drawn from the Madras Regulation I of 1834. As Peacock pointed out, 'the great advantage of having Special Commissions was that there should be no delay, and that the sentences passed should be carried into effect as soon as possible after the commission of the crime'. In this regard Peacock referred to similar legal powers bestowed upon British military officers under the first of the special acts enacted in 1857—Act VII—that provided for the 'trial of persons amenable to the Articles of War for the Native Army, and to carry into immediate effect any sentence of such Courts, the object being to make the punishment prompt in order that it might be effectual as possible'. As Peacock informed the members of the Legislative Council, 'the very object of taking these cases out of the jurisdiction of the ordinary tribunals was to ensure speedy and exemplary punishment upon offenders, with a view of deterring others following their example'. In the future this argument was one frequently resorted to by colonial and post-colonial officials to justify the introduction of emergency legislation. On 30 May 1857 the final amended version of the bill for Act XI was sent to Canning for his approval. The governor general gave his assent to the bill the very same day, an indication of the sense of urgency felt by the British that this legislation should be passed into law as soon as possible.

Act XI was followed, on 6 June 1857, by the enactment of Act XIV. This act specified the punishments to be imposed for inciting sedition among the Indian troops of the EIC and for the concealment of those guilty of doing so. These punishments replicated those outlined in Act XI. Act XIV extended still further the legal jurisdiction of the commissioners: they now possessed the ability to try individuals for criminal offences detailed in the act, as well as those cited in Act XI, in any district, irrespective of 'whether such District shall or shall not have been proclaimed to be in a state of rebellion' and duplicated Act XI's race-based exemption relating to the enforcement of these special legal powers. Act XVI, assented to by Canning on 13 June 1857, provided for a more expansive definition of what constituted 'heinous' crimes, encompassing offences ranging from attempted murder and rape to comparatively minor offences such as receiving stolen property. Those accused of such crimes could be brought before military courts or the courts of the special commissioners and, if convicted, would be subject to the same range of sentences as those set out in Act XI. One further special act of 1857, Act XVII, dealt with punishments applicable to Indian military officers and rank and file charged with acts of mutiny and desertion. Here again the punitive penal influence of Act XI was evident in the fact that this act enabled military commissions to try such offences and, if it was thought necessary, impose a death sentence to be carried out at once.

Let us now turn our attention to how and to what extent Act XI was implemented during the Indian Uprising of 1857. One commissioner, William Power, all too soon acquired from the British troops of a military column that he was accompanying the nickname 'Hanging Power'. On one occasion he ordered the execution in the town of Mau of some 100 Indian prisoners he had declared to be guilty of acts of insurgency. According to one eye-witness, these men were 'summarily tried, and hanged upon the branches of a great pipul-tree in the square in the centre of the town'.[19]

[19]W. Gordon-Alexander, *Recollections of a Highland Subaltern* (London: Edward Arnold, 1898), pp. 209, 214.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

Power's actions were surpassed in their severity by those carried out by commissioners in the North Indian city of Allahabad in the British-administered North Western Provinces (NWP) during the months of June and July 1857. One near contemporary Indian writer recorded that the actions of these men, together with the willingness of the military to rigorously enforce a regime of martial law in and around Allahabad, resulted in the deaths of several thousand of the city's population.[20] In a letter sent to *The Times* newspaper one of Allahabad's civilian commissioners boasted of his exploits, writing that 'day by day we have strung up eight or ten men. We have the power of life and death in our hands and I assure you we spare it not. A very summary trial is all that takes place.'[21] Allegedly the first action taken by another of the non-official commissioners was to order the arrest and immediate execution of several Indian merchants to whom he was indebted prior to the rebellion.[22] Yet another of the commissioners, the assistant surgeon James Irving, sentenced every Indian prisoner brought before his court to be hanged.[23] It is not then without any sense of exaggeration that Henry Keene, a former member of the Indian Civil Service, when looking back at these terrible events, could write that the behaviour of Allahabad's commissioners constituted a '*terreur blanche*'.[24]

Senior colonial officials did seek to exercise greater oversight over the actions of the commissioners. In regions where the unrest was less intense, such as in the districts of southern Bengal, government officers could, via a series of official circulars, exert a far stronger guiding hand on the operation of the courts of the commissioners.[25] Elsewhere any capacity to reign in the more overly zealous of the special commissioners was hampered by the widespread destruction of government infrastructure and by the frequent disruption to the official channels of road, river, and telegraphic communication. Steps were taken, however, to reduce the severity of the British response to the revolt, most notably with the release of an official circular by Canning's government at the end of July 1857 that drew the attention of civil officials to the need to exercise greater discrimination in their efforts to suppress the insurgency. While this circular did not specifically cite the actions of the special commissioners, it is perhaps not a coincidence that shortly after its release Canning moved to cancel the commissions held by Allahabad's non-official European commissioners. By early to mid-1858,

[20]Bholanauth Chunder, *The Travels of a Hindoo to Various Parts of Bengal and Upper India* (London: N. Trubner and Co., 1869), vol. 2, p. 324.

[21]'Letter to the Editor from a Civil Servant, Allahabad, 28 June 1857', *The Times*, 25 August 1857, p. 6.

[22]Arthur Irwin Dasent, *John Thadeus Delane, editor of 'The Times': His life and correspondence* (New York: Charles Scribner's Sons, 1908), vol. 1, p. 306.

[23]Michael Maclagan, *'Clemency' Canning: Charles John, 1st Earl Canning, governor-general and viceroy of India, 1856–1862* (London: Macmillan and Co. Ltd., 1962), p. 134.

[24]H. G. Keene, 'Indian districts during the Revolt', *The Army and Navy Magazine*, vol. 6, 1883, p. 348. The severity of sentences handed down by the special commissioners was evident at the very epicentre of the Uprising in the districts of the NWP. Of the 3,925 recorded sentences passed up to the end of April 1859, nearly 45 per cent were capital sentences. Abstract of Special Commissioners' Proceedings in the NWP to the close of Apr. 1859. NWP Judicial Department (Criminal), P/234/56, 8 Apr. 1859, no. 188. India Office Records, Asia and African Studies Collections, British Library, London. My thanks to Radhika Singha for her help in obtaining these data.

[25]*Narrative of Events Attending the Outbreak and Restoration of Authority* (Calcutta: Foreign Department Press, 1881), vol. 1, pp. 702–703.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

with the intensity of the rebellion finally beginning to wane, the judicial powers of the commissioners were confined to the trial and conviction of those identified to be 'rebel' leaders rather than those who had simply taken up arms against the British or who had engaged in non-political acts of 'social' violence such as *dacoity* (armed robbery) or rioting. By this point senior government officials were now in the position to review and, if necessary, revise any sentence handed down by a special commissioner.[26] Yet Act XI itself was to prove to have an extended shelf life in British colonial law. Although revised over time, the act remained a fixture on the colonial statute books for well over half a century after the Indian Uprising of 1857. Various sections of the act were repealed by the Repealing Act XVII of 1862, and other excisions were made in its text to remove what were deemed to be redundant provisions by the Repealing Act of 1876 (Act XII). Despite these alterations, under the Laws Local Extant Act of 1874, the remaining legal powers contained in Act XI would now be able to be enforced throughout the greater part of British India.

Several years after the suppression of the Indian Uprising the emergency powers of Act XI were invoked once again in response to an uprising among the tribal population of the Jainta region of Assam in northeast India.[27] This uprising had its origins in simmering resentment over the imposition of new local taxes by the British. In early March 1862 the governor general's agent for the North-East Frontier region, Henry Hopkinson, suggested that the penal provisions of the act should be used to quash this rebellion instead of relying upon the potentially more violent excesses of martial law. The Government of Bengal agreed and appointed several special commissioners to try and convict the insurgents. The act remained in force until the surrender of the last of the leaders of the insurgency in December 1863. Act XI was again invoked in 1871 when it formed part of the criminal charges brought against a prominent Muslim businessman accused of financing the followers of the fundamentalist Wahhabi sect.[28] Throughout the rest of the nineteenth century, Act XI's penal powers were incorporated into various colonial legislative acts and regulations that could be activated in districts or hill tracts that were considered by officials to be in a 'disturbed' state. Legislation along these lines included, for instance, British Burma's Arakan Hills District Laws Regulation LX of 1874 and Regulation I of 1890 relating to the Baluchistan region of northwest India.[29]

Beyond India itself, in South Africa's Cape Colony, the British governor of the colony, Henry Frere, appointed, in the late 1870s, special commissioners to try Africans

[26]W. Muir, Sec. to Govt., NWP, to the Commissioner of Meerut, Allahabad, 26 Apr. 1858. Inclosure in no. 5 of no. 47, *Further Papers (No. 9) Relative to Insurrection in the East Indies* (London: Harrison and Sons, 1858), pp. 934–935; Muir to R. Alexander, Commr., Rohilkhand, Allahabad, 28 Apr. 1858. Govt. of India, Home Dept., Consultations no. 1, Judicial, 20 Aug. 1858, NAI.

[27]*Selections from the Records of the Government of Bengal, Part. 1: Papers Relating to the Disturbances in the Cossyah and Jynteeah Hills* (Calcutta: Bengal Secretariat Press, 1863), pp. 43–44, 53, 75; *Selections from the Records of the Government of Bengal* (Calcutta: Bengal Secretariat Office, 1864), vol. 2, pp. 208–209.

[28]Julia Stephens, 'The phantom Wahhabi: Liberalism and the Muslim fanatic in mid-Victorian India', *Modern Asian Studies*, vol. 45, no. 1, 2013, pp. 22–52; D. E. Cranenburgh, *A Handbook of Criminal Cases Reprinted Verbatim from the Bengal Law Reports* (Calcutta: D. E. Cranenburgh, 1889), vol. 1, pp. 489–512.

[29]*The Burma Code*, 4th edn (Calcutta: Superintendent of Government Printing, India, 1910), p. 204; F. G. Wigley, *Chronological tables of Indian statutes* (Calcutta: Superintendent Government Printing, India, 1909), p. 129; Ghose, *Laws*, pp. 103–104.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

for rebellion. The judicial arrangements to do so were based upon commissions established under Act XI. It seems, according to Michael Lobban, that Frere had a somewhat 'rosy view of the Indian commissioners'.[30] But rather than possessing the unadulterated authority of the commissioners of 1857, the legal powers of the Cape Colony's commissioners more closely resembled those of circuit court judges. Moreover, any death sentence imposed by the commissioners was to be subject to review. Nevertheless, as Jill Bender has noted, Frere's knowledge of the Indian commissioners demonstrated an awareness of counter-insurgency measures deployed elsewhere within the British empire, as well as a willingness to resort to such measures, albeit in a diluted form.[31]

During the first two decades of the twentieth century, Act XI, or rather some modified version of it, was believed by colonial officials to be of use in combating acts of terrorism and revolutionary violence that were taking place in the northern Indian provinces of Bengal and Punjab. To British officials the continued appeal of the act lay in its extensive discretionary powers. Indeed, the courts of the special commissioners matched the flexibility and autonomy of the military courts in the sense that, as one Indian jurist writing in 1919 put it, the operation of such courts were not subject to review and therefore 'there was no real guarantee that they shall be in conformity with the law'.[32] An internal government report produced in 1910 by H. C. Woodman and Harold Stuart, the additional deputy secretary of the Home Secretary and the deputy secretary for the Government of India respectively, examined the suitability of the application of the emergency laws passed in 1857 to punish civil offences in twentieth-century India. It was noted that two of Act XI's provisions relating to the appointment of commissions to try crimes against the state, as well as heinous crimes such as murder and arson, still remained in force. So too did the power to enable the judgments of such courts to be final and beyond any oversight by a higher court. To Woodman and Stuart these measures provided a 'valuable reserve power' but warned that they could only be triggered when a state of rebellion existed and, furthermore, 'would doubtless be subject to the closest legal scrutiny'. They were also of the opinion that the use of such extreme measures could generate friction between the executive and judiciary as to what actually constituted a state of rebellion. Furthermore, the current political situation that the British were confronted with in India was one of sporadic outbreaks of revolutionary violence and terrorism rather than full-blown military mutiny or widespread civil insurrection. Therefore, the prevailing circumstances were, Woodman and Stuart affirmed, 'wholly different from 1857' and the severity of Act XI's emergency powers 'would probably be regarded as too summary for the present day politics'.[33]

[30]Michael Lobban, *Imperial incarceration: Detention without trial in the making of British colonial Africa* (Cambridge: Cambridge University Press, 2021), p. 66 and n. 126.

[31]Jill C. Bender, *The 1857 Indian Uprising and the British empire* (Cambridge: Cambridge University Press, 2016), p. 181. Frere's knowledge of the special commissioners was no doubt acquired during the time he spent in India while serving as a member of the governor general's Legislative Council and later, during the 1860s, as the governor of the Presidency of Bombay.

[32]Nagendranath Ghose, *Comparative administrative law* (Calcutta: Butterworth and Co., 1919), p. 477.

[33]'Acts passed at the time of the Indian Mutiny for the punishment of civil offences triable by civil powers', Govt. of India, Home Dept., Political Branch Deposit, Mar. 1910, File no. 21, pp. 3–4, NAI.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

Several months later, in June 1910, the feasibility of utilizing Act XI was raised again during official deliberations over a proposed new sedition bill. One senior official suggested that the act could be deployed in response to what he termed the 'present emergencies' in Bengal. Archidale Earle, the secretary to the Government of India, rejected using the 'Mutiny Act XI of 1857', given that its judicial powers could only be applied in districts where rebellion had actually broken out.[34] However, matters did not end there. Three years later in 1913 Reginald Craddock, the home member of the governor general's Executive Council, believed that some type of special legislation was required to suppress the revolutionary violence still taking place in Bengal, and that the government might perhaps consider extending Act XI 'to areas proclaimed to contain anarchical organisations, in lieu of declaring such tracts to be or to have been in a state of rebellion'. A modern act of this nature should also be made a permanent one so that 'it would always be available if anarchy again raised its head in India'. The governor general of India, Charles Hardinge, was quick to pour cold water on Craddock's proposal. Hardinge was not in favour of resorting to such emergency legislation since he did not believe that the pre-existing level of violence warranted such a move, although he did not rule out the introduction of a 'special Repression Act' should one be needed in the future.[35]

Anne Besant, the co-founder of the Indian Home Rule League and a prominent supporter of the Indian National Congress party (INC), called upon the Government of India to repeal Act XI at the cessation of the First World War, or at the very least remove the clause that exempted Europeans from its legal purview.[36] Other influential INC political figures, such as Sundara Satyamurthy, voiced similar concerns. Satyamurthy asserted that Act XI was one of the earliest instances of colonial legislation designed to circumvent the procedures of the Indian criminal courts. For Satyamurthy the continued presence of a legislature of this nature illustrated the suspicion and unease felt by the British in administering 'the ordinary Courts of the land' and their 'anxiety to set up special rules of procedure and evidence'. Such mistrust, Satyamurthy believed, derived from the conviction held by officials that the judicial system of India was deficient in cases where the interests of the state may have been affected.[37] The eminent Indian liberal politician Surendranath Banerjea was equally dismissive of such emergency legal powers which he regarded as being 'obsolete' and 'a bureaucratic device' designed to 'strike terror into the hearts of the people'.[38] And within the pages of the Indian language newspapers of this period, the British were

[34]'Proposal to amend certain acts with a view to combating seditions (Omnibus bill)'. Govt. of India, Home Dept., Political Procs., Oct. 1910, no. 2, Notes, pp. 11, 16, NAI; Govt. of India, Home Dept., Political, May 1913, Proc., no. 23, pp. 4, 9, NAI.

[35]'Political situation in Bengal. Proposals for dealing with elements of disorder and conspiracy in that province'. Govt. of India, Home Dept., Political A Proc. 1913, nos. 72–73, Notes, p. 38, NAI; 'Proposal to appoint a commission with special power to deal with Political Crime'. Govt. of India, Home Dept., Political A, Nov. 1914, File nos. 39–43, pp. 8–9, NAI.

[36]Anne Besant, *India: A nation. A plea for Indian self-government* (London: T. C. and E. C. Jack, 1916), p. 78.

[37]S. Satyamurthy, *Rights of citizens* (Madras: Ganesh and Co., 1919), pp. 38–40.

[38]Surendranath Banerjee, *A nation in the making: Being the reminiscences of fifty years of public life* (Bombay: Oxford University Press, 1963), p. 143.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

roundly condemned for their reliance on repressive measures that resembled legalized lawlessness.[39]

In March 1920 Vallabhbhai Patel, a prominent lawyer and member of the INC, put forward a resolution in the Legislative Council calling for the repeal or amendment of repressive colonial laws and regulations, including Act XI. At the time William Vincent, the Government of India's home member, opposed such a move, claiming that it 'would do nothing but provide unrest, agitation and ill-feeling'. Here Vincent was alluding to the civil unrest that had erupted in various parts of India during the previous year, most notably in Punjab province, in response to the passing of the Anarchical and Revolutionary Crimes Act of 1919[40] that, among other things, provided India's colonial police force with sweeping powers of arrest and detention. The government's argument won the day and Patel's resolution was voted down.[41]

The decision taken by British authorities to finally take steps to repeal Act XI was the result of a resolution submitted in the Council of State, British India's newly formed upper house of legislature, by the liberal Indian politician V. S. Srinivasa Sastri in mid-February 1921. Sastri called for the 'fetters' of such autocratic colonial legislation to be struck off. His resolution was now one supported by senior British officials. According to Marris, serving as the private secretary to the governor general, the presence of this war-like legislation on India's statute books was 'rather a denial of our own principals; we use them too intermittently, and they are weapons too big and clumsy to deal with nine-tenth of the action of mischief'.[42] During the following month a committee was appointed to examine whether such laws should be repealed, amended, or preserved in their entirety. The Repressive Laws Committee, its name itself a reflection of the prevailing political mood, was placed under the chairmanship of Tej Bahadur Sapru, the law member of the governor general's Executive Council. In conjunction with the appointment of this committee, officials from the various administrative regions of British India were asked for their views on this matter. The majority supported the repeal of Act XI. However, officials from Bengal and the Central Provinces of India and Burma suggested that it should be replaced by a more up-to-date statute. Officials from Bombay were also in favour of its repeal provided that the first section of the Indian Criminal Law Amendment Act of 1908, also under review by the committee, was retained. This section gave magistrates the authority to expedite the pace of criminal trials 'in the interest of peace and good order'. One strident voice of dissent was that of C. A. Barron, the chief commissioner of Delhi, who wondered why Act XI should be repealed, given that it conferred 'powers, to be exercised in the last resort, of which I imagine no civilised Government is destitute or would dream of divesting itself'. It should come as no surprise that Barron favoured its retention, his only caveat being the deletion or modification of section six of Act XI since he could 'see no reason for

[39]*Report on Indian newspapers and periodicals in Bengal for the week ending 13 March 1915* (Calcutta: B. S. Press, 1915), p. 9.

[40]To be examined in more detail later in this article.

[41]Procs. of the Legislative Council, Mar. 1910, pp. 1264–1265, 1267, 1269, available at https://eparlib.nic/bitstream/123456789/1/ilcd_10-03-1920.pdf, [last accessed 10 April 2023].

[42]Cited in N. G. Barrier, *Banned: Controversial literature and political control in British India, 1907–1947* (Delhi: Manohar, 1974), p. 80, n. 48.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

treating a rebel of British birth, if caught on Indian soil, differently from any other conspirator against the British Empire and its King-Emperor'.[43]

The Repressive Laws Committee released its findings in early September 1921.[44] Among its recommendations was the repeal of Act XI. It was felt that this long-standing statute, together with other older pieces of emergency legislation such as Regulation X of 1804, should be rescinded since these ancient colonial laws dealt with 'a state of affairs which no longer exists'. Members of the committee were well aware of the authoritarian nature of this legislation that armed the 'executive with special powers which are not subject to revision by any judicial tribunal' and as such their continued presence on the British Raj's law books would be 'regarded as an offence by enlightened public opinion'. Committee members were also of the view that should any state of emergency arise in the future, it could be dealt with by the implementation of new and more relevant legislation. Here the committee had in mind 'legislation by ordinance' that should 'be reserved for exceptional or sudden emergencies'.[45] The recommendations put forward by the Repressive Law Committee were, in the main, accepted by the Government of India and duly passed into law in late February 1922 under the Special Laws Repeal Act.[46] But despite its repeal, Act XI's emergency legal powers were still found reflected, if not firmly embedded in, subsequent colonial and post-colonial emergency legislation, as the following case studies will demonstrate.

Murderous Outrages Act, 1867

A colonial statutory act set in place a decade after the Indian Uprising shares many of the punitive features of Act XI. This act, entitled 'An Act for the suppression of murderous outrages in certain Districts of the Punjab' (Act XXIII of 1867), better known by its short legal title as the Murderous Outrages Act (MOA),[47] sought to expedite the trial and punishment of Indians arrested and charged with 'murderous attacks, attributable to religious fanaticism, made on Europeans in stations on the Punjab frontier'.[48] It was felt that such offences could not be adequately dealt with under the normal procedures of criminal law, a refrain all too commonly made by officials in colonial and post-colonial India when referring to emergency legislation. To Elizabeth Kolsky, this

[43]H. D. Craik, Sec. to Govt. of India, Home Dept., to members of the Repressive Laws Committee, 22 July 1921, p. 20; Telegram from the Chief Sec. to Govt. of Bombay to Sec. to Govt., Home Dept., 16 June 1921, p. 180; C. A. Barron, Chief Commr., Delhi, to Sec. to Govt. of India, Home Dept., 21 May 1921, p. 76; Govt. of India, Home Dept., Political, 1921, File no. 29, pt. 1, nos. 1–57, all NAI.

[44]'Report to the Government of India of the Committee appointed to examine the repressive laws', *The Gazette of India, Extraordinary*, 19 September 1921, pp. 378, 383, 386.

[45]The ability of the governor general to declare a state of emergency and to issue an ordinance of up to six months in duration that had the exact same status as a statutory act was provided for by section 23 of the Indian Councils Act of 1861, while the capacity of the governor general to unilaterally respond to an emergency had its basis in section 49 of the Government of India Act of 1833.

[46]*A collection of acts of the Indian legislature and of the governor-general for the year 1922* (Calcutta: Superintendent Government Printing, 1923), n.p.

[47]As provided for under the Amending Act of 1903.

[48]Procs. of the Council of the Gov. Gen. of India, 21 Dec. 1866, p. 244, available at https://eparlib.nic.in/bitstream/123456789/763363/1/ilcd_21-12-1866.pdf, [accessed 26 February 2024]. The text of the act is reproduced in *A Collection of the Acts Passed by the Governor General of India in Council in the Year 1867* (Calcutta: Office of the Superintendent of Government Printing, 1868), pp. 93–96.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

legislation, and by implication special laws of an equally punitive character such as Act XI, generated 'a legal regime of exception that existed in tandem with the colonial rule of law', with the creation and application of such an extraordinary law deriving from a conviction that 'exceptional circumstances required exceptional treatment'.[49]

One of the goals that the British sought to achieve by enacting MOA was the very same one that had prompted the enactment of Act XI: in the words of Edward Brandreth, the law member of the governor general's Legislative Council, 'to provide for a more speedy mode of trial and giving effect to the sentences passed' and thereby provide the 'speediest retribution' of crimes committed by 'fanatics'. In the act's preamble it was asserted that the 'law of the country is not adequate to suppress such offences'. As another member of the Legislative Council opined, 'prompt and severe retribution would be more effective than any slower procedure'. Accelerated and overly punitive colonial criminal law procedures were needed because they had the potential to inhibit others from committing crimes of a similar nature, an argument that reiterated the one made by Peacock a decade earlier.[50]

As an 'exceptional' piece of colonial criminal legislation, MOA was not, however, confined to the protection of members of the European community living in India's North-West Frontier region for, as was stated in the act, it encompassed 'servants of the Queen and other persons'. The latter category included Hindu traders who were themselves often the victims of attacks by 'fanatical' Muslims.[51] Under the act, those convicted of murder were to be dealt with in a similar manner to those accused of political offences under Act XI: namely, they could be sentenced to death by hanging in a public space or face transportation for life, and have all their property and personal possessions seized by the state. In an identical manner to the trials held under Act XI, a commissioner would oversee court proceedings. In the case of MOA this could consist of a civil official such as the commissioner of an administrative division within Punjab province where an offence under the act had been committed, or be undertaken by a district magistrate. In a departure from the 1857 Act, MOA's commissioners could appoint legal assessors to assist them. It was, however, preferred that these assessors should be magistrates or British military officers in command of 'Native' Indian regiments.[52] In most other respects MOA was a mirror image of Act XI, for instance its denial of the right of legal appeal and the capacity to implement court sentences immediately without further review or confirmation by a senior court. And

[49]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, no. 4, 2015, pp. 1221, 1223. See also Mark Condos, '"Fanaticism" and the politics of resistance along the North-West Frontier in British India', *Comparative Studies in Society and History*, vol. 58, no. 3, 2016, p. 719; and his monograph, M. Condos, *The insecurity state: Panjab and the making of colonial power in British India* (Cambridge: Cambridge University Press, 2017).

[50]Procs. of the Council of the Gov. Gen. of India, 21 Dec. 1866, p. 245; Procs. of the Council of the Gov. Gen. of India, 22 Feb. 1867, p. 97, available at https://eparlib.nic.in/bitstream/123456789/753354/1/ilcd_22-02-1867.pdf, [last accessed 14 March 2023]; Procs. of the Council of the Gov. Gen. of India, 4 Jan. 1867, p. 7, available at https://eparlib.nic.in/bitstream/123456789/763366/1/ilcd_04-01-1867.pdf, [accessed 14 February 2024].

[51]Procs. of the Council of the Gov. Gen. of India, 4 Jan. 1867, p. 7.

[52]Ibid., p. 6.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

in a legal measure that was to prove to be a common feature of future emergency colonial laws, the commissioner appointed to a MOA special court had the authority to try the accused for crimes other than those specified in the act if they contravened the legal provisions included in the Indian Penal Code.

In the initial deliberations on the MOA bill by senior British officials, reference was made to criticism that it was 'an illustration of the extreme readiness of the Indian Government to licence lawlessness'. This critique was rejected by Sumner Maine, the legal member of the governor general's Executive Council, who argued that its intent was only to target a specific type of crime. But it is perhaps significant that as an 'exceptional law' the act was to have a lifespan of no longer than ten years.[53] The inclusion of this expiry date led to the passing of the Punjab Murderous Outrages (Amendment) Act of 1877 which reactivated the features of the original act. Under the new act the legal powers of the original MOA were to 'remain in force until the Governor-General in Council otherwise directs'. At the beginning of the twentieth century the 1877 Act was repealed and its legal provisions were inserted into the Frontier Murderous Outrages Regulation (Regulation IV of 1901; hereafter FMOR).[54] The desire by colonial officials to hasten trial proceedings using the legal powers of MOA, and later those of FMOR, remained over the years a remarkably consistent one. As late as 1931 a 'fanatic' arrested for the attempted murder of the British magistrate of the district of Charsadda was tried under FMOR by a sessions court in Peshawar the very next day and sentenced to death. This sentence was carried out the following morning.[55] Under MOA a commissioner had the right to dispose of the corpse as he saw fit. It was common for the body to be ordered to be burnt as an act of religious defilement, for Muslim religious beliefs dictated that 'the destruction of the body involves future obliteration' and as a further corollary motive for such an act, the burning of the corpse prevented the burial site of a 'fanatic' becoming a *ziarat* or holy shrine.[56]

Some consideration was given to extending the legal provisions of FMOR to other parts of India. In 1908 the governor of Eastern Bengal and Assam believed it could be applied to suppress revolutionary terrorism, and it was also suggested in this regard that special laws similar to those enacted in 1857 might be of use. While the Government of India was of the view that FMOR was far too drastic a measure, it remained open to the possibility of introducing a revised version of it at some future date.[57] In 1929 David Petrie, the director of the Government of India's Intelligence Bureau, suggested that legislation similar to FMOR be introduced by the Government of Bengal to combat an uptake in acts of revolutionary terrorism in that province. This proposal was considered by officials of the Government of Bengal who, while initially

[53]Procs. of the Council of the Gov. Gen. of India, 15 Mar. 1867, pp. 195–96, 207, available at https://eparlib.nic.in/bitstream/123456789/763348/1/ilcd_15-03-1867.pdf, [accessed 26 February 2024].

[54]The text of the Punjab Murderous Outrages (Amendment) Act, 1877, and the Frontier Murderous Outrages Regulation, 1901, can be found in *The Punjab and North-West Frontier code* (Calcutta: Superintendent Government Printing, 1916), pp. 83, 591–596.

[55]'Magistrate's assailant sentenced to death', *The Times*, 19 February 1931, p. 12.

[56]John Dickson Poyndere, 'A Bird's-eye view of the North-West Frontier', *The National Review*, vol. 28, no. 138, 1896, p. 111; Mark Condos, 'Licence to kill: The Murderous Outrages Act and the rule of law in colonial India, 1867–1925', *Modern Asian Studies*, vol. 50, no. 2, 2016, p. 506.

[57]Michael Silvestri, *Policing 'Bengali terrorism' in India and the world: Imperial intelligence and revolutionary nationalism, 1905–1939* (Cham: Palgrave Macmillan Switzerland, 2019), p. 56.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

keen to implement such legislation, decided not to pursue this course of action. In a letter sent to the Government of India in November 1931 it was noted that legislation of such a severe character 'would be strongly resented as an insult to the people of Bengal'. Intriguingly, Bengal government officials had also considered developing an ordinance along the lines of Act XI to allow for acceleration in criminal trial proceedings and the more rapid passing of sentences of Indians accused of acts of terrorism. A draft bill 'to make provision for the speediest trial of terrorist crime' was in fact drawn up in 1932 but was then put on hold.[58]

The Defence of India (Criminal Law Amendment) Act, 1915

Britain declared war on Germany on 4 August 1914. Four days later the British parliament rushed into law the Defence of the Realm Act to ensure 'the public safety and the defence of the realm'. Those breaching its regulations would promptly face trial before a military court martial. A revised version of this act, passed on 27 November 1914, specified that those committing less serious misdemeanours would be subject to a summary court trial. The governor general of India announced the resolution in the Imperial Legislative Council some five weeks later, signalling India's formal entry into the conflict. The Government of India was quick to follow suit with a piece of legislation modelled on the Defence of the Realm Act, a decision spurred on by a request for such powers by officials from Punjab.[59] A bill to this effect was placed before the Legislative Council on 18 March 1915. It was deemed by Governor General Hardinge to be a 'precautionary measure' to enable 'quickening up the procedure of justice' during a state of war. It was to be temporary in duration and to remain in force throughout the course of the conflict and to expire six months after its cessation.[60] In presenting this bill Craddock stated that it had been introduced in order to deal with 'lawlessness' stirred up by revolutionary and anarchical-inspired movements in Punjab and Bengal, as well as outbreaks of economic and communal unrest in districts situated in western Punjab. The proposed act differed in some respects from the Defence of the Realm Act in that it substituted military courts martial for special courts presided over by local government-appointed commissioners in specially designated areas.[61]

The special tribunals to try offences under the act were to consist of three commissioners and, in a similar manner to MOA, to potentially encompass offences not included in the original proceedings of a trial. The commissioners were to consist of a mixture of session judges, additional judges, legal advocates of the senior court, and

[58]Govt. of India, Home Dept., Political, 1934, File no. 45/VI/34, p. 6, NAI.

[59]On this matter, see Michael O'Dwyer, *India as I knew it* (London: Constable and Company Ltd., 1925), pp. 199–201. There had also been some talk at the time among senior government officials of satisfying Punjab's request for emergency powers via an ordinance modelled on Act XI of 1857. 'Promulgation of the Defence of India Act (IV of 1915)'. Govt of India, Home Dept., Political A, Apr. 1915, File nos. 385–411, pp. 7–8, NAI.

[60]Procs. of the Council of the Gov. Gen. of India, 18 Mar. 1915, p. 472, available at https://eparlib.nic.in/bitstream/123456789/785178/1/ilcd_18-March-1915.pdf, [last accessed 22 February 2023].

[61]Ibid., p. 500. The Defence of the Realm Act was later amended to allow the right of trial before a jury in a civil court. There was no such softening on the penal severity of India's Defence Act. Charles Townshend, *Making the peace: Public order and public security in modern India* (Oxford: Oxford University Press, 1993), p. 59.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

experienced court pleaders. The British desire to speed up the proceedings of criminal trials proved to be a prominent feature of the bill and subsequent act. Craddock admitted that 'we are indeed shortening the criminal procedure by dispensing with committal proceedings and by withdrawing the right of appeal'.[62] Yet again the familiar argument was trotted out by Craddock to justify the need to hurry up criminal proceedings: 'the greatest check upon the spread of crime of this kind is the prompt punishment of the offenders'. And in an identical manner to that of Act XI of 1857, sentences imposed by the tribunals were to be 'final and conclusive' with no further confirmation necessary.[63] What the Defence Act did not share with the 1857 Act was the latter's exemption of Europeans from its provisions. It was now thought to be politically inexpedient to include such an exemption in the act. Instead, if the need ever arose, local government officials were instructed to fall back on section 46 of the Government of India Act of 1833 which prevented any court established by the Government of India from passing a sentence of death upon European subjects of the Crown.[64]

Under the Defence Act any contravention of wartime rules, such as spreading false reports or tampering with state infrastructure, would be punishable by jail sentences of up to seven years, a fine, or a combination of the two. For more serious offences, such as waging war against the state or aiding and abetting those doing so, a tribunal could impose sentences of death, transportation, or a jail term of up to ten years. The severity of these sentences was a virtual carbon-copy of the punitive measures contained in Act XI. A further facet of the Defence of India bill, which was one found repeated in later colonial and post-colonial emergency laws, was the provision to hold over any convictions and legal proceedings still pending after the act had expired in order to ensure all the court proceedings relating to it could be finalized. This carry-over feature in effect extended the afterlife of such legislation.

Various amendments to the bill were put forward by the Indian members of the Legislative Council but only one was accepted by the Government of India. It was agreed that the legal work experience of the judges selected for appointment to the tribunals should be increased from one year to at least three years.[65] A proposed amendment to the bill put forward by the Hindu nationalist liberal politician Madan Mohan Malaviya removing the provision requiring commissioners to produce only a summarized memorandum of the evidence of witnesses was opposed by Craddock as he felt that this would place a break upon expedited trial proceedings. Similarly, an amendment to delete the provision declaring that there be no further review of sentences passed by the special tribunals was rejected on the basis that it would open the door to legal appeals and hence, in Craddock's words, would 'strike at the root of the speedy trial procedure which the Bill is intended to provide'. In summing up the reasons why the bill should become law, Craddock, in part echoing the intention

[62]This was not strictly true. Those facing death sentences could plead their case via memorials that could be sent in the first instance to the local government and then to the governor general in Council. Procs. of the Council of the Gov. Gen. of India, 18 Mar. 1915, p. 510.

[63]Ibid., pp. 476, 513.

[64]Govt. of India, Home Dept., Political, to Sec. of State of India, Delhi, 23 Mar. 1915. Govt. of India, Home Dept., Political A, Apr. 1915, nos. 385–411, p. 52, NAI.

[65]Procs. of the Council of the Gov. Gen. of India, 18 Mar. 1915, p. 506.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

behind the passing of Act XI, reaffirmed that 'in introducing the Bill and explaining the necessity for a speedier method of administering justice. I dwelt strongly upon the necessity that there was that punishment should follow quickly on the crime, and that all the proceedings which are allowed in ordinary times to pursue their leisurely course, should be quickened up'.[66] Given this aim, Craddock acknowledged that the judicial powers contained in the bill were of a 'drastic' character but he believed that in 'the administration of an Act of this kind…the action taken will be not more stringent than the necessities of the case warrant'.[67] As per the express desire of the Government of India, the bill passed into law on 19 March 1915, the same day as its introduction into the legislature.[68]

The Anarchical and Revolutionary Crimes Act of 1919

The Anarchical and Revolutionary Crimes Act (Act XI of 1919), or the 'Rowlatt Act' as it was more commonly known, was the outcome of recommendations made by members of a government-appointed committee charged with investigating seditious activities in India. This five-member committee, made up predominantly of British and Indian jurists, was headed by Sidney Rowlatt, a judge of the King's High Court of Justice. One of the main objectives of this committee was to advise the Government of India as to what legislation might be required to aid in the suppression of revolutionary-inspired acts of criminal violence. The committee issued its report on 15 April 1918. Its contents quickly drew criticism from both Indian politicians and the Indian-run press for advocating for exceedingly repressive measures. However, despite this criticism, the recommendations made by the committee were accepted by government officials. Indeed, it had been the intention of the government all along to formulate some kind of preventive emergency legislation suitable for use in India in peacetime conditions. 'We recognised from the first,' William Vincent, then home member of the Government of India later wrote, 'that it would be quite impossible to put through our Council drastic measures of this nature, unless we were in a position to say that they had the unanimous support of the Rowlatt Committee.'[69] In this respect Indian legislation followed the precedent set for the prolongation of wartime powers in Great Britain under the Termination of the Present War (Definition Act) of 1918.[70]

To put into effect the committee's recommendations, the government tabled two so-called Rowlatt Bills, one of which, the Criminal Law (Emergency Powers) Bill, later became the Rowlatt Act.[71] In introducing this bill into the Legislative Council Vincent

[66]Ibid., p. 513.

[67]Ibid., p. 514.

[68]The text of the act is reprinted in *A collection of the acts passed by the governor general of India in Council in the year 1915* (Calcutta: Superintendent Government Printing, India, 1916), pp. 13–20.

[69]W. H. Vincent to Michael O'Dwyer, Lt.-Gov. of the Punjab and H. Wheeler, Council Member, Bengal, Delhi, 14 Dec. 1918. Govt. of India, Home. Dept., June 1919, Political B, Proc., no. 82, p. 7, NAI, available at https://archive.org/details/rowlatt-act-proceedings-scanned-copy/page/n11/mode/2up, [accessed 14 February 2024].

[70]This piece of legislation was followed up two years later by the Emergency Powers Act of 1920 which enabled the Crown to proclaim a state of emergency.

[71]The second Rowlatt Bill, the Indian Criminal Law (Amendment) Bill, sought to modify certain provisions contained in the Indian Penal Act and Indian Criminal Code. This bill was never enacted.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

made it clear that the government sought to target 'seditious crime', and that to do so in any meaningful manner it was essential to carry forward some elements of the Defence of India Act into postwar India, albeit in a more watered-down form. The British conceded that the Defence of India Act had all but quashed the 'revolutionary outrages' that had taken place in Bengal and Punjab, yet according to officials, the threat of a revival of such unrest and violence had not entirely been eliminated. Vincent, while admitting that the new bill was a 'repressive measure', believed that its special pre-emptive powers needed to be made available to the government if required.[72]

Among the Sedition Committee's suggestions was the creation of special courts for the rapid trial of seditious offences to be presided over by three senior judges. Under the Rowlatt Bill these judges were to be selected from the judges of India's high courts. Court trials were to dispense with committal proceedings and the right of appeal.[73] Such procedures were hardly new. Indeed identical provisions were present in the Defence of India Act. The committee also recommended that trials be conducted without juries and legal assessors, that the courts should have the option to hold their proceedings in camera, and those brought to trial could also be made to stand trial for criminal offences other than those they had been originally charged with. The rulings made by these special courts would be final: no higher court would possess the authority to revise any sentence imposed. The latter requirement was, again, a virtual repetition of the judicial powers of Act XI. The Rowlatt Act also shared with the 1857 Act the caveat that its implementation could only be sanctioned by the governor general in Council, as well as the requirement that some form of public notification be issued of its enforcement. These exceptional legal measures would, it was believed, 'secure the moral effect which punishment should produce and also to prevent the prolongation of the excitement which the proceedings may set up'. The decision taken to appoint High Court judges was considered by the British to be one of the Rowlatt Act's key legal safeguards: the presence of such experienced judges, it was believed, would ensure that a trial was conducted in both a fair and impartial manner.[74] This is in stark contrast to the appointment of special commissioners under Act XI in 1857 who could include anybody—from a district court judge, a magistrate, to an ordinary member of a district's local European community who possessed little, if any, legal knowledge or experience. The revised version of the Rowlatt Bill was passed into law by the Legislative Council on the back of block voting by the official members of the council on 18 March 1919. Among the more significant amendments made to the text of the act was the greater emphasis placed upon the degree to which it sought to target 'anarchical and revolutionary movements', hence its altered title.[75] Originally intended to

[72]Procs. of the Indian Legislative Council, 6 Feb. 1919, pp. 451–452, 455, available at https://eparlib.nic.in/bitstream/123456789/785285/1/ilcd-06-02-1919.pdf, [last accessed 3 May 2023].

[73]The right to appeal a conviction was not erased entirely, for those convicted under the Anarchical and Revolutionary Crimes Act could petition the local government in the first instance, and then the governor general in Council for a remission of their sentence.

[74]'Statement of Objects and Reasons', W. H. Vincent, Delhi, 11 Jan. 1919. Home Dept., Political B Proc., no. 82, pp. 51–53, NAI; Legislative Council Proceedings, 13 Mar. 1919, p. 1051, available at https://eparlib.nic.in/bitstream/123456789/784966/1/ilcd_13-03-1919.pdf, [accessed 14 February 2024].

[75]Ibid., p. 5.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

be a permanent statute, the government, as a conciliatory gesture, decided to make it a temporary one to lapse three years after the end of the First World War.

Throughout its passage through the legislature, the Rowlatt Bill was consistently opposed by the non-official Indian members of the Legislative Council. The government was called upon to either abandon the bill entirely, or postpone its enactment. Madan Mohan Malaviya, among others, alleged that the British were seeking to do nothing less than substitute executive power for judicial authority.[76] Tej Bahadur Sapru, in summing up the mood of the Indian legislators, declared the Rowlatt Bill to be 'wholly wrong in principle, unsound in its conception, dangerous in its operation and too sweeping and too comprehensive'.[77] Outside the legislature, Indians of all shades of political opinion voiced their joint opposition to the Rowlatt bills, which they deemed to be an infringement upon an individual's rights to freedom of expression and movement. These bills were also thought to be a deliberate attempt on the part of the British to clamp down upon the country's nationalist movement. The Indian press was particularly vocal in its condemnation of the Rowlatt Bill and the subsequent statute. In one article published in the March 1919 edition of *The Modern Review* historical parallels were drawn between this piece of colonial legislation and the Inquisition in Europe, as well as how the Star Chamber court functioned in England during the Tudor and Stuart periods.[78] To Mohandas Gandhi the Rowlatt Act was indicative of 'British mistrust of the Indian people' for it 'armed the police and the executive with arbitrary and demoralising powers'. Gandhi's strong aversion to this legislation was grounded in his conviction that it was 'nurtured in repression', and his call for its complete repeal was to prove the driving force behind the launch of his first large-scale civil disobedience movement.[79]

In response to the civil unrest that gripped Punjab in 1919, the British had enforced a state of martial law. Interestingly, in this regard Act XI was cited as providing the governor general with a legal precedent for establishing special criminal courts.[80] William Marris, the joint secretary to the Government of India's Home Department, advocated the enforcement within Punjab of Act XI to remedy what he saw as the serious legal defects of the martial law powers of Regulation X of 1804. Marris was also convinced that its use would have a symbolic value in that it would have the 'advantage of marking by its date [1857] the character of the evils it is directed against'.[81] This proposal

[76]Kanji Dwarkadas, *India's fight for freedom, 1913–1937: An eyewitness story* (Bombay: Popular Prakashan, 1960), p. 95.

[77]Procs. of the Legislative Council, 7 Feb. 1919, p. 510, available at https://eparlib.nic.in/bitstream/123456789/784953/1/ilcd_07-02-1919.pdf, [accessed 14 February 2024].

[78]'Notes', *The Modern Review*, vol. 25, no. 3, 1919, pp. 311–312.

[79]*Collected works of Mahatma Gandhi* (New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India, 1965), vol. 15, pp. 110, 118 and vol. 16, pp. 39–40. British distrust of Indians can be seen in the comment made by a senior official that, while the public in England were willing to provide the police with information on bomb-related conspiracies, the public in India were seemingly reluctant to do so. Procs. of the Council of the Gov. Gen. of India, 11 Dec. 1908, pp. 57–58, available at https://eparl.nic.in/bitstream/123456789/784483/1/ilcd_11-december-1908.pdf, [last accessed 11 March 2023].

[80]'Note on martial law'. T. P. Ellis, Legal Remembrancer to Govt., Punjab, 31 July 1919. Govt. of India, Home Dept., Political Deposit, Sept. 1919, Proc. no. 49, p. 13, NAI.

[81]'Question of the preparation of a scheme for adoption in the case of disorders in the future'. Govt. of India., Home Dept., Political A, Proc. June 1920, nos. 185–190, p. 3, NAI. On the legal problems arising from

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

was not taken up. Instead reliance continued to be placed on the emergency ordinance powers available to the governor general under section 72 of the Government of India Act of 1915. Yet, as has been noted, even as late as the early 1930s the advantages to be gained from implementing special legislation along the lines of Act XI to aid in the suppression of ongoing acts of terrorism in Bengal continued to be the subject of discussion among officials. The Government of Bengal had seriously considered creating an ordinance based on the act's repressive legal powers 'in order', as one official put it, 'to provide for the speedy trial and execution of sentences in the cases of outrages of a terrorist nature'.[82] But to return once again to the Rowlatt Act, the act itself was never enforced by the British and, in a historic moment of legal synchronicity, it (along with Act XI of 1857) was, as we have noted, struck off the colonial statute book by the Special Laws Repeal Act of 1922.

The Defence of India Act, 1962

Based upon the Defence of Indian Ordinance promulgated by the president of India, Sarvepalli Radhakrishnan, in October 1962, the Defence of India Act was enacted two months later on 12 December. Its aim, as its preamble declares, was 'to ensure the public safety and interest, the defence of India and for the trial of certain offences'.[83] These offences related to the large-scale incursion of Chinese troops across India's north-eastern border and were retrospectively backdated to 26 October 1962, the date on which Radhakrishnan proclaimed what was to be the country's first state of emergency under section one, clause three, of the Indian Constitution.[84] The act was to be a short-term one, expiring six months after the end of the emergency. Its text was in essence a word-for-word reproduction of the previous ordinance which in turn was almost a complete facsimile of the British colonial government's Defence of India Act of 1939. Under the Defence Act of 1962 any state government of India was given the legal authority to establish special tribunals. These tribunals were to be overseen by three members of the judiciary consisting of individuals qualified for appointment as judges of a high court, those with three years' work experience as session's judges, additional session's judges, and various categories of magistrates. The special tribunals, as with the tribunals formed in 1915, had the authority to try offences that related to wartime conditions in India. And again the special tribunals could consider criminal offences unrelated to those originally brought forward as part of the initial trial proceedings. Once the accused had first been brought before the tribunal they could then be tried in absentia if it was considered that their absence would not impede the proceedings of a trial. While commissioners of a tribunal also could proceed with secret in camera trials, any sentence imposed had to be announced in public. Only those sentenced to death, life imprisonment, or to jail terms of over five years had the right of appeal to

the enforcement by the British of Regulation X of 1804, see Troy Downs, 'Bengal Regulation X of 1804 and martial law in British colonial India', *Law and Social History Review*, vol. 40, no. 1, 2022, pp. 1–36.

[82]Govt. of India, Home Dept., 1934, Political, File No. 45/VI/34, p. 6, NAI.

[83]The text of this ordinance is published in *The Gazette of India, Extraordinary*, no. 46, 26 October 1962, pp. 319–337.

[84]Lok Sabha Debates, 8 Nov. 1962, p. 106, available at https://eparlib.nic.in/bitstream/123456789/808895/1/pms_01_01_02-08-1962.pdf, [last accessed 10 May 2023].

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

a High Court. Furthermore, as with other extraordinary laws of this nature, no other judicial court possessed the legal authority to revise a sentence imposed by a special tribunal.[85]

The 1962 Defence of India Act was not itself the first post-colonial piece of legislation to establish special courts in order to secure more speedy trials of specific offences. One can, for instance, cite the West Bengal Criminal Law Amendment (Special Courts) Act of 1949, created to try cases involving fraud and bribery. Under this act a single session's judge or senior magistrate could be appointed a 'special judge' of a court without the presence of jurors or legal assessors. Those brought before such a court were, however, granted the right of appeal to the High Court.[86]

Introducing the Defence of India bill into the Rajya Sabha (the upper house of the Indian parliament), B. N. Datar, the Minister of State for Home Affairs, expressed no 'apologia for the sweeping nature of some of its provisions', some of which were of a 'precautionary or preventive nature', while others were 'of a deterrent or penal nature'.[87] In the debates on the bill in the Lok Sabha (the Indian parliament's 'House of the People' or lower house) and the Rajya Sabha, a concerted effort was made by members to ensure that jail sentences of five years or less should be subject to revision.[88] Having already agreed to cut the length of jail sentences subject to judicial review by half from ten years, as specified in the Defence of India ordinance, to five years, the government refused to accept such an amendment. Likewise, attempts to amend the bill to enable a much wider appeal process, or for other judicial courts to possess the capacity to intervene to revise or transfer court cases from the courts of the special tribunals, were rejected.[89] Critics of the bill observed that while those accused were given the ability to lodge an appeal with the Supreme Court, this would be well beyond the financial resources of the majority of those brought before the special tribunals. The Government of India responded by amending the bill so that legal appeals could be made to the High Court of an Indian state for all convictions involving sentences of death, lifetime imprisonment, or fixed jail terms in excess of five years.[90]

One member of the Lok Sabha, N. G. Ranga, considered it to be dangerous 'to place so much power in the hands of any Government' but acknowledged that it needed to be done during a time of 'national emergency'.[91] Ranga had previously objected to the bill's wide-ranging powers which he feared might be used by the state governments in a 'power-drunk manner'. He also warned that the powers to be handed over to the Government of India were 'more powerful, more effective and more competent than a totalitarian Government'. This assertion was rejected by D. C. Sherman, the deputy Speaker of the House, who countered that totalitarian governments 'do not come to

[85]The Defence of India Act (Act no. 51 of 1962), available at https://legislative.gov.in/sites/default/files/A/1962-51.pdf, [last accessed 3 April 2023].

[86]*The Calcutta Gazette, Extraordinary*, 12 January 1949, pp. 45–48.

[87]Rajya Sabha Debates, 5 Dec. 1962, pp. 2990–2991. Sourced from *Digital Sansad*, the internet portal site of the Rajya Sabha Council of States, https://sansad.in/rs/search, [last accessed 25 June 2023].

[88]Lok Sabha Debates, 28 Nov. 1962, p. 3676, available at https://eparlib.nic.in/bitstream/123456789/2889/1/isd_03_03_28-11-1962.pdf, [last accessed 5 April 2023]; Rajya Sabha Debates, 5 Dec. 1962, p. 2990.

[89]Lok Sabha Debates, 28 Nov. 1962, p. 3680.

[90]Rajya Sabha Debates, 8 Dec. 1962, pp. 3537–3538, available at https://sansad.in/rs/search, [last accessed 25 June 2023].

[91]Ibid., p. 3735.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

a House like the Lok Sabha to have their diktats confirmed'.[92] Other members of the Lok Sabha drew comparisons between the bill and previous British colonial legislation. According to H. C. Mukherjee, the bill's 'nomenclature smacks of the bureaucratic tradition of a previous age' and stated that he did not believe that the House wished to see 'an exact replica of the British Defence Act of India of the previous times'.[93] Drawing specific attention to the nature of special tribunals to be established under the proposed act, Homi Daji remarked that their procedures were 'against all established principles of criminal jurisprudence'. To allay these concerns the government's Minister of Law, A. K. Sen, pointed out that the courts would be overseen by three members drawn from the judiciary rather than by a single judge, as with the Defence of India Act of 1939. Moreover, in a repetition of the legal preconditions associated with the implementation of Act XI of 1857, the Government of India would only establish these special courts to ensure 'speedy disposal of justice' in parts of the country where the ordinary procedures of law had ceased to operate.[94]

In urging the members of the Lok Sabha to approve the revised version of the bill, Datar admitted that its legal measures were of a rather 'sweeping character'. Nevertheless, they were required to meet the circumstances of the times. Some of the provisions in the bill were indeed of a 'deterrent nature', while others were of a 'preventive nature', but for Datar the powers set out in the bill would 'be used in as firm a manner as possible while using it [in] as judicious a manner as possible'. One could argue here that the language used by Datar to convey the essence of the Defence Act of 1962 all but reproduced that used by British officials in the colonial era to justify the need for such extraordinary acts as Act XI of 1857 and the Anarchical and Revolutionary Crimes Act of 1919.

The Terrorist and Disruptive Activities (Prevention) Act, 1985

In force from 23 May 1985, the contentious and much derided Terrorist and Disruptive Activities (Prevention) Act of 1985, more commonly known by its acronym TADA, was part of the Government of India's response to protracted violence associated with the demands of extremists in Punjab for the creation of an independent Sikh state of Khalistan, as well as the occurrence of terrorist-related incidents elsewhere in India.[95] In introducing the TADA bill into the lower house of the Indian parliament, Minister of Law and Justice A. K. Sen stated that it was designed to 'root out terrorism' and warned the members of the House that 'if you want, you oppose it, even then we shall pass it'. Several members of the Lok Sabha raised concerns over the haste with which

[92]Lok Sabha Debates, 21 Nov. 1962, pp. 2810, 2821, available at https://eparlib.nic.in/bitstream/123456789/556639/1/isd_03_03_21-11-1962.pdf, [last accessed 25 June 2023].

[93]Lok Sabha Debates, 22 Nov. 1962, pp. 2978, 2984, 2986, available at https://eparlib.nic.in/bitstream/123456789/2859/1/lsd_03_03_22-11-1962.pdf, [accessed 27 February 2024].

[94]Lok Sabha Debates, 26 Nov. 1962, pp. 3418–3419, available at https://eparlib.nic.in/bitstream/123456789/2860/1/lsd_03_03-26-11-1962.pdf, [last accessed 7 April 2023]; Lok Sabha Debates, 27 Nov. 1962, pp. 3556, 3558, available at https://eparlib.nic.in/bitstream/123456789/2878/1/lsd_03_03_27-11-1962.pdf, [accessed 14 February 2024].

[95]A. K. Sen, 'Statement of objects and reasons', New Delhi, 17 May 1985. Reprinted in *Black Laws: 1984–85* (New Delhi: People's Union for Civil Liberties, 1985), p. 10.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

the government sought to push through this legislation.[96] Originally the act was set to expire two years after its enactment, by which time government officials assumed that the level of terrorist violence in Punjab and in other parts of India would have subsided. One legislator, N. Tombi Singh, doubted whether the duration of TADA would be so short-lived and he feared that it would become a permanent feature of India's statutory law.[97] This proved, in fact, to be the case, given that TADA was renewed every two years before finally being repealed a decade later in 1995.[98] Throughout its extended legal life TADA was enforced in 23 out of the 25 states of India and in two out of the seven of the union territories administered by the central government.[99]

Unsurprisingly, critics of TADA labelled it, among other things, as 'authoritarian' and 'draconian' in character, or as Girdharihah Bhargava, a member of the Lok Sabha rather colourfully put it, the legal equivalent of using 'a hammer to kill mosquitoes'.[100] Members of the upper and lower houses of the Indian parliament were quick to point out that TADA not only breached the human rights of individuals enshrined in the country's Constitution but negated the very principles of criminal jurisprudence. It was noted that application for bail was normally denied by the designated courts, while any appeal of a conviction to the Supreme Court based in New Delhi was out of reach of all but the wealthiest of defendants. There was also a widely held view that the act would invariably be misused by the state governments and their police forces to target political opponents, trade union leaders, and other activists.[101]

In casting around for a piece of emergency legislation that was in some way comparable to TADA in its legal severity, opponents of the act reached back into India's colonial past and cited another well-known 'Black Act', the Anarchical and Revolutionary Crimes Act of 1919. In many respects the legal powers of the Rowlatt Act were considered to be more benign in character, with one commentator claiming that the Rowlatt Act was 'child's play' in comparison to the severity of TADA. For one, courts

[96]Lok Sabha Debates, 20 May 1985, pp. 16, 32, available at https://eparlib.nic.in/bitstream/123456789/3616/1/lsd_08-02_20-5-1985.pdf, [last accessed 19 April 2023].

[97]Ibid., p. 44.

[98]The periodic renewal of TADA resulted in various revisions to the text of the original act. For example, the TADA statute of 1989 added new legal provisions such as the ability of the government to confiscate the property of those convicted under the act.

[99]Vinay Lal, 'Normalisation of anti-terrorist legislation in democracies: Comparative notes on India, northern Ireland, and Sri Lanka', available at southasia.ucla.edu/history-politics/independent-india/normalisation-anti-terrorisr-legislation-democracies-comparative-notes-india-northern-ireland-sri-lanka, [last accessed 5 January 2023].

[100]K. G. Kannabiran, *The wages of impunity: Power, justice and human rights* (New Delhi: Orient Longman, 2002), pp. 91–92; Lok Sabha Debates, 14 May 1993, p. 424, available at https://eparlib.nic.in/bistream/123456789/3463/1/lsd_10_6th_14-05-1993.pdf, [last accessed 22 June 2023].

[101]Lok Sabha Debates, 12 Aug. 1991, p. 885, available at https://eparlib.nic.in/bitstream/123456789/3385/1/lsd_10_01_12-08-1991.pdf, [last accessed 24 June 2023]; Rajya Sabha Debates, 19 Aug. 1985, p. 285, available at https://sansad.in/rs/search, [last accessed 24 June 2023]; Lok Sabha Debates, 24 Aug. 1987, pp. 646, 647, 667, available at https://eparlib.nic.in/bitstream/123456789/1/lsd_08_08_24-08-1987.pdf, [last accessed 10 April 2023]; Lok Sabha Debates, 9 May 1989, pp. 549, 552, available at https://eparlib.nic.in/bitstream/123456789/474/1/lsd_08_13_09-05-1989, [last accessed 23 June 2023]; Lok Sabha Debates, 10 May 1989, p. 328, available at https://eparlib.nic.in/bitstream/123456789/489/1/lsd_08_13_10-05-1989.pdf, [accessed 14 February 2024].

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

under the Rowlatt Act were presided over by three High Court judges, while the special courts under TADA were administered by only a single—and less senior—session's judge. The Rowlatt Act did not create any new criminal offences but instead cherry-picked offences from the pre-existing Indian criminal code for trial in a summary fashion. TADA placed the onus of proof of innocence upon the accused. Furthermore, unlike the Rowlatt Act, under TADA, court cases were excluded from the legal scrutiny of High Court judges and the act also made it admissible for a court to hear the testimony of approvers.[102] Opponents of TADA in the Indian legislature considered it to be rather ironic that while Indians had launched large-scale protests against the 'repressive' Rowlatt Act in colonial times, the post-independent Government of India was intent on pressing ahead with equally anti-democratic and repressive legal measures such as TADA.[103]

TADA's harsh nature was readily admitted by senior government officials, but its severity was deemed to be a vital requirement in the efforts to combat ongoing acts of terrorism.[104] Moreover, India's state governments were in no hurry to see its legal powers withdrawn, believing them to still be of use in dealing with terrorists and criminal groups.[105] In actual fact TADA was itself closely modelled on another recent emergency act, the Terrorist Affected Areas (Special Courts) Act of 1984 (TAASC). During the Lok Sabha debates on the latter, one legislator accused the government of seeking to create 'a police raj'.[106] While the 1984 act had a more clearly defined purpose in that it sought to 'provide for the more speedy trial of certain offences in terrorist affected areas', the intent behind TADA was more expansive. It created two brand new criminal offences: 'terrorist acts' and 'disruptive activities'. In addition, in the revised version of TADA, enacted in September 1987, a confession made to a police officer was, for the first time in Indian law, made admissible as evidence in court, prompting one critic of the act to opine that even the British had never contemplated the use of such an extreme legal measure.[107]

Under the TAASC and TADA, extrajudicial proceedings could be held in certain notified areas. These provisions resemble the emergency application of Act XI during 1857 which, as has already been mentioned, could only come into play in districts proclaimed by the British to be, or to have been, in a state of rebellion. Trials were to be presided over by a session's judge whose appointment had been approved by the chief justice of the High Court. In the case of the TAASC, this judge was appointed by the central government, but with TADA the state governments would, by and large, be empowered with this authority. Under both statutes committal proceedings were

[102]Lok Sabha Debates, 14 May 1993, p. 405; Lok Sabha Debates, 12 Aug. 1991, p. 885.

[103]Rajya Sabha Debates, 11 May 1989, p. 117, available at https://sansad/rs/search, [last accessed 24 June 2023]; Lok Sabha Debates, 9 May 1989, p. 552.

[104]Lok Sabha Debates, 10 May 1989, pp. 323, 325.

[105]Rajya Sabha Debates, 11 May 1989, p. 139.

[106]Lok Sabha Debates, 14 Aug. 1984, p. 338, available at https://eparlib.nic.in/bitstream/123456789/2016/1/lsd_07_15_14-08-1984.pdf, [accessed 14 February 2024].

[107]Lok Sabha Debates, 24 Aug. 1987, p. 666. Section 25 of the Indian Evidence Act of 1872 specified that 'no confession made to a Police Officer shall be proved against a person accused of any offence'. *A Collection of the Acts Passed by the Governor of India in Council for the Year 1872* (Calcutta: Office of the Superintendent of Government Printing, 1873), n.p.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

dispensed with and covert in-camera trials were to be conducted in order to protect the identity of witnesses. Summary trials of scheduled offences could take place for all criminal offences that warranted a prison sentence of two years or less. The judges of both courts could also try the accused for non-scheduled offences. The only real difference between the two acts in this respect was that under the 1984 Act a direct connection had to be established between the former and the latter offences. In contrast, TADA's legal ambit was far broader, given that a TADA court could 'take cognizance of any offence without the accused being committed to it for trial'. Finally, in a manner identical to Act XI's special commissioner courts, the courts established that TASSC and TADA could impose death sentences and jail sentences up to life imprisonment.[108]

By 1991 even the Indian government's Minister of Home Affairs, S. B. Chavan, was forced to concede that TADA 'had been misused by certain States Governments', and that the central government had been compelled to issue a detailed set of instructions to all of the country's state governments on how the act should be properly applied.[109] While admitting that TADA was indeed 'a harsh law', Chavan went on to affirm, some two years later, in May 1993, in language once again resembling that used by colonial officials, that TADA's presence on India's statute books was still required for 'terrorism cannot be tackled with velvet gloves'.[110]

Conclusion

The legal attributes of Act XI continued to live on in post-1857 colonial and post-colonial emergency legislation. This historical legacy can be seen in the continued desire on the part of the executive for accelerated criminal court trials. For the British, one of the benefits of such 'speedy' trials was that they pre-emptively circumvented the potential for excitement and unrest more lengthy criminal trials might well generate among the Indian public. They were also much more likely to achieve a conviction, a result by no means guaranteed in trials held in the ordinary Indian criminal courts. A further iteration of Act XI was the continued reliance colonial and post-colonial government officials placed on special commissions that functioned in what was an essentially authoritarian and autonomous manner, free from any judicial restraint or oversight. Hastening the pace of criminal proceedings was thought to be eminently desirable as a legal means of deterring politically inspired criminal acts. As one British administrator, writing in the early 1900s, remarked, 'punishment is robbed of its deterrent effect by delay'.[111] Peacock, when tabling the draft version of Act XI in the midst of the chaotic conditions that existed during the initial stages of the Indian Uprising of 1857, would no doubt have agreed with such an assessment, given that

[108]TASSC, available at https://iddashboard.legislative.gov.in/sites/default/files/A1984-61_0.pdf, [last accessed 3 April 2023]; TADA, available at: https://indiacode.nic.in/repealed-act/repealed_act_documents/A1985-31.pdf, [accessed 14 February 2024].

[109]Rajya Sabha Debates, 6 Aug. 1991, p. 151, available at https://sansad.in/rs/search, [last accessed 24 June 2023].

[110]Lok Sabha Debates, 14 May 1993, p. 403.

[111]Procs. of the Council of the Gov. Gen. of India, 11 Dec. 1908, p. 70, available at https://eparlib.nic.in/bitstream/123456789/784485/1/ilcd_11-december-1908.pdf, [accessed 14 February 2024].

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

one of the main aims of Act XI was to reduce, if not eliminate entirely, specific forms of criminal behaviour, in particular criminal offences that posed a direct challenge to the sovereignty of the state. This accounts for the frequent references made by government officials to the 'preventive' character of future legislation of this nature. Furthermore, it was believed that any action along such lines should be driven forward and overseen by the executive rather than by the judiciary.[112] It also explains why in the later colonial period the British, as well as Indian post-colonial governments, almost always carefully prepared and set in motion executive ordinances containing the very legal features that they later wished to see re-created either as temporary or permanent statutory acts.

There was, however, a sea change in the character of the emergency acts enforced in the twentieth century as compared with those put in place during the preceding century. This consisted of a shift away from the uniformly relentless severity of the measures of lawfare prescribed in the 1857 Act to an insistence on the use of far less brutal powers, and the provision of much more detailed instructions inserted into the text of emergency ordinances and acts as to how a special court or tribunal should operate. There was also a greater readiness to provide legal safeguards to forestall possible misuse of emergency powers. Thus, unlike those arraigned for offences under Act XI, those accused of more serious offences under the more modern special or emergency laws were never entirely denied the right of appeal to a higher court. It was no longer politically acceptable to deploy the full array of the extra-legal powers contained in Act XI, powers that had been so freely and indiscriminately used during the Indian Uprising of 1857. On occasion, however, other equally 'rusty' weapons stored in the colonial state's armoury, such as Bengal Regulation III of 1818, were still wheeled out by the British.

Yet the anxiety and fear, combined with a certain degree of paranoia, that had gripped British colonial officials during the upheaval of the Indian Uprising over time never entirely subsided.[113] During the first two decades of the twentieth century, the menace posed to the governance of the British Raj shifted from the twin destabilizing dangers of widespread military mutiny and large-scale civil insurrection to that of the combined triple threat posed by actual or potential acts of terrorism, communist-inspired conspiracies, and communal violence. The Government of India was accused of grossly exaggerating the scale of such threats—of, for instance, smelling terrorism everywhere in India when, statistically speaking, during this same period the number of terrorist-related crimes—roughly 23 per annum—were miniscule compared to India's total population at the time of over 330 million people.[114] Indians were not in a constant state of war with their British rulers, even if India itself could not necessarily

[112]Legislative Assembly Debates, 19 Mar. 1925, p. 2696, available at https://eparlib.nic.in/bitstream/123456789/761510/1/clad_02_02_19-03-1925.pdf, [accessed 14 February 2024].

[113]Kim A. Wagner, '"Treading upon fires": The "Mutiny"-motif and colonial anxieties in British India', *Past and Present*, vol. 218, no. 1, 2013, pp. 159–197; Kama Maclean, 'The art of panicking quietly: British expatriate responses to "terrorist outrages" in India, 1912–1933', in *Anxieties, fear and panic in colonial settings: Empires on the verge of a nervous breakdown*, (ed.) Harald Tischer-Tine (Chem: Palgrave Macmillan, 2016), p. 136.

[114]Legislative Assembly Debates, 12 Dec. 1932, p. 3105, available at https://eparlib.nic.in/bitsteam/123456789/783162/1/ilcd_04_04-12-12-1932.pdf, [last accessed 19 May 2023]; 'The promised reforms and the Rowlatt bills', *The Modern Review*, vol. 25, no. 3, 1919, p. 315.

https://doi.org/10.1017/S0026749X23000537 Published online by Cambridge University Press

be said to be in a state of complete peace. Despite this being so, officials in British India remained obsessed with uncovering real or existential threats to their rule, a mindset reflected in the language officials used to describe the character of politically motivated acts of violence and civil unrest with which they were at times confronted. These dangers were compared to malignant or contagious diseases that must at all costs be contained, or as consisting of 'a poisonous growth which must be rooted out'. In keeping up with the disease metaphor, Craddock, when introducing the 1915 Defence of India bill, affirmed that 'we must deal vigorously with the early manifestation of a turbulent spirit before they have had time to become epidemic'. Thus it was believed that to 'nip in the bud' or eliminate entirely such dangers to colonial rule required the creation and rigorous enforcement of 'exceptional' legislation that would both speed up and severely restrict or circumscribe criminal court proceedings.[115]

The various historical permutations of Act XI examined in this article serve to highlight the more repressive features of the British Raj, or what some scholars have called its 'bureaucratic authoritarianism'.[116] These features of British rule were appropriated in full by the executive in post-colonial India. The transference and appropriation of the infrastructure of colonial governance can clearly be seen in the composition of post-colonial India's emergency laws that were devised and enforced at both the national and state levels to control or suppress political dissent. It is perhaps not so ironic then that the perceived threats to British governance in India would prove to be the very same ones that prompted various governments in post-independent India to rush into law emergency measures such as TADA which matched, and at times even exceeded, the severity of repressive laws of the colonial era.

Acknowledgements. I greatly appreciate the valuable suggestions made, and the insightful queries raised, by the reviewer for *Modern Asian Studies* on the structure and text of the various draft versions of this article. I also wish to express my thanks to Sumit Guha, one of the editors of the journal, for his advice and support.

Competing interests. The author declares none.

[115]Procs. of the Council of the Gov. Gen. of India, 18 Mar. 1915, p. 473; Legislative Assembly Debates, 12 Dec. 1932, p. 3137.

[116]Ayesha Jalal, *Democracy and authoritarianism in South Asia: A comparative historical perspective* (Cambridge: Cambridge University Press, 1995), p. 18. A similar point is made by Anil Kalhan et al., 'Colonial continuities: Human rights, terrorism and security laws in India', *Columbia Journal of Asian Law*, vol. 20, no. 1, 2006, p. 100. See also Christopher Roberts, 'From the state of emergency to the rule of law: The evolution of repressive legality in the nineteenth century British empire', *Chicago Journal of International Law*, vol. 20, no. 1, 2019, pp. 1–61.

Cite this article: Downs, Troy. 2024. 'Act XI of 1857: The life and afterlife of an emergency statute in colonial and post-colonial India'. *Modern Asian Studies* 58(2), pp. 584–610. https://doi.org/10.1017/S0026749X23000537