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Law and Terror in the Age of Colonial Constitution Making

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In this exploration of the close relationship between terror and law, I have several aims. First, I want to demonstrate that the relationship between terror and law is not a question of relating violence just to law, but to the very process of constitution making.

Second, I want to show this by arguing that the laws which relate to terror may or may not find a formal place in the constitution, but this relationship is essential to the working of the basic law, of the *rule of law*, of the working of the constitution. Third, I want to show the key place intelligence gathering occupies in this regard, and this activity, which has no mention in any constitution almost anywhere in the world, is the fulcrum on which reasons of state stand. Intelligence is the close monitoring of human movement, of the body, of the physical activities – like meeting somebody, writing, talking, seeing, reading, sleeping somewhere – and in this physical form of politics we have the meeting of the body and reasoning, terror and constitution, violence and law.

What appears in the description that follows is specifically an Indian experience, yet it may have larger significance in terms of retrieving the history of constitution making. I have tried to capture this significance by means of a term – colonial constitutionalism.

Not all these themes will be very clear or clear to an equal degree in this exploration. In light of the current reality these themes probably require a book to clearly express their inter-relationships, so this essay is something of an introductory and exploratory approach.

I

The colonial state in India was an extraordinarily warlike state. In some ways it had continued the record of the pre-colonial state in making war, conquest and

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large-scale murder the basis of state foundation, expansion and consolidation. But the colonial state raised the level of violence to an unprecedented level. Throughout the 19th century, the truly colonial century in India's history, wars, plunder, conquest, battles of attrition, destruction, mutinies, revolts, massacres, famine, pestilence and widespread depopulation marked the country's life.

In this war-torn century, empire making meant terror at every level and every step. It meant employing warriors and armaments, the raising of mercenary armies, anarchic modes and outcomes of taxation, seizing land, forcibly colonizing tracts with huge loss of life, and imposing trade rules with devastating effect. The war-struck century became, as a result, a terror-struck century. It also meant that a huge landmass dotted with points of intense violence needed to be aggressively ruled by guns and regulation making at a ferocious pace. The pacification that started with Regulation III of 1818 did not quite achieve the success that it claimed. With the onset of the new century violence struck the political horizon of the country again. The early terrorists had learnt the lesson – the violent colonial state understands only the language of terror, or at least mass movements must be laced with appropriate measures of terror and violence. The size and the spread of violence and terror in all forms throughout the century – assassination, internment, deportation, exile, physical torture, random death penalty, increasing monopolization by the colonial state of the means of violence and murder (by which, murder by an individual became an occasion for the state to decide who was guilty and confer a death sentence), incarceration, artillery development, punitive taxation, collective punishment (as in the suppression of the Mutiny), race violence, forced labour employed by the army, and starving massive groups of people to death – meant that violence had a deep impact on the political forms of social action. In this uniquely ubiquitously violent society, terror was the birthmark of politics.

Thus, terror becomes one of the most significant moments, or at least the next moment, in the development of law. In a situation where the State at one moment goes beyond law to combat or inflict terror, and then shrinks back at the next moment to the confines of law to take stock and legislate in order to forge an appropriate tool of terror and counter-terror, the *will to legislate* becomes contingent on elaborate phantom-building exercises. Defining terror so that at some level terror becomes acceptable or normal in politics becomes a juridical task of high priority – normalization in the sense of bringing the phenomenon back to the 'normal' level, also 'normalizing the level' achieved. The story of constitution-making in colonial times in India, against the background of the twin developments of terror and law, is significant for it shows us the material conduct of the state in an age when terror appears to be one of the most essential ingredients of politics, and physical control therefore becomes once again one of the chief instruments of rule.

The sheer physical dimension of the only possible form of anti-colonial political activity – founding clubs to indicate a martial culture and martial activities – ensured that, with terror, modern politics would make its appearance in the colonial land. It also ensured the centrality of the body in such politics, in other words the central significance of the physicality of terrorist opposition to colonial rule. The early terrorists were nurtured and brought up through innumerable organizations devoted to the inculcation of physical discipline – indeed the two best-known

militant anti-colonial organizations, *Anushilan* and *Jugantar*, grew out of such efforts. The famous garden of Maniktola, one of the early terrorist organizers Upendra nath Bbandopadhyay tells us in his memoir, housed one such centre, where study of anti-colonial politics, culture of the body, meditation, physical discipline, abstinence from all temptations, cooking for yourself, cleaning the home, all went hand in hand and formed a sort of curriculum for militant nationalist pedagogy.[1] And the name *Maniktola bagan*, associated with the fame of the Maniktola Conspiracy Case, soon became a household name in nationalist Bengal and a model for several such efforts, though the centre was disbanded when the police raided it in 1908. Such organizations, called *samities* and *akhras*, were founded in many districts; and ironically the more the leaders of the terrorist organizations claimed that 'the people must be trained up spiritually to face dangers'[2] the more they stressed the perfection of the body as the tool for anti-colonial resistance. To live the physical life of a soldier, to train the body to attack, to destroy the bodies of the occupiers, and then to die to accomplish the mission – was the journey of a rebel. Another terrorist leader, Bina Das, confessed years later that on hearing of the massacre of the prisoners in Hijli prison she was seized with frenzy, she became insane; she knew that only death could relieve her from madness, give her peace. 'I felt I would go mad if I could not find relief in death . . . My object was to die nobly fighting against the despotic system of government'.[3] For after all, the colonial wars, violence and terror were a physical reality – bodies were being tortured, killed, force-laboured, starved to death, dumped, or confined and controlled in multiple ways, and the physicality of the milieu marked the articulation of politics. Indeed, as we shall see, terror had no other purpose, than to make a political declaration; and politics had no other purpose, at least at the outset, than to strike terror into the enemy camp.

The literature on the Great Game involving the colonial powers in Central Asia has made us familiar with the colonial wars of conquest, annexation and suppression on the western side of India. What we do not realise is the connection that existed between the Wahabi threat to colonial rule and the imperial policy of guarding the frontier. It became clear much later when Lord Mayo, the Viceroy, was assassinated in the Andaman Islands by the Wahabi prisoner Shere Ali in 1872. The history of wahabite proselytism meets here the British punitive and pacification policy. This indeed created something new in Indian reality, called the modern jail system; as one historian recalls, the colonial society became a penal society, where social, political and physical order was sought to conform with the normative order of colonialism (Sen, 2000). Jails became the breeding grounds of the early terrorists. State surveillance only increased hatred. The colonized were not just a subject, but a convict-subject bound by rules of segregation, punishment, impressive spectacles of power and benevolence, and obedience to personalized authority. Colonial penal policy grew directly out of the needs of conquest and pacification. The procedural forms of punishment were elaborately laid out with the formalization of the Penal Code, Criminal Code, Evidence Act and the jail system. All these were reinforced with a bizarre paradox, one which generated only hatred, namely that, while justice theoretically might be individuated, punishment was to be whenever required collective. And where guilt was collective, the punishment meted out to the individual was to be severe and 'equal', thus denoting the collective reality behind the crime and

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punishment. As if colonial rule, law, justice, order and magistracy, by the acts of hanging, lynching, caning, exiling, interning, torching, confiscating and impounding, were addressing not the one who was subject to the law, but the collective society behind him. Law born out of conquest and war ensured that only hatred could be the site of politics. Revenge, punishment and pacification were uppermost in colonial conduct in the wake of the South Indian wars of conquest as well. After defeats elsewhere in the last period of the 18th century, British governing and military establishments went on the offensive, not just in terms of warfare, but also in terms of rule and suppression on a massive and successful scale. The fall of Tipu Sultan in Seringapatnam was in that sense more significant than or at least equal to the exile of Bahadur Shah II, the killing of his sons by Hudson, and the fall of Delhi 58 years later in the suppression of the Mutiny. Hereafter, colonial rule was to be a race rule, law was to provide how this rule was to demonstrate terror when necessary, anti-colonial terror became the dominant form the other side of the war; and as identities solidified and multiplied, terror, which is always linked to a politics of identity, became the universal form of politics.

If, on the western side, the Wahabis symbolized the role that terror played in the development of the colonial legal system, in the East the conquest of Assam played the same role. By Article 2 of the Treaty of Yandabo the King of Burma had renounced all claims on Assam. Now if Assam was annexed to the empire, how was this to be done? The upper portion of the Brahmaputra Valley went under British administration, the frontier tract, inhabited by the Moamarias, Khamtis and the Singpos, was excluded from direct administrative control, the Assam Light Infantry was posted to protect the frontier, prevent both the Assamese and the hill tribes from eating each other, and to control both, the sons of chiefs of the tribes were taken as hostages, and yet by 1830 rebellions had broken out in the frontier tracts. In 1842 new areas were annexed – Sadiya and Matak – and civil rebellion in North Cachar had to be suppressed. However, there is no doubt that with the Treaty of Yandabo a huge new tract had been prised open. Access to Burma meant all adjoining territories were to be annexed also. In the following 75 years the Cachar Plains (1830), Khasi Plains (1833), Jaintia Plains (1835), Assam Hills (1838), North Cachar Hills (1858), Garo Hills (1873), NEFA (1875), Lushai Hills (1890) and the Naga Hills (1904) were all subjugated. Conquest was followed by rational rules of administration that necessitated successive measures such as the *Scheduled District Act* of 1874, the *Backward Tracts Act* of 1919, and finally the *Excluded and Partially Excluded Areas Act* of 1935. By the enactment of Special Powers such as the *Armed Forces Special Powers Act*, which conferred immunity on the conquerors and administrators, that is with terror, the conquerors eventually sealed their conquest. By conferring immunity on them they covered their footsoldiers; with rules of exclusion they had divided and pacified their subjects, and by these means they had been able to guard the frontier. But the necessity of defending the frontier meant that, first, colonial law had indeed created 'permanent exceptions', and second, that law came only in the wake of conquest, wars of physical annexation, physical violence, physical resistance and disorder.

Upendra nath Bandopadhyay in his reminiscences of his stay at the Andaman Islands Cellular Prison tells us of an exchange of words with Reginald Craddock, the well-known colonial administrator and the Home Member at that time, when he

inspected the Island Prison in 1913. Upendra nath and other prisoners had asked Reginald Craddock why they were being denied facilities granted under the jail manual. Reginald's reply was that they were terrorists, they had 'done conspiracy' against the State. Again, on being asked why in that case they had not been put to public trial, Reginald had answered that: 'these things did not call for or require evidence', and that the State should have killed them in the first instance. In reply to this, the prisoners asked, 'If so, why then the entire ceremony of law and court, and the unnecessary spending of public money? The work could have been finished briefly.' Reginald remained silent, adding cryptically that discipline had to be maintained whatever the merits of their demands.[4] After he left, torture of the prisoners resumed with frenzy. Ullaskar became insane; the Ghaddar prisoner Prithwi Singh died after spending six continuous months in a cell; two others died after merciless beating and then dysentery; three died on hunger-strike; Chatta Singh was caged and put in sun and darkness for days, and died in his cage; Amar Singh was caged similarly; and Jyotish Chandra Pal, the accused in the Balasore Conspiracy Case, went mad in his cell, and died in Baharampur Asylum in Bengal after he was sent back to the mainland.[5]

We must therefore come to the issue of law, the law that follows conquest. It is here we find the true story of constitution building. This administration from day one had granted 'permanent exceptions', or built itself up on them. The administrative-legal strategy to tackle resistance invented by colonial rule had to be a mix of terror and the principle of responsible government. Indeed, the two discourses of exceptions and responsibility emerged in colonial rule in India roughly at the same time. We have already noted that terror, necessitated by conquest, was a physical fact. Yet, this was not enough. The task was to combine terror with law, suppression with responsibility, conquest with constitutionalism – a juxtaposition I have elsewhere called 'colonial constitutionalism' (Samaddar, 2002). Built on the physicality of the fact of rule was the colonial power's discursive strategy to define the opposition to its rule, particularly subaltern opposition, as terror-driven and to counterpose its norms of 'responsible governance' to the 'terrorist' methods of its opponents. These two techniques combined effectively to devise permanent exceptions, thereby making colonial rule a success. With colonialism thus began the paradox; we can in fact say that almost from the beginning of liberal jurisprudence, the world of juridical-political knowledge had taken a somersault. Distinctions between terror and terrorism, colonial rule and constitutionalism, control and freedom, security and democracy, individual guilt and collective punishment, and information and intelligence, vanished as a result of this acrobatic feat. In this upturned world of juridical knowledge, the operation of law making had one important aim among several, namely legally defining terror, that is to say, how to include some acts as acts of terror and omit others from that definition. This was the founding moment of law. Regulation III of 1818 was to be thus succeeded by many measures in the first part of the 20th century, including the Defence of India Rules. Law making and terror-acts thus went hand in hand in colonial times.

II

In terms of constitutionalism the significance of the development of the legal discourse on terrorism was evident in India. India's colonial history proved two tasks of statecraft to be important – making terror a subject of law and making intelligence operation fundamentally beyond the law, but a crucial instrument in this exercise of legality. The second, I submit, was the more significant of the two. Intelligence gathering became critical because: intelligence was a grey area in state operation, little controlled by law and norms of accountability; and terror had become 'democratic', with the means of violence within reach of many, hate becoming widespread and opposition to rule deep – all these therefore requiring the State to gather greater and greater information about 'irresponsible opposition'. With each and every development of military technology by the superior powers, the terrorists were also learning new modes or using old modes in new ways – an equally potent revolution in military affairs, half noticed and half understood. Thus new techniques of gun-making, bomb-making, clandestine travel, radio transmission, new organizational techniques, financial laundering, printing fake currency notes, robbery, cryptography, train wrecking, improved graphics printing for forging papers and travel permits, combined with old forms like stabbing, beating or strangling – and we find intelligence files abound with all these pieces of information.[6] Terror became cost-effective and democratic. Therefore intelligence gathering became crucial. As a result, spies and intelligence officers of the government became the most hated objects of the militant nationalists or the early terrorists. (For instance, in 1910 the District Superintendant of Police (DSP) of the Criminal Investigation Department (CID), Shamsul Huda, was shot dead on the corridors of the Calcutta High Court; the same year CID Inspector Sarat Chandra Ghosh was attacked in Dhaka – the former was associated with the investigation of the Maniktola Bomb Conspiracy case, the latter with the Dhaka Conspiracy Case. In 1911 the Head Constable attached to the intelligence department, Srish Chandra Chakraborty, was killed. Then the CID Chief Denham was attacked. In 1914 it was Inspector Nripendra nath Ghosh's turn to die, and then in 1916 DSP Basanta Kumar Chatterjee, who had escaped earlier attacks. Consequently, before the law could pronounce certain truths, it was important for the colonial rulers to find out who killed whom, when, where and by what means – even now a key issue in military affairs relating to terrorism. Thus, as soon as the Chittagong Armoury Raid took place, followed by the deadly attack in Dhaka on the Inspector General of Police (IGP) Lohman and the SP of Dhaka Hodson, the *Bengal Criminal Law Amendment Act* of 1925, which was to expire on 21 March 1930, was given a new lease of life in the form of the *Bengal Act VI* of 1930. Empowered by this new legislation that conferred enormous powers to investigate and dispense with the necessity of evidence and corroboration, the government formed special tribunals, arrested and sentenced scores of political activists. Long-term prison sentences were handed out on a massive scale to entire ranks of the Jugantar group; the verdict of the Mechuabazar Bomb case resulted in scores being sent to jail for periods sufficient to break the backbone of terrorist organization – Satish Pakrashi, Niranjan Sen Gupta, Sudhir Aich, Mukul Ranjan Sen Gupta, Sudhangshu Das Gupta, Nishikanta Ray Chaudhury, Ramendra Biswas, Panna lal Das Gupta, and many more.[7]

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To understand the critical role accorded to intelligence in developing constitutional rule, we have to note the most important fact that the role of intelligence gathering had become strategic. Before, intelligence was for the king, for the benefit of his council, for selected things and targets, and its role was tactical. Now intelligence became strategic, it called for analysis and recommendations on political goals.[8] Thus, for instance, in report after report the intelligence agencies and officers researched what impulses fuelled the formation of secret societies, their nature, organization, membership, sustainability, and the reasons behind their periodic appearance. The techniques for forming secret societies used by the early terrorists became an object of study – techniques such as oath taking, raising money by robbery, the rules for introducing new comrades, rules of secrecy, contacts, networking, reading sacred texts in groups, group study or 'infiltrating legal societies and associations'.[9] Again, what was noticeable was the way the intelligence officers analysed declarations the early terrorists like Barindra nath Ghosh made to the police on being arrested or to the court during trial, and turned these into confessions to be subsequently used as material for building up a conspiracy case. The Maniktala Bomb Conspiracy Case was one of the early instances of this technique. It also helped to bring in charges against a group and pave the way for group punishment. 'Confession' or 'declaration' was therefore one of the thorniest issues in the ranks of the revolutionaries, and if one of the early nationalist bomb-makers Hem Chandra Das Kanungo is to be believed, it sowed and encouraged suspicion, and according to Kanungo, Barin Ghosh too was guilty of making such as declaration/confession.[10] Indeed, the Sedition Committee Report of 1918 mentioned the technique explicitly, and Hem Kanungo also drew attention to the Report. The Intelligence Bureau published two books in colonial India that went beyond the simple goal of collecting information piecemeal on some individuals and activities, and presented strategic analyses of colonial security threatened by terrorist activities. The first, *Political Troubles in India: 1907–1917* by J. C. Kerr, Special Assistant to the Director of Criminal Intelligence from 1907 to 1913, and published in 1917 (to which we have made reference already), and the second compiled by H. W. Hale specially deputed to the Intelligence Bureau for this purpose in 1937 to cover the period between 1917 and 1937. With pride, Ewart, the then Director of the Intelligence Bureau, stated in the latter, indicating at the same time the strategic role that intelligence was playing as a technology to buttress the colonial rule: 'The book in its final form represents an immense amount of research among the scattered and diffuse contemporary records'.[11]

In 1932 R. E. A. Ray, Special Superintendent, Intelligence Bureau CID, prepared a 'Brief Note on the Alliance of Congress with Terrorism in Bengal', where he noted the progress made by the early terrorists in influencing mass non-violent movement with their ideas of militant nationalism. In 1921, he noted that terrorists had taken part in the Non-Cooperation Movement, after coming out of prisons following the Royal Proclamation of December 1919. They then achieved representation in the Bengal Provincial Congress Committee in 1922. In 1923, they supported C. R. Das 'in return for Mr Das's connivance at the secret conspiracy'. The key part of Ray's report dealt with his analysis of 'Terrorists' views on their connection with the Congress'. It noted the popular nature of the issues related to civil liberty, ignored in the

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Gandhi–Irwin Pact of 1931. Prisoners were still in jail, hundreds were awaiting trial for years, many were not even charge-sheeted, there was large scale detention without trial, many were being executed, many more were being deported or interned – the situation was inflammable, and then the report tellingly cited a letter from a suspect undergoing trial, accused in the Chittagong Armoury Raid, addressed to Gandhi in 1931, 'You cannot certainly deny the fact that in almost all the provinces the Congress programme has been worked out by men most of whom have got violence as their policy at heart, and especially in Bengal where the disobedience campaign has achieved the highest success, 90 percent of the Congress workers are open revolutionaries to whom no doubt all the credit for the success goes.'[12]

Both Anushilan and Jugantar, the two major terrorist groups in British Bengal, gradually developed their specific ideas, tactics and views on building up and/or mixing with political and social organizations such the Ramakrishna Mission, the Indian National Congress, the Swarajya party, the Indian National Educational Board or the Sankar Math. Relations between these and the terrorists ranged from the purely instrumental and tactical to integral.[13] Historians of civil society should take note of these in sketching out their ideas on the problematic of the civil/political in an anti-colonial political milieu where, contrary to their ideas of a neat division, everything was civil and at the same time everything was political. Seen in this light, it should not be thought strange that in colonial India intelligence officials were also investigating the town structure of Benaras (Varanasi, today) in order to understand how that town could patronize large-scale terrorist activities.

The report spoke of the visit of Tilak to Benaras in 1900, and noted the congenial atmosphere that Benaras offered to the 'Poona Party', 'so closely connected with the murders of 1897', and guessed that it was the 'Marhatta' connection that had led to the beginning of Bengali terrorist activities in the town. It mentioned various names and castes, and cited the instance of the founding of Anusilan Samiti in Benaras by Sachaindra Nath Sanyal and Deo Narain Mukherji. The report devoted considerable space to the visit to Benaras in 1910 of Basanta Kumar Biswas, one of the best-known names among the early terrorists of Bengal, indeed the entire country. Basanta was a member of Jugantar, conspicuous for his organizational skills, and an important intermediary between the Calcutta office of the Jugantar and the 'co-conspirators' in Chandannagar. He was still very young when he started to work on his own in 1910, was sent to Puri and eventually to Benaras where he was said to have taken shelter in the Ramakrishna Mission. In 1911, he came into contact with Rashbehari Bose who was in Dehra Dun and who himself had been in close contact with Benaras. Basanta along with others had organized money supply for the activities – something that came to light later in the Benaras Insurance Fraud case. The two veterans, Sachindra Sanyal[14] and Rashbehari Bose, linked up the Bengali Diaspora in almost all the major towns outside Bengal, principally Puri, Patna, Benaras, Dehra Dun and Delhi, as the sustaining network for militant activities, and Basanta was one of the principal activists. Many other names occur in this strange story. Basanta's story came to an end when he was finally apprehended and subsequently hanged on conviction for the Delhi Conspiracy case in 1915.[15]

Basanta was spared the death penalty in the lower court due to lack of sufficient evidence, but was hanged on appeal, on the strength of 'presenting a 'conspiracy'.

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What is conspiracy? That, of course, the law does not define. How exactly does it relate to sedition? Again we have no answer. Was the last emperor of a free country, Mughal India, guilty of conspiracy and sedition, and could he be deported under Regulation III of 1818?[16] Was he a subject of the British sovereign? To build up the factual-legal-mythological world of sovereignty, which could then form the basis of getting the entire law and justice machinery to work, intelligence machinery provided the framework. Intelligence must be built around a solid core of knowledge about the organizational style of terrorists, the modus operandi of activities such as political robbery, the decentralized functioning of the main groups, etc. Thus, a published government report titled 'Terrorist Conspiracy of Bengal, 1 April–31 December' (Govt of Bengal, 1926) described in detail several organizational networks of terrorists. The report had significant implications for legislations in their attempts to control and suppress terrorism, and develop constitutional rule.

But, to legislate, the State had to know the identity of the subject who was going to be legislated for. In fact, modern law has never freed itself from the trap of the identity question, and always has to solve the question in its framing, operation and verdict, who are the law-breakers, who are the culprits, what are his/her intentions, who are the subjects, and given all these, what is the gravity of any violation of law? Each year the colonial administration produced case histories of people and organizations, detailed their caste identities or caste origins, behavioural proclivities and dress, their appearance, handwriting style, manner of speaking, and so on. So we have in government files the photograph of a baboo, a coolie, a terrorist-baboo, a raider. Thus, for instance, the Government wanted to know, why had Charu Chandra Bose, who had a crippled hand and was hanged in 1909, joined the movement? Why had Charu just a few days before he committed the fateful act of killing the public prosecutor in the Alipur Conspiracy case gone to a studio to photograph himself? Why did he want to meet his relatives before his death? Why had he, a meek, silent and disabled person, done 'this'? And the intelligence officials therefore took another photograph of Charu before he was sent to the gallows. Could this photograph then give any clue – that photograph taken by Charu and this one taken by the intelligence officers?

So the search would go on: Who are these terrorists? The publication *Terrorist Conspiracy in Bengal* mentioned earlier refers to the need for continuing Regulation III as a special measure, and the need for other special measures (Govt of Bengal, 1926). The *Bengal Criminal Law Amendment Act*, 1925 came close on the heels of the 1924 Ordinance. The Government noted the appearance of what it termed a 'New Violence Party'. It prepared yet another 'Memorandum on the History of Terrorism in Bengal'. It spoke of 'lack of evidence' that justified the *Revolutionary and Anarchist Crimes Act* of 1919 preceded by the *Indian Criminal Law Amendment Act XIV* of 1908, because what was needed was speedy and one-sided trials, 'where the accused shall not be present during an inquiry, unless the magistrate directs, nor shall be represented by a pleader during any such enquiry'. Section 15 of the Amendment Act said: 'If the Governor General-in-Council is of the opinion that any association interferes or has for its objects interference with the administration of the law or with the maintenance of the law and order, or that it constitutes a danger to the public peace, the Governor General-in-Council may, by notification in the official gazette, declare such

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association to be unlawful'. Thus, several associations, for instance the Samities in Bengal, were banned in January 1909 under this Section 15 (2b). And as the gloss of the Royal Proclamation of Amnesty in 1919 wore thin, Section 121 A of the IPC were invoked again to defeat 'waging war against the King' (Barisal Conspiracy Case); and two successive *Bengal Criminal Law Amendment Acts* came in 1925 and 1930.

In all these matters of understanding who were the terrorists and, on the basis of that understanding, recommending strong punitive measures, the most unambiguous were the decisions of the Court of Commissioners constituted under the *Defence of India Act*, 1915 in the Lahore Conspiracy case, 1916 (that included the matter of the bomb attack on the Viceroy on 23 December 1912). The Commissioners spoke of terror as of: 'dacoits, seduction of troops, villagers and students, manufacture and collection of arms and bombs, projected and accomplished attacks on railways, bridges, arsenals, and general communications, and finally projected as general uprising, which was to be the culminating act of war'; and then the Commissioners declared, 'We regard acts done up to July–August as acts of conspiracy to wage war; acts thereafter, when once the war had started as acts in furtherance of that war, and in abetment of such war'.[17] The Commissioners were severe – in the first case of the 82 accused, 78 faced trial, and of them 24 were sentenced to death and 26 were sentenced to transportation. Only 5 were acquitted. One more was sentenced to death in a separate case and promptly hanged and had no opportunity to face trial in this case.

The issue of the identity of the terrorist had another import too from the rulers' point of view. The issue was access to arms. In this context, the CID (Criminal Investigation Department) came into existence in 1906. Armed constabulary was organized along Irish lines. Laws and other measures were enacted. Rules of organization building, behaviour, 'modus operandi', 'enticement of minors and young boys', spreading 'ideas' and increasing the capacity of their 'reception' – everything was to be found out, if necessary by torture.[18]

It is surprising how little of this physical world is reflected in the legal history of colonial rule. It began with Regulation III of 1818 for detention of suspects. Act I of 1900, known as the *Press Act*, was passed to regulate publication of newspapers and other printed material and to contain sedition and seditious literature. The *Defence of India (Consolidation) Rules* of 1915 conferred wide powers on the Government to detain people on the ground of anti-government activities. The infamous Rowlatt Act found its new form in the *Indian Penal Code (Amendment) Act No XVI* of 1921; it amended Sections 121 and 122 of the Code. The *Criminal Law Amendment Act* of 1925 strengthened the ordinary criminal laws; close on its heels came the *Bengal Suppression of Terrorist Outrage Act* of 1932. Police circulars became more detailed. For instance, one such circular suggested that police evidence alone was enough at times for a *prima facie case*; reports were to be exact, meaning it was enough if they were streamlined in terms of the format. The *Explosives Substances Act* and the *Arms Act* were cited as provisions under which culprits could be booked.

Intelligence files, the will to legislate, torture, and the litany of enactments, collectively this then was the colonial state's unconscious. This was also a 'protracted war', marked by moments of tremendous violence. Though, in the '40s of the last century, it seemed that mass movements punctuated by isolated terrorist acts were

a phenomenon which had happened in distant past, the violence of 1942, 1945–6, and 1947–8 showed that in fact the whole nation had become terrorist.

III

What makes the Indian colonial experience particular is that the principle of responsibility was laced with three elements of a constitutional design that worked as both inclusive and exclusive strategies of rule: (a) *parliamentary system*, (b) *federal structure*, and (c) *the basic civil and criminal laws providing the backbone of the administrative system*. All three elements proved durable and were left practically untouched by the new Constitution of independent India.

It all began with the exercise of 'regulating acts' by the Home Government on the basis of which local governments and subordinate governments were set up. Rule of law also demanded that, de-linked from commercial interests as well as direct imperial interest, a form of government be found that would make it look as if Indians, albeit with the help of some Englishmen, were ruling India, or were being trained to rule India. The passage from Company rule to rule by the British Emperor, that is rule of the constitutional government at 'Home', was the first step towards rule of law, and it came only with suppression of the Mutiny, which had been the most terrorizing and horrific act by the Indians in that century. Already the Governor General-in-Council by the Act of 1833 (Section 85) was to take steps to mitigate the state of slavery, and to provide by laws and regulations for the protection of the 'natives' from insult and outrage in their persons, religions and opinions. We can see how the multi-layered politics of responsibility was building up: the Crown was responsible for good governance; the Company was responsible to the Home Government; the Government was responsible for initiating Indians into self-governance and good governance; and the Indians were responsible for their self-education. Terrorism and mutiny were the evils that aimed to destroy this scheme.

The thrust was towards codification, which meant the consolidation of rule. The Regulation of 1781 (Impey's Civil Code) satisfied in anticipation the principle of the 'cognoscibility of law': that law should be capable of being understood by the people whose rights and duties it determined – a principle that Bentham was to stress later. A Code of Regulations needed the Courts of Justice, who could provide redress against infringement of the Regulations. By the Act of 1797 Parliament sanctioned legislation and codification by the Governor General-in-Council. *The Code of Gentoo Laws and Ordinations of the Pundits* (1775) was the beginning; *Judicial Regulations* (1772–1806) followed it. Then came John Herbert Harington's three volumes of *An Elementary Analysis of the Laws and Regulations* (1805–17). Princep's *Abstract of the Civil Judicial Regulations* was published in 1829. And thinkers like Bentham and the Mills, who were powerless or unwilling to change the lot of their own country, concentrated their energy on constitutional experiments in the colony. Indeed Bentham wrote an essay *On the Influence of Time and Place in Matters of Legislation*[19] with the object of considering what modifications were required in transplanting his system of law codes to a colony.

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The power of making and amending laws was vested in the Governor General-in-Council, and the task of ascertaining 'all laws and customs having the force of law' was entrusted to a Law Commission. Thus the First Law Commission came into existence. The work on the Penal Code started around the same time, 1837. The Second Law Commission formed in 1853 assigned priority to a 'simple system of pleading and practice uniform as far as possible throughout the whole jurisdiction . . . which is also capable of being applied to the administration of justice in the inferior courts of India'. The work of the Commission was transferred from Calcutta to London. On the basis of its recommendations forwarded by the 'Home Government', the Legislative Council passed in 1859 the Code of Civil Procedure, in 1860 the Penal Code, and in 1861 the Code of Criminal Procedure. The High Courts Act came in 1861. The same year the Third Law Commission was appointed 'to prepare for India a body of substantive law, in preparing which the law of England should be used as a basis'; and as if this was not enough, the Fourth Law Commission recommended in 1879 that 'English law should be made the basis in a great measure of our future Codes, but', as a concession to the colonized it said, 'its material should be recast rather than adopted without modifications . . . in recasting those materials due regard should be had to Native habits and modes of thoughts'.[20]

The structure of administration initiated by Lord Ellenborough was in place by 1843 with separate 'Home' and Military departments besides Foreign and Finance. District administration was strengthened. Regulations were issued to set up a body of Commissioners to take up municipal and police functions, as in Calcutta. The judicial administration was bolstered at the bottom by the union of the magistrate and the collector. This union of judicial and police functions continued long after India became free. Equally important was the creation of the Civil Service whose members, Rivers Thompson, the Lieutenant Governor of Bengal, observed in 1883, 'have abandoned caste, (they) have surrendered religious feelings, (they) have broken family ties and set themselves against the devout sentiments and doctrines of their ancient creeds'.[21] Selected on the basis of competition, and produced through special training, they became along with the judge, the police officers, intelligence officials and the army generals, the main elements of the framework of rule that stabilized the empire.

Large-scale mutiny became impossible after 1857 for close to another three-quarters of a century. The impregnable administrative massif that the nationalist warrior would face was partly a result of the transfer of power from the Company to the Crown – in many ways as significant as the much better known transfer of power about a century later. It meant direct control of the colonial power, a ruthless transplantation of modes of politics prevalent in the 'Home' country – for example with a cabinet mode of governing which had little to do with parliament, but more to do with a centralized executive mode led by the Governor General-in-Council. Thus Lytton kept secret his Afghan War and annexation of Upper Burma; similarly under Kitchener the most prodigious centralization of all armed forces in 1909 took place; and, Canning candidly admitted, it should mean 'paramount authority of the head of the government'.[22] Princes became practically feudatories. The transfer of power brought centralization to the administrative and social sphere. It was only in this way that in 1915 the Defence of India Act with its provision of Special Tribunals was

rushed through the Council in a single sitting. This was in the footsteps of the Defence of the Realm Act passed in England. The Special Tribunals became notorious when, at Lahore, 24 people were sentenced to death, although only six of them had been found guilty of murder.

The other significant transfer of power came when the capital was moved from Calcutta to Delhi. With the institution of Lieutenant Governorships and Chief Commissionerships provinces were strengthened, and though Bengal Partition was annulled, the country had been reorganized at a stroke. Colonial rule was then ready to face the militant nationalist threat. It could take its time and say, as Curzon as a member of Lloyd George's coalition cabinet had indeed said, that its goal was 'to ensure progressive realization of responsible government in India as part of the British Empire' and the British Dominion.[23] The Rowlatt Committee's Report was only one proof, though the best known, of this strategy. By 1935 and subsequently by the Defence of India Rules the entire system of permanent exception, and permanent exclusion had been put in place so that the regulations could now work, acts could be the bedrock of the rule of law, and the state's reason could become amply clear as the soul of the constitution.

Equality of law, equality before the law, equality in the marketplace, equal rights, etc., are the great principles on which constitutionalism stands. Yet, and for the first time, the legal definition of terrorism and its juridical invocation introduce the possibility of a constitutional sanction of inequality – on the basis of a person or group's association with violence – thereby making some citizens, some half-citizens, and some outlaws on whom freedom's laws are not conferred. This becomes a new way to define citizenship – earlier gender, property, education, status, identity were the criteria, which constitutionalism long discarded. Now two tests become crucial – territorial location in the form of national identity and identification with violence. The refugee or the non-state person (association with location) and the terrorist (association with violence) – become the two great outsiders to the promised land of citizenship and equality. While the relationship between the immigrant and equal citizenship is of a more recent origin,[24] the political fact of association with violence as one of the disqualifications for citizenship is of older origin. We can see how the organic quality of nationhood has depended from the beginning on inheriting one of the essential features of pre-national political formations – armed rulers and unarmed peasantry. In terms of liberal polity it has meant that those associated with violence will be disqualified from citizenship. The disqualification began with the colonial strategy of creating permanent exceptions.

We can thus suggest here a re-reading of the history of citizenship. In the received history, citizenship is associated with achievement of rights. In fact, some are not granted citizenship or would soon be denied it because of their association with violence. Armed people cannot have the right to vote. A permanent disqualification in the form of exceptions to freedom's laws appears. Constitution making in the independent country therefore has depended to a great extent on colonial laws and enactments that foresaw who were to be disqualified.[25]

What then of the constitution-making exercise itself whose pre-history we have recounted in the briefest manner? As we know, the Constituent Assembly was a child of the Cabinet Mission. The transfer of power was to be complete with two

missions accomplished – formation of an interim government and the convening of a constituent assembly that through its deliberations would form a constitution to give birth to a sovereign country. In this hidden story of passive revolution, few things merit our attention more than the fact that in the operation of both these conditions the existing regime of law and order developed through the past 150 years remained intact.

Sovereignty arrived like this. The constitution-making exercise never touched on the regime of laws that was already in place. Now it also had to keep out the politics of the street, as the constitutional chamber had become by this time the locus of power. But the constitutional story significantly signalled stability, and the sustainability of the framework of institutions put in place amidst and as a consequence of the disorder of the past. Finally, it constituted for the first time in the life of the country 'a superior law', which legitimized all the ordinary laws that had previously lacked such a sanction.

IV

To sum up: colonial legality never came to terms with what can be called actions in the public space symbolizing opposition to the law.[26] The deployment of coercive means in wars and domestic control in the colony presented colonial rule with two problems: (a) The requirement that to the extent the colonial ruler was successful in annexing territory and subduing populations the ruler had to then provide *rule* in terms of administration of land, goods, services and people. In other words conquest had to be normalized into a form of rule. (b) Yet there was no way in which the colonial ruler could ensure that a normal administration would be viewed as such by the ruled, and coercion would become thereby the exception and not a matter of daily necessity for the ruler. The colonial strategy of rule built a state that wanted to be both coercive and paternalistic. The strategy of conquest, coercion, domestication and normalization faced one inveterate challenge – that posed by the early nationalists who were also the early terrorists, and who were singularly insistent in their aim that this strategy of normalization must not succeed. That challenge, as we know, invited more coercion and more methods of administration, which in turn developed the modern state in South Asia.[27]

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Notes

1. Bandopadhyay (1999: 8–35). First published in 1921, it created a sensation; read and appreciated by Tagore, it has since then run into several imprints. See also the account by Pulin Behari Das, the founder of the Dhaka Anushilan Samity, in De (1987: 132–44).
2. Barindra Kumar Ghosh, *Amar Atmakatha*, cited in *Agnijuger Banglaye Biplabimanas*; see also *Sedition Committee Report*, Government of India, 1918, p. 20.
3. Cited in *Agnijuger Banglaye Biplabimanas*: 152–3.
4. Upendra nath Bandopadhyay, *Nirbashiter Atmakatha*: 102–3.
5. Ibid., 104–9. See also Madan mohan Bhaumik (1985: 55–80).
6. Amiya Kumar Samanta (1995: Volume 1, pp. 32–3, 45) speaks of bomb-making, train-wrecking, and the proliferation of small arms. The tragi-comic story of the early Bengal revolutionaries' attempts at bomb-making is documented in graphic detail in Bhupendra nath Datta (1983: 151–3). For details of the various techniques employed by the early terrorists, the best account is Trailokya nath Chakraborty (1981).
7. On this period, see also Ker (1973); also in this connection, see IB, Govt of India (1974).
8. Michael Shapiro calls the politics of surveillance the 'bio-politics' of our age, when following Michel Foucault he argues that surveillance and control of bodies have become crucial for the State to manage security. I am grateful to Shapiro for providing me access to his essay, 'Bodies, Surveillance, and the State'.
9. Some of these are drawn and discussed in detail by Hem chandra Kanungo (1984), ch. 4, 'Gupto Samitir Adorsho Byartho Holo Keno?': 27–49; Trailokya nath Chakraborty (1981: 23–92).
10. *Banglaye Biplob Prachesta*: 183–9.
11. *TIB* 5: ii.
12. All citations are from R. E. A. Ray, 'Alliance of Congress with Terrorism in Bengal', *TIB* 3: 939–57.
13. The jail lives of the terrorists were marked by intense discussions and debates on merits and demerits of particular linkages. See on this, *Biplaber Padachinha*: 159–70.
14. Indeed, Sachaindra nath Sanyal's life is a great instance of a terrorist as an organized warrior. He along with Rashbihari Basu became legends in their lifetime for organizing and leading a 'terrorist' army. On Sachaindra nath Sanyal, his association with Rashbehari, and their joint work, see Bhupendra nath Datta (s.d.: 120–32).
15. To understand the role of Benaras along with towns like Kanpur, Allahabad, and Meerut in the development of early terrorism, one has to read Sachindra nath Sanyal's memoir which he wrote in several phases and only haphazardly completed before his death in 1943, *Bandi Jeevan* (Sachindra nath Sanyal, 2001); also Jogesh chandra Chattopadhyay (1977: 147–91).
16. We can see in this connection the 'Report of the Government of Eastern Bengal and Assam on Deportation', Political Branch, File no 706 of 1909, *TIB* 4: 1281–331. The report dealt with deportations under Regulation III of 1818 of Aswini Kumar Datta, Satish Chandra Chatterji, Pulin Behari Das, and Bhupesh Chandra Nag. The report spoke of their activities, political profiles, and place in 'terrorist activities'. In this connection one can see also Pulin Behari Das' own revealing account; he wrote of the strength of the Dhaka Anushilan Samity, the near autonomous functioning of similar Anushilan Samities in eastern Bengal, and the fragile nature of the unity of the terrorist groups (see De, 1987: 102–24).
17. *TIB* 5: v.
18. On the systematic use of torture by intelligence officials in the interrogation centres at the intelligence headquarters and elsewhere, by the police in police custody, and in jails by jail officials, see the detailed accounts by Jogesh chandra Chattopadhyay (1977: 48–53); Jogesh lists various methods used, the likely occasions when the prisoners would be tortured, and the attitude of the intelligence officials towards torture.
19. Stokes (1982: 51).
20. *CHI* 1: 302–16.
21. *CHI* 1: 439.

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22. *CHI* 2: 62.
23. The Simon Commission later admitted the fact of limitless centralization that the one century of legal reforms had brought about (see *Report of the Simon Commission*, 1, paras 138, 139).
24. Here too colonial history had much to teach the business of modern state-running the world over: first of course, it made race integral to the notion of citizenship; second it showed how the global communities of colonial labour (mostly in indentured form) were de-linked from the democratic universe of citizenship of the decolonized countries. Thus Indian labour abroad could not return to India after 1947. Various Acts were passed in the last decade of colonial rule in India, such as, *Registration of Foreigners Act* of 1939, the *Reciprocity Act* of 1943, the *Trading with the Enemy (Continuance of Emergency Provisions) Act* of 1947, the *Foreigners' Act* of 1946; one can also see in this context the deliberations on the Immigration into India Bill. For an insightful analysis of the relation between citizenship and decolonization, see Banerjee (2002).
25. I am here extending some of the arguments of Wallerstein (2003).
26. Bourdieu (1991: 116–17) reminds us of the symbolic power of certain acts.
27. Instructive in this study once again is Tilly (1990). Tilly of course misses the role played by colonial rule in developing the means of coercion.

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