

# Penal Strategies and Political Resistance in Colonial and Independent India

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**T**his paper will explore the discursive practices surrounding specific laws, trials, and the ideology of punishment in colonial and independent India. The purpose is to show how through this matrix of law, court and punishment, the penal system, delineated the exceptional and the extra-ordinary, and legal and penal practices commensurate with it. In the process of this examination it will attempt to formulate and examine the problematic that (a) penal strategies devised to deal with political resistance are embedded in notions of necessity, which implies suspension of ordinary laws/procedures, (b) the identification of extraordinariness is necessarily determined by reasons of state and given form through legal, juridical and penal measures (c) the extraordinary does not lie at the borders or the limit between politics and law, but the two inextricably inform each other in complex interlocking relationships (d) the process of interlocking involves a reaffirmation of state sovereignty through laws, judicial procedures, and penal structures (e) alongside the process of reaffirmation of the domain of state sovereignty through legal, juridical and penal measures, a corresponding process of de-legitimation of political resistance, struggles, and assertions of popular sovereignty, takes place, through a process of de-politicisation and criminalisation, the use of binary oppositions viz., nationalist-anti-national, violent-peaceful, and the deployment of constitutional/extra-constitutional, legal/extra-legal methods of repression including extra-judicial killings, custodial violence and rape.

Integral to the examination will be an examination of the legal matrix constituted by laws, which define the exceptional circumstances that necessitate extraordinary laws and the trials by courts that affirm it. Within this matrix, the paper will focus in particular on the manner in which the process of (de-)legitimation occurs through legal and juridical discourses surrounding 'sedition' and 'waging war against the state'. While examining this process, the paper will outline and examine another problematic pertaining to the ways in which the processes and categories used to pin down the illegitimate emerge in colonial and independent India.

The principle of colonial difference and deferral, encapsulating the paradoxical relationship between the universalist claims of modernity and colonial governmentality, is now a familiar framework explaining the practices of colonial rule. Studies that have looked at the relationship between rule of law and emergency have emphasised that colonialism provides perhaps the most appropriate historical context for 'any theoretical study of norm and exception, rule of law and emergency'. The ideology and practice of colonial governmentality, was shaped by the compulsions of not just holding together a vast and heterogeneous population, incorporated into the Empire through conquest, but also of ruling them without representation. While the former strengthened the domain of state sovereignty, the latter hedged it in with the question of legitimacy. In this context the notion of legal exceptionalism and by implication, the idea of a prior rule of law, and closely related to it, the specific relationship between state power and legal authority assumed importance.

This process of legitimation was, however, fraught with contestations that made themselves manifest in different forms and affected the character and the relationship between the different state structures in different ways. In colonial times procedural legality and institutional processes were surrogates for self-government. Yet, the post-colonial with its distinguishing feature of political democracy, cannot on that count, be seen as totally distinctive.

It is indeed remarkable that the principle of supreme necessity continues to justify exceptions to the norm.

The massive proliferation of extraordinary or emergency laws in countries all over the world brings home the fact that democracy can actually be implicated in the process of legitimation. The sovereign, who has the power to decide as to when a condition of emergency exists, can now lay claim to speaking on behalf of the people.

The paper intends to examine within the above framework the trajectory of laws that define the exception, including the *Defense of India Rules*, specific sections of the *Indian Penal Code*, the *Public Safety Act*, the *Terrorist and Disruptive Activities (Prevention) Act*, and *Prevention of Terrorism Act*, as well as specific trials that give affirmation to state action. It proposes also to study the life of certain laws, which not only survived both company rule and the colonial state, but became part of the legal and penal structure of the state in independent India, like the *Bengal Regulation III of 1818*, *Madras State Prisoners Regulation II of 1819* and *Bombay State Prisoners Regulation XXV of 1827*.

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