

monarch in the post-1857 period giving rise to two new discourses of justice as equity and justice as liberty.

In Chapter 4, I argue that the discourse of the Indian National Congress, founded as a party in 1885, was firmly lodged within an epistemologico-juridical paradigm determined by the telos and procedures of justice as equity and liberty. This juridical paradigm explains, I contend, why the lawyer emerged in the late nineteenth and early twentieth centuries as the dominant enunciative persona for the articulation of political discourse. It also explains why the Indian National Congress, even as it opposed the colonial regime, continued to operate within an imperial juridical framework grounded in the figure of the monarch.

In Chapter 5, I explore the genealogy of the discourse of renunciative freedom under which Gandhi led the movement for independence. The emergence of this new discourse of freedom signified the rejection of the imperial discourse of justice on which Congress politics was the grounded and dominant form of politics as elite pleading.

I contend in Chapter 6 that because the Gandhian movement did not construct a legislative discourse of governance and freedom, when independence came, the Congress immediately restored its original discourse of imperial justice. The critical category of imperial justice as equity (rather than freedom) was thus transformed in the Constitution of independent India into the dominant legislative category, unifying and structuring seemingly disparate domains in postcolonial India like the economy, society, and foreign policy in the decades after independence. The Indian Constitution marked the re-emergence in post-independence India of the two constitutive aspects of the British imperial-political formation in the form of an overdetermining discourse of justice as equity, and in the consolidation of dynastic leadership in the Congress party that ruled over India with only brief interruptions for the first fifty years of independence.

In Chapter 7, I conclude that the British imperial idea of justice embodied in the Indian National Congress and the Gandhian ethos of mass resistance as two competing and conflicting legacies have been the major driving forces determining the nature and evolution of the Indian polity after independence.

1

THE COLONIAL AND THE IMPERIAL¹

India and Britain in the Impeachment Trial of Warren Hastings

The impeachment trial of Warren Hastings has long been considered one of the key political trials in the history of the British Empire. It was the first major public discursive event of its kind in England, and arguably in Europe as a whole, in which the colonial ambitions and practices of European powers in the East stood exposed to a close and comprehensive critique, and the legal and moral legitimacy of colonialism itself as a phenomenon thrown into question before the highest judicial body in Britain, the House of Lords. The fact that the prosecution was led by Edmund Burke, one of the most articulate and prescient political statesman of modern Europe, has only added to the trial's enduring significance as a moment of critical reflection on colonial practices. Indeed, it could be argued that, it was on this occasion, and in this act of defending the rights of an alien population against coercive colonial rule that some of Burke's long-held political and ethical convictions found their sharpest articulation.

Paradoxically, the historical contribution of the trial and Burke's intervention in India to the construction of a discourse of imperial sovereignty, have remained largely unexplored in existing

¹ A version of this chapter has been published as an article in *Law and History Review* 23, (3), Fall 2005, pp. 589–630. I thank the journal for the permission to reprint. For a general account of the trial see Marshall, *The Impeachment of Warren Hastings*. Also see Carnall and Nicholson, (ed.), *The Impeachment of Warren Hastings: Papers from a Bicentenary Commemoration*.

scholarship.² While historians have focused almost entirely on the question of the legality of the trial and the truth of Burke's allegations against Warren Hastings, political theorists have analysed the trial only to the extent that it throws light on what they believe to be Burke's political philosophy or core political beliefs.³ In most of the interpretations by political theorists, India emerges either as an instance of, or as an exception to an otherwise coherent set of political beliefs, such as natural law, trusteeship, liberal utilitarianism, etc., that in being European in origin were manifested in their essences in the western context.⁴ In general, almost all these interpretations

² Indeed, some historians of eighteenth-century England and India, most prominently Peter James Marshall, have argued that Burke's vision of an empire of justice had little significance for the British Empire as it evolved over the nineteenth century and, in fact, 'was already beginning to look irrelevant to the British empire of the 1790s.' See his Introduction in *The Writing and Speeches of Edmund Burke*, p. 36.

³ In the course of the nineteenth century, liberal historians like Macaulay and Morley defended the truth of Burke's accusations against Warren Hastings. See Babington Macaulay, *Warren Hastings*, and John Morley, *Edmund Burke, a Historical Study*. On the other hand, in the late nineteenth and early twentieth centuries, a series of imperial historians like James Fitzjames Stephen, John Strachey, Sophia Weitzman, Lucy S. Sutherland, and Keith Feiling dismissed Burke's accusations that Hastings had been personally corrupt and argued that his arbitrariness was justified by the necessities of maintaining empire in the East, a view that Hastings himself articulated in the trial. See James Fitzjames Stephen, *The Story of Nuncomar and the Impeachment of Elijah Impey*; John Strachey, *Hastings and the Rohilla War*; Sophia Weitzman, *Warren Hastings and Philip Francis*; Lucy S. Sutherland, *The East India Company in Eighteenth-Century Politics*; Keith Feiling, *Warren Hastings*.

⁴ For example, Peter Stanlis, whose work has been invaluable in bringing to attention the centrality of natural law doctrine in Burke's works, leaves the implications of the fact that the discourse of natural law and the law of nations found its sharpest articulation in Burke's speeches in the impeachment trial unexplored, concluding that Burke's understanding of international relations was limited to the European context, his intervention in India being merely an exception to his deep-seated convictions about European solidarity based on a common cultural inheritance. As a result, Burke emerges in his analysis primarily as a European conservative, and the radicality of his deployment of natural law and the law of nations for the defence of an alien, non-European people against colonial oppression passes unnoticed. See Stanlis, 'Edmund Burke and the Law of Nations', p. 400. Also see his *Edmund Burke and the Natural Law* and Canavan, *The Political Reason of Edmund Burke*. Again, scholars like Conniff have used the Indian case only to prove the inadequacy of Burke's political categories such as trusteeship, that, in his view, fail the test of universality when applied to a non-European people who lacked the political culture of the West. See Conniff, 'Burke and India: The Failure of the Theory of Trusteeship', pp. 291–309; and Dreyer, *Burke's Politics: A Study in Whig*

presuppose the boundaries between Europe and India, and the latter appears as a mere appendage to what is essentially the history of European political thought, as it found articulation in Edmund Burke, one of its most eloquent spokesmen.

The relative marginalization of Burke's intervention in Indian affairs in the historical scholarship on Burke has resulted in a neglect of what was arguably one of the more radical and innovative aspects of his thought—his effort in the historical context of the eighteenth century to go beyond the territorially bounded discourses of political sovereignty and institutional practices of nation-states, and to conceptualize a form of deterritorialized juridical-imperial sovereignty, that would be exercised not in the pursuit of the exclusive interest of the colonizing nation, but rather in ensuring that colonial administration in India remained firmly grounded in 'native' society and prevented from exercising absolute and arbitrary power over it. In this chapter, I will examine the construction of Burke's discourse of juridical-imperial sovereignty as it found articulation in his speeches for the prosecution in the impeachment trial of Warren Hastings, in opposition to a discourse of colonial sovereignty based on absolute power and national interests, articulated by Hastings' defence.

In recent years there has been a noticeable surge in interest in empires of the past and their continuities and discontinuities with the present global order.⁵ While most earlier works on empire focused primarily on the essential links between imperialism as a political form and the economic phenomenon of capitalist expansion, lately

Orthodoxy. The most significant works that have attempted to establish Burke as a theorist of liberal utilitarianism are Morley, *Edmund Burke, a Historical Study* and Macpherson, *Burke*. Some excellent works in the recent past that have departed from this general tendency and have emphasized the centrality of Burke's writings on empire, particularly on India, for an understanding of his political theory are Wheelan, *Edmund Burke and India: Political Morality and Empire*; and Mehta, *Liberalism and Empire: A Study in Nineteenth Century Liberal Thought*. Also see Suleri, *The Rhetoric of English India*. For connections between Burke's writings on India and other parts of the British Empire like Ireland, see Janes, 'At Home Abroad: Edmund Burke in India', pp. 160–74, and O'Brien, *The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke*.

⁵ Darby, *Three Faces of Imperialism: British and American Approaches to Asia and Africa 1870–1970*; Lieven, *Empire: The Russian and Its Rivals*; Ferguson, *How Britain Made the Modern World*; Hobsbawm, 'America's Imperial Delusion: The US drive for world domination has no historical precedent', *The Guardian*, 14 June 2003; Ignatieff, 'The Burden' in *New York Times Magazine*, 5 January 2003.

India to independence and to whom bhakti mattered more than most others in the Congress, walked away from power even as others scrambled to find a place in the new government. The source of the possible dictatorship that was the object of Ambedkar's fear lay more precisely in the imperial legacy of the discourse of justice as equity as the sovereign legislative discourse of governance that was not viable in the absence of the figure of the monarch. If dictatorship is defined as a system in which an institution or a figure that makes laws seems at the same time to stand above it, then a monarchy, seen from the perspective of modern democratic polities, would appear to be a permanent form of dictatorship. Yet, the discourse of justice as equity that sits at the heart of the Indian Constitution cannot function without the figure of the monarch and the exteriority of the state to the civil society.

It was modern India's democratic legacy of anticolonial mass movements that sensitized and alerted Ambedkar to anticipate and articulate a very real danger of 'dictatorship' as he concluded his work on the Constitution. However, the discursive force of the British imperial legacy—deeper and more pervasive than often thought—prevented him from thinking his way to its origin. This was not just Ambedkar's story—it is the story of postcolonial India itself. Not long after his work on the Constitution was completed, Ambedkar left government a disappointed, indeed a disillusioned, man, to launch another chapter in India's history of mass movements, even as Nehru, his one time colleague in the Constituent Assembly, now the Prime Minister, began to reinvent himself in the shadows of an ever-departing but never-departed Empire.

7

INDIA AFTER INDEPENDENCE

A Tale of Conflicting Legacies

One of the curious things about Indian independence from the British Empire is that it has not been consecrated with the designation of revolution.¹ This stands in stark contrast to all major events of national freedom in world history, either from colonialism or from native monarchies that have been characterized as revolutions. Why then was Indian independence any less of a revolution than other moments of national freedom? After all, it came at the end of one of the largest and most disciplined mass movements in history, spanning decades. What is more, it was the only instance in world history where the mass movement that led to independence was based on the idea and practice of non-violence.

Behind the absence of the designation of revolution lies buried an aspect of India's emergence as an independent country that often goes unnoticed—it reveals the triumph of the British imperial narrative of its history in India. The absence of the narrative of revolution in India—including in Indian historiography—assumes a discourse of freedom without resistance. This freedom without resistance is nothing but the ideology that presented the British Empire in India as a pedagogical mission as articulated in the discourse of justice as liberty. In this imperial discourse, India's national independence was the fulfilment of the avowed imperial mission; national independence was an imperial gift to India. As I have shown in Chapters 2 and 3 of this book, the Indian National

¹ One of the few scholars to call the Indian independence movement a revolution is Franchis G. Hutchins. See his *Spontaneous Revolution: The Quit India Movement*, pp. 1–2.

Congress itself was anchored in this imperial discourse. With the withdrawal and then death of Gandhi—the driving force of the anticolonial movement—and the return of the Congress to its pre-Gandhian discursive moorings, the notion of resistance slowly fell out of the historical narrative, making revolution appear an unlikely designation for Indian independence.²

This disavowal of resistance has had a profound impact on studies of the postcolonial Indian polity. The proliferation of paradoxes in reference to postcolonial India that I alluded to briefly in the introduction has its roots in the triumph of this imperial narrative of the British Empire as a pedagogical mission. It is in this context that one can understand why the birth of constitutional democracy in India has been understood not as the outcome of a complex development of culturally specific and historically contingent discourses, institutions, practices, and conflicts, but rather in terms of the transfer and communication of a set of ideas (such as freedom, liberty, equality, and justice), and institutions, western in origin, to a traditional eastern society. This transfer and communication of western ideas to India as a methodological premise of such studies assumes the pedagogical model that robs the postcolonial polity of its history. Paradoxes (such as modern but also traditional, western but also eastern, industrialized but also poor, urban but also rural) arise from a tendency on the part of scholars to see the postcolonial Indian polity in ahistorical terms as a simple juxtaposition of different and disparate—but also inert—elements, without any meaningful connection between them.

This largely theoretical—and pedagogical—approach to the study of Indian constitutional democracy has two problems. First, the theoretical–pedagogical approach makes differences between western and non-western democracies appear as digressions, deviations, and signs of inadequacy or lack, rather than as the outcome of complex histories of discourses and institutions through time.³ Contemporary political scientists have referred to postcolonial India as a ‘transitional’

² In many ways the birth of Subaltern School of historiography with its focus on peasant insurgencies was a reaction to the dominant Congress ethos based on the general disavowal of resistance.

³ The absence of a historical approach to Indian democracy has been pointed out by Sumit Sarkar in his chapter ‘Indian Democracy: The Historical Inheritance’, in *The Success of India's Democracy*, pp. 23–46.

or ‘follower’ democracy, not only assuming the theoretical sameness of democracies everywhere, but also presupposing that the essential structure and the set of abstract categories that define democracy can be simply communicated or transferred from one authorisation to others.⁴ It is not surprising that while most historians of modern India terminate their research at 1947, the year of India's independence, assuming postcolonial political development to be inaccessible to historical research, most studies by political scientists have taken 1947 as their point of departure, as if the postcolonial political formation had emerged fully formed without any history.⁵ In the absence of an understanding of the historical processes through which what appear as contraries have nevertheless come together, the postcolonial Indian polity is likely to continue to appear as nothing more than a bundle of paradoxes.

Second, the theoretical–pedagogical approach, by focusing on the transference of ideas from England to her colonies, is indifferent to questions of power, domination, and the cultural and historical conditions behind the production of knowledge that have become so much a part of cultural history today. In the case of postcolonial nations, such an emphasis on a benevolent transfer of ideas means that the specific histories of conflict and movements of opposition to colonialism through which democracies have become realities in erstwhile colonies are also ignored. If the emergence and success of democracies were simply a matter of transferring categories and institutions from the metropole to the colonies, how would one explain the fact that the postcolonial histories of nations like India, Pakistan, Bangladesh, and other Asian and African nations have diverged so radically despite having the same British colonial past? My contention is that the evolution of democracy in particular and of political formations in general in postcolonial nations depended not just on British imperial institutions and acts, but also to a significant degree on the legacy of the specific nature of the anticolonial resistance movements they inherited.

⁴ Kohli, ‘On Sources of Social and Political Conflicts in Follower Democracies’. For general theoretical works on democracy see Benhabib (ed.), Gutman and Thompson (eds), *Democracy and Disagreement*; M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy*; Elster and Slagstad (eds), *Constitutionalism and Democracy*.

⁵ Sarkar, ‘Indian Democracy: the Historical Inheritance’, p. 23.

Seen in light of its historical origins, the Indian polity in the wake of independence came to be constituted by two primary historical legacies—the Congress discourse of imperial justice and the Gandhian legacy of non-violent mass movement. It is the dialectic of these two legacies that has determined the nature and dynamics of postcolonial politics in India. In so far as the Congress—in the wake of independence and Gandhi's death—fell back on its original discourse of imperial justice as equity which was anchored in the figure of the monarch, it lacked the conceptual resources or political incentive to give rise to the discourse and practice of democracy in postcolonial India based on principles of popular sovereignty and universal suffrage from within itself.

At the same time, it was because the discourse of imperial justice was historically anchored in the figure of the monarch that the Congress soon developed its own version of it—the dynasty. One of the glaring omissions in the scholarship on the nature and history of postcolonial Indian polity is the absence of any attempt to problematize the intriguing presence of a dynasty at the helm of the Congress and, consequently, the Indian state for much of India's years as an independent democratic country. Indeed, postcolonial Indian polity has followed the model of 'constitutional monarchy' more closely than Britain, the original home of this polity. As is evident from the research presented in the course of this book, the dynasty is the other side—the institutional side—of the discourse of justice as equity that has anchored much of the democratic polity of postcolonial India, as it did the post-1857 British Empire.

If the Congress still recognized universal suffrage as an unqualified right in the Constitution, then that was because of the force of the Gandhian legacy. The democratic features of the postcolonial Indian polity are anchored in the Gandhian legacy of mass mobilization that turned the people of India from passive recipients of imperial justice to active and sovereign subjects of history. Despite the fact that the Gandhian movement—grounded as it was discursively in the Indic traditions of renunciative freedom—failed to construct a legislative discourse of governance, it did manage to extract the crucial concession of universal suffrage or the political necessity of elections from the Congress, a concession that has come to be the mainstay of Indian democracy.

Some scholars have argued that democracy in postcolonial India has come to be limited to elections, implying that it does not extend

to governance.⁶ The reason lies in the fact that the political necessity of elections and the discourse of governance have had their origins in two different, even incompatible, legacies that I have traced in my study. If democracy does not, or appears not to, extend to governance then that is because governance continues to be anchored in the imperial legacy of the discourse of justice as equity addressed to the figure of the monarch. The political necessity of elections, on the other hand, owes its origin to the Gandhian legacy of mass resistance. In so far as the Gandhian movement did not have a legislative discourse of governance, it could take democracy only as far as the elections. In the absence of the sovereign discourse of legislative freedom, the postcolonial Indian polity as a whole draws much of its dynamism and indeed its future possibilities from this necessity of elections; it is this democratic necessity of elections that has increasingly brought vast sections of the Indian civil society disenfranchised for long onto the centerstage of Indian politics.

It was the inherent and essential conflict between the Indian National Congress as the bearer of the imperial legacy of justice as the discourse of governance and the Gandhian democratic legacy of disciplined mass resistance that was the main driving force behind the major developments in the first three decades of postcolonial Indian politics. In the decades after independence, even as the Congress fell back on its imperial discourse of governance under the increasingly dynastic leadership of the Nehru–Gandhi family, it also grew increasingly intolerant of the Gandhian democratic legacy. What kept the essential fissure between the two legacies within the Congress from erupting in the open in the immediate aftermath of independence was the momentum built up over three decades of sustained mass movement by the Congress under Gandhi in the colonial period. However, as the Congress, driven by the very logic of its origins, began to increasingly resemble a royal court under its dynastic leadership, a slow but inevitable alienation set in amongst the section of the leadership within the Party which identified with the Gandhian legacy. This alienation led to a split in the Party, and eventually to an open conflict between the two legacies.

The essential difference between the two legacies came out into the open and turned into an active confrontation, most vividly, in the period immediately preceding and following the declaration of

⁶ Khilnani, *The Idea of India*, p. 48.

emergency in 1975 by Indira Gandhi, the daughter and successor of Jawaharlal Nehru, the first prime minister and leader of the Congress. This was a dramatic moment in the history of postcolonial India in which the imperial side of the discourse of justice as equity came in public confrontation with the Gandhian legacy of mass movements. What is most striking about the imposition of dictatorial rule during the emergency that suspended the fundamental rights of the citizens while giving the Prime Minister absolute power as the head of the state, was that it was done precisely in the name of justice as equity. The fundamental rights or freedom of the people had to be suspended, Indira Gandhi declared, in order to give the government the power it needed to alleviate the hardships of the poorer sections and the middle classes by the 'better distribution of goods.'⁷ Thus the declaration of emergency by Indira Gandhi starkly exposed the imperial lineage of the discourse of justice as equity.

It was not surprising, then, that in the ensuing resistance movement against the imposition of emergency, almost all the well-known Gandhians, including Jayaprakash Narayan and Morarji Desai, found themselves arrayed against the embodiment of the imperial legacy, Prime Minister Indira Gandhi. In the response that the emergency provoked, the future of constitutional democracy in India was permanently affected. For the first time in thirty years of India's independence, the Indian National Congress had to concede power to a new party, the Janata Party in 1977. Moreover, it was through this popular resistance against the Emergency that whole new sections of the Indian population that had hitherto remained politically disengaged were brought into the mainstream of Indian politics, fundamentally changing the very nature of the Indian polity, particularly in the states. Once again the legacy of Gandhian resistance had come to the rescue of the beleaguered democracy in India.

What happened in the aftermath of the electoral defeat of the Congress, however, also exposed once again the limits of the Gandhian legacy that had come to the fore in the wake of national independence. Even as the new Janata government succeeded in dealing a serious blow to the imperial side of the discourse of justice

⁷ *Prime Minister's Broadcast to the Nation on Proclamation of Emergency*, New Delhi: Government of India Division of Audio-Visual Publicity, 1975.

by mobilizing the masses, it not only left the discourse of governance grounded in the idea of justice as equity itself untouched, indeed it even claimed that discourse as its own. It was not surprising, then, that this new experiment was only a fleeting success, soon falling apart. The Janata Government was an impossible experiment in governance to begin with: it was an attempt to maintain the discourse of justice as equity without the central figure of a monarch to whom it necessarily had to be addressed. In the absence of a monarch-like figure, the government formed by the Janata Party ended up becoming a coalition of disparate and fractious groups that could not survive the contrary pulls for more than a couple of years, leaving the door open for the Congress to make a triumphant return. In this failure, however, what stands starkly revealed is how essential the figure of the monarch or the dynast is to the discourse of justice as equity.

Even as the powerful Gandhian legacy—that continues to operate in and through popular electoral practices and the general ability for mass mobilization—militates against the imperial legacy visible in the figure of the dynast, the continued reliance of the Indian polity on the discourse of justice as equity needs the same figure of the dynast as its anchor. In the absence of this dynastic anchor, a national government in India—if at all possible—has proved to be, and is likely to continue to be, unstable, because parties formed in the provinces in the name of justice as equity by their very nature claim to represent a part—a province, community, caste, language, or ethnicity—and must depend on the dynast to turn the fragments into a whole to give themselves national unity. On the other hand, the Indian National Congress with the dynast at its center—by its very nature—must continue to reproduce and also enforce the old colonial image of Indian civil society as a collection of warring fragments that the monarch alone can unify.

Through much of its years as an independent country, the Indian polity has been caught in this cycle of opposing political legacies. The postcolonial Indian polity, therefore, is very different from western democracies where an identity of the state and the civil society, albeit complex and uneven, is often assumed—a fact reflected in the idea of the 'nation-state.' Given that in the postcolonial Indian polity—as in the colonial polity before it—the state and the civil society continue to find themselves to be exterior to each other, it is not surprising that they often appear to prey upon each other

without limit. It is sobering, though not surprising given the colonial legacy, to recall that much of the widespread and gruesome violence in postcolonial Africa took place, and continues to take place today, in the pursuit of justice.⁸

⁸ See Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*.

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