

Review: Decolonising Rule of Law

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that was formed to take on the challenges of militant nationalism and State authoritarianism, disintegrated, faced with the dilemma of having to deal with the intrusion of the Indian Peace Keeping Force, and Tamil and Sinhala nationalism. The Sinhala Mother Front that was instrumental in highlighting state violations of human rights was co-opted and later collapsed. Saro Thirupathy and Nirekha De Silva in *Women in Sri Lanka Peace Politics*, argue that, one among several reasons for failure is that the Front did not call upon groups like the Liberation Tigers of Tamil Eelam (LTTE) to stop violence or disarm; it also never built on the “cosmopolitanness” of inter-ethnic and religious solidarity (perhaps a lesson for us in the north-east?).

For similar reasons, the Jaffna Mothers Front failed because it was unable to sustain women’s activism and aspirations for peace in the direction of the peace process. However, the article still provides an informative overview of the involvement of women in the State’s war with the LTTE, maps the various organisations and personalities which campaigned for peace, and discusses the role of women in militarisation and their position in the LTTE and the army.

The thrust of Megha Guha Thakurta’s “Minorities, Women and Peace”, based on her readings of Bangladesh, has import in understanding peace politics in south Asia. Against the backdrop of oppression of vulnerable groups such as

ethnic and religious minorities, Guha Thakurta criticises development discourse of non-governmental organisations (NGOs) that tends to be both ahistorical and apolitical, while simultaneously hijacking the political issues.

The book is no doubt a contribution to the growing body of significant work on peace politics started in India by feminist author-publishers Ritu Menon, Urvashi Butalia, and Rita Manchanda among others. As women become prominent players in the peace process, we look forward to fresh insights into women’s contribution and their role in determining the agenda of peace-building in the region.

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## Decolonising Rule of Law

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EP Thompson was famously reported to have observed that the rule of law is an “unqualified human good” (Baxi 1993). However, in post-colonial societies, it would appear to many that the repressive character of the rule of law has been more prominent. The book under review is a serious attempt at a critical assessment of the theory and practice of the rule of law, criminology and human rights in India. Its relevance is enhanced in the context of the “rotten” state of criminal justice system in the country, which was taken note of by the National Human Rights Commission not long ago.

### Gunboat Criminology

Kalpna Kannabiran, one of the editors, advances a radical critique of colonialism, rule of law, criminology and human rights. Her main argument is summed up in the last essay of the volume, where she rejects conventional wisdom and calls for a “counter-colonial” perspective in legal pedagogy and research. Criminology, as a social science, had been a servant of colonialism, concentrated on colonising the colonised countries. The historical background and the human

**Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India** edited by Kalpana Kannabiran and Ranbir Singh (New Delhi: Sage Publications), 2008; pp 495, Rs 1,250.

rights challenges in the latter countries necessitate a rejection of the “gunboat criminology of imperialism” and adoption of new “technologies of peace and love”. Militant struggles for social justice in India are being met with increasingly violent state response. Kannabiran commends the method of “deliberative democracy” for conflict resolution adopted recently by the Andhra Pradesh Committee of Concerned Citizens, which focused, not so much on violence and counter-violence, but on the pressing need to provide to common people their “basic right to dignified life and livelihood”. This exercise was conducted outside the “conventional conundrum of crime and punishment” firmly rejecting the subjection of the people to a repressive “rule of law”.

The volume, dedicated to Upendra Baxi, a renowned human rights theorist and activist has 18 papers by eminent scholars. Baxi himself does not make a contribution though he is profusely quoted by Kannabiran. The authors interrogate,

from different perspectives, the assumptions behind “rule of law” and “criminology” in contemporary India. Kannabiran, in her two essays, speaks powerfully to the reader. Her exposition on “Sexual Assault and the Law” is to be specially commended. The authors, including activists, advocates, civil servants, scholars and practitioners, share a common concern to develop interdisciplinary research and activism in order to entrench human rights concerns.

The book is in five sections: Section I, contains four essays and looks at the construction of crime and criminality in colonial India; Section II with four essays examines the issues of vulnerability, governance and the law; Section III, in three essays examines the way in which borders and boundaries were legislated in the past; Section IV, with three essays looks at the specific ways in which the legal is socially ordered; and the final Section V explores in four essays other issues in human rights and criminal jurisprudence.

### Criminalising the Margin

The first essay in Section I, by Meena Radhakrishna, traces the history of the Criminal Tribes Act, 1871 (later 1911), which sought to suppress the so-called hereditary “criminal tribes” of India (about 200 of them). It examines the discursive evolution of a nomad into a “criminal” through a process of comparison

and association. Next, Sumanta Banerjee examines colonial police and other records to identify the complex forms of social oppression and exploitation, which led the women of Kolkata to commit new forms of "crimes", as viewed by misogynist British policymakers. Socio-economic tensions in the emerging urbanisation, including poverty with rising ambitions among the middle class, were the real factors behind these "crimes". The female law-breakers were, however, viewed by the British as "delinquents of a special type who were in essence non-women"!

Arvind Narrain then examines the background to the inclusion of sodomy as a crime in Section 377 of the Indian Penal Code. This arose from the Judeo-Christian framework of morality, which informed the thinking of colonial administrators. He explores the role of this law in bringing about "normality" in the family and community in independent India. Is the idea of heterosexuality as "normal" related to the stigmatisation of homosexuality as "abnormal"? Next, Kalpana Kannabiran explores the vexed issue of sexual assault which has confronted the Indian judiciary for many years. Problems arise from the construction of the offence of rape in the Indian Penal Code as it is compounded by the issue of women's bodies in the social imaginary of India. In this perceptive essay, which traces the debates within courts and in communities on the issue of consent and sexual assault from the colonial period to the present, the author explores the multiple locations of justice available to survivors in a largely hostile environment.

Section II begins with a discussion of social exclusion by S R Sankaran who goes into the provisions of the Constitution relating to protection of the dignity of the individual. He examines the penal provision of laws prohibiting manual scavenging and the practice of bonded labour in light of the reality of the absence of effective justice for dalit and adivasi victims of structural violence and their vulnerability. He further argues that the criminal justice system fails to take into account the systemic discrimination embedded in the policies, procedures and

culture of public and private institutions. Next, Jayashree P Mangubhai and Aloysius Irudayam, examine how the law, pre-occupied with "law and order", ignores the wider social problems that give rise to gender crimes against adivasi and dalit women.

The Constitution provides for equality and the right to life and livelihood for all Indian citizens, but the everyday existence of a large section of the population is made illegal when the State declares land cultivated by adivasis as part of protected sanctuaries and national parks. This issue, examined by Seema Misra, highlights the fact that these communities are left with no option but organise militantly to protect their traditional rights and privileges against State action. However, the State uses brute police power to suppress such adivasi protest. Seema Misra tracks the protest movements since the year 2000 and examines the legislative and judicial responses to the illegalisation of the very existence of such impoverished communities. Shekhar P Seshadri and Kaveri Haritas explore the status of children under Indian criminal law. They address aspects of the relationship between children and the law, stressing the need for substantive and procedural law for healing child

victims of sexual abuse and penalisation of the offender.

### Policing the Political

Section III begins with Ujjwal Kumar Singh who notes a strong continuity between colonial and independent India's discursive practices with regard to specific laws, trials and the ideology of punishment. He delineates the ways in which the penal system defined the "exceptional" and the "extraordinary" to develop legal and penal practices to deal with them. Doctrines of necessity were thus made to validate the suspension of ordinary laws and procedures and he explores the implications this has for political resistance and assertions of popular sovereignty. Paula Banerjee analyses laws such as the Armed Forces Special Powers Act and the National Security Act, and brings out the process through which groups were marked as recalcitrant by evolving border laws and then treated as criminals. The history of such Acts demonstrates how State violence can be institutionalised and how certain areas and regions in the north-east of the country are securitised. Further, women in these areas are viewed as "recalcitrant" and their sexuality itself considered threatening, justifying rape against them as a means of controlling them. Thus, the protest against these laws has



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Coordinator

often emerged from among the women of these areas.

Ritu Menon, while examining the issue of abducted women during the Partition of 1947, argues that in the exercise of providing protection, nurturance and compensation, the government of India actually withheld or abrogated certain fundamental rights of citizens. It reiterated, in the language of the acts and ordinances, the penal culture of refugee camps or settlements and suspended the right of residence of women citizens and their right to choose where and with whom they wished to live.

In Section IV, Abha Joshi focuses on the perception of law among common citizens as a tool to be feared and avoided, engendering a hatred of the legal system. All the instruments of law push the person back to the same state of nature as during conditions of war. She portrays impunity as a most pervasive malady of the Indian legal system. Vijay K Nagaraj examines the social basis of such impunity through the specific case of the Bhopal gas tragedy, and K S Sangwan looks at the role of the Khap panchayats of Haryana in its intersection with the formal structures of criminal justice. He underscores the interplay of identity, power and criminal justice in a traditional society.

The final section opens with a piece by Ranabir Samaddar which examines the effort to bring about a moral society through formal criminal justice administration and the gift of colonial enlightenment through the "rule of law". This called for a recasting of the relation between crime and society. K G Kannabiran looks at how conspiracy was introduced in 1913 by the British as an offence in the Indian Penal Code (IPC) to contain the freedom struggle and how it has been used by the ruling elite of independent India to discredit political dissent. He underscores the fact that this legal provision has eroded constitutional rights and liberal values in republican India. Bikram Jeet states that the attempted reform efforts in the field of criminal justice administration in independent India have led to "hardening" the system and enhancing the severity of punishment, signifying a change in the character of the state. Thus, the colonial

emphasis on retribution and deterrence has not really been eliminated.

### The Irish Model

Missing in the volume is a serious study of police policies, structures and processes. The extant Indian police structure was created by Charles Napier who, in the mid-1850s, transplanted it from the Irish colonial experience. The Irish colonial police was a centralised paramilitary force led by the inspector general of police who reported to the chief secretary. It had several specific political-organisational characteristics which served colonial interests (Arnold 1986; Subramanian 2007). The British felt that no better police had ever been devised for a turbulent, unruly country. They said that the Indian police they inherited was "all but useless for the prevention and sadly inefficient in the detection of crime", "authoritarian" in the exercise of its powers with a "generalised reputation for corruption and oppression". The borrowed colonial Irish police model was superimposed on this decrepit structure, which, strangely, was retained intact in 1947.

The provisions of the IPC, the Criminal Procedure Code (CrPC), the Police Act and the Evidence Act, enacted by the British focused on maintaining colonial rule in India (Gupta 1988). A rights-based approach would need radical reform of the IPC, which prioritises "offences against the state" and maintenance of order and begins discussion of ordinary crime only from Chapter XVI in Section 299. The CrPC prioritises arrest and maintenance of public order, relegating investigation of crime to the latter part of the text. The Police Act talks of collection of political intelligence, appointment of special police officers from the public and imposition of collective fines for failure to maintain public order. The history and politics of repressive legal regimes in colonial and post-colonial India have been examined extensively in earlier studies (Kannabiran 2004; Verma 2004).

David Bayley, in 1983, observed that the criminal justice process, far from being the "professional imposition of a coherent moral consensus on society", had become an "intensely political activity". Police officers were "preoccupied with politics, penetrated by politics and participated in

it individually and collectively". Today, "political violence" dominates the social order. Endemic violence is institutionalised in Jammu and Kashmir, the north-east and the central tribal belt, while sporadic and episodic violence persists in other places. Human rights of ordinary people are sadly neglected by state institutions. Thus, the phenomenon of violence in Indian society today, quite apart from ordinary crime and criminality, needs serious probing. The massive growth of centralised police power in the shape of the central paramilitary forces of over a million men at arms, with its heightened potential for mass repression, needs to be addressed.

The collection of political intelligence by the police to sustain the established order is a neglected area of study. Police intelligence collection on social movements of complexity and variety is a crucial element in government policymaking. Secret police intelligence reports are invariably biased, self-serving, misleading and compare poorly with publicly available reports. While the latter focus on State violence and human rights violations, the former focus on non-State violence and prioritise greater fire power, mobility and manpower for the police. The "prose of counter-insurgency" in the colonial period, theorised by Ranajit Guha (1983) for the colonial period, is neglected in the current context.

This volume is a solid contribution to the study of criminology, criminal law, criminal justice and human rights in India and should be of great interest to scholars and activists in the field.

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