Law and History Review (2025), 1–31
doi:10.1017/S0738248024000269

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY
CAMBRIDGE UNIVERSITY PRESS

ORIGINAL ARTICLE

Constitutional Panic in British India: How the Ilbert Bill Controversy of 1883 Revealed the Constitutive Character of Racial Discrimination in the British Empire

Gwinyai Machona

Law Faculty, Humboldt University Berlin, Berlin, Germany
Email: gwinyai.machona.1@hu-berlin.de

Abstract

Until today, not only the general public but also scholars of colonialism and imperialism debate about the extent to which Europeans were aware of the centrality of racial discrimination for colonialism and empires. Those who stress that racism was the foundation of European colonialism appear to be anachronistic. However, as this essay demonstrates, at least the British of the late nineteenth century were well-aware of the constitutive character of racial discrimination for their Empire. During the "constitutional panic" which the proposal of the Ilbert Bill in 1883 caused, the arguments exchanged in newspapers, town hall meetings and parliamentary debates revealed the racist foundation of British India. One contemporary observed "the unhappy tendency of this controversy to bring into broad daylight everything which a wise and prudent administrator should seek to hide." This essay seeks to bring into broad daylight once again what has been widely forgotten or ignored. Statements in Parliament expressing that it was "perfectly impossible and ridiculous, so long as we retained our hold on India, to give Native races full equality" testify for explicitness of the debate. Analyzing the arguments against the Ilbert Bill, which sought to introduce full racial equality in the judiciary, serves for better understanding the foundation of British India.

> "*[There is] the unhappy tendency of this controversy to bring into broad daylight everything which a wise and prudent administrator should seek to hide.*"[1]

[1] Walter S. Seton-Karr [secretary to the Government of Bengal], quoted in "Meeting in St. James's Hall," in *The Ilbert Bill: A Collection of Letters, Speeches, Memorials, Articles, &c., Stating the Objections to the Bill*, ed. Executive Committee of Anglo-Indian Association (London: Allen & Co. 1883), 14–42, 27.

"*[...] it was perfectly impossible and ridiculous, so long as we retained our hold on India, to give Native races full equality.*"[2]

Racial discrimination was a constitutive element of British rule over India. For some, this statement does not need further historical investigation, for others it appears as an anachronistic value judgment.[3] The latter view implies that "the British," be it British civil servants, politicians or settlers,[4] were convinced of their own imperial justifications and thus unaware of the contradictory nature of their Empire.[5] This essay demonstrates the contrary. For this purpose, the essay turns to one specific historical moment, the so-called Ilbert Bill Controversy of 1883, in which the British discourse explicitly revealed the foundation of British India: racial discrimination.

The Ilbert Bill was a proposed piece of legislation that aimed to abandon racial discrimination with regards to the composition of the judiciary in British India. It sought to remove "at once and completely, every judicial disqualification which is based merely on race distinctions" under the Criminal Procedure Act.[6] Yet, its critics feared that the Bill would eventually lead to a taking-over of "Indians"[7] and consequently to the end of the British Empire as such.

In light of the fundamental nature of the debate, this essay suggests that the Ilbert Bill Controversy constituted a "constitutional panic."[8] It was due to this

[2] Sir Ellis Ashmead-Bartlett, House of Commons Hansard Sessional Papers, Third Series, Volume 279, May 11, 1883, 520–69, 566.

[3] On the latter end of the spectrum: Nigel Biggar, *Colonialism: A Moral Reckoning* (London: Harper Collins, 2023); in similar direction: Niall Ferguson, *Empire: How Britain Made the Modern World* (London: Allen Lane, 2003), xxi f. (the British "practiced forms of racial discrimination and segregation that we *today* consider abhorrent," emphasis added), further arguing that by "spread[ing] and enforce[ing] the rule of law over vast areas" (359) and seeking to globalize the idea of liberty, the British bore the "White Man's Burden" (affirmatively cited, 369 f.).

[4] For insights into the diversity of "British" realities in British India, instead of many, David Gilmour, *The British in India: A Social History of the Raj* (New York: Farrar, Strus and Giroux, 2018).

[5] See exemplary in Ferguson, *Empire*, e.g. 358–62; this assumption is, however, widespread, see also Ashley Jackson, *The British Empire: A Very Short Introduction* (Oxford: Oxford University Press, 2013), 2–4, 39–41, 54 f.

[6] Courtney Ilbert, "Statement of Objects and Reasons," reproduced in: *The Indian Criminal Procedure Code Amendment Bill, 1883: A Full Report of the Official Proceedings Connected with the Bill*, ed. S. N. Banerji (Calcutta: Englishman Press, 1883), 102–3, 102; also quoted in Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23 (2005): 631–83, 680 n. 159.

[7] Already in 1883, foreign and local population spoke of "Indians." As a synonym, especially Europeans also employed the term "natives," occasionally "indigenous." I employ the term "Indian" when referring to local population of then British India, as explained further below. It is acknowledged that this term is to some extent over-simplistic and anachronistic, instead of many, see Sukanya Banerjee, *Becoming Imperial Citizens: Indians in the Late-Victorian Empire* (Durham: Duke University Press, 2010); Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993); Anil Seal, *The Emergence of Indian Nationalism: Competition and Collaboration in the Late Nineteenth Century* (Cambridge: Cambridge University Press, 1971).

[8] The term is borrowed from Lauren Benton, "Constitutional Panics and Imperial Power," Annual Lecture of the Centre for Law and Society in a Global Context (CLSGC) and the Institute of Humanities and Social Science (IHSS) at Queen Mary University, who drew from the concept of

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

panic that the constitutive character of British India was made explicit in town hall meetings, the press, and in Parliament. Employing an empirical and textual approach, this essay thereby demonstrates that anti-racist critiques of Empire do not need to "distort" history or view Empire through an anachronistic lens of "temporal superiority."[9] In fact, contemporary voices speak for themselves, loud and clearly.[10]

The Ilbert Bill in Context: "Constitutional Panics" in the History and Historiography of British India

The Ilbert Bill proposal in its historical context

For the colonial administration, the proposed reform of criminal procedural law initially constituted just one of numerous steps in the nineteenth century liberal reform agenda.[11] After a period of explicitly regressive policy under Viceroy Lytton, his successor Lord Ripon assumed office in 1880 with the aim to "restore" liberal policies in British India.[12] Ripon had rejected imperialist projects like the British invasion of Afghanistan in 1878,[13] was personally chosen by the liberal Prime Minister Gladstone[14] and in fact "behaved as a

"Legal Panics" in Lauren Benton and Lisa Ford, "Legal Panics, Fast and Slow: Slavery and the Constitution of Empire," in *Power and Time: Temporalities in Conflict and the Making of History*, eds. Dan Edelstein, Stefanos Geroulanos, and Natasha Wheatley (Chicago/London: Chicago University Press, 2020), 295–316, 297;
moreover, the term occasionally appears in reference to Brexit, e.g.: Richard Ekins, "The Constitutional Dynamics of Brexit," *Notre Dame Journal of International & Comparative Law* 15 (2022): 46–74, 46 and 70; this may be coincidence or in fact a connection between the interest in colonial "panics" from a perspective of challenges to liberalism today, see Joshua Ehrlich, "Anxiety, Chaos, and the Raj," *The Historical Journal* 63 (2020): 777–87, 778.

[9] Lynn Hunt, "Against Presentism," *Perspectives on History*, May 1, 2002 https://historians.org/research-and-publications/perspectives-on-history/may-2002/against-presentism; following up James H. Sweet, "Is History History? Identity Politics and Teleologies of the Present," *Perspectives on History*, August 17, 2022, https://historians.org/research-and-publications/perspectives-on-history/september-2022/is-history-history-identity-politics-and-teleologies-of-the-present: "Doing history with integrity requires us to interpret elements of the past not through the optics of the present but within the worlds of our historical actors." (both accessed May 14, 2024).

[10] With a similar approach of taking voices of "the colonizers" seriously in order for complicating over-simplistic historical narratives, see Yann LeGall and Gwinyai Machona, "Possessions, Spoils of War, Belongings: What Museum Archives Tell us About the (Il)legality of the Plunder of African Property," *Verfassungsblog*, December 2, 2022 https://verfassungsblog.de/possessions-spoils-of-war-belongings/ (accessed May 14, 2024).

[11] For socio-political contextualization: Christine Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion in India, 1883," *Historical Studies: Australia and New Zealand* 12 (1965): 87–102; also cf. Kolsky, "Codification and the Rule of Colonial Difference"; and more general: Thomas R. Metcalf, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1995, online ed. 2008), esp. chapter 2.

[12] On the explicit turn (back) to liberal agenda and away from Lord Lytton's policy, Seal, *The Emergence of Indian Nationalism*, 131–70.

[13] Lawrence James, *Raj: The Making and Unmaking of British India* (London: Little, Brown & Co., 1997), 349; similar: Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 96.

[14] Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 96.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

liberal should have" during his time in India.[15] This included the (apparent) realization of liberal conceptions of rights and the idea of education as foundations of the "civilizing mission."[16] The Queen's Proclamation of 1858 (by some referred to as the "Indian Magna Carta")[17] served as orientation for apparent goals of equality in a "progressive" vision for the future,[18] yet always with one eye fearfully tilted backwards to the events of 1857.[19] There was a sense in which the slightest mistake in governance could have sparked revolts again.[20] While Lord Ripon's predecessor Lytton regarded liberal policies as enhancing this danger and thus, for instance, planned to legally divide government service into two categories, one for Indians and one exclusively for Europeans, his successor Ripon sought to re-open civil service for Indians, yet failed with most reform proposals.[21]

In this environment of attempts to introduce liberal reforms, the two Indians Behari Lal Gupta and Romesh Chandra Dutt suggested that Indian judges and magistrates should be allowed to try Europeans in criminal proceedings without exception, not only in towns and cities as was formally possible at that time.[22] Although the privilege that Europeans could only be convicted in one of the High Courts in Bombay, Madras, or Calcutta was abolished in 1872,[23] the existing law had the effect that Europeans could de facto only be tried by European judges.[24] Under the applicable Criminal Procedure Code of 1861,

[15] Vincent A. Smith, *The Oxford History of India*, Part III, rewritten by Percival Spear, 3rd ed. (Oxford: Oxford University Press, 1964), 689; critical of Smith's historiography, Chatterjee, *The Nation and Its Fragments*, 16–18.

[16] Highlighting this: Mrinalini Sinha, *Colonial Masculinity: The "Manly" Englishman and the "Effeminate Bengali" in the Late Nineteenth Century* (Manchester: Manchester University Press, 1995); instructive and with focus on education: Seal, *The Emergence of Indian Nationalism*, 147–70; more detailed in *Colonialism as Civilizing Mission: Cultural Ideology in British India*, eds. Harald Fischer-Tiné and Michael Mann (London: Wimbledon Publishing, 2004).

[17] Seal, *The Emergence of Indian Nationalism*, 168.

[18] Nevertheless, it seems questionable if British officials aimed for actual absolute justice and equality: cf. Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 90.

[19] Metcalf, *Ideologies*, 48 f.; Mark Condos, *The Insecurity State: The Punjab and the Making of Colonial Power in British India* (Cambridge: Cambridge University Press, 2016), 4 f.; Kim A. Wagner; "'Treading Upon Fires': The 'Mutiny' Motif and Colonial Anxieties in British," *Past & Present* 281 (2013): 159–97; more generally: Thomas R. Metcalf, *The Aftermath of the Revolt: India 1857–1870* (Princeton: Princeton University Press, 1964).

[20] In addition to n. 19 and in relation to legal codification, see Kolsky, "Codification and the Rule of Colonial Difference," 669; connecting this to the Ilbert Bill Controversy, Banerjee, *Becoming Imperial Citizens*, 50.

[21] Seal, *The Emergence of Indian Nationalism*, 140, 149–53.

[22] Crispin Bates, *Subalterns and Raj: South Asia since 1600* (London/New York: Routledge, 2007), 90; James, *Raj*, 349; as primary evidence of Behari Lal Gupta's initiative: "Letter from H.A. Cockerell" in *Full Report of Official Proceedings*, 49 ff., with the note by Behari Lal Gupta of January 30, 1882 attached, 52 ff.; for a detailed study of Indians in the judiciary and an excellent overview of the judicial system, see Abhinav Chandrachud, *An Independent, Colonial Judiciary: A History of the Bombay High Court during the British Raj, 1862–1947* (New Delhi: Oxford University Press, 2015), I thank Ankita Gandhi for bringing this study to my attention.

[23] Chandrachud, *An Independent, Colonial Judiciary*, 72.

[24] Ram Gopal, *British Rule in India: An Assessment* (Bombay et al.: Asia Publishing House, 1963), 184.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

magistrates or judges had to be Justices of the Peace or judges of the Session Courts in order to convict Europeans.[25] Those were exclusively British European, up until the first appointment of an Indian High Court justice in 1882.[26]

In practice, this led to a systematic non- or ill-application of criminal law vis-à-vis Europeans in rural areas, in particular on plantations—localities of grave but daily discrimination and brutality.[27] Reportedly, Courtney Ilbert himself stated that the Bill aimed to "stop the impunity" enjoyed by planters who occasionally "did to death their native servants."[28] Other historiographical accounts highlight the fact that only in the 1880s, the issue of equality amongst Indian and European judges became a practical issue. Only now constellations occurred in which a more senior but Indian judge had less jurisdiction over European subjects than his less senior but European colleagues.[29]

Whatever their primary motivation may have been, Behari Lal Gupta and Romesh Chandra Dutt introduced the reform to the Viceroy. Such participation of Indians in imperial reform projects was far but uncommon in British India.[30] Rather, it was another key element of colonial rule in general.[31] Following these suggestions,[32] the law member of the viceregal council, Sir Courtney Ilbert changed his draft of the intended amendment to the Criminal Procedure Act as to "remove from the Code, at once and completely, every judicial disqualification which is based merely on race distinctions."[33] This change would have provided for the possibility of Indian judges to try Europeans also in criminal proceedings in the rural areas (*mofussils*) outside the Presidency towns.[34] In civil proceedings, Indian judges were already rather the rule than

[25] See Section 24 with comment in *The Code of Criminal Procedure, Act XXV of 1861, and other laws and rules of practice relating to procedure in the criminal courts of British India: With notes, containing the opinions delivered by all the superior local courts*, 2nd ed., ed. and re-published H. T. Prinsep (London: Allen, 2014, first published 1868). I thank Erica Kim Ollikainen-Read for bringing this provision to my attention.

[26] Chandrachud, *An Independent, Colonial Judiciary*, 71.

[27] Cf. Sumit Sarkar, *Modern India 1885–1947*, 2nd ed. (Delhi: MacMillan, 1984), 22; for further insights e.g.: Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010).

[28] Cited accordingly in Gopal, *British Rule in India*, 184.

[29] E.g. in Gopal, *British Rule in India*, 184; according to Jon Wilson, the process was initiated by a complaint issued by Maharaja Sir Jotindra Mohun Tagore on behalf of a senior judge, Jon Wilson, *India Conquered: Britain's Raj and the Chaos of Empire* (London: Simon & Schuster, 2016), 310 f.

[30] See Amiya P. Sen, *Social and Religious Reform: The Hindus of British India* (Oxford: Oxford University Press, 2011); Seal, *The Emergence of Indian Nationalism*, conceptualizing employment by the State as the "most palpable form" of "collaboration," while "support" from local, non-official political elites "was of greater political importance to the Raj," 9 f.

[31] Seal, *The Emergence of Indian Nationalism*, 8 f. observing that generally "[c]olonial systems of government [...] have tended to rely upon the support of some of their subjects, and the passivity of the majority [...]."

[32] James, *Raj*, 349.

[33] Ilbert, "Statement of Objects and Reasons," 102; also quoted in Kolsky, "Codification and the Rule of Colonial Difference," 680 n. 159.

[34] For more details on the proposal: Edwin Hirshmann, *"White Mutiny": The Ilbert Bill Crisis in India and Genesis of the Indian National Congress* (New Delhi: Heritage, 1980), 36 ff.; for details on the

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

the exception, reportedly with about 90% of civil suits and 45% of magisterial matters coming before Indian judges and magistrates in 1888.[35] As within the Indian civil service and government posts in general, the vast majority of judges and magistrates were part of local elites (mainly Hindu) who could afford education and the required examinations.[36] Knowing that the judicial system (like all colonial administration) depended on Western-style-educated, liberal-minded Indians of the political and economic elite,[37] the reform proposal introduced by Courtney Ilbert was initially supported by almost all provinces, in particular by the Bengali government.[38] However, push-back arose primarily from the constellation in Bengal, facing on the one hand a higher percentage of Indian lawyers and judges than other provinces and on the other more "acrimonious" race relations within society.[39] Nevertheless, with only a few Indian judges who would have been in the position to sit in a criminal procedure,[40] the proposal was—at the face of it—a "minor administrative move."[41]

In a typically liberal fashion, the proposed Bill seemingly aimed for an "improvement" for (a small part of) the colonized population,[42] yet at the same time it sought to perpetuate and stabilize the British rule in, domination over and exploitation of India and its greater population.[43] It needs to be stressed that the Bill, much like the already existing law that enabled Indians to judge Europeans in certain scenarios, would have first and foremost only been formal, black letter law. Yet, already the current practice under existing law was "governed by tacit conventions" that excluded Indian judges as "[r]acial social hierarchies cut across the supposed equality of the court room."[44] The Ilbert Bill would

criminal procedure and its laws: *The Code of Criminal Procedure Relating to Procedure in the Criminal Courts of British India*, ed. Henry T. Prinsep (Cambridge: Cambridge University Press, 2014).

[35] Seal, *The Emergence of Indian Nationalism*, 126.

[36] Chandrachud, *An Independent, Colonial Judiciary*, explicitly 75; more detailed in Ch. 3 "Race, Class, and the Bombay High Court"; Seal, *The Emergence of Indian Nationalism*, 123–30; see also Christopher A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012), 185 f.; Wilson, *India Conquered*, 308 f.

[37] Wilson, *India Conquered*, 297 f.

[38] Seal, *The Emergence of Indian Nationalism*, 164.

[39] Quote in Seal, *The Emergence of Indian Nationalism*, 260; further Chandrachud, *An Independent, Colonial Judiciary*, 73.

[40] According to Kenneth Ballhatchet there would have been "only two Indians in the ICS with sufficient seniority," Kenneth Ballhatchet, *Race, Sex and Class under the Raj: Imperial Attitudes and Policies and their Critics, 1793–1905* (London: Weindenfeld and Nicolson, 1980), 6; generally Chandrachud, *An Independent, Colonial Judiciary*.

[41] Wilson, *India Conquered*, 311.

[42] Cf. Smith, *The Oxford History*, 689, with an almost apologetic account of Lord Ripon's rule.

[43] For an overview of this "age of reform": Metcalf, *Ideologies*, esp. chapters 2 and 3; similar yet with more focus on criminal jurisdiction: Kolsky, *Colonial Justice in British India*, chapter 2; see also Durba Ghosh, *Gentlemanly Terrorists: Political Violence and the Colonial State in India, 1919–1947* (Cambridge: Cambridge University Press, 2017), arguing that liberal law reforms were generally paired with emergency laws for guaranteeing supreme authority.

[44] Wilson, *India Conquered*, 312 f.; more detailed Chandrachud, *An Independent, Colonial Judiciary*, esp. Ch. 3 "Race, Class, and the Bombay High Court."

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

presumably not have changed this legal practice "governed by double standards."[45]

The Ilbert Bill proposal emerged in the intellectual context of British and Western ideas of a "rule of law."[46] Famously, in 1885 Albert Dicey published a previously held lecture in which he defined his notion of the rule of law as the following:

> "[w]e mean [...], when we speak of the 'rule of law' [...], not only that with us no man is above the law, but (what is a different thing) that here every man whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[47]

This understanding articulated by Dicey arose from a set of (early) liberal ideas debated by legal theorists in England since the seventeenth century[48] and was further informed and advanced by streams of nineteenth century liberalism in Victorian England, Britain and its colonies.[49] By the 1860s and 70s, liberal theorists regarded the English constitutional conventions and principles as expressions of a *spirit of legalism* binding in particular the government.[50] Legal historians date Dicey's first explicit use of the term "rule of law" for capturing this idea of legalism to 1875.[51] The "rule of law" was thus a relatively young concept in English constitutional thinking at the time of the Ilbert Bill Controversy in 1883. Those rule of law ideas merged with inter-related trends toward increased codification that had "seized the European continent" during the second half of the eighteenth century.[52] Yet, due to the tension with common law traditions,[53] those ideas of a rule of (codified) law met more resistance in Britain than in the "peripheries" of the British Empire, where a more

[45] Wilson, *India Conquered*, 313; see also Chandrachud, *An Independent, Colonial Judiciary*, 137.

[46] Cf. Kolsky, "Codification and the Rule of Colonial Difference."

[47] Albert V. Dicey, *The Law of the Constitution*, 194, as reproduced in *The Law of the Constitution: First Edition (1885)*, ed. John Allison (Oxford: Oxford University Press, 2013), 100.

[48] Mark D. Walters, "The Spirit of Legality: A. V. Dicey and the Rule of Law," in *Cambridge Companion to the Rule of Law*, eds. Jens Meierhenrich and Martin Loughlin (online: Cambridge University Press, 2021), 153–70, 155.

[49] Sandra den Otter, "Law, Authority, and Colonial Rule," in *India and the British Empire*, eds. Douglas M. Peers and Nandini Gooptu (Oxford: Oxford University Press, 2012), 168; Sandra den Otter, "'A Legislating Empire': Victorian Political Theorists, Codes of Law, and Empire," in *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, ed. Duncan Bell (Cambridge: Cambridge University Press, 2007), 89–112; similar Kolsky, "Codification and the Rule of Colonial Difference"; also Condos, *The Insecurity State*, 17 f., 115–24, 221 f.

[50] Besides Dicey, see e.g. William E. Hearn, *The Government of England: Its Structure and Development* (London: Longman, Green Reader and Dyer, 1867); Edward A. Freeman, *The Growth of the English Constitution from the Earliest Times* (London: MacMilan, 1872).

[51] Used in Albert V. Dicey, "Stubbs's Constitutional History of England," *Nation*, March 20, 1875, 153, 154; identified as first use in Walters, "The Spirit of Legality," 156.

[52] Jens Meierhenrich, "*Rechtsstaat* versus the Rule of Law," in *Cambridge Companion to the Rule of Law*, eds. Jens Meierhenrich and Martin Loughlin (online: Cambridge University Press, 2021), 39–67, 63.

[53] Ibid., 46 ff.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

"experimental" spirit was actively pursued—partly with the hope to enhance codification in Britain as well.[54] Especially liberals celebrated codification in British territories as a great achievement of British rule,[55] although this certainly did not entail the establishment of one coherent system of equal laws for all subjects under one jurisdiction.[56]

Viewed in this context, the Bill proposed by Courtney Ilbert did not seem to fall considerably outside the scope of the liberal reform theories and policies of Victorian England and Empire.[57] Nevertheless, this relatively marginal reform proposal was met by heavy criticism by the non-official Europeans, especially residents in Calcutta,[58] rural tea and indigo planters[59] as well as entrepreneurs engaged in infrastructure projects.[60] The *Anglo-Indian and European Defense Association* was initiated for campaigning against the proposed reform.[61] While the judges of the High Courts of Madras and Bombay were generally more reserved in their critique of the Bill, all judges of the Calcutta High Court expressed their strong objections (as seen below)—all Calcutta judges but the first ever Indian High Court judge Romesh Chunder Mitter.[62] Calcutta became a center for anti-Bill mobilization,[63] with opposition also strong amongst planters in Bengal and the North-West Provinces, whose governmental representatives partially began to support the opposition movement.[64] Europeans in India experienced a sense of collective identity and

[54] Kolsky, "Codification and the Rule of Colonial Difference," 632 f., citing inter alia Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983); for further context: Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles," in *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform*, eds. Wing Cheong Chan, Barry Wright and Stanley Yeo, 2nd ed. (Oxford/New York: Routledge, 2016), 19–57.

[55] Exemplary: Earl of Northbrook, quoted in "The Colston Festival in Bristol," *The Times*, November 14, 1883, 6.

[56] Exemplary: Thomas B. Macaulay, *Hansard House of Commons*, Third Series, Volume 19, July 10, 1833, 479–550, 533, arguing for codification, but clarifying that "We do not mean that all the people of India should live under the same law: far from it," rather there should be "an enlightened, and paternal despotism," i.e. "absolute government"; on multiple co-existing legal orders: Lauren Benton and Lisa Ford, "Empires and the Rule of Law: Arbitrary Justice and Imperial Legal Ordering," in *Cambridge Companion to the Rule of Law*, eds. Jens Meierhenrich and Martin Loughlin (online: Cambridge University Press, 2021), 101–17; more generally: Lauren Benton, *Law and Colonial Cultures: Legal Regimes in Word History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

[57] Liberal accounts: e.g.: Earl of Kimberley, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1762; also "Editorial Article," *Manchester Guardian*, August 3, 1883, 5; and Earl of Northbrook, "Colston Festival"; conservative/critical accounts: e.g.: Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1752 f.

[58] Cf. James, *Raj*, 351.

[59] Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 90.

[60] Chatterjee, *The Nation and Its Fragments*, 21; James, *Raj*, 350.

[61] Bates, *Subalterns and Raj*, 90; Chatterjee, *The Nation and Its Fragments*, 21; James, *Raj*, 351; for more context: Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion."

[62] Chandrachud, *An Independent, Colonial Judiciary*, 72 f.

[63] Cf. James, *Raj*, 351.

[64] See exemplary in Bates, *Subalterns and Raj*, 90.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

received support from the British public. Impactful newspaper campaigns, above all the *Englishmen* in India[65] and in the *Times* in England[66] campaigned against the proposed Bill. In fact, the majority of voices in the blooming, "enlightened" public sphere[67] in Britain seemed to back the interests of their fellow country-people in India. In particular in conservative media characterized Lord Ripon's policy as liberal Radicalism.[68]

It appears as if Ripon had gone one step too far in reversing the policy of his predecessor. He had repealed the *Vernacular Press Act* and attempted to revoke European privileges concerning the licensing of firearms under the *Arms Act*.[69] Salaries of judges in Calcutta had been reduced (in order to align them with other high courts), while those of Indian civil servants were said to be increased.[70] Moreover, Ripon had appointed the first ever Indian judge as chief justice at the Calcutta High Court in 1882.[71] The Ilbert Bill proposal seemed to be the straw that broke the camel's back. Already during the Controversy, Lord Ripon regarded the Bill as "the excuse for the present outbreak of feeling, and not its main cause."[72] Seemingly concerned with trying to achieve one liberal reform after the other, neither the Viceroy, nor his administration or the Indian political elites had expected that the Bill would spark a "whole body of hostile opinion as the fruit of panic."[73] This panic and hostility, even personally aimed at Lord Ripon,[74] isolated the British governmental elite from their fellow Europeans in both India and Britain.[75] As with other instances of "panics" and crisis in the colonies, historiography has not yet offered a convincing explanation for how the colonial administration could have misjudged public opinion and sentiments in such grave manners over and over again. It begs the question if this was a characteristic of colonial administration (in India), for instance due to lack of knowledge of and "strangeness" in the colony,[76] or if such process is rather a characteristic

[65] Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion."

[66] Wilson, *India Conquered*, 311.

[67] For insights into the public sphere in Western post-Enlightenment society, see contributions in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA/London: MIT Press, 1992); and reproduced foundational texts in *The Idea of the Public Sphere: A Reader*, eds. Jostein Gripsrud, Hallvard Moe, Anders Molander, and Graham Murdock (Plymouth/UK: Lexington, 2010).

[68] Exemplary: "Liberal Ideas on Colonisation," *Ipswich Journal*, April 14, 1883, 8.

[69] Seal, *The Emergence of Indian Nationalism*, 162 f.

[70] Seal, *The Emergence of Indian Nationalism*, 167.

[71] Seal, *The Emergence of Indian Nationalism*, 167.

[72] Ripon to Kimberley, March 18, 1883, RP (B.M. I.S. 290/5), as cited in Seal, *The Emergence of Indian Nationalism*, 168.

[73] Quote in "Leading Article in the 'Times'," June 26, 1883, in *Collection of Letters et cetera*, 43–46, 45; See also "Correspondent, by Indo-European Telegraph, Calcutta March 11," *The Times*, March 12, 1883, 5, reporting that a member of the Executive Government admitted that he "had not foreseen the strength or the intensity of the opposition to the Bill."

[74] James, *Raj*, 351; Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 99.

[75] Cf. Sarkar, *Modern India*, 22.

[76] As could be concluded with Christopher A. Bayly, *Empire and Information: Intelligence Gathering and Social Communication in India, 1780–1870* (Cambridge: Cambridge University Press, 1996); Ranajit Guha, "Not at Home in Empire," *Critical Inquiry* 23 (1997): 482–93; Wagner, "Treading Upon Fires."

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

of modern governmental politics after the rise of the "public sphere" in general.[77] An attempt to answer this question would exceed the limits of this essay.

In this instance, the colonial government and the majority of white Europeans agreed on a compromise by the end of 1883, which was passed as legislation in February 1884.[78] This compromise provided for the right of Europeans to demand that at least half of the jurors were Europeans if the presiding judge was Indian.[79] Equality was compromised by (imagined) racial superiority—explicitly, as this essay will show.

Indian elites, who were in the process of organizing an all-Indian nationalist conference (from which the Indian National Congress emerged),[80] were taken aback by the "racist agitation" against the Bill, as it ultimately demonstrated the deep reservations and even hostility vis-à-vis the educated, liberal-minded Indian elite.[81] Indian elites publicly countered the agitation. For instance, the prominent Indian lawyer Badruddin Tyabji argued that the question "ought never to be whether a judge is a European or a native, but simply whether he is fit for the exercise of the powers entrusted to him."[82] Similarly, Nanabhai Haridas, acting judge at the Bombay High Court, opposed his superior and argued that "[a] judge's fitness for his post does not depend in the least upon the colour of his skin or upon the nationality of the prisoner to be tried."[83] In addition to Indian lawyers and judges, Indian-led press like the *Lahore Tribune* or the *Quarterly Journal of the Poona Sarvajanik Sabha* highlighted the "logical flaws" (Bayly) in the British and Anglo-Indian argumentation.[84] However ultimately, the emerging Indian political leadership accepted the compromise and called for moderation and general support of Lord Ripon:

> "The only Viceroy (recently at all events) who has done some real service, shall we drive away? [...] I am angry too. But let no man act spasmodically

[77] At least implied in Chatterjee, *The Nation and Its Fragments*, 19–24; such explanation could be enriched with, e.g. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: Polity Press, 1989, first published in 1962); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996); Thomas Häussler, *The Media and the Public Sphere: A Deliberative Model of Democracy* (New York: Routledge, 2017); and/or Niklas Luhmann, *Societal Complexity and Public Opinion*, first published in 1990, transl. in Gripsrud et al., *Idea of the Public Sphere*, 173–83, 179 f.: "the political system depends on public opinion. For politics, public opinion is one of the most important sensors whose observation takes the place of direct observation of the environment." Through public opinion, politics produces "boundaries of its own possibilities of action." Arguably, the political system occasionally misjudges these boundaries produced through public opinion, as seen e.g. with Brexit.

[78] Enacted as Indian Criminal Procedure Code, 1882, Amendment Act No. 3 of 1884, reproduced in Hirshmann, *"White Mutiny,"* 307 ff.

[79] Chandrachud, *An Independent, Colonial Judiciary*, 74; also Bates, *Subalterns and Raj*, 90.

[80] Seal, *The Emergence of Indian Nationalism*, Chs. 2, 3.

[81] Bayly, *Recovering Liberties*, 186, including quote.

[82] Badruddin Tyabji, "The Ilbert Bill Opinions: The Bombay Officials" (1883), as cited in Chandrachud, *An Independent, Colonial Judiciary*, 74.

[83] Nanabhai Haridas, "Article 12—No Title" (1883), as cited in Chandrachud, *An Independent, Colonial Judiciary*, 74.

[84] *Lahore Tribune*, December 8, 1883; *Quarterly Journal of the Poona Sarvajanik Sabha* (1885), 6 f., as cited in Bayly, *Recovering Liberties*, 187.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

and strike a man who has made it possible to speak fearlessly. Hit the rest as hard as you please."[85]

Instead of panic or (rather reasonable) outrage amongst the Indian elites, there was a sense in which, as the *Lahore Tribune* phrased it in May 1883, "[t]he Ilbert Bill [...] has brought together the people of India of different races and creeds into one common bound of union [...] the growing feeling of national unity which otherwise would have taken us years to form [...]."[86] In this light, the Ilbert Bill Controversy can be regarded as having accelerated the process of an emerging Indian Nationalism—until today one main reason why the Controversy is so widely referred to in the historiography of British India.[87]

The Ilbert Bill in the historiography of British India

While historiography of India widely recognizes the importance of the Ilbert Bill Controversy, the majority of historical work follows a rather conventional historiographical approach by focusing on the description of series of events coupled with some explanations for (potential) causalities.[88] In this vein, historiography understands the Ilbert Bill Controversy primarily as a significant moment or even a cause for the politicization of Indian communities which ultimately resulted in the formation of the Indian National Congress.[89] Moreover, historiographical studies highlight the (causal) relation between the Controversy and the rise of the press as a public institution.[90] Although these accounts undoubtedly provide for important insights into the (socio-) political dynamics of the time and in particular of Indian nationalism, they do not provide for deeper analytical understanding of the discourse over the nature and character of British rule in India.

Mrinalini Sinha's *Colonial Masculinity* (1995) constitutes an early exception. Sinha pursues a rather analytical approach and investigates fundamental structures of and their implications for the British rule inter alia through the Ilbert Bill Controversy.[91] In light of her overall argument, Sinha applies the concept of "colonial masculinity" to the Controversy[92] and argues that it demonstrates

[85] Mandlik to Metha, December 27, 1883, Metha Press, as cited in Seal, *The Emergence of Indian Nationalism*, 260; similarly, Chandrachud, *An Independent, Colonial Judiciary*, 89 f.

[86] Cited in James, *Raj*, 351 f.; similar quote from *Indian Mirror* cited in Seal, *The Emergence of Indian Nationalism*, 260.

[87] Bayly, *Recovering Liberties*, 186 f.; Seal, *The Emergence of Indian Nationalism*, 162–70; Wilson, *India Conquered*, 310–12; Chatterjee, *The Nation and Its Fragments*, 20–22.

[88] Exemplary: Somnath Roy, "Repercussions of the Ilbert Bill," *Proceedings of the Indian History Congress* 32 (1970): 94–101; and James, *Raj*, 349–52.

[89] Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 101 f.; Hirshmann, *"White Mutiny"*; see also Seal, *The Emergence of Indian Nationalism*, esp. 259 f.

[90] Chandrika Kaul, "England and India: The Ilbert Bill, 1883: A Case Study of the Metropolitan Press," *The Indian Economic and Social History Review* 30 (1993): 413–36.

[91] Sinha, *Colonial Masculinity*.

[92] Ibid., chapter 1; also published as Mrinalini Sinha, "Reconfiguring Hierarchies: The Ilbert Bill Controversy, 1883–84," in *Feminist Postcolonial Theory: A Reader*, eds. Reina Lewis and Sara Mills (New York: Routledge, 2003), 427–59.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

that colonial masculinity "substituted for a straightforward defense of racial exclusivity a supposedly more 'natural' gender hierarchy between 'manly' and 'unmanly' men."[93] In short: the category of race was "*substituted*" by gender. While trying to live up to Sinha's methodological approach, this essay rejects the argument of "substitution." In fact, the arguments analyzed in the following sections demonstrate that there was no "straightforward substitution" of racial discrimination with more complex intersectional conceptualizations (Sinha), but instead actors recognized racial discrimination as *the* foundational element of British rule in India with "striking clarity" (cf. Kolsky). This does not mean that an intersectional concept like "colonial masculinity" cannot explain constitutional elements of the British rule in India.[94] Yet, such perspectives should be accompanied by an in-depth analysis of the reasoning against absolute racial equality in British India's judiciary and its society at large.

Historiography seems to be rather puzzled by the explicitness of racist argumentation by British and British Indians against the Bill.[95] For Partha Chatterjee, it "seems something of a paradox that the racial difference between ruler and ruled should become most prominent precisely in that period in the last quarter of the nineteenth century when technologies of disciplinary power were being put in place by the colonial state."[96] Chatterjee seeks to resolve this puzzle by reminding us that "forms of objectification and normalization of the colonized had to reproduce [...] the truth of the colonial difference."[97] Yet, this does not explain why a relatively marginal reform proposal to the criminal procedure suddenly "brought up most dramatically the question of whether a central claim of the modern state [impersonal, nonarbitrary system of rule of law, P.C.] could be allowed to transgress the line of racial division."[98] Similarly, for Elizabeth Kolsky the "paradox of attempting to create domestic legal institutions in the context of absolute authoritarianism manifested itself with *striking clarity* in the debates about the Code of Criminal Procedure."[99] Concerned with demonstrating how codification during the "prelude to the 'white mutiny' of 1883"[100] often "brought to surface internal tensions in liberalism and empire,"[101] Kolsky does not attempt to answer why this seeming paradox between universalism and racism[102] came to surface with such "striking clarity." This essay suggests that a collective state of panic offers some explanation for this "striking clarity." From this analytical perspective, this

[93] Ibid., 5, accordingly argued at 40 ff.; with a similar perspective on the Ilbert Bill Controversy: Ballhatchet, *Race, Sex and Class under the Raj*, 6 f.

[94] Effectively in: Judith Whitehead, "Bodies of Evidence, Bodies of Rule: The Ilbert Bill, Revivalism, and Age of Consent in Colonial India," *Sociological Bulletin* 45 (1996): 29–54.

[95] Cf. Bayly, *Recovering Liberties*, 186.

[96] Chatterjee, *The Nation and Its Fragments*, 19.

[97] Ibid., 20.

[98] Ibid., 20.

[99] Kolsky, "Codification and the Rule of Colonial Difference," 683, emphasis added.

[100] Ibid., 680.

[101] Ibid., 683.

[102] Cf. Bayly, *Recovering Liberties*, 186, citing Metcalf, *Ideologies*.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

essay digs deeper into the argumentative patterns in the British and Anglo-Indian public discourse in the relatively short moment of *constitutional panic* in 1883.

The Ilbert Bill Controversy as "constitutional panic"

This essay employs the concept of "constitutional panic" as an empirically grounded analytical tool for better understanding the Ilbert Bill Controversy and its implications. The term "constitutional panic" seeks to capture the sudden, fast-paced and emotionally charged element of the debate (*panic*), which lead to the "striking clarity" with which Britons revealed the foundational role of racial discrimination within the British Indian legal, political and social order (*constitutional*).

The concept "constitutional panic" draws from the concept of "legal panics" as developed by Lauren Benton and Lisa Ford.[103] Benton and Ford lay out how legal reforms resulted in debates "about the fundamental nature and structure of imperial rule."[104] Since Benton and Ford show how "[l]egal panics focused attention on core constitutional questions,"[105] Lauren Benton elsewhere referred to such dynamics as "constitutional panics."[106] In their conception of "legal panics," Benton/Ford explicitly draw from Christopher Bayley's description of "information panics."[107] Just as in "information panics," in which "British officials knew they possessed inadequate or flawed information and then, in the absence of alternatives, sought more bad information, in the process making crises worse,"[108] in "legal panics," law-makers knew that their reasoning was incoherent, but, in the absence of alternatives, sought more incoherent reform, thereby (from their perspective) making crises worse. In light of the Controversy's effects on Indian nationalism, the Ilbert Bill Controversy appears as a materialization of such a process, in which "flawed" policies led to further "flawed" reforms with negative long-term effects for British colonial rule.

While aiming to "improve" the criminal justice system, the reform of 1884 deliberately perpetuated racial inequality amongst judges as well as amongst non-official European and Indian subjects. This reproduction of contradictions through law was not only characteristic of "legal panics" in the sense employed by Benton and Ford, but also of the legal framework of modern colonialism and imperialism in general.[109] Yet, rather than understanding the Ilbert Bill

[103] Benton and Ford, "Legal Panics."

[104] Ibid., 297.

[105] Ibid., Benton and Ford thus "entered deeply into the social and political life of the colonies," 299.

[106] Benton, "Constitutional Panics."

[107] Benton and Ford, "Legal Panics," 297; drawing from Bayly, *Empire and Information*; partly expanding Christopher A. Bayly, "Knowing the Country: Empire and Information in India," *Modern Asian Studies* 27 (1993): 3–433.

[108] Benton and Ford, "Legal Panics," 297; see for a similar instance of "information panic" based on Bayly's conception Wagner's account of the "mud-daubing panic" of 1894, Wagner, "Treading Upon Fires," esp. 191.

[109] Besides Benton and Ford; instead of many more: Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: Chicago University Press, 1999); Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005).

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

Controversy as one of many "legal panics," this essay understands "*constitutional* panics" as extraordinary instances. The Ilbert Bill Controversy—as a *constitutional panic*—was less concerned with yet another legal reform proposal but more with the political, social, and legal colonial framework of British India, thus its *constitution* (in both the legal and socio-political sense).[110] For instance, one British judge regarded the Ilbert Bill proposal as ultimately "shifting the foundations on which the British Government of India rests."[111]

Not only the *constitutional* element of the "constitutional panic" is empirically grounded. Also, *panic* was felt and expressed at the time. Today, panic generally refers to "a sudden strong feeling of fear that prevents reasonable thought and action."[112] Although common conceptions of "panics" in the late nineteenth century differed from today's use of the term,[113] "[t]here was a new quasi-psychological sense in which the words 'nervousness', 'panic', 'hysteria' were being used during this period and an eagerness to use 'mental' terms to explain group behaviour."[114] In fact, contemporary participants and observers of the Controversy noticed both elements of "panic," *first* a sudden strong feeling of fear, and *secondly* the inhibitory effect on reasonable thought and action.

As to the first, an article in *The Times*, described the "whole body of hostile opinion" against the Bill as "the fruit of panic."[115] Others spoke of "a feeling of insecurity"[116] or a "fearfully dangerous" policy.[117] For some "[i]t was impossible [...] to exaggerate the gravity of the present crisis."[118] Even though commentators like George Campbell (Member of Parliament) thought that "the panic among Europeans in India was ridiculously exaggerated," that it was "an artificial alarm created by lawyers, and others no better than lawyers,"

[110] See also Benton, "Constitutional Panics."

[111] "Letter from the Hon. Mr. Justice Stephen, KCSI," in *Collection of Letters et cetera*, 7–13, 12, originally appearing in *The Times*, March 1, 1883, 13.

[112] Cambridge Dictionary, "Panic," available online https://dictionary.cambridge.org/dictionary/english/panic (accessed May 15, 2024).

[113] D. K. Choudhury, "Sinews of Panic and the Nerves of Empire: The Imagined State's Entanglement with Information Panics, India c. 1880–1917," *Modern Asian Studies* 38 (2004): 965–1002, 967, inter alia referring to Sigmund Freud, *Introductory Lectures on Psycho-Analysis*, 2nd ed. (London: Allen Unwin, 1949, first published 1890), 325.

[114] Choudhury, "Sinews of Panic and the Nerves of Empire," 979; with similar definition and method for arriving at such definition and applying it to histories of empire as well as to collectives: Robert Peckham, "Introduction," in *Empires of Panic*, ed. Robert Packham (Hong Kong: Hong Kong University Press, 2015), 1–22, 5; applying concepts of individual psychology to collectives dates back to at least the 1920s, see as foundational William McDougall, *The Group Mind: A Sketch of the Principles of Collective Psychology with Some Attempt to Apply Them to the Interpretation of National Life and Character* (Cambridge: Cambridge University Press, 1920); Maurice Halbwachs, *On Collective Memory* (Chicago: The University of Chicago Press, 1992, first published 1925); Georges Lefebvre, *The Great Fear of 1789: Rural Panic in Revolutionary France* (New York: Pantheon Books, 1973, first published 1932); more recently also on "collective panics": Jackie Orr, *Panic Diaries: A Genealogy of Panic Disorder* (Durham, NC: Duke University Press, 2006).

[115] "Leading Article in the 'Times'," June 26, 1883, in *Collection of Letters et cetera*, 43–46, 45.

[116] Chatterjee, *The Nation and Its Fragments*, 21, citing from a resolution of a town hall meeting.

[117] Stephen, "Letter," 13.

[118] "Meeting in St. James's Hall," in *Collection of Letters et cetera*, 14–42, 14.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

there was "no doubt, a certain amount of panic did exist."[119] This essay agrees with this observation. Panic did exist.

As to the second element, observers acknowledged that the Controversy had "the unhappy tendency [...] to bring into broad daylight everything which a wise and prudent administrator should seek to hide."[120] While it was not regarded unreasonable to uphold racial discrimination (as will be shown below), it was regarded as unreasonable to reveal this very nature and character (the constitution) of the British rule in such clarity and publicness as done during the Controversy.[121] This article suggests that this occurred precisely due to a state of panic.[122]

Per definition, a (constitutional) panic is an exceptional state in public discourse. However, this essay does not argue that the "normal" state of mind of British imperialists was one of unchallenged security and confidence. It could well be that imperialists and Empires in general were more anxious than historiography has long suggested.[123] In this vein, recent studies argue that anxiety and fear arose rather frequently amongst the British administration in India, some even claiming that British rule was a "fundamentally anxious and insecure endeavor."[124] Generally in those accounts, "panics and anxieties

[119] George Campbell, *House of Commons Hansard Sessional Papers*, Third Series, Volume 283, August 23, 1883, 1719–821, 1808; similar assessment by Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 92.

[120] Seton-Karr, "Meeting in St. James's Hall," 27.

[121] It was assumed that also debates in Britain would at some point reach Indians via the press, see with respect to the "mud-daubing panic" of 1894, Wagner, "Treading Upon Fires," 183, also cf. 189.

[122] Similarly, Kim A. Wagner argues that "moments of acute vulnerability (real or imagined) [...] reveal the inner workings of colonial rule," Kim A. Wagner, "'Calculated to Strike Terror': The Amritsar Massacre and the Spectacle of Colonial Violence," *Past & Present* 233 (2016): 185–225, 190; also Norman Etherington, "Colonial Panics Big and Small in the British Empire (1865–1907)," in *Anxieties, Fear and Panic in Colonial Settings: Empire on the Verge of a Nervous Breakdown*, ed. Harald Fischer-Tiné (Cham, Switzerland: Palgrave Macmillan, 2016), 201–24, 202: with the hypothesis that fault-lines in colonial mentalities would become more visible in situations of crisis."

[123] See e.g. contributions in Fischer-Tiné, *Anxieties, Fear and Panic in Colonial Settings*; Antoinette Burton, *The Trouble with Empire: Challenges to Modern British Imperialism* (Oxford: Oxford University Press, 2015); Peckham, *Empires of Panic*; contributions in *Helpless Imperialists: Imperial Failure, Fear, and Radicalization* (Göttingen: Vandenhoeck & Ruprecht, 2013), eds. Maurus Reinkowski and Gregor Thum (Göttingen: Vandenhoeck & Ruprecht, 2013); Michael Vann, "Fear and Loathing French Hanoi: Colonial White Images and Imaginings of 'Native' Violence," in *The French Colonial Mind: Violence, Military Encounters, and Colonialism*, vol. 2, ed. Martin Thomas (Lincoln, NE: University of Nebraska Press, 2011), 52; Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2008); Ricardo Roque, "The Razor's Edge: Portuguese Imperial Vulnerability in Colonial Moxico, Angola," *The International Journal of African Historical Studies*, Special Issue: Colonial Encounters Between Africa and Portugal 36 (2003): 105–24; Yumna Siddiqi, *Anxieties of Empire and the Fiction of Intrigue* (New York: Columbia University Press, 2008).

[124] Quote Condos, *The Insecurity State*, 3; similarly: Wilson, *India Conquered*, 5: "the British imperial regime was ruled by doubt and anxiety from beginning to end"; similar already Jon Wilson, *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835*, 2nd ed. (London: Palgrave Macmillan, 2010), 47, 160; Kim Ati Wagner, *Amritsar 1919: An Empire of Fear and the Making of Massacre* (New Haven, CT, 2019); Wagner, "Treading Upon Fires"; Choudhury, "Sinews of Panic

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

[...] stand in the same relation as event and structure."[125] While Condos, Wilson, Wagner and others claim that latent anxieties formed part of the *structure* of British rule in India ("colonial culture of fear"),[126] this essay merely analyzes the Ilbert Bill Controversy as an exceptional incident of *constitutional panic* ("*event*"), in which Britons revealed how they thought their Empire was structured (or constituted). Thus, this essay neither supports nor rejects the claim that British rule in India was structurally anxious.

The Ilbert Bill Controversy as self-exposure (remarks on method, sources and perspectives)

Since this essay is concerned with the explicitness of racial discrimination as a constitutional feature of the British rule as revealed public discourse, the methodological approach and the selection of sources follow approaches of historical discourse analysis rather than (quasi-)psycho-analytical approaches for better understanding the mental state of administrators. Neither does this essay provide for an analysis of archival material such as minutes or confidential letters within the British administration for understanding how the administration could have underestimated the degree of opposition to the Ilbert Bill proposal so enormously. As indicated above, this raises the question to what extent this failure in the decision-making process is exceptional or rather the rule in modern governance, especially after the rise of the "public sphere."[127] The latter questions would have resulted in a different study, searching for the "very foundations of colonial power" in the archives[128] and contrasting those with general features of modern government. Yet, interested in analyzing the public discourse about key constitutional elements, this essay

and the Nerves of Empire"; all those accounts draw significantly from Bayly's concept of "information panics" in Bayly, *Empire and Information*; prior however: Guha, "Not at Home"; rather critical of this "trend": primarily on methodological grounds, Ehrlich, "Anxiety, Chaos and the Raj"; primarily on epistemological and normative grounds, Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001), 307–16 cautioning that an (over) emphasis on "vulnerability" of the British rule could be read as apologetic or disregard colonial violence.

[125] Wagner, "Treading Upon Fires," 161; in other terms: "According to Clark, anxiety is associated with the order of normality while panic is of the order of catastrophe," Choudhury, "Sinews of Panic and the Nerves of Empire," 968, referring to Michael J. Clark, "Anxiety Disorders; Social Section," in *A History of Clinical Psychiatry*, eds, German Berrios and Roy Porter, 563–72, 565; with similar relation between anxiety and panic: Etherington, "Colonial Panics," 219.

[126] Quote Wagner, "Treading Upon Fires," 160, 162; similar Condos, *The Insecurity State*, 10, explaining that the book "traces how these systemic anxieties and concerns about the security and stability of the colonial regime were inscribed into the very foundations of colonial power in Punjab and beyond"; cf. Wilson, *India Conquered*, 9: "[...] the British empire was never a project or system. It was something far more anxious and chaotic. [...] To see the real life of Britain's strange imperial state at work, we need to look beneath the abstract statements of great imperial officers [...]."

[127] For possible venues in this direction, see above (n. 77).

[128] As suggested e.g. by Condos, *The Insecurity State*, 10 f. (including quote); for the value of archival research in legal history, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2004).

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

draws from sources that formed part of the *public* discourse at the time. These were in particular published letters, reports of public speeches and meetings including parliamentary records and newspaper articles.[129] The latter were of particular importance for contemporaries not only as a relatively new medium for spreading opinion, especially in what can be called a large-scale media campaign against the Bill,[130] but also simply as one of the fastest media for publicly available information between Britain and India. For instance, asked for details concerning the debate about the Ilbert Bill a government official stated in the House of Commons that "the Government had received no information other than that which appeared in *The Times*."[131] The increasing pace of communication, information and opinion had an accelerating effect on political debates, including law-making processes, and thus also enhanced (legal/constitutional) panic.[132] Mirroring this contemporary importance of newspapers as tools for communication and public discourse, the essay primarily analyzes arguments (re-)produced therein next to statements made in Parliament and published reports of town hall meetings.

The emphasis on the explicitness of racial discrimination as a constitutional feature of British India within the *British* discourse further results in a focus on "British" sources and voices. At first, this may seem as yet another piece of historiography of Empire in an imperial fashion, unduly ignoring perspectives of colonized peoples. Yet, generally this critique against Western-centric historiography draws attention to the fact that one-sidedness of sources and perspectives commonly results in an unnuanced or even apologetic account of Empire.[133] German historian Sebastian Conrad referred to this process as "double marginalization," once in history and again in historiography.[134] This essay, however, analyzes "British" sources and voices exclusively for critical purposes. Rather than risking to be apologetic, this study may serve as rebuttal against charges of anachronism against critiques of empire. In a rather subversive manner, the essay demonstrates that British colonial administrators, settlers, journalists, and domestic politicians knew exactly how fundamental racial discrimination was to British India and the Empire in general. For

[129] See also Chatterjee, *The Nation and Its Fragments*, 21–26.

[130] Kaul, "England and India: The Ilbert Bill, 1883: Case Study of the Metropolitan Press."

[131] John Kynaston Cross, Under Secretary for State of India, in *House of Commons Hansard Sessional Papers*, Third Series, Volume 276, March 5, 1883, 1407–563, 1437 f.; similar: request by Ashmead-Bartlett, *House of Commons Hansard Sessional Papers*, Third Series, Volume 280, June 12, 1883, 342–482, 386.

[132] Cf. Choudhury, "Sinews of Panic and the Nerves of Empire"; cf. Benton and Ford, "Legal Panics"; for a study of time/"temporality" and Western law/constitutions, see Philipp Dann, *It's about Time: Temporality and Constitutionalism*, forthcoming (on file with author).

[133] See exemplary Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021); also in Alan Lester, "The British Empire in the Culture War: Nigel Biggar's Colonialism: A Moral Reckoning," *The Journal of Imperial and Commonwealth History* 51 (2023): 763–95; exemplary for a history of Empire from "Western" positionality, yet recognizing heterogenous agencies of colonized peoples: Richard Gott, *Britain's Empire: Resistance, Repression and Revolt* (London: Verso, 2012).

[134] Sebastian Conrad, "Doppelte Marginalisierung: Plädoyer für eine transnationale Perspektive auf die deutsche Geschichte," *Geschichte und Gesellschaft* 28 (2002): 145–69.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

substantiating this claim, this essay necessarily employs close textual analysis of arguments made in the *British* discourse during the Ilbert Bill Controversy as a moment of self-exposure. While it would be both interesting and important to investigate Indian responses to the Ilbert Bill and the subsequent "compromise" further, such investigation would exceed the scope of this essay. Moreover, the analysis of the British discourse results in a reproduction of colonial dichotomies. The discussants generally assumed that there were only two categories of judges and accused: European and "Native"/Indian. They tended to ignore even the relatively large group of "Eurasians." The agitators against the Ilbert Bill quite literally only saw "black and white."[135] While the approach of close textual analysis results in a reproduction of those oversimplified accounts uttered during the Controversy, it needs to be stressed that those colonial dichotomies fail to grasp complex social realities in many respects.[136] This essay does neither aim nor claim to provide an accurate account of social realities. It merely attempts to show that the "British" discourse clearly acknowledged that British India was constituted by racial discrimination.

The Ilbert Bill Controversy: Arguments Revealing the Constitutional Character of Racial Inequality in British India

Relatively soon after the Ilbert Bill was proposed in February 1883, a handful of arguments crystalized as the main pillars of the campaign against the reform. This section focusses on three lines of argument, first that Europeans had a right to be tried by their own peers (1), second that the Bill would endanger the proper administration of justice (2), and third that the Bill would essentially lead down the road toward absolute equality which would effectively mean the end of British India (3).

Other arguments, such as those (prima facie) based on economic considerations (the reform would drive capital out of India)[137] and practical ones (there was no necessity for reform)[138] are not considered in depth in this

[135] "'Black and white' in India," *Evening Telegraph*, April 2, 1883; see also Chatterjee, *The Nation and Its Fragments*, 21.

[136] For literature on those social realities, see e.g. Banerjee, *Becoming Imperial Citizens*; Indira Chatterjee, *Gender, Slavery and Law in Colonial India* (New Delhi: Oxford University Press, 2002); Kolsky, *Colonial Justice in British India*; Ravindra S. Khare, *Caste, Hierarchy, and Individualism: Indian Critiques of Louis Dumont's Contributions* (New Delhi: Oxford University Press, 2006); Ballhatchet, *Race, Sex and Class under the Raj*; Elizabeth M. Collingham, *Imperial Bodies: The Physical Experience of the Raj, c. 1800–1947* (Cambridge/Malden, MA: Polity Press, 2001); David Gilmour, *The Ruling Caste: Imperial Lives in the Victorian Raj* (London: John Murray, 2005); more from (socio-) political angle: Barbara Metcalf, "Islam and Poser in Colonial India: The Making and Unmaking of a Muslim Princess," *American Historical Review* 1 (2011): 1–30; with a more discursive perspective: Dirks, *Castes of Mind*.

[137] Exemplary: Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1754 f.; "Leading Article in the 'Times'," June 26, 1883, in *Collection of Letters et cetera*, 45, rephrasing a statement by Walter S. Seton-Karr.

[138] Exemplary: "Letter of the Judges of the High Court of Calcutta," May 23, 1883, in *Collection of Letters et cetera*, 52–69, 57 f.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

essay.[139] The selection is primarily informed by the interest in expressed thoughts concerning the nature and structure of the British Empire. While the economic and practical considerations only indirectly referred to such fundamental questions, the three selected lines of argument made the constitutional character of the debate explicit. All three of them were prominent and widely articulated arguments in fora such as Parliament, town hall meetings, public letters or newspaper articles.

In those fora, adversaries of the Ilbert Bill expressed "varieties of reasoning and experience which led to a practical unanimity of conclusions," as was observed in a leading article in the *Saturday Review* reporting about a town hall meeting.[140] The overarching conclusion was that racial equality within the judiciary would lead to disastrous consequences, ultimately questioning the very nature and structure of British rule in India.[141]

The "right" of Europeans to be tried by their peers

A prominent argument against the proposed scenario of Indians convicting Europeans in criminal court proceedings was based on the invocation of a "right" of Europeans to be tried by their own peers. *The Times*, for instance, referred to this as "the most dearly prized right of Englishmen," stating that "preservation of that right is incompatible with the transfer of criminal jurisdiction to men differing from them in race, religion, history, and education."[142] To invoke this "right" was in itself a noteworthy transplant of a legal arrangement.

Under common law and later statutory law, the House of Lords held exclusive jurisdiction over holders of a peerage (except Irish Peers in the House of Commons and bishops) and their wives or non-remarried widows in cases of treason, felony, or misprision thereof.[143] This was referred to as the right of Peers only to be tried by fellow Peers. This constituted no individual right in a strictly doctrinal sense, but a privilege of "peerage as a class."[144] This "collective right" was based on a rather de-contextual understanding of clause 39 of *Magna Carta* which read:

> "No free man is to be arrested, or imprisoned [...] except by the lawful judgment of his peers or by the law of the land."[145]

[139] A contemporary overview of the arguments against the Bill: Charles C. Macrae, "Criminal Jurisdiction over Englishmen in India," in *Native Indian Judges and Criminal Jurisdiction over Englishmen in India*, ed. British India Committee (London: J.C. Durant, 1883), 26–40, 32 f.

[140] "Leading Article in the 'Saturday Review'," June 30, 1883, in *Collection of Letters et cetera*, 47–51, 47.

[141] Exemplary: "Liberal Ideas on Colonisation," *Ipswich Journal*, April 14, 1883, 8.

[142] "Leading Article in the 'Times'," June 26, 1883, in *Collection of Letters et cetera*, 44.

[143] Collin Lovell, "The Trial of Peers in Great Britain," *American Historical Review* 55 (1949): 69–81, 69 and 72; see also briefly: John Baker, *The Oxford History of the Laws of England*, Volume VI: 1483–1558 (Oxford: Oxford University Press, 2003), 84 and 520f.

[144] Lovell, "The Trial of Peers," 80.

[145] British Library, "Magna Carta 1215," available https://www.bl.uk/collection-items/magna-carta-1215 (accessed June 7, 2022).

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

In the thirteenth century when *Magna Carta* was drafted, "peer" was often used interchangeably with the term "baron," signifying that the clause was intended to ensure trials of Peers by Peers, instead of trials of Peers by the *monarch*.[146]

After the end of feudal society, when (almost) all men were formally free in the sense of clause 39, the Peers held on to their privilege apparently guaranteed by *Magna Carta*.[147] Yet, at the time of the Ilbert Bill Controversy, this privilege had come under considerable pressure. The related interpretations of *Magna Carta* were questioned[148] and the privilege seemed hardly compatible with those rule-of-law-ideas that were gaining ever-greater momentum in the 1880s.[149] A legal challenge to this privilege was ultimately dismissed by the Peers themselves in the House of Lords in 1887,[150] which indicates that the proceeding was initiated at the time of or shortly after the Ilbert Bill Controversy.[151] Thereafter, a proposal to abolish this privilege by legislation failed in 1901 and the privilege remained part of English law until 1948.[152]

The fact that this rather obscure "right" became one of the main arguments against the Ilbert Bill was presumably due to misunderstandings or (deliberate) misinterpretation of initial connections drawn between the privilege in criminal proceedings enjoyed by Peers in Britain and arguably by Europeans in the so-called *mofussil*. Relatively early during the Controversy, in April 1883, Earl of Lytton argued that the fact that Indian judges were not allowed to try Europeans shall not be regarded as a "humiliation." He referred to an English High Court judge who was not allowed to try a Peer as an analogous constellation:

> "in these days, when everything is liable to alteration, it may possibly happen that some day your Lordships' right to be tried by your Peers may, perhaps, be challenged. But when that happens—if it ever does happen—I venture to think that those who might then object to that right as an anomaly would scarcely be wise in resting their case upon a picture of one of the Judges of the High Court, writhing under humiliation of being forbidden to try a Peer of the Realm for picking a pocket. Yet this, or something like this, is the sole reason given [for the Ilbert Bill...]."[153]

[146] Lovell, "The Trial of Peers," 70, with further reference.

[147] Ibid.

[148] Very clear: Macrae, "Criminal Jurisdiction," 36; more general: Lysander Spooner, *An Essay on the Trial by Jury* (Boston: John P. Jewett and Company, 1852).

[149] Cf. Walters, "The Spirit of Legality"; for an explanation how legal theorists tried to deal with similar contradictions: Jean-Philippe Dequen, "Ambiguities and Interdependencies: The Relationship between Legal Positivism and Islamic Law in Colonial India, 1765–1909," in *State Law and Legal Positivism: The Global Rise of a New Paradigm*, eds. Badouin Dupret and Jean-Louis Halpérin (Leiden/Boston: Brill Nijhoff, 2022), 114–49, 136.

[150] The case *Queen v. Lord Graves* is cited in Lovell, "The Trial of Peers," 80; primary: "Privilege—The Queen v Lord Graves," *Lords Chamber Hansard*, Third Series, Volume 310, January 31, 1887, 245–56.

[151] No evidence as to when and how the proceedings started could be found. However, the quote of Lytton below indicates that the proceedings were initiated at some point after the beginning of April 1883.

[152] Lovell, "The Trial of Peers."

[153] Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1751.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

With this comparison the Earl supposedly wanted to evoke the sympathy of his fellow Lords for his argument against the Ilbert Bill, implying that the reasoning behind the proposed Bill could also lead to the Peers losing their own privilege to be tried only by Peers (in certain cases). Yet, Lytton neither applied the "right" of the Peers directly to Europeans in India nor did he broaden the scope of that "right." His argument did not state that this "right" guaranteed any European only to be tried by his or her "equals" in terms of "race, religion, history, and education," as claimed in *The Times*.[154] Nevertheless, from thereon many adversaries of the Bill invoked this "right,"[155] making it one of the main line of arguments against the Ilbert Bill. However, this extremely broad and de-contextual understanding of the seemingly outdated "right" to be tried by one's own peers appeared to lack any legal footing. Reportedly, it had been "for many years" disputed that Englishmen had "any constitutional right to be tried [only] by Englishmen" in India at all.[156] Taken out of context, "peers" now simply meant "equals"; and "free men" (cf. clause 39) meant all European men and women. In this understanding, Indians were neither free nor equals. Instead of class—the original parameter for the privilege—now race was the decisive category for group identification.

Besides this symbolic shift from class to race as the decisive category for self-identification amongst Europeans in India, the invocation of an apparent right to be tried by fellow Europeans demonstrates how also Indian members of the judiciary (seen as the most "westernized" Indians) were ultimately characterized, differentiated and subordinated by racial imaginations.[157] In summation, the argument that Europeans should only be tried by fellow Europeans rested on the claim that Indian judges were—qua race—"naturally" less equipped to appreciate the lack of criminal fault of Europeans in certain scenarios.

One such scenario commonly constructed was that of a planter or his wife who were falsely accused of crimes by the local population.[158] Here, the Indian judge—even if not part of the conspiracy—was said to be "naturally" inclined to

[154] "Leading Article in the 'Times'," June 26, 1883, in *Collection of Letters et cetera*, 44.

[155] Explicitly claiming this right to be enshrined in the English Constitution: J. D. (presumably John Dawson) Mayne quoted in "Meeting in St. James's Hall," 29; further invocations e.g.: "Mr. Plunket on the Ilbert Bill," *The Times*, October 26, 1883, 4; "Letter of Calcutta Judges," in *Collection of Letters et cetera*, 61.

[156] "Correspondent, by Indo-European Telegraph, Calcutta March 11," *The Times*, March 12, 1883; also disputing the existence of this right: Lord Chancellor, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1735–801, 1783.

[157] Famously coining this process as "orientalism": Edward W. Said, *Orientalism* (London: Routledge & Kegan Paul, 1978).

[158] "Letter of Calcutta Judges," in *Collection of Letters et cetera*, 61; see also quote cited in James, *Raj*, 349 f.; Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1751 f.; Viscount of Cranbrook, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1774; also in the Press: "Mr. Plunket on the Ilbert Bill," *The Times*, October 26, 1883, 4; for even further references: Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 95 n. 34; very critical: Arthur Hobhouse, "Native Indian Judges," in *Native Indian Judges and Criminal Jurisdiction over Englishmen in India*, ed. British India Committee (London: J.C. Durant, 1883), 3–25, 11 ("rubbish telegraphed over for consumption in England").

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

believe the constructed charge. What qualified the European judge to identify and debunk those (hypothetical) cases was that apparently he had the

> "knowledge of the position and of the character and of the proclivities of his countryman, which will enable him to say with greater certainty than the Native whether the charge brought against his is likely to be true, or whether the defence set up by the Englishman was in fact, and in law, substantiated."[159]

Another scenario often constructed was one where a lower-class Englishman, usually a sailor or railway worker, committed a low-scale offence.[160] One commentator could "hardly imagine a more distressing position than that, say, of a railway guard, who, having misconducted himself when drunk, is brought up to be tried before a man who has no sort of knowledge of him or sympathy with him, and only half understands him."[161]

These two hypothetical scenarios were meant to highlight the importance of the apparent right to be tried only by fellow Europeans. The scenarios rested on the implicit argument that Indian judges were qua nature (and/or culture) less qualified to fully grasp the level of guilt properly attributed to Europeans.[162] This inherent lack of abilities was—so the argument went—specifically dangerous to Europeans in the rural areas. The adversaries of the Bill painted a picture of the "poor, isolated Englishmen in India under criminal jurisdiction"[163] who "is a foreigner in a strange country,"[164] who comes before a criminal court almost without any fault (thus often drunk), and is now faced with an Indian judge who will—"by nature"—never be capable of fully recognizing the lack of fault. Any ordinary European person could find himself or herself in such a setting (either constructed charges or intoxicated foolery). The apparent right only to be tried by fellow Europeans thus functioned as an insurance against apparently improper criminal convictions in such cases. Besides the sense that the imagined scenarios appeared to be largely counterfactual, also to contemporaries,[165] this line of argument reveals two aspects of the fundamental nature and structure of British India.

First, the argument rests on the discursive creation of "otherness" mainly based on race and culture, which was a typical line of colonial thought and which operated as the ultimate barrier between the colonized and the (fully)

[159] Seton-Karr, quoted in "Meeting in St. James's Hall," 25.

[160] "Mr. Plunket on the Ilbert Bill," *The Times*, October 26, 1883, 4; J. D. Mayne, quoted in "Meeting in St. James's Hall," 31, referring to "guards," "engine drivers [...] and so forth" as "the lowest class of Europeans."

[161] Stephen, "Letter," 12.

[162] Critical thereof: Marquess of Hartington, *House of Commons Hansard Sessional Papers*, Third Series, Volume 283, August 23, 1883, 1719–821, 1807 ff.

[163] Alexander Arbuthnot, quoted in "Meeting in St. James's Hall," 21.

[164] Stephen, "Letter," 12.

[165] Hobhouse, "Native Indian Judges," 11 f., 23; also cf. Campbell, *House of Commons Hansard Sessional Papers*, Third Series, Volume 283, August 23, 1883, 1719–821, 1807 ff.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

civilized.[166] Although education had been central to the "civilizing mission," the constructed "otherness" of the collective always trumped individual English-modelled education or religion.[167] This "racial gulf theory" led to the situation that no matter how well-educated an Indian person was, he or she could never be fully recognized as equal due to the "gulf" between the races which was imagined as unbridgeable.[168] Therefore, the statement presumably made with some normative endorsement that "white skin is a certificate of social status in Hindustan"[169] held at least true descriptively. The created or imagined otherness directly led to and upheld social status and privilege, such as being able to sit as a judge in all types of legal cases or being able to reject being tried by a person of a different color of skin. This constructed otherness underlying the invocation of a right to be tried by one's own peers (equals) will re-appear as a constitutive element of the other two main arguments below. This demonstrates not only how central the creation of otherness was for the constitution of British Empire, but also how *explicit* and widespread it was in the discourse at the time.

Second, and equally characteristic for colonial thinking was the reversion of the relation between norm and exception. Although it was recognized that the English were foreigners,[170] it appeared to be almost unthinkable that an English person was subject to societal institutions, including criminal jurisdiction controlled by locals. Naively speaking, this would have been the "norm" for a foreigner. However, quite to the contrary, the norm was considered to be one of privilege, no matter where white Europeans happened to be. Crucially, this privilege was either not regarded as an "anomaly" at all, or—more commonly—it was seen as an anomaly to a certain extent, but it was subsequently argued that "[t]he 'anomaly' would be really greater if, in the case of isolation from friends and counsel, the trial took place before a single Native judge."[171] Implicit here is the assumption that a white privilege was not actually "abnormal," rather it reflected the "normal" hierarchy of races.[172]

This hierarchy—more specifically the apparent supremacy of white Europeans—also served as the explicit explanation why this argument of a right to be tried by one's own peers would not equally apply in favor of Indians. As Justice Stephen claimed in a letter to *The Times*,

> "If it is said that a Native before an English Judge is equally ill off [when facing a judge that is not his/her own peer], it is hardly true, for every

[166] Instead of many: Said, *Orientalism*; today, this process is referred to as "othering," coined in: Gayatri Chakravorty Spivak, "The Rani of Sirmur: An Essay in Reading the Archives," *History and Theory* 24 (1985): 247–72, 252.

[167] See also Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 94 ff., esp. 96.

[168] Dobbin, "The Ilbert Bill: A Study of Anglo-Indian Opinion," 94 f.; critical: Hobhouse, "Native Indian Judges," 10.

[169] "'Black and white' in India," *Evening Telegraph*, April 2, 1883.

[170] Explicit e.g. in Stephen, "Letter," 12; repeated in: James Fitzjames Stephen, "The Ilbert Bill: To the Editor of The Times," *The Times*, November 2, 1883, 4.

[171] "Leading Article in the 'Saturday Review'," June 30, 1883, in *Collection of Letters et cetera*, 49.

[172] More details in 3. (floodgate argument).

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

> effort is made to familiarize English Judges with both the language of the country and the character of the Natives, whereas Natives have no familiarity at all with the character of the lower class of English, and few know our language well enough to administer justice in it. In so far, however, as the observation is true, it proves so much, for it is based upon a defect inseparable from the existence of the British power in India."[173]

Besides the fact that the language argument seemed distorted and was challenged accordingly,[174] there are at least two elements in this argument that are noteworthy. First, the reiteration of the separation between "lower class" English people and Indian judges. The underlying reasoning of this re-introduction of class considerations appears to be that only the European judges were equipped to fully and objectively understand the "character" of *all* classes in India, including "lower class" Europeans.

Second, Stephen—and others[175]—seemed to acknowledge that there could have been some merit in the argument that the right to be tried by one's own peers should apply in favor of Indians as well, yet Stephen conceded that "in so far" this inequality or double standard simply reflected the nature of the British power in India.[176]

Thus, viewed together, the underlying imaginations that informed the invocation of a "right" to be tried only by fellow Europeans mirror typical colonial thinking. The argument was based on a pseudo-legal argument that "transplanted" a legal arrangement from Britain to British India in such a way that it supported the imperial mission. Thereby, the actors openly acknowledged that a consistent and equal application of that "right" was incompatible with imperial rule. This inevitable inequality was ultimately justified by the imagination of "otherness" and racial discrimination, the white European being the unquestioned rulers; an element that will re-appear below.

The (faith in) proper administration of justice

A second, more structural argument was one concerning the faith in the proper administration of justice. Introducing full racial equality on the benches would result in a loss of faith in the judicial system on the side of Europeans, so this argument went.

This line of argument had two streams, one assuming that Indian judges would actually be less trustworthy in the administration of justice than Europeans and the other stream arguing that even if this was not the case,

[173] Stephen, "Letter," 12 f.; again in Stephen, "The Ilbert Bill"; also cf. "Mr. Plunket on the Ilbert Bill," *The Times*, October 26, 1883, 4.

[174] Lord Chancellor, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1735–801, 1783; Prime Minister Gladstone, *House of Commons Hansard Sessional Papers*, Third Series, Volume 279, May 11, 1883, 520–69, 567.

[175] E.g. cf. Earl of Carnarvon, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1786 f.

[176] Also central under 3.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

Europeans would nevertheless reasonably believe so, which would similarly undermine the proper administration of justice.

As to the first, in a memorandum-like letter that was described as "one of the most important documents that have ever been transmitted from India"[177] a number of judges from Calcutta argued that Indians would

> "speaking generally, offer a less complete guarantee for impartiality and independence—who generally labour under the disadvantage arising from difference of nationality and social habit, and in whom the portion of the community concerned confessedly place less confidence than on the existing tribunals."[178]

This assumption of a general lack of trustworthiness was widespread.[179] The Calcutta judges emphasized at this point that it was "no disparagement of the integrity or ability of a Native judge to say that he is necessarily more amenable to the external influence" since—in their view—the lack of impartiality and independence stemmed from their natural characteristics and them being situated within the local community from which "some unknown or improper influence will be brought to bear on that officer."[180] In other words, this line of argument assumed that Indian judges were less impartial not due to their individual lack of integrity or by individual fault, but due to their "natural" and cultural otherness. This in turn meant that first, no individual judge could possibly rebut this assumption by his educational background or experience in the Civil Service, and second, no program or institution of education or professional training could overcome this very last barrier toward equality. Therefore, following this logic, an Indian judge would always pose a threat to the proper administration of justice which was only mitigated in the cities by social institutions such as the press.[181]

The second variation of the argument aiming to protect the administration of justice twisted this further. Exemplifying this line of argument, one adversary rhetorically asked his audience in a town hall meeting whether

> "after all society is not better satisfied, criticism is not more disarmed, and the interest of justice not better consulted, when a European at a distance from friends and advisers, is tried by a tribunal which is not only impartial, but which he and the world besides *believes* to be thoroughly equitable and impartial."[182] (emphasis added)

[177] William Wilson Hunter, "The Government of India and the Ilbert Bill: To the Editor of The Times," *The Times*, October 2, 1883, 8.

[178] "Letter of Calcutta Judges," in *Collection of Letters et cetera*, 55.

[179] Exemplary: J. D. Mayne, quoted in "Meeting in St. James's Hall," 34 ff.; "Correspondent, by Indo-European Telegraph, Calcutta March 11," *The Times*, March 12, 1883, 5.

[180] "Letter of Calcutta Judges," in *Collection of Letters et cetera*, 55.

[181] J. D. Mayne, quoted in "Meeting in St. James's Hall," 35; Earl of Carnarvon, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1786 f.

[182] Seton-Karr, quoted in "Meeting in St. James's Hall," 25; similar e.g. Viscount of Cranbrook, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1771.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

The speaker then—much like the Calcutta judges—immediately stressed that he was arguing against the Bill "[w]ithout saying one single word against the class of Native judges, whose integrity and impartiality I am bound to admire."[183]

This even-if-argument essentially acknowledged that Indian judges might *in actuality* not constitute a threat to the proper administration of justice, but argued that Europeans in rural areas *believed* so.[184] In this twisted argument, it was not the proper administration of justice as such that was to be protected, but the trust therein.[185] Consequently, this line of argument sought to "protect" views that were undoubtedly present in the European community, but which were based on prejudices.[186] It was acknowledged that those prejudices were possibly ill-informed or mistaken, yet they were still considered worthy of protection. In other words, the fact that "want of confidence in the natives, which, whether it were right or wrong, clearly existed"[187] justified the discrimination of Indian judges by law.

Instead of relying on transformative powers of law or abiding by principles of true equality, this way of reasoning complied with discriminatory views held in European communities. Thereby the argument consciously perpetuated existing prejudices and "legalized" them in the sense that the law was to protect prejudices to the expense of the individuals that were degraded by those prejudices in the first place. Thus, one could conceptualize this process as another form of "double marginalization" of Indian judges, first by society and then by law.[188]

Already at the time, the argument that racial inequality in the judicial system would protect (trust in) the proper administration of justice was questioned based on the fact that the argument could go both ways. For instance, the Marquess of Hartington argued in the House of Commons that the continuation of racial differentiation within the judicial system would lead to distrust on side of the Indian population, even more so now if the draft would be withdrawn.[189] The policy that a European can only be tried by another European would raise "suspicion—or, at least, a prejudice against our rule—that we think it necessary, in the interest of our countrymen, to require that they shall have something more than a fair and impartial trial, and that they are to be tried by men who may be presumed to have some bias in their favour."[190] For maintaining

[183] Seton-Karr, quoted in "Meeting in St. James's Hall," 25.

[184] J. D. Mayne, quoted in "Meeting in St. James's Hall," 34.

[185] It is remarkable that the German Federal Constitutional Court resorted to similar reasoning when upholding a law that prohibits legal trainees to wear hijab in court, see Bundesverfassungsgericht (Federal Constitutional Court), Decision of January 14, 2020, 2 BvR 1333/17, para. 90.

[186] Recognizing this explicitly e.g.: Macrae, "Criminal Jurisdiction," 26.

[187] So e.g. "Correspondent, by Indo-European Telegraph, Calcutta March 11," *The Times*, March 12, 1883, 5.

[188] As noted above, the term "double marginalization" is borrowed from Conrad, "Doppelte Marginalisierung."

[189] Marquess of Hartington, *House of Commons Hansard Sessional Papers*, Third Series, Volume 283, August 23, 1883, 1719–821, 1817.

[190] Ibid., 1817.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

British rule in India, there should rather be a "general belief that an offence will be punished by whomsoever committed."[191]

Consequently, as the protection of proper administration of justice was a double-edged sword, it is not surprising but telling that in an (implicit) act of balancing interests, the trust of Europeans in the judicial system clearly outweighed the trust of the Indian population that was diminished due to the open and systematic bias within the judicial system. This demonstrates again that the public institutions introduced by the Government in India were meant to serve first and foremost the European population in India, not the locals, including those officially serving the British.[192] This finding is certainly no surprise or new, yet in the moment of *constitutional panic*, British themselves revealed this element of the nature and structure of British India very explicitly. The informed public was well-aware of this dynamic.

The floodgate toward absolute equality and end of Empire

A further prominent argument was one of floodgates. To introduce racial equality in the judicial sector would, it was widely argued, first lead to similar arguments concerning other official posts and ultimately to absolute equality which would mean the end of Empire. Thus, the Ilbert Bill was characterized as a stepping-stone toward Indians demanding other "privileges" such as that of carrying arms,[193] becoming "Lieutenant-General of a Province, or Chief Commissioner, of Commander-in-Chief of the Army, or Viceroy."[194] This line of argument directly made the transfer from the concrete issue of racial equality in the judicial sector to a question of principle.

On this level of abstraction, the adversaries claimed that absolute equality was not only impractical, but virtually *impossible* in British India. The floodgate argument was to demonstrate that "it was perfectly impossible and ridiculous, so long as we retained our hold on India, to give Native races full equality."[195] This was the line of reasoning that stood behind the relatively common and widespread mantra that "[i]f the Government really set themselves to work to sweep away anomalies, the first which they would have to remove was the British Government itself."[196]

This was not an anti-imperialist argument at all. Rather, the anomaly of the overall situation of Britons in India was argumentatively accepted in order to highlight the impossibility of introducing absolute equality. At this point of

[191] Ibid., 1817.

[192] Critical thereof and highlighting "the personal indignity resulting from the present law": Hobhouse, "Native Indian Judges," 19.

[193] "'Black and white' in India," *Evening Telegraph*, April 2, 1883.

[194] Quote: Marquess of Salisbury, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1799; also cf. Seton-Karr, quoted in "Meeting in St. James's Hall," 26 f.; and "Playing with Fire: Lord Ripon's Blunder," *Sheffield Daily Telegraph*, May 22, 1883, 7.

[195] Ashmead-Bartlett, *House of Commons Hansard Sessional Papers*, Third Series, Volume 279, May 11, 1883, 520–69, 566.

[196] Earl of Carnarvon, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1786 f.; similar and representative: Ashmead-Bartlett, *House of Commons Hansard Sessional Papers*, Third Series, Volume 279, May 11, 1883, 520–69, 566; and Stephen, "Letter," 13.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

"logic," when proclaiming the necessity of an anomaly, racialized reasoning was introduced into this argument. Consequently, the abstract argument against absolute equality was two-fold: In the first step it was acknowledged that "Europeans in India are essentially and always must be neither more nor less than a handful of foreigners"; in the second step it was concluded that they needed to be "divided from the general population of the country by every line of demarcation."[197] Put more clearly: for there to be a British imperial rule in India there needed to be British rulers and ruled Indians and thus a demarcation between the "races."

In considering what these lines of demarcation were, James F. Stephen explained that "[i]n the first place, the difference of color makes an indelible outward and visible distinction, which appeals forcibly, emphatically, and at every moment to the eye."[198] He continued by claiming that the distinction of color coincided with a series of other distinctions "which it comes to typify and symbolize,"[199] meaning that the color of the skin was the symbol for the differentiation between human races of different quality, the white skin symbolizing the greatest social status as already observed above.

This demarcation between races was generally based on and justified by a socio-Darwinist conception of Europeans naturally being "not the equals, but, the superiors" while Indians supposedly accepted this hierarchy as "a just, a natural, and a necessary inequality."[200] Consequently, as Earl of Lytton observed in the House of Lords, the Government of India was "founded on a wise recognition of this inevitable inequality."[201] If one were to "place it on any other foundation, or administer it by any other principle," the unofficial Europeans would certainly leave India,[202] which implied the end of British India. This reasoning was echoed by fellow Lords stating that the entire abnormal position existed to a great extent in the "force of character in the dominant race"[203] and to deny it was useless "political hypocrisy" as Indians apparently knew "perfectly well that they are governed by a superior race, and that all this talk [about equality] is hollow and unreal."[204] Directed at those "Radicals" informed by "elementary principles of morals," the Earl of Lytton concluded that a "system which you regard as founded upon fraud and maintained by oppression can never come to good in your hands. You are attempting an impossible task."[205]

[197] Stephen, "The Ilbert Bill."
[198] Ibid.
[199] Ibid.
[200] Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1756.
[201] Ibid., 1756.
[202] Ibid., 1756.
[203] Viscount of Cranbrook, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1772.
[204] Marquess of Salisbury, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1799.
[205] Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1756.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

Thus, the general state of "anomaly" was justified by proclaiming the naturalness of inequality, whereby the apparent "anomaly" was in fact not abnormal after all.[206] In this light, the "sentimentalist" and "pseudo-humanitarian" supporters of the Ilbert Bill[207] were said to pursue the most "fearfully dangerous" policy of "shifting the foundations on which the British Government of India rests."[208] To reject the Bill, on the other hand was to realistically accept that the government in India was "essentially an absolute Government, founded, not on consent, but on conquest."[209]

It is here that one can see most clearly that even though the Controversy was a moment of "panic," it was not a moment of complete irrationality. Rather, the constitutional panic revealed or made explicit how *instrumental* the employed reasoning for constituting Empire was.[210] It was realized that British India could only remain the crown jewel of the Empire if a demarcation was upheld between the rulers and the ruled, especially in branches of government. The most functional operator of demarcation, as can be seen in Stephen's letter, was that of skin color.[211] The use of this tool for demarcation was then justified by racial differentiation and hierarchization along the line of (pseudo-)scientific socio-Darwinist ideas. Thus, this line of argument against the Ilbert Bill exemplifies the general observation by Sumit Sarkar that "a certain amount of white racism had a functional and necessary role in the political and economic [to add: and legal, G.M.] structure of colonial India" and that it was "not irrational, after all, from the British point of view, to exclude Indians from the really senior and key posts in the military and administrative cadre as much as possible."[212]

The panic, regardless of whether it was exaggerated or not, was informed by the sense that the Ilbert Bill was only one further step toward the total loss of control over government, society, and ultimately British India and Empire.

Conclusion

The arguments analyzed above demonstrate that it was commonly known and accepted that racial discrimination was, as a matter of dominant policy, a constitutive element of the British Empire in 1883. The "striking clarity" (Kolsky) with which racial discrimination formed the basis of the arguments against the Ilbert Bill further shows that "straightforward" racial supremacy was far from being substituted for more complex intersectional concepts like "colonial

[206] See also Seton-Karr, quoted in "Meeting in St. James's Hall," 26.

[207] Ashmead-Bartlett, *House of Commons Hansard Sessional Papers*, Third Series, Volume 279, May 11, 1883, 520–69, 566; similar: J. M. (presumably James Mackenzie) Maclean, quoted in "Meeting in St. James's Hall," 41.

[208] Stephen, "Letter," 13; similar: Earl of Lytton, *House of Lords Hansard Sessional Papers*, Third Series, Volume 277, April 9, 1883, 1733–811, 1751 ff.

[209] Stephen, "Letter," 13; see also "Meeting in St. James's Hall," in *Collection of Letters et cetera*, 26 (Seton-Karr) and 37 (Maclean).

[210] See similarly, Chatterjee, *The Nation and Its Fragments*, 20.

[211] Critical: Hobhouse, "Native Indian Judges," 24, rhetorically asking "what amount of colour is enough to excite mistrust?."

[212] Sarkar, *Modern India*, 23.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

masculinity" (Sinha). Nevertheless, it is vital to stress that argumentative patterns described as "white men saving brown women from brown men"[213] as well as patterns of saving white women from brown men were also present in the Controversy (see Sinha). They had to be left aside in this essay for the sake of focus and clarity. This focus was primarily informed by the lack of in-depth analytical historiography concerning the racialized arguments clearly expressed by adversaries of the Ilbert Bill in various fora.

Just as the essay does not seek to question conceptions of gendered colonialism, it does not aim to suggest by its focus on the arguments *against* the Bill that the views analyzed above were uncontested. As occasionally indicated above, the arguments were oftentimes criticized on the basis of incoherence.[214] Even though it might be true that some supporters of the Ilbert Bill genuinely aimed for absolute racial equality (at some point in India's future), it is important to bear in mind that also the supporters of the Bill often thought along the lines of a "civilizing mission" that rested on similar constructions of "otherness" and "backwardness" as the arguments against the Bill.

Overall, the concept of *constitutional panic* served as a useful tool to capture the fundamental nature of the Ilbert Bill Controversy and the arguments made therein. The actors felt that nothing less than the foundations of Empire was at stake. The discursively dominant conservative camp that successfully campaigned against the key element of the Bill (racial equality in the judiciary) primarily based its arguments on racial discrimination. The reasoning was—as explicitly recognized at the time—never entirely consistent and, ironically, led to an increased political mobilization of Indian elites pressing for the redemption of the promise for equality. As in "information panics" (Bayly), in this instance of *constitutional panic*, the colonial administration knew that their reasoning was incoherent, but sought more incoherent reform, thereby in the long-term making crises worse (from their perspective). This reproduction of contradictions through law was characteristic of imperialism and its legal framework,[215] but the explicitness of acknowledging this contradiction and the foundational character of racial discrimination was extraordinary in this Controversy.

It is in this way that this essay pursued its two-fold aim of first analyzing three main arguments against the Ilbert Bill for providing a better understanding of the constitution of British India and second, demonstrating that openly racialized reasoning was understood to be inconsistent to certain degrees, yet sought to uphold the constitution of Empire as long as possible. In this light and viewed through the lens of *constitutional panics*, the Ilbert Bill Controversy went to the heart of British India: racial discrimination.

Acknowledgments. First, I thank Yasmin Khan (University of Oxford, Faculty of History) for her invaluable support and feedback on an earlier version of this essay, which was accepted as

[213] Gayatri Chakravorty Spivak, "Can the Subaltern Speak? Speculations on Widow Sacrifice," *Wedge* 7/8 (1985): 120–30, 121; applied to the Ilbert Bill Controversy in: Sinha, "Reconfiguring Hierarchies," quoted at 452.

[214] Most clearly: Hobhouse, "Native Indian Judges."

[215] Besides Benton and Ford; instead of many more: Mehta, *Liberalism and Empire*; Pitts, *A Turn to Empire*.

https://doi.org/10.1017/S0738248024000269 Published online by Cambridge University Press

Dissertation for the Postgraduate Certificate in Historical Studies, University of Oxford in 2022. Further, I thank Kunal Ambasta, Aparna Chandra, Preeti Pratishruti Dash, Bindu N. Doddahatti, Ankita Gandhi, Erica Kim Ollikainen-Read, Rahul Raman, and Arun Thiruvengadam for their immensely helpful feedback and comments as well as the organizers and participants of the Indian-German Young Scholars Workshop at National Law School of India University (Bangalore, 2023) in collaboration with the Chair for Public Law and Comparative Law (Philipp Dann), Humboldt University of Berlin. Mistakes are mine alone.

Gwinyai Machona completed LL.B. at King's College London, German law degree at Humboldt University Berlin, Postgraduate Certificate in Historical Studies at University of Oxford, currently researcher and PhD candidate at Humboldt University Berlin, Law Faculty <gwinyai.machona.1@hu-berlin.de>.

Cite this article: Gwinyai Machona, "Constitutional Panic in British India: How the Ilbert Bill Controversy of 1883 Revealed the Constitutive Character of Racial Discrimination in the British Empire," *Law and History Review* (2025): 1–31. https://doi.org/10.1017/S0738248024000269