

# UC Santa Cruz

## Refract: An Open Access Visual Studies Journal

### Title

Interpreting the Legal Archive of Visual Transformations: Textual Articulations of Visibility in Evidentiary Procedures and Documentary Formats of Colonial Law

### Permalink

<https://escholarship.org/uc/item/0m80q0bq>

### Journal

Refract: An Open Access Visual Studies Journal, 2(1)

### Author

Akhtar, Asif Ali

### Publication Date

2019

### DOI

10.5070/R72145859

### Copyright Information

Copyright 2019 by the author(s). This work is made available under the terms of a Creative Commons Attribution License, available at <https://creativecommons.org/licenses/by/4.0/>

Peer reviewed

## **Interpreting the Legal Archive of Visual Transformations: Textual Articulations of Visibility in Evidentiary Procedures and Documentary Formats of Colonial Law**

Asif Ali Akhtar

### **Introduction**

This essay is concerned with tracing an onto-epistemological break through the archaeology of colonial penal law, whereby a historical restructuring of the “visible” and the “articulable” produces modern ways of “seeing” and “knowing.” This epistemic break will be investigated through eighteenth- and nineteenth-century “Regulations” of Islamic *shari‘a* penal law by British administrators of the East India Company in colonial Bengal.<sup>1</sup> The juridico-discursive body, which came to be known as Anglo-Muhammadan law, is analyzed through court records compiled by Company jurists and their Regulations modifying *shari‘a* jurisprudence. Islamic penal law is based on hermeneutical practices of juridical reasoning formed through particular ways of seeing, knowing, and verifying the truth through eye-witness and testimony. In this essay I show that when the British commandeered this system of justice toward their own ends, the regulatory changes they instituted inadvertently brought about *visual transformations* of the ways in which legal life-worlds of the colony come to be recorded, articulated, and expressed. Under the British administration of colonial Bengal, this dual-process of appropriation and subversion of the law took shape through translation and transliteration of *fiqh* treatises, to legal amendments and sweeping legislations in substantive law.<sup>2</sup> This process not only provided colonial power access to the bodies of colonial subjects but also conditioned the relations between criminality, visibility, and juridical

veridiction through penal legislation.<sup>3</sup> As this essay shows, the East India Company's regulation of Islamic penal law began incorporating modern forms of evidentiary proofs, indexicality, and documentary formats that restructured the life-world of colonial law in nineteenth-century Bengal.

I approach these complex changes by looking at the Nizāmat 'Adālat, a superior criminal court of judicature operating in Bengal from the late eighteenth to mid-nineteenth century. I approach the Nizāmat system through court records produced by East India Company servants from 1805 to 1859, titled *Reports of Cases Determined in the Court of Nizamat Adawlut*.<sup>4</sup> Treating these *Reports* as the primary object of analysis, I show how they provide lucid insights into the visual restructuring of law and life in the colony. Changes in the substantive and procedural law, which affected epistemological bases, hermeneutical practices, and veridictional procedures of *shari'a* law, were enacted by the British through a series of Regulations that constituted new types of evidentiary rules and documentary procedures. By regulatory enactment, "criminal sentences [were] to be prepared from commencement of 1805, for the information of government...and cases of importance to be selected from such reports for publication."<sup>5</sup> This legislation eventually materialized in the *Reports*, whose format and documentary features provide vivid insights into the changing nature of legality and penalty, evidencing what I argue is an epistemic break restructuring the visible and articulable lifeworld of law.

In considering eighteenth- and nineteenth-century penal law discourses and practices, this essay theoretically and methodologically draws on the work of Michel Foucault, along with his understanding of history in terms of epistemological breaks and regimes of truth.<sup>6</sup> Conversely, the colonial legalscape provides a different view—and a different empirical substrata—than the discourses of the classical age of European modernity commonly associated with Foucault's researches. In apprehending historical epochs and past systems of legality and penalty in terms of the "visible" and the "articulable," this work also gestures to the direction of how Gilles Deleuze has refracted certain aspects of Foucault's conceptions of discourses and practices to view them in a different light. To quote from Deleuze's *Foucault*:

An 'age' does not pre-exist the statements which express it, nor the visibilities which fill it. These are the two essential aspects: on the one hand each stratum or historical formation implies a distribution of the visible and the articulable which acts upon itself; on the other, from one stratum to the next there is a variation in the distribution, because the visibility itself changes in style, while the statements themselves change their system.<sup>7</sup>

Viewed in this light, the *Reports* of criminal law cases—judged by Company jurists together with their Mahomedan law officers—under consideration in the following sections illuminate how the changing onto-epistemological modalities of colonial law also restructured ways of seeing, saying, and knowing in colonial Bengal. The changing epistemological modalities, it will be argued, also have bearing on how visibilities of law come to be restructured and conditioned through emerging modern evidentiary frames, documentary formats, and recording techniques of colonial law.

To evidence a rupture—in terms of the visible and the articulable—between the Islamic premodern and the colonial modernity, the *Reports* are treated as an archive of visual and legal transformations. The discursive residue in the form and content of the *Reports* elucidates an onto-epistemological break in terms of shifting evidentiary modes, documentary formats, and means of determining the truth. The visibilities apparent in the colonial penal law are treated on two levels: first, at the level of the “discursive residue” of the *Reports* themselves—their materiality, format, and indexicality of the court records—in terms of what cues they provide as an archive into visual transformations underway; and second, at the level of evidentiary and documentary transformations discernible from their content, in terms of changing epistemologies and truth-procedures. Over the course of the early nineteenth century, the focus of the legal records shifts from evidentiary rules of *shari‘a* jurisprudence toward medico-juridical and forensic techniques. Eyewitness testimonies and attention to the instrument of murder come to be replaced with documents such as crime scene reports, postmortem reports, and autopsy reports. These changes, it will be argued, produce different ways of seeing and attesting to the truth, while the transforming relations of the visible to the articulable become discernible through a continuous recording of early nineteenth-century colonial penal law crystallized in the *Reports* as a unique archive of where the colonial gaze meets the colonized body.

Considering the case records contained in these volumes of the *Reports* in relation to the periodic Regulations, I show how this “discursive residue” of an antecedent legal system forms an archive not only of legal change but also of visual transformations. Part 1 of this essay establishes a historical and institutional context of the Nizāmat ‘Adālat and its regulatory modes necessary for interpreting the *Reports*. Part 2 delineates certain visual features of the *Reports* in terms of formatting and indexing, which make them useful as an archive of visual change. Finally, part 3 considers how the *Reports* elucidate an onto-epistemological break in terms of evidentiary modes, documentary formats, and truth-procedures, which evidence a rupture between the Islamic premodern and the colonial modernity that follows.

### Preliminary Context: Historical Strata of Colonial Regulation of Islamic Law

Prior to the onset of colonial modernity, Bengal, the largest province of the Mughal dominion, was administered by the dual system of a *Nâẓim* (governor) and a *Dīmān* (treasurer). While the Diwani was the domain of commerce and treasury, the Nizāmat was properly the administrative domain under the figure of the *Nâẓim*—though these spheres often intersected.<sup>8</sup> According to a decentralized mode of Mughal criminal adjudication, every village had its local *qadi*, or judge, who “had criminal jurisdiction along with other jurisdictions.” Further, “a *Mufti* was attached to every court,” where each *qadi* would pronounce judgment in consultation with a *mufti*, or jurisconsult.<sup>9</sup> In the mid-eighteenth century, as the East India Company gained influence in the region, its initial foray was into the realm of the Dīwān, where they took on responsibilities for taxation and civil litigation under a reconstituted Sadr Dīwānī ‘Adālat. Meanwhile, the Sadr Nizāmat ‘Adālat was left under the auspices of the Nawab of Bengal up until the 1757 battle of Plassey. As Tapus Kumar Banerjee notes, “After Plassey, nothing remained to the Nawab but the ‘Name and Shadow of Authority’, and the Company could [also] usurp the powers and functions of the *Nizāmat*.”<sup>10</sup> Although there is a rich history of how this usurpation takes place during the time of Warren Hastings,<sup>11</sup> the period that concerns the current discussion of court records stems from the formalization of a new type of codified institution in 1790 following the Regulations initiated by the incoming Governor General, Marquis Cornwallis.

#### *Cornwallis’s Minute on Defects of Muhammadan Law and Its Colonial Regulation*

In 1790 Marquis Cornwallis ushered in a new phase of the British administration of criminal justice in Bengal. The East India Company had engaged in various experiments of influencing criminal law, from 1765 on through a policy of noninterference, and indirect rule through the office of the Naib Nâẓim. The end of this period came in 1790, when “the Company took the control of the *Nizāmat* into its own hands, and the veil was removed.”<sup>12</sup> In a Minute recorded at Fort William on December 1, 1790, Cornwallis noted two obvious causes for the notoriously defective system: “1st, the gross defects in the Muhammadan law; and 2ndly, The defects in the constitution of the courts established.”<sup>13</sup> While the British had already altered significant parts of the law and the institutions in the decades prior, Cornwallis ushered in an era of systematic and codified changes to the *sharī‘a* law

that would come to be properly known as the Regulations. The rationale behind these Regulations was to correct the “defects in the penal laws of the country” while instituting “an efficient administration of criminal justice.”<sup>14</sup> Consequently, by 1793 Cornwallis “formed the Regulations into a regular Code, [as] the basis of the Regulation Law.”<sup>15</sup> The Regulations of the Bengal Presidency are of crucial importance in understanding the British administration of criminal law in India up to 1859 as documented in the *Reports*. These properly formed the template for later applications in other areas up until the passage of the Indian Penal Code Act in 1860.

As *shari‘a* law functions on the basis of specific hermeneutic and commentary discourses, the Regulations provided a means for the British to make alterations to the substantive law from without.<sup>16</sup> As a series of legislative acts aimed at rescinding, altering, abrogating, mutating, and subverting the existing law, the Regulations can thus be properly considered a *counter-discursive* body of law acting in reference to and poised against the existing evidentiary rules and hermeneutical procedures of *shari‘a* jurisprudence.<sup>17</sup> Prior to 1790, British amendments of the law were cautious yet arbitrary and unsystematic; later on, they systematically un-render the *shari‘a* through codification.<sup>18</sup> The complex procedure, whereby one format of law rewrites, or codifies an existing legal system, it is argued, is what produces legal modernity together with new modes of seeing and knowing as evidenced in the *Reports*.

To illustrate the point about how the Regulations can be used to interpret visual change taking place in the *Reports*, I provide an example of a single but formative Regulation, which came to significantly restructure criminal jurisprudence. The Regulation in question stems from Cornwallis’s remarks recorded in his Minute on the matter of evidence in homicide cases.<sup>19</sup> The law officers writing the fatwas would refer, in lieu of Abu Hanifa’s emphasis on determining the intention from the nature of the instrument deployed, to “more modern authorities” of Abu Yusuf and Muhammad al-Shaybani, who stress intentionality should be determined from circumstantial evidence.<sup>20</sup> The effects of this Regulation in terms of visibility of evidentiary criteria and how visual cues are laid out in the *Reports* are considered in the final section. The statement from Cornwallis’s 1790 Minute, which makes the stipulation to consider the intent of the murderer and not the instrument of murder in homicide investigations, is reproduced for context:

“1st. That the doctrine of Yusuf and Mohummud, in respect to trials for murder, be the general rule for the officers of the courts to write the *Fatwas* or law opinions applicable to the circumstances of every trial, and that the distinctions made by Aboo Huneefa as

to the mode of the commission of murder, be no longer attended to; or in other words, that the intention of the criminal, either evidently or fairly inferrible from the nature and circumstances of the case, and not the manner or instrument of perpetration (except as evidence of the intent) do constitute the rule for determining the punishment; ...we have it in evidence before us that the best subsequent, or more modern, law authorities among the Mohummudans, do expressly, in cases where Aboo Huneefa and his said two disciples differ, leave it to the *Hakim*, or ruling power, to make an option between their varying sentiments; upon which ground I think it is plainly our duty to adopt, in all such cases, the opinion of either that shall appear most rational and fitted to promote the due and impartial administration of justice.”<sup>21</sup>

Harington notes that Cornwallis’s remarks “were accordingly included in a Regulation, of fifty-two articles,” passed two days later. We may note in this instance how Cornwallis’s utterance at Fort Williams becomes enacted and codified into law as Regulations. This points to the institutionalization of a hitherto-unprecedented discourse of legal amendments, requiring new types of evidence and new practices of punishment and correction to be invented. After 1805, the *Reports* provide vivid insights into how these Regulations functioned in terms of the articulability of the visible and how the focus shifts from eyewitness testimonies and the instrument of murder to the corpse of the victim, marks of mutilation, and various other visually discernible circumstantial evidence. Before we turn to the *Reports*, understanding the procedure of the Nizāmat as administered by Company servants will add further context to interpret the form and content of the records.

### *Institutional Structure and Function of the Nizāmat ‘Adālat post-1790*

As the Nizāmat is not a regular court of law, in order to fully appreciate the form and content of the *Reports*, the reader will benefit from a basic understanding of its institutional structure and function. A summary of this is provided by W. H. Macnaghten in the opening Advertisement for the first volume of the *Reports*:

The chief peculiarity in the mode of proceeding in the Court of Nizamut Adawlut is, that the prisoners are never personally before it. Judgement in each case is formed by a perusal of the original

proceedings of the Magistrates on the commitments, and copies of the proceedings held by the Courts of Circuit on the trials. The proceedings of the Courts of Circuit are ordered to be conducted in the following manner. The charge against the prisoner; his confession, if he plead guilty; the evidence on the part of the prosecutor; the prisoner's defence, and any evidence which he may have to adduce, being all heard; the Cauzy or Moofty (who is present during the whole of the trial) writes at the end of the record of the proceedings (which record is in the Persian language) the *futwa*, or exposition of the Moohummudan law, applicable to the circumstances of the case, and attests it with his seal and signature.<sup>22</sup>

The court of the Nizāmat 'Adālat was reconstituted, by Section 67, Regulation IX, 1793, as a superior criminal court of appeals, and was relocated to Calcutta from Murshidabad. Following the East India Company's reordering of the legal system, the offices and responsibilities were hierarchized in an unprecedented manner, with British judges supervising Muhammadan law officers (1 *Qadi*, 1 *Mufti*, 2 *Maulavies*, and 2 *Muharrirs*, i.e., Persian scribes) in the lower courts.<sup>23</sup> While the newly reformed superior court of the Nizāmat 'Adālat "consist[ed] of three judges, to be denominated respectively chief judge, and second and third judge...assisted by the head cauzee of Bengal...and by two moofties." Later the number of judges would be increased to five, "all chosen from among the covenanted [British] servants of the Company."<sup>24</sup> This institutional edifice of hierarchical subordination and bureaucratic organization is one of the key aspects that truly sets Anglo-Muhammadan law apart from any preceding practice of *shari'a* in the world.<sup>25</sup> The figure of the *qadi* was completely redefined and subsequently displaced during the reordering of this system. As Nizāmat judge J. H. Harington notes: "The judicial functions, which appertained to the office of the cauzy-ul-cuzzat...under the Mahomedan government, have been discontinued since the establishment of courts of justice under the superintendence of British judges."<sup>26</sup> Thus the office of the *qadi* was no longer a judgeship; rather, it became subordinated as a clerical position of the "law officer."<sup>27</sup> Under this new categorization, the role of the *qadi* (judge) came to be collapsed with the *mufti* (jurisconsult) and *maulavi* (professor), jointly referred to as "Muhammadan law officers" in the *Reports* and Regulations. The law officers would be instrumental in the functioning of both courts, as Macnaghten notes:

As soon as practicable after the conclusion of each [Circuit Court] trial, a counterpart of the record is transmitted to the Nizamut



Adawlut, accompanied with an English letter, stating the opinion of the Judge on the evidence adduced. The record includes the whole of the proceedings, with every examination and material paper taken by or delivered into Court, and Persian translations of all examinations which may have been taken down in any other language. The whole of the papers and proceedings received from the Magistrate upon the case referred, are also transmitted. On receipt of these proceedings, they are made over to the Kazeer ool Koozat and Mooftes of the Nizamut Adawlut, who, in the first instance, are required to state their opinion in writing at the foot of the record of each trial.<sup>28</sup>

These law officers would themselves become disciplinary subjects, terminable upon any misconduct. Further, “they were required to take and subscribe a retrospective oath, half-yearly,” attesting to the fact that they had performed their duties diligently and honestly in the service of the government.<sup>29</sup> While the role of the law officers is occluded in the *Reports*, the “Rule for obtaining *futwa* of law officers” specified in Regulation 9, 1793, and Regulation 8, 1803, perhaps offers the most visible description of their role:

The law officers of the nizamut adawlut are ordered to assemble at the office of the register three times in every week, or oftener if necessary. The register is to lay before them the Persian copies of proceedings upon trials referred by the courts of circuit to the nizamut adawlut; after duly considering which, and previously to leaving the register’s office, they are to state in writing, at the foot of the record upon each trial, whether the *futwa* of the law officer of the court of circuit is consistent with the evidence, and conformable to the Mohummudan law; or the *futwa* which, in their opinion, ought to be delivered upon the case; and are to subscribe their names, and affix their seals thereto. The register is to submit the proceedings so revised to the judges of the nizamut adawlut at their next meeting; and the court after presenting the proceedings of the court of circuit, with the *futwas* of the law officers of that court, and of the nizamut adawlut, are to pass the final sentence; unless further evidence or information upon any point appear requisite. . . . if further evidence be received, a second *futwa* is taken from the law officers, and the trial is again brought before the

court...the register is to transmit a copy of [the sentence], under the seal of the court, and attested with his official signature.<sup>30</sup>

Together these law officers would undertake the joint production of fatwas no longer as a hermeneutic practice but as a bureaucratic requirement of the Company courts. It should be noted that initially the fatwas are legally applicable to the parties in criminal case, regardless of their professed faith. For the procedures of the Nizāmat and the subordinate courts, the fatwas would function initially qua binding legal documents stating the law officer's opinion on the matter<sup>31</sup>—gradually, through subsequent Regulations, these sealed and stamped fatwas would become entirely dispensable. The judges of the Nizāmat would have supervisory authority over the whole process and its documentation:

The proceedings so revised are then submitted to the Judges of the Nizamut Adawlut, who may (and generally do) hold separate sittings, and pass sentence, except in cases where the single Judge so sitting does not concur with the Judge of Circuit before whom the trial took place, or with the *fatwa* of the Nizamut law officers, in which case the opinion of another Judge must be had before the sentence can be passed. Various regulations have from time to time, been passed with a view to remedy defects in the Moohumudan law; and the opinion of the law officers may always be overruled, whether on the side of the conviction or acquittal, by not less than two Judges of the Nizamut Adawlut.<sup>32</sup>

Hence, from their centrally visible place in the legal system, the law officers and their fatwas eventually become erased from the process. Having outlined this procedure of how the *Reports* came to be compiled at the time, we may now attend to their form and content to understand changing evidentiary criteria in terms of how ways of seeing, showing, and saying are described within the legal process. The next section looks at the visual *form* of the records themselves, and the final section properly investigates marks of evidentiary change in the *content* of the *Reports*.



Figure 1 A Hindustani doctor's deposition to the judge of the circuit court in Urdu. A question-answer record of a conversation between the judge and the native doctor of the mental ward about the psychological disposition of a subject on trial, whether he was actually insane or feigning insanity. An example of the documented medicalization, and changing procedures of the courts visually captured and crystalized in the court records. *Nizāmat 'Adālat*, Reports of Cases Determined in the Court of Nizamut Adawlut [1831-1850], Calcutta: Bengal Military Orphan Press, 1841-1852. Image courtesy: British Library Board (IOR/V/22/445, p. 334-335).

### Format and Visual Features of the Reports

The *Reports of Cases Determined in the Court of Nizāmat Adawlut*, reporting cases from January 1805 until the end of 1859, elucidate and occlude particular elements in their selective reporting criteria with changing times and formats.<sup>33</sup> “It is not likely that the Nizamut Reports will be perused by any but those who are conversant with the system of proceeding observed in the Courts of Criminal Justice in this country,” wrote Macnaghten, the registrar of the Nizāmat when the first volume was published in 1827. It is unlikely that Macnaghten himself appreciated the

significance of the records he was compiling in terms of “discursive residue” being secreted, at the same time, for future observers of a *dead* legal system. I am referring here, more specifically, to historical researchers concerned with visual criteria and other aspects of nineteenth-century legal lifeworlds as different species of readers of court records—ones who approach and conceptualize the textual record and the colonial archive in different ways. For instance, here we are about to consider the *Reports* as a legal archive of visual transformations. “To those who peruse the following Reports,” Macnaghten notes,

it cannot fail to be obvious, that much matter has been introduced unconnected with the principles laid down in the notes, and unnecessary to the elucidation of the practice proposed to be established. This is doubtless to be deprecated in some measure, as being a deviation from that perspicuous brevity which characterizes the reports of cases in crown law published in England. But a detail of the particulars developed in the criminal trials of this country cannot be regarded altogether as surplusage. According to European notions, the motives which here instigate the commission of offenses are sometimes inadequate, and not always comprehensible; and any information calculated to familiarize the Judge with the ideas and springs of action which prevail among those to whom he dispenses justice, cannot be wholly uninteresting or useless.<sup>34</sup>

At the same time, Macnaghten notes elements that he himself has taken the liberty to occlude for the print format:

It is a subject of regret to me, that the multifarious and incessant avocations of the Judges left them no leisure to revise their opinions. These were probably written without any reference to their future appearance in print; and I have ventured to make a few verbal alterations, where the style of the remark appeared clearly intended for private reference, and obviously too colloquial for publication.<sup>35</sup>

These statements attest to the colonial nature of a court through which foreigners dispense justice to natives by their own laws, while making modifications to rules, procedures, and practices that affect ways of seeing, saying, and knowing. What visual, indexical, and evidentiary insights can these records of a *dead* legal system offer into the lifeworlds of institutionalized legality and penalty

experienced by historical subjects of colonial law? In this section, I attempt to review some of these visual and indexical features of the *Reports* that can lend themselves to attuned readers as a visual resource.

### *Form and Formatting of the Reports*

The cases are reported chronologically in summarized form with headings bearing the prosecutor/prosecutrix versus the prisoner and the charge. There are changes to the format, as new types of evidence and documentation from the lower courts, police records, and medical examinations come to be included in the process of the trials; however, the general style and presentation remain almost constant until the end. These changes attest to changing evidentiary procedures. As noted above, the reports in the first two volumes were compiled prior to publication of these materials, while each preceding year's cases were reported regularly thereafter with new details being added frequently. This may owe to the highly summarized format and brevity of the reports contained in the first volume. An example of one of the earliest cases reported in the series, "Government *against* Telok Sahoo and five Others," dated March 18, 1805, reads as follows:

The prisoners, whose trial came on at the Dacca Jelalpore sessions[,] were arraigned on a charge of having robbed the house of Shekh Jogen, and of having caused his death by applying fire to different parts of his body. This charge was fully established by their confessions as well as by the evidence adduced upon the trial; and they were declared by the law officers liable to exemplary punishment extending to death. They were accordingly sentenced by the Court of Nizamut Adawlut (present H. T. Colebrooke and J. Fombelle) to suffer death.<sup>36</sup>

The above quoted report, though one of the briefest in the volume, provides a template for how the earlier cases are narrated. Cases for later years, as I show, are replete with much greater detail and expand significantly in length. A given report usually starts with a charge from a particular circuit court trial outlining the basic features of the case. Usually this is followed by the opinion in the fatwa of the Muhammadan law officers of the circuit court, and whether the judge of that court concurred with this opinion. If the fatwa of the law officers of the Nizāmat 'Adālat differs from the circuit court fatwa, then it is also summarized. The report is concluded by noting the judges who were present at the time, and

their verdict with reference to any specific punishment—either in agreement or disagreement with the fatwa—along with their opinion and reasoning. The cases in the first volume are briefly summarized, and rarely do they ever span over two pages.

### *Invisibility of the Law Officers*

Unfortunately, the Muhammadan law officers, that is, the *qadis*, *muftis*, and *maulavis*, are nowhere listed by name, except the few rare instances where a reference appears in the footnotes. The disappearance of the law officers is significant to the changing modalities of a secularizing sacred law. Later on, their fatwas come to be contested by other evidence such as *sooruthal* reports of the police *darogha*, and postmortem reports of the medical officers, which point to evidence of the fact. This attests to the diminishing legal value of the fatwa in light of modern evidentiary criteria. The law officers, however, remain a feature of some of the cases until the very end of the Nizāmat system, with occasional references to fatwas even in 1859. The earlier court records judiciously summarize the fatwa of the law officers regardless of whether their opinion is final, and in their deliberations the judges make regular reference to this opinion. Later on, however, as becomes evident especially in the cases recorded in the sixth and final volume of the edition, there are cases where the Muhammadan law officers are scarcely mentioned, though their presence is required according to procedure. This erasure of the law officers is accompanied by other appearances and new forms of evidence. Exemplary of this trend is a case from 1850, where the circuit law officer's fatwa is overridden by the testimony of a medical officer:

The body was disinterred, an inquest duly held and an autopsy taken by Dr. Denham which he describes as follows: "The body presented, externally, marks of burns on the lower part of the back, but no marks of violence about the private parts. Internally there was a small portion of membranous substance in the cavity of the womb, . . . the deceased must have miscarried, and in all probability death was occasioned from the loss of blood."<sup>37</sup>

Hence medical facts are attested as visual facts in the legal documentation of court procedure—this process is described in more detail in the following section. In several cases recorded toward the end of the compendium, neither the law officers nor their fatwas are mentioned in the records. By 1832 the Regulations

grant circuit court judges authority to override the fatwa according to discretion. Moreover, the absence of the voice of the *qadis*—who are possibly central characters in other instances of *shari‘a* trials—in most of the court records where these individuals are present, suggests already a different type of procedure taking shape, along with its own textual conventions of inscription, documentary recording, and evidentiary criteria that accord the attention of the viewer of the record to different details.

### *Maps, Diagrams, Genealogical Charts, and Foldouts*

The most visually distinct feature of the otherwise textual reports are charts, plots, and maps that are included as aids for the viewer. Occasional cases, especially those of highway robberies, or *decoities* as they were referred to by the British administrators, would include foldout pages that indicate where the gang had assembled in relation to where the infraction took place, and how they came to be apprehended. Complex cases would also include genealogical plots, or diagrams connecting different claimants, witnesses, and accused in relation to one another. These hand-drawn maps and plots that literally fold out of the pages of the reports also present new ways of seeing the colonial terrain over which the Company was administrating. In complex cases involving crimes that took place outside Company jurisdiction, and hence outside the purview of the Nizāmat, they would mark out borders, which would also visually represent legal boundaries. These markings and inscriptions can be read as texts that map out the law onto a visual terrain. Often evidentiary details would also be pointed out, including facts such as the distance between one village and another, making the alibi of the accused, or a statement of the witness, visually verifiable in wholly modern ways.

### *Indexical Features of the Reports*

Originally intended to provide reference to colonial lawyers and judges of the courts, these features make the volumes accessible as a mode of categorization of case law in terms of principal matters seen as relevant at the time. These indexical features in the *Reports* provide vivid insights into ways of summarizing and categorizing the law. In addition to the case records being logged in chronological order with margin summaries, each volume includes a table of the cases sorted by the defendant’s name. The case records also note which judges were present by name, by noting, for example “(present J. H. Harington and H. T. Colebrooke,)” for an

1805 case.<sup>38</sup> At the end of the first two volumes, and at the beginning of the sixth, is a comprehensive index to principal matters and a collated list of cases in that volume by specification, that is, the crime in question. An index at the end of volume 5 collates principal matters from all previous volumes and provides an invaluable map distilling the records up to that point. The final volume of the *Reports* published as a coda in 1861 is itself an “Index to the first six volumes of the select reports of the Nizamut Adawlut, from 1805 to 1850.”<sup>39</sup> The indexes compiled at the end of some of the volumes and at the end of the collection provide a visual map of legal change as it took place over the first half of the nineteenth century. It also shows a taxonomy of principal matters that appeared to be important at the time.

The cases listed under the section “Evidence,” for instance, show all the principal cases wherein evidentiary criteria became a significant point of law, hence providing a map for relating the visible back to the articulable. Other indexical entries attest to the colonial lifeworld being seen through European eyes: index titles such as “British Subjects, European,” “British Subjects, Native,” “Europeans,” “Female Infanticide,” “Human Sacrifice,” “Killing Sorcerers and Witches,” “Sodomy,” “Sorcerers,” “Whoredom,” and “Witchcraft” bring to light a colonial world striated and categorized by European interlocutors through their version of codified Islamic law. The Advertisement of this volume notes: “The enactment of the Indian Penal Code is not calculated to affect the value of the precedents embraced in this Index. On the contrary, it is believed that a reference to the decisions will materially assist those employed in the administration of criminal justice, even when the proceedings are regulated and punishments awarded in accordance with the new code.”<sup>40</sup>

### *Interpreting “Discursive Residue” of Law as Archive of Visual Transformations*

Certain features of the *Reports* make them a rich resource for visualizing the process of legal change undergone in the transition from Islamic jurisprudence to Company law in the colonial period. Insofar as the changing factuality of the law is recorded by the Company’s own procedures, the *Reports* inadvertently also form an archive of the visual restructuring of colonial modernity. A key aspect is obviously the periodization from early to mid-nineteenth century where the heyday of British experimentation with *shari’at* law occurs. The term *discursive residue* is meant to signify that the recording processes of Company law outlive their own relevance to a legal system that has long since become antecedent—both the East



India Company and its system of Anglo-Muhammadan law have ceased to exist. What does persist is their *recording* of legal facts in the moment that they were produced.<sup>41</sup> Hence this *residue* is the materiality and textuality of the *Reports*, but also the fact that they form a “visual archive” of this changing factuality of the law. Where the institutional secretions of the court become crystallized, the *Reports* provide a visually rich archival record of myriad social experiments in penalty and legal transformations precisely as they take shape.

In the moment of crystallization of printed matter, the pages of the *Reports* record legal facts that become transformed into historical fact—*after* the fact. The registrar’s compiling the *Reports* also compiles antecedent terms as technical terminology of Anglo-Muhammadan law adapted from *shari‘a* and imprecisely transliterated into colonial vernacular. These italicized words (such as *mouburir*, *moonsif*, *sooruthal*, *razzenama*, *roobacaree*) attest to forms of documentation that also officiated colonial law in technical terms adapted by Company jurists from local practice. The terms are italicized and hence appear as visual markers on the page of the *Reports*, alongside technical Latin terms (such as *mens rea* and *in articulo mortis*). These visual features of the text present markers on the page of cultural translation as it was taking place. Most interestingly, at times the Persian and Urdu text is reproduced within the body of the English records, usually witness testimonies, and even fatwas originally recorded in the local languages are translated into English for the record. However, very rarely, the Persian and Urdu script seeps back into the colonial record. The most interesting examples are included as illustrations (fig 1, 2); these include a fatwa where the question from the British circuit judge is in Urdu, while the response of the *mufti* is in Persian. It is the only Persian fatwa found in the *Reports*, and as such bears testament to an antecedent artifact of the law while visually displaying precisely what the regulated law was, at the same time, erasing.

The residue of the procedures of the law that is left over in the *Reports* thus records key moments of colonial legal change as it was taking place. The fact that the law is recording the law, regulated through the law itself, along with its own forms of recording, recoding, and regulation, bears testament to the fact that certain procedures came to be changed while evidencing the means through which these changes occurred. The residual discursive marks left behind form only a partial view of lived legal reality of the time. However, in that partial view, much is to be gleaned and gathered as visibly significant evidence of changing ways of seeing, showing, and judging that can be visualized and partially reconstructed, *after* the fact of colonial modernity.

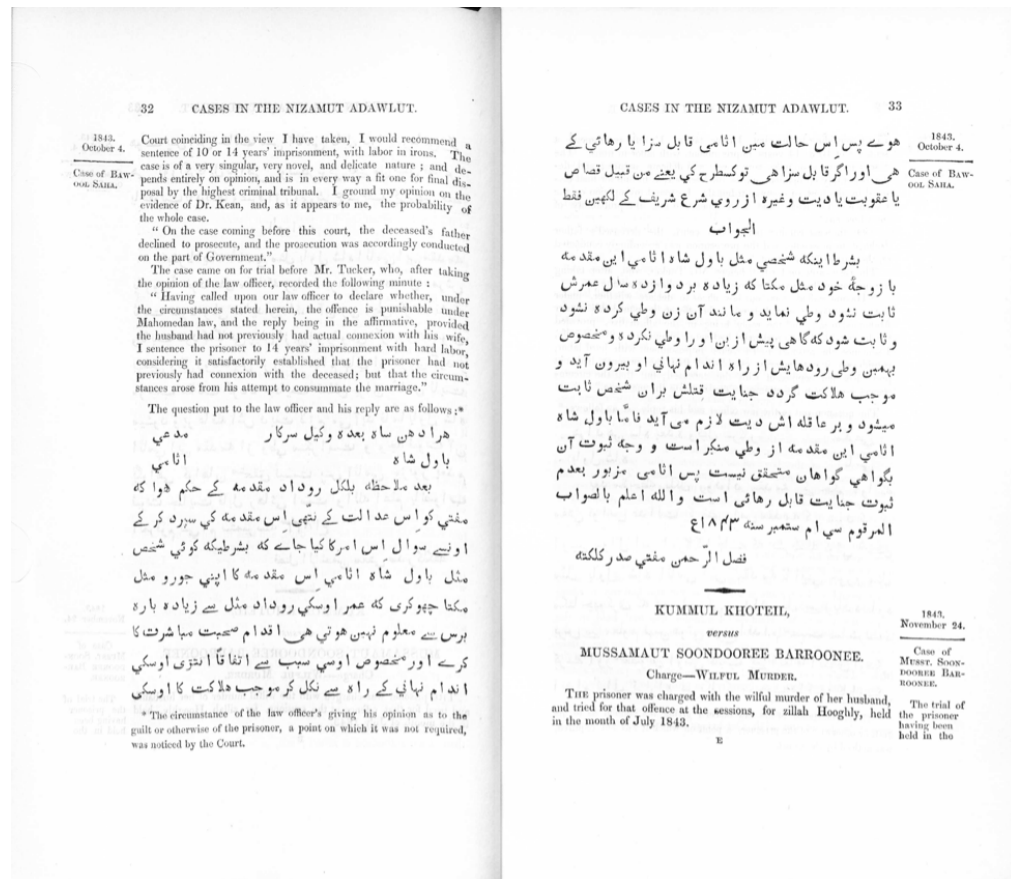


Figure 2 A rare example of a Nizamat 'Adalat law officer's fatwa reproduced in typographical Persian script. This may be the first and only time such Persian reinscription of the fatwa in question-answer format is rendered visible in the Reports. On the right is the Nizamat judge's specific query to the law officer in Urdu. On the left is the law officer's response in Persian. The asterisk marked footnote underneath stating the fatwa was unnecessary, suggests that this is already the end of an era. Nizamat 'Adalat, Reports of Cases Determined in the Court of Nizamut Adawlut [1831-1850], Calcutta: Bengal Military Orphan Press, 1841-1852. Image courtesy British Library Board (IOR/V/22/445, p. 32-33).

## Visual Transformations: Evidencing an Epistemological Rupture

The previous section attended to the "form" and formatting of the Reports. In this section I attend more closely to the "content" of the Reports—specifically through a visual frame—to discern an onto-epistemological break taking shape through regulation of the law. This section shows how this *rupture* also comes to be recorded within the medium of the law by its own production of factuality. The changing mode of visibilities and articulabilities are described in the various

modalities that become evident as we transition from decade to decade within the volumes of the *Reports*.

### *Eyewitness Accounts and Testimonial Evidence*

In terms of content of the *Reports*, the cases recorded often provide rich visual material in the form of eyewitness testimonies, and descriptions of the crime that are revealed during the investigations. Islamic law places the greatest evidentiary value on eyewitness accounts and does not value circumstantial evidence beyond establishing certain culpability or suspicion. This evidentiary value on visual testimony, however, is being outmoded during the same process in which the *Reports* are being assembled. New modes of inquiry and assessment of factual bases of crimes are coming into effect. However, as the importance is still laid on the fatwas of the law officers, at least in the earlier career of the Nizāmat, the eyewitness accounts are included in the records as corroborating evidence. The legally attested facts of what principal witnesses to the crime in question saw and the ways in which they describe it are logged in these cases and provide a rich visual-historical resource in terms of penal law. Often times, the eyewitness accounts don't stand up to the criteria required by *fiqh* jurisprudential standards; however, the accounts are still included to establish circumstantial evidence and hence convict the perpetrators of the crime. On June 26, 1821, in the case of "Government *against* Hatim Ali," the visual testimony of a boy becomes crucial in the matter of a murder of his mother having been committed by a man she was cohabiting with:

It appeared also, from the statement of this boy, that on the morning on which the murder occurred, the prisoner came home before [sunrise], and desired the boy to leave the house, which he refusing [*sic*] to comply with, he threatened to beat him. The witness then left it, and went to the house of a woman named Chandoo, and did not return until after sunrise. Seeing no one, he looked through a hole in the wall, and observed the deceased apparently dead, of which he informed the Darogha. The Darogha immediately repaired to the house, and finding the door locked, made a smith wrench it open, when the body of the deceased was discovered lying partly on a *charpai*, with two saber wounds, weltering in blood, and the prisoner had absconded. Three days after, the prisoner was apprehended not far from the Thana, with his sword, which is said to have been stained with blood. He made no attempt to escape,

or any resistance....Near the body of the deceased was found a *chadur* belonging to the prisoner, stained with spots of blood. ...His sword is said to have had also marks of blood on it. ...When the witnesses were examined before [the judge of circuit], and the sword shown them, they could not assert with certainty whether the marks on it were caused by blood or rust, but stated them to be precisely the same marks as were on it at the time of the prisoner's apprehension.<sup>42</sup>

Here the visual criteria of the case rest both on the testimony of the boy and on the marks on the sword, which allegedly belonged to the assailant. What was seen at the time, who it was seen by, and how they described the situation is logged in the *Reports* as legal fact; however, this descriptive content is refracted by ways of seeing developed during colonial legal modernity. A later case from 1827 provides one of several examples where visual criteria, although not attestable as evidence according to rules of Islamic jurisprudence, is still employed by the European judges as providing circumstantial evidence to the fact of the commission of the crime in question:

It appeared in evidence, that on the 22d of February 1827, Buray the prosecutor's nephew, a boy about 13 years of age, left his home early in the morning to tend some cattle, having on his person at the time certain gold and silver ornaments. ...About 10 o'clock the same night, a shepherd named Hurgobind, observed to the Jemadar of the Chowkee, that he had seen the deceased in company with the prisoner Nunheh at about 7 A.M. In consequence of this information he was apprehended, but denied the charge. ...Several respectable witnesses deposed to the ...facts, though no one appeared to have actually seen the murder committed. ...W. Dorin, (fourth Judge.) "The prisoner was seen on the very day in company with the murdered boy, who wore gold and silver ornaments to the value of 125 rupees. On being taxed, and evasions, he indicated the well in which the body was found, and then produced the ornaments of the boy from his own house, hid under some straw. There is no resisting the presumption that he murdered the boy, and I would pass a capital sentence."<sup>43</sup>

In this case, we can observe the way in which visual evidence provided by a shepherd is used by one of the judges of the Nizāmat to establish circumstantial

evidence of the crime having been committed, although no one had actually *seen* the crime take place. The fact that the prisoner was seen in such and such a place helped corroborate the facts during the investigation, and also in the passing of the final sentence. Later on, I examine how different ways of seeing come to be incorporated in the *Reports*, as judgments come to be made of different visual criteria.

*Evidentiary Transformations (from Murder Weapon to Body of the Victim)*

One of the earliest, and possibly most substantial, change made by British administrators to sharia jurisprudence effected during Marquis Cornwallis's Minute on the "defects of Muhamudan Law," discussed in the first part of this essay, was to shift the criteria of evidence in homicide trials. The doctrine of Abu Hanifa was to be regularly overridden by the opinions of his two disciples Imam Yusuf and Muhammad Al-Shaybani. This allowed the British to shift the investigation into murder cases in evidentiary terms, from establishing guilt by assessing the type of weapon used, that is, whether this was a sharp metal object or one that could easily effect death, or was the object an unlikely murder weapon. The emerging doctrine allowed Company jurists to convince their Islamic law officers to pay attention to the murderer's intent. Although this Regulation came into force in 1793, the earliest cases in the *Reports* from 1805 still pay attention to the murder weapon in the way the record is laid out. Later on, this changes as new modes of investigating and establishing crimes are outmoding the *fiqh* evidentiary criteria. One of the earliest cases of "Vakeel of Government *against* Sonaram," from January 1805, shows what the colonial recorders of the case are paying attention to in a moment while points of codified law are still being formed:

The prisoner, charged at the Backergunge sessions with the murder of Kusoola, his wife, by striking her on the head with the handle of a hatchet, pleaded "not guilty." By the concurrent testimony of several witnesses, who were examined in support of the prosecution, it appeared that the prisoner, after a quarrel with his wife, in which she gave him abuse, and he beat her, was found standing near the body of the deceased, with a hatchet in his hand; and that, on being interrogated by them, he confessed that he had killed the deceased by striking her on the head with the handle of the hatchet. From the inquest holden on the body of the deceased, it also appeared that she had received a severe contusion and wound on the

back of the head. . . . The law officers of the Nizamut Adawlut, considering [it] being uncertain, from the instrument used, that the death of the deceased was intended by the prisoner, declared retaliation for willful homicide to be barred; but that the prisoner was liable to discretionary punishment.<sup>44</sup>

The “handle of a hatchet” is referred to on several occasions during this otherwise terse record, because it becomes a determining factor in the case. A point that makes it even more significant is the fact that the Islamic law offices use this fact as a point of uncertainty on whether willful homicide was intended by the assailant. While this point of the law had already been regulated, we can note the onto-epistemological terms (knowing facts through objects as they come to be described in relation to the crime) in a moment of flux. To be sure, a footnote marked with an asterisk is appended to this record.

It may be added, upon the *futwa* of the law officers, in this case, that death, occasioned by a blow given with the wooden handle of an axe, or any similar instrument, is not considered by the Moohummudan lawyers to be willful homicide; nor is it by *Aboo Huneefah*, if the blow were struck with the iron back of the instrument. But *Aboo Yoosuf* and *Imam Moobummud* maintain it to be equally murder, whether occasioned by the iron back of such an instrument, or by the edge of it.<sup>45</sup>

Here we can note the degree of detail accorded to the object, whether it was metallic or sharp, and whether the blow was struck with the edge or with the handle. This allows the determination of the crime on two distinct epistemological levels, that is, of the Regulations, as well as that of the classical Hanafite doctrine. We may note also that the “inquest holden on the body of the deceased” is also mentioned, but in nowhere near as much detail as is accorded to the instrument with which the murder was perpetrated. This evidentiary criteria will shift from the instrument to the body in the coming decades over which the *Reports* are tabulated. A decade later, a case of “Vakeel of Government *against* Pedro Gomez,” for the charge of “Murder by Strangulation,” from January 14, 1816, already shows this shift of the juridical gaze toward the body as having taken place, though the epistemological and documentary terms are still lacking in the vivid description the body acquires in later decades.

It appeared from evidence, that the prisoner married the deceased about three years before the murder. ...The prisoner confessed at the Thana, that he had strangled the deceased. ...Before the Magistrate [the prisoner] stated, that, on the evening before [his wife's] death, the deceased attempted to run away from his house; that he bound her hand and foot, to prevent her flight; and that a snake bit her in the night, and caused her death. On his trial he simply denied the murder, and said that she died from the bite of a snake. ...On the inquest held on the body, there were marks of a rope found on the neck, but no signs of the bite of a snake, and the prisoner was unable to prove that she had been bitten by a snake. The *fitwas* of the law officers of the Court of Circuit, and Nizamut Adawlut convicted the prisoner of willful murder of his wife by strangulation, and the Court of Nizamut Adawlut, (present J. Fombelle,) concurring in the conviction, sentenced the prisoner to suffer death.<sup>46</sup>

In this case, the evidence gathered from the inquest held on the body during the initial investigation is used to disprove the accused's statement about a snake bite. While marks of rope were identified on the body, the rope itself does not become an object of the case record in so much detail. Later records show how greater detail in terms of the visible becomes accorded to both the inquest and the body in determining facts of the crime.

*Inquest of the Body: "The Sooruthal Report"*

The later records forwarded by the circuit judge to the Nizāmat incur a visible shift in details that are included. Particularly after the 1830s, the police files, reports from the *thanna* (police station) filed by the *darogah* (inspector), are awarded significant space. The documentary evidence forwarded from the initial inquest in murder and homicide trials is an attested document known as the "*sooruthal* report"—the colonial accent on the Persian (*surat-e-hal*) would roughly translate to "present state of affairs," while *surat* itself literally means visible appearance. The *sooruthal* report, which would be confirmed by the eyewitnesses, documents facts immediately discernable from the scene of the crime as encountered and recorded by the *darogah*. We can note the detailed ways in which the wounds on the victim's corpse are described in this report included in a record from December 31, 1840:

There being no doubt as to the cause of the death of Ashruff, the body, after being inspected by the police and an inquest held thereon, was buried on the spot. The witnesses, Bhyrub Chunder Ghose and Jeedhun, Nos. 19 and 20, have authenticated the *sooruthal*. The wounds of Musst. Nooree are described in the inquest held on them by the police, on the 26th of June, at the *thanna*, to have consisted of one wound on the right arm, 9 fingers in length, 2 ½ in breadth, and 1 ½ in depth and to have been cut to the bone; another wound above it, 6 fingers long, 1 broad and deep; a wound on the neck under the left ear, 3 fingers long, ½ broad, and about the depth of a grain of corn; a wound under the left shoulder, 2 ½ fingers long, ½ a finger broad and deep; one wound extending from the back of the neck across the left shoulder blade, one span long, about 3 fingers in breadth towards the middle, and about 2 fingers at each end cut to the bone; and the fingers of both hands slightly cut in several places. The witnesses Naimut Khan and Hazeer Buxoollah, Nos. 21 and 22, have authenticated the above.<sup>47</sup>

In contrast to the earlier records, where seldom an inquest or the body is mentioned, these later records provide detailed descriptions of the marks on the body. This signals to a different way of seeing and attesting to the truth as established in the earliest instance of encountering a violent crime. In a case from 1857, the *sooruthal* report is still being employed to gather immediate facts of the crime; however, the unit of measurement has now shifted to the more standardized inch, which suggests an epistemological shift taking place in how facts are recorded:

The darogah went to the spot, and held the usual *sooruthal* and discovered two severe wounds on the person of the deceased, one of the left side of the throat, two inches in length, one in breadth and one and a half in depth, and another on the cheek, from the top of the ear to the chin, about five inches long, one inch broad, and one inch deep, and saw the prisoner's bed in a bloody state.<sup>48</sup>

In one of the last cases in the *Reports* from 1859, their point of terminus, we find the *sooruthal* report being a central feature of case reports, which have now become inflated with much detail. In this case, however, there is a problem of attestation of the report, which causes the circuit judge to censure the *darogah* in his letter to the Nizāmat. In doing so, the judge also describes the modality and



operation of the *sooruthal* report and the fact that it had by then superseded eye-witness accounts and testimonial evidence:

In examining witnesses to the *sooruthal* instead of looking into the attestation of that document, the Magistrates are in the habit of questioning the witnesses as to what they saw on the occasion of the inquest. ...the essence of a *sooruthal* is its being the intelligent and full record of what has transpired at an inquest, set down by an officer who is...experienced in such matters and understanding what is material, and what is otherwise. This record made on the spot at the time, and assented to by the subscribing witnesses, forms a permanent history of the circumstances which cannot vary and which can be relied on by the Court. Whereas to substitute for the written record, the random recollections of the witnesses, is to substitute danger for safety, uncertainty for certainty, I should therefore be glad to see the police stimulated to greater care in the legal preparation of these documents, and the Magistrates advised to pay attention to their proper attestation.<sup>49</sup>

#### *Postmortem Report and Medical Examination*

The epistemic shift underway in terms of evidentiary criteria finally appears to crystallize with the appearance of “medical evidence” in the records. In addition, to the *sooruthal* report, the postmortem report conducted by a medical officer such as the civil assistant surgeon would provide forensic information after the fact. The criteria and description of evidence based on what this officer finds in the autopsy examination are of an entirely different nature. A medical report cited in this case from January, 31, 1859, describes the corpse as such:

The evidence of the Civil Assistant Surgeon shows that the beating must have been severe, bruises and extravasated blood being found on the scalp, back, neck, loins, and even on the abdomen and knees. Considerable force must have been exerted and, in all probability, some stick or blunt weapon was employed. But this beating, though more severe than the witnesses would make out, was not sufficient to cause death, which was caused by pressure on the windpipe, the face and eyes presenting all these appearances which usually result from strangulation, though there was not a trace of a

rope outside the neck, nor had the tongue protruded, as it would have done had the woman hung herself. The woman was quite healthy otherwise, and there was no trace of disease about her such as the prisoner hinted at before the police or the Magistrate. The witnesses to the *sooruthal* also speak of the marks of severe beating. But the medical evidence is obviously of the greatest importance in a case like this.<sup>50</sup>

While doctors and surgeons are referred to even in earlier records, the *Reports* become riddled with appearances of postmortem reports and autopsies of the corpse from 1840 on. This forms the basis of a medico-juridical evidentiary criteria that can offset eyewitness accounts, as well as the hermeneutical reasoning of the law officers' fatwas into contestation through a distinctly scientific epistemic frame. A case from January 24, 1857, marks a clear rupture:

The civil assistant surgeon, who held a *post mortem* examination of the deceased's death to have been caused by rupture of the liver and spleen; that there were contusions all over the body, more especially on the sides of the chest and belly, and that these contusions and ruptures were apparently the result of violence; that he cannot exactly state what might have been the result of those injuries if the spleen and liver had not been ruptured, but that the deceased was, from the state of her body, which presented a mass of bruises, dreadfully beaten, and that she might have possibly lived two or three hours or even longer. ...it has been clearly deposed by the civil assistant surgeon that the deceased met her death by violence, the body on examination presenting a mass of bruises and both the liver and spleen were ruptured, the former of which was in a healthy condition, and this leads me to believe that great force must have been used to cause the rupture.<sup>51</sup>

By the 1850s, the epistemic shift brought about in Islamic penal jurisprudence by East India Company jurists appears to have restructured the visibility of seeing and knowing in terms of scientific fact. That this takes place before the enactment of the Indian Penal Code of 1860 is highly significant, for this shift has taken place endogenously to Islamic criminal jurisprudence by various means and not caused by the overhaul of the legal system as would commonly be assumed. The dominant position of medical knowledge can be further ascertained by the

summarized entry of a record found under the heading “Evidence Medical” in the final volume, or Index, of the *Reports*:

Held that if prisoners charged with murder wish to impugn the accuracy of the opinion given by the Medical Officer, making the post mortem examination, they should summon medical evidence before the Session Judge, for the purpose of contradicting that opinion *on a fact deposed to by the officer making the post mortem examination*, but this Court, when that officer’s evidence *is unopposed by any scientific evidence to a contrary effect*, cannot venture *itself* to apply doctrines laid down in text books on medical jurisprudence to the particular facts deposed to by the Medical Officer, but will accept this officer’s opinion as to the immediate cause of death.<sup>52</sup>

From the weapon to the body, from eyewitness accounts to circumstantial evidence, from testament to document—we have witnessed a visual transformation of evidentiary proofs. The primary knowledge and interpretive expertise of the Muhammadan law officers initially become displaced by other visual-discursive evidentiary criteria, and eventually superseded by an altogether different layer of medical and forensic factuality. It should be clear from this visual survey of the evidentiary form of the *Reports* how their discursive residue provides a clear-cut map and index of a visual restructuring within a legal archive of colonial modernity.

## Conclusion

Having surveyed the changes in form and content of the *Reports* from 1805 to 1859, we have witnessed an epistemic rupture whereby visibilities and articulabilities of law and life in the colonial realm come to be restructured in terms of each other. Islamic hermeneutic reasoning, ways of seeing and bearing witness to the truth, are thus displaced by modern forms of reason, inflected by colonial regulation. If law structures life, then the *regulation* of law itself comes to restructure the ways in which the visibility of law comes to be articulated. New formats and procedures determine what is made apparent, and through what means. The shifting epistemological bases of truth-production through law, penalty, and evidentiary procedure can be discerned in visible traces the law leaves behind through its own recording operations. Traversing across such historical strata of legal history can illuminate these traces that highlight the breaks and ruptures in ways of seeing and saying, in terms of the visible and the articulable. To return to Deleuze’s refraction

of the Foucauldian optics of the subject and the institution, of discourses and practices:

The expression also has a form and a substance: for example the form is penal law and the substance is ‘delinquency’ in so far as it is the object of statements. Just as penal law as a form of expression defines a field of sayability (the statements of delinquency), so prison as a form of content defines a place of visibility.<sup>53</sup>

In considering the *Reports* as an archive of penal law, we consider the Foucauldian technique of discerning articulabilities in an entirely distinct legal lifeworld of the colonial subject of law, which provides us a vantage point and perspective on modernity distinct from the transformations of European modernity.

For example, ‘in the classical age’ the asylum emerged as a new way of seeing and displaying madmen, a way that was very different from that of the Middle Ages or the Renaissance; while for its part medicine—but equally law, rules and regulations, literature, etc.—invented a system of statements concerning the new concept of folly.<sup>54</sup>

In colonial Bengal we may note how similar types of regulatory modalities shift the principles of articulation of an entirely different lifeworld than European strata, which is also in itself entirely modern.

If seventeenth-century statements wrote of madness as being the last degree of folly (a key notion), then the asylum or internment envelops it in a general concept uniting madmen, vagabonds, paupers, idlers and all sorts of depraved folk: this offers a certain ‘self-evidence,’ a historical perception or sensibility, as much as a discursive system. And later, under different conditions, it is prison that provides a new way of seeing and displaying crime, and delinquency a new way of saying.<sup>55</sup>

What we have witnessed above is a transposition of these modern ways of seeing and saying that were themselves novel in Europe. In colonial modernity, however, this transposition produces altogether distinct ways of seeing and saying that still persist. As the entire system of Anglo-Muhammadan law itself came to an abrupt end marked by the rupture of codified British law in 1860, pursuing the

*Reports* to reconstruct a cartography of visual change may provide a more colorful testimony to the operations of antecedent system onto the visibilities and articulabilities of the colonial.

\* \* \*

Asif Akhtar is a Ph.D. Candidate in Media, Culture, and Communications at New York University. He holds an M.A. in Politics from the New School for Social Research. Akhtar's dissertation research focuses on understanding the politics of mediatic regimes and regulatory frameworks in 21st century Pakistan in terms of the colonial and precolonial antecedents through genealogies of mediation, regulation and politics.

*The author thanks Brinkley Messick for providing the inspiration for this work and for valuable comments on an earlier version of this essay.*

#### Notes

<sup>1</sup> Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 15, <https://doi.org/10.1017/CBO9780511815300>, particularly the idea of "jural colonization" (383), where Hallaq has argued that an "epistemological break" takes place during the "structural death" of *shari'a* through colonial procedures. The present essay considers the visual implications of this historical process through the archive of colonial law.

<sup>2</sup> Tapus K. Banerjee, *Background to Indian Criminal Law* (Calcutta: Orient Longmans, 1963); Jörg Fisch, *Cheap Lives, Dear Limbs: The British Transformation of Bengal Criminal Law, 1769–1817* (Wiesbaden: Franz Steiner Verlag, 1983). Both Banerjee and Fisch have provided excellent legal-historical research on British regulation of criminal law in Bengal.

<sup>3</sup> Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998).

<sup>4</sup> William H. Macnaghten, *Reports of Cases Determined in the Court of Nizamat Adawlut*, vols. 1–10 (Calcutta: Military Orphan Press, 1827–1860); only vols. 1 and 2 have Macnaghten as their registrar, the later ones are unnamed. All will be referred to as *Reports* followed by volume and page; these are cataloged in the India Office Records under the shelfmarks IOR/V/22/440-460. All spellings and

transliterations are retained to capture the character of these texts; furthermore, anachronistic words have been used to designate specific terminology, for example, “Muhammadan law officers.”

<sup>5</sup> John H. Harington, *An analysis of the laws and regulations enacted by the Governor General in Council, at Fort William in Bengal for the civil government of the British territories under that presidency*, vol. 1 (London: A. J. Valpy, 1821), 45–46. I have used this source for details and context of Regulations, hereafter cited as *Analysis*. An original unabridged version, J. H. Harington, *An Elementary Analysis of the Regulations Enacted by the Governor General at Fort William in Bengal*, vol. 1 (Calcutta, 1818), is hereafter cited as *Elementary Analysis*.

<sup>6</sup> Michel Foucault, *Discipline and Punish: Birth of the Prison* (New York: Vintage, 1977).

<sup>7</sup> Gilles Deleuze, *Foucault* (Minneapolis: University of Minnesota Press, 1988).

<sup>8</sup> For an analysis of Mughal institutions in economic terms, see Tilottama Mukherjee, “The Co-ordinating State and the Economy: The Nizamat in Eighteenth-Century Bengal,” *Modern Asian Studies* 43, no. 2 (2009): 395, <https://doi.org/10.1017/S0026749X07003095>.

<sup>9</sup> Banerjee, *Background*, 134, 138–39.

<sup>10</sup> *Ibid.*, 2.

<sup>11</sup> Fisch, *Cheap Lives*, and Banerjee, *Background*, provide detailed historical background of Warren Hastings era; Singha, *Despotism*, also provides an exceptional analysis of the early changes in a more visual context of penalty.

<sup>12</sup> Banerjee, *Background*, 9–10.

<sup>13</sup> Harington, *Analysis*, 307.

<sup>14</sup> *Ibid.*, 223.

<sup>15</sup> William H. Morley, *An Analytical Digest of All the Reported Cases Decided in the Supreme Courts of Judicature in India, in the Courts of the Hon. East-India Company, and on Appeal from India, by Her Majesty in Council*, vol. 1 (Calcutta: Ostell and Lepage, 1850), xlv; hereafter cited as *Digest*.

<sup>16</sup> Fisch, *Cheap Lives*, 85.

<sup>17</sup> As Regulations passed after 1793 often rescind, invalidate, or amend previous Regulations, they therefore form a moving body of legislation that provides a roadmap for what Hallaq has called the “jural colonization” of India. Fisch notes the difficulty in tracking these changes, as the later copies of the Regulations omit previous acts rescinded, and Banerjee adds that “unfortunately it is next to impossible to get a complete set of these Regulations.” These features of the Regulations lend credence to the idea of a counter-discourse, or antisystem functioning in precise regulatory opposition to the system of *shari‘a* jurisprudence. Both Fisch and

Banerjee have provided an excellent chronological map of the Regulations—I would argue that these legal alterations cannot be properly understood in terms of their empirical and visual criteria without systematically cross-referencing back to the individual cases that prompted Regulations, and vice versa. As I illustrate in the third and last section, to understand how the Regulations acted on visual modes of veridiction and truth-production, and how this contrast between the visible and the articulable in turn acted back on this body of law, it is essential to read the Regulations and the *Reports* in reference to each other.

<sup>18</sup> Hallaq, *Shari‘a*, 383.

<sup>19</sup> Cornwallis quoted in Harington, *Analysis*, 309, apparently in a speech he gave at Fort Williams on December 3, 1790.

<sup>20</sup> *Ibid.*; Banerjee, *Background*, 71; Fisch, *Cheap Lives*, 45–46.

<sup>21</sup> Marquis Cornwallis Minute from 1790, quoted in Harington, *Analysis*, 309.

<sup>22</sup> *Reports*, vol. 1, iii.

<sup>23</sup> Banerjee, *Background*, 140.

<sup>24</sup> Harington, *Analysis*, 433–34.

<sup>25</sup> Banerjee, *Background*, 140; cf. Foucault, *Discipline and Punish*, 171, on “Hierarchical Observation” as a disciplinary structure. It would appear that the law officers become disciplined as subjects of the institution; the Regulations contain specific rules of conduct.

<sup>26</sup> Harington, *Analysis*, 219; cauzy-ul-cuzzat refers to head *qadi* of Bengal, Behar, Orrisa, and Benares; this post would hire subordinate *qadis*.

<sup>27</sup> Cf. Hallaq, *Shari‘a*, 381; Schacht, *Introduction*, 95, on the clerical subordination of *qadis*.

<sup>28</sup> *Reports*, vol. 1, i.

<sup>29</sup> Harington, *Analysis*, 166–67.

<sup>30</sup> *Ibid.*, 321.

<sup>31</sup> “Fatwas are not binding. The British, however, erroneously thought they were and regarded them as justification for the harsher sentences desired by them” (Rudolph Peters, *Crime and Punishment in Islamic Law* [Cambridge: Cambridge University Press, 2005], 111; for fictional aspects of fatwa, see Fisch, *Cheap Lives*, 113).

<sup>32</sup> *Reports*, vol. 1, i–ii.

<sup>33</sup> Of the *Reports*, vols. 1 and 2 list Macnaghten as court registrar; both were published in 1827 and contain cases during 1805–19 and 1820–26, respectively; vol. 3 was published in 1828 and records cases during 1827–30; vols. 4 and 5 were published after a long gap in 1841 and record cases during 1831–34 and 1835–40, respectively; the final volume (6) was published in 1852 and records cases during

1841–50 inclusive. Later decades 1850–59 are extended to 10 volumes in a different edition of the *Reports*.

<sup>34</sup> *Reports*, vol. 1, i.

<sup>35</sup> *Ibid.*, iii.

<sup>36</sup> *Ibid.*, 14.

<sup>37</sup> *Reports*, vol. 6, 277.

<sup>38</sup> *Digest*, cii. This is significant, as Harington is also the author of *An Analysis of Regulations* and the chief judge in 1805, from whose diary entries the cases from 1805 came to be compiled. The indexical fact of Harington's own presence in court on a particular day becomes relevant. The notes appended to the cases are often "written or approved by the Judges by whom the cases were decided."

<sup>39</sup> J. Carrau, *Index to the first six volumes of select reports of the Nizāmat Adawlut, from 1805 to 1850, and to the most important of the cases determined from 1851 to 1859* (Calcutta: Bengal Military Orphan Press, 1861), 6; see also *Reports*, vol. 10 (IOR/V/22/461).

<sup>40</sup> *Reports*, vol. 10, i.

<sup>41</sup> According to a Regulation, "It is intended that cases of importance shall be selected from [the annual report] by the judges, to be published, with the approbation of government, for general information" (Harington, *Elementary Analysis*, 146). As noted above, the cases referred to the Nizāmat, as the superior criminal court, are either those which entail a sentence of death or imprisonment for life, or those where the judges of the Circuit Courts disagree with the fatwa produced by their law officers, or otherwise anomalous instances that require further legislation by Regulations. This in-built filtering mechanism has resulted in the most extraordinary cases being deposited in the *Reports* from 1805 to 1859. It should be noted that select cases have been included, possibly owing to their instructive or exemplary nature.

<sup>42</sup> *Reports*, vol. 2, 85.

<sup>43</sup> *Reports*, vol. 3, 69.

<sup>44</sup> *Reports*, vol. 1, 5–6.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Reports*, vol. 1, 331.

<sup>47</sup> *Reports*, vol. 5, 201.

<sup>48</sup> *Reports*, vol. 7, pt. 1, 145.

<sup>49</sup> *Reports*, vol. 9, 208.

<sup>50</sup> *Ibid.*, 18.

<sup>51</sup> *Reports*, vol. 7, pt. 1, 59–60.

<sup>52</sup> *Reports*, vol. 10, clxiv.



<sup>53</sup> Deleuze, *Foucault*, 48.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.