Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings

Author(s): Mithi Mukherjee

Source: Law and History Review, Vol. 23, No. 3 (Fall, 2005), pp. 589-630

Published by: American Society for Legal History

Stable URL: http://www.jstor.org/stable/30042899

Accessed: 16-06-2015 00:41 UTC
Justice, War, and the Imperium: India and Britain in Edmund Burke’s Prosecutorial Speeches in the Impeachment Trial of Warren Hastings

MITHI MUKHERJEE

The impeachment trial of Warren Hastings has long been considered one of the key political trials in the history of the British empire.¹ 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. In addition, the legal and moral legitimacy of colonialism itself was thrown into question before the highest judicial body in Britain, the


Mithi Mukherjee is an assistant professor in the department of history at the University of Colorado at Boulder <mithi.mukherjee@colorado.edu>. The author thanks Ronald Inden, Clinton B. Seely, William J. Novak, Sanjay K. Gautam, Christopher Tomlins, and the anonymous readers of the Law and History Review for their support, advice, and very generous comments on earlier versions of this article. She is also deeply indebted to the late Bernard S. Cohn for innumerable thought-provoking conversations about law and colonial India that have contributed to this article. Finally, she thanks participants of the South Asia Workshop at the University of Chicago and the American Society for Legal History Annual Conference (October 2000), where previous versions of this article were presented.
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 clearest expression.

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 scholarship. 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 analyzed the trial only to the extent that it throws light on what they believe to be Burke’s political philosophy or core political beliefs. 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, and liberal utilitarianism that, in being European in origin, were manifested in their essences in the western context. In general, almost all these interpretations presuppose the bound-


4. Peter Stanlis, for example, whose work has been invaluable in bringing attention to the centrality of natural law doctrine in Burke’s works, does not explore 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. He concludes that Burke’s understanding of international relations was limited to the European context, his intervention in India being
aries 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.

Historical scholarship on Burke has marginalized his intervention in
Indian affairs. This 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 conceptualize a form of deterritorialized juridical-impe-
rrial sovereignty that would be exercised not in the pursuit of the exclu-
sive 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
article I will examine the construction of Burke’s discourse of juridical-
imperial sovereignty as it was revealed 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’s defense.

merely an exception to his deep-seated convictions about European solidarity based on a com-
mon cultural inheritance. As a result, Burke emerges in his analysis primarily as a European
conservative. His unprecedented use of natural law and the law of nations for the defense of
an alien, non-European people against colonial oppression passes unnoticed. See P. J. Stanlis,
(1953): 400–401. Also see his Edmund Burke and the Natural Law (Ann Arbor: University
of Michigan Press, 1958) and Francis P. Canavan, The Political Reason of Edmund Burke
(Durham: Duke University Press, 1960). Again, scholars like Coniff have used the Indian
case only to prove the inadequacy of Burke’s political categories such as trusteeship, that, in
Coniff’s view, fail the test of universality when applied to a non-European people lacking
the political culture of the west. See James Conniff, “Burke and India: The Failure of the
Theory of Trusteeship,” Political Research Quarterly 46 (1993): 291–309. Also see Frederick
A. Dreyer, Burke’s Politics: A Study in Whig Orthodoxy (Waterloo, Ontario: Wilfrid Laurier
University Press, 1979). The most significant works that have attempted to establish Burke
as a theorist of liberal utilitarianism are John Morley, Edmund Burke, a Historical Study
and C. B. Macpherson, Burke (New York: Hill and Wang, 1980). Some excellent works in
the recent past 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. See Frederick G. Whelan, Edmund Burke and India: Political Morality and Empire
(Pittsburgh: University of Pittsburgh Press, 1996) and Uday Singh Mehta, Liberalism and
Empire: A Study in Nineteenth-Century British Liberal Thought (Chicago: University of
Chicago Press, 1999). Also see Sara Suleri, The Rhetoric of English India (Chicago: Uni-
versity of Chicago Press, 1992). For connections between Burke’s writings on India and
other parts of the British empire like Ireland, see Regina Janes, “At Home Abroad: Edmund
Burke in India,” Bulletin of Research in the Humanities 82 (1979): 160–74, and Conor Cruise
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. Most earlier works on empire focused primarily on the essential links between imperialism as a political form and the economic phenomenon of capitalist expansion. But lately the realization that existing political institutions at an international level are proving inadequate to the task of meeting the challenges of globalization has prompted more work on questions of national and imperial sovereignty and their changing dynamics over time. One of the most significant works in this direction that has gained much attention worldwide is an ambitious attempt to theorize the emergent processes of globalization. Authors Antonio Negri and Michael Hardt have proposed that one way to understand the complex dynamics of the new global order is to see it as a new empire, continuous in some aspects with older world empires, but also fundamentally different. departing from other theorists, who have denied the novelty of the processes of globalization and argued that globalization is merely a continuation and perfection of imperialism, Negri and Hardt contend that globalization marks a fundamental rupture and a paradigmatic shift not only in contemporary capitalist production and global relations of power but also in the creation


of a new supranational sovereign power that is centered, indeterminate, continually shifting, discontinuous, and virtual. The authors contend that this new form of supranational, deterritorialized imperial sovereignty is radically different from the sovereignty that characterized earlier colonial empires. These were, in their opinion, centralized political formations that had extended national sovereignty over various subject peoples, while being firmly rooted in national institutions and metropolitan culture. The new empire, in their view, is different from past imperialism, which was nothing but the extension of the sovereignty of European nation-states beyond their own boundaries. One of the most important signs that the empire has come into being, in the authors’ opinion, is the existence of the United Nations as a global juridical institution, which, while predicated on the recognition and legitimation of the sovereignty of nation states, has also emerged as a real supranational institution whose legitimacy is grounded on the essential universal values of justice and morality that transcend the national interests of its member states.

While agreeing with Negri and Hardt that a distinction needs to be made between the category of “imperialism” and that of “empire,” I contend in this article that the two categories do not characterize two separate chronological phases in the history of the contemporary world. Instead, they describe contesting and contradictory historical forces that pointed to radically different directions that empire could take even in the early years of European expansion in the eighteenth century. One of the problems with Negri and Hardt’s analysis is that they make little attempt to rigorously trace the historical genealogy of the discourses and institutions that, in their view, characterize empire. Therefore, they fail to recognize that what they describe as “Empire” and its basic discourses and institutions emerged not after but contemporaneously with the advent of colonialism. Indeed, efforts to create both a discourse of deterritorialized, supranational sovereignty and institutions on which to ground it are evident even as early as the eighteenth century in the period of the American Revolution and the establishment of a second British empire in the East.

The relationship between nation and empire was one of the most contentious issues in late eighteenth-century British political circles. The critical question at the heart of this debate over empire was whether conquest based on national interests was a legitimate foundation for the sovereignty of empire, which was no more than an extension of the sovereignty of the nation state, or whether the sovereignty of empire was different from national sovereignty and had to be founded on juridical principles of universality and extraterritoriality that transcended the discourse of national interests and the simple domination and subjugation of one nation by another. An equally important related question was, could empire be based on existing
national institutions, or did existing institutions have to be reconstituted to ground the new supranational discourse of imperial justice?

I will examine the articulation of this crucial debate in the speeches for the prosecution by Edmund Burke and defense in the impeachment trial of Warren Hastings. Hastings was impeached by the British House of Commons for “high crime and misdemeanours” as the governor-general of the East India Company’s government in India (1772–1785). In 1788, proceedings began in the British House of Lords for a verdict. Along with charges of corruption, use of political power for extorting bribes from native rulers of India, abuse of judicial authority, despotism, and arbitrary rule, Hastings was being tried specifically for illegally occupying territory in India by launching aggressive offensive and criminal wars against native rulers, treaty violations, and for open violence against native rulers and the people of India.  

Through an analysis of the trial, I will argue that the British empire was a complex political phenomenon that often carried conflicting and competing visions and agendas of rule. Under the general phenomenon of empire, I


9. The predominant tendency among historians of empire in general and of the empire in India in particular has been to arrive at a single essence of empire, thus reducing what was complex and contained within it differences, contradictions, and even conflicts to a homogenous phenomenon. While one of the oldest traditions of imperial historiography, which I identify as the pedagogical school, developed a seamless narrative of the spread of progress and enlightenment from the imperial center to the colonies, economic histories of empire have similarly constructed the development of empire in terms of homogenous narratives of development of capitalism. Mountstuart Elphinstone’s The Rise of the British Power in the East, ed. T. E. Colebrooke (London: J. Murray, 1887), John Robert Seeley’s The Expansion of England: Two Courses of Lectures (London: Macmillan, 1895) and, more recently, D. A. Low’s Eclipse of Empire (Cambridge: Cambridge University Press, 1991) are representative of the first school, while Dobb’s Studies in the Development of Capitalism and Fieldhouse’s Economics and Empire, 1830–1914 are good examples of the second. In fact, even Marx who constructed contradiction as a driving force of history described the process of colonization in India very much in pedagogical terms, as the spread of the capitalist mode of production and also the values and knowledge systems of the enlightenment to the colonies. For a general Marxist interpretation of empire, see V. G. Kiernan, Marxism and Imperialism: Studies (London: Edward Arnold, 1974). It was only later Marxists like Lenin and other economic historians like Hobson who, in their studies of imperialism, focused on conflicts and the fact of economic exploitation rather than on pedagogical transfers of ideas, values, and institutions. See Hobson, Imperialism: A Study; Lenin, Imperialism, the Highest Stage of Capitalism. Cain and Hopkins’s British Imperialism: A Recent Economic
delineate two converging, but also often competing and conflicting aims and strategies of rule with respect to India. I have identified these as the “colonial” and the “imperial.” The phenomenon and discourse of the colonial was articulated and operated in terms of conquest and domination of the colonized in the name of the national interests of the colonizing nation and was institutionally grounded in the governor-general’s council in India, with the bureaucracy, the army and the police as its most important instruments. The imperial was articulated and operated in supranational critical juridical terms of justice, equity, and impartiality, with the Crown-in-Parliament, the House of Lords, and the Supreme Court in India providing the institutional agency. It was in the Hastings’s trial that these two visions of the future of empire in India dramatically clashed. And, as the eighteenth century drew to a close, it was by no means clear whether the new empire in the east would unfold along one of these two visions, or some form of a combination of the two.

To underscore the complex and fractured nature of colonialism, I will begin by problematizing the question of the identity of Britian as a nation and an empire. In 1906 in India, a prominent Indian National Congress leader and theoretician, Dadabhai Naoroji published Poverty and Un-British Rule in India, a book that was to be crucial to the nationalist understanding of the colonial state in India. As the first detailed theoretical and critical analysis of the economic and administrative policies of the British government in nineteenth-century India, it related widespread poverty in the subcontinent to the drain of wealth from the colonized country to the metropole and to the destruction of its indigenous industry. The primary purpose of this critique was to expose colonial governance in India as “un-British rule.”

The deployment of the term “un-British” raises a critical question: un-

*History of Empire* has also developed some of the arguments of Hobson. However, the problem with these studies is that they confined contradictions to the economic domain at the expense of potential and real contradictions in other institutional domains, such as the judicial, bureaucratic, military, intellectual, educational, etc. In the process of privileging the economic over other domains, they also tended to dismiss most discourses of empire and even those of nationalism as either false consciousness or ideology that, as such, has no history. It is only recently under the rubric of postcolonial studies that works on empire have focused on the study of discourse in the analysis of empire. See Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) and *After Colonialism: Imperial Histories and Postcolonial Displacements*, ed. Gyan Prakash (Princeton: Princeton University Press, 1995). One of the important works that has brought attention to the contradictions within empire in the recent past is *Tensions of Empire: Colonial Cultures in a Bourgeois World*, ed. Frederick Cooper and Ann Laura Stoler (Berkeley: University of California Press, 1997).

der what historical and discursive conditions could one make a critique of British colonial government in India as being “un-British,” since, by “un-British,” Naoroji could clearly not have meant rule by a non-British people? How could the government be British and “un-British” at the same time? It is clear that by using the term “un-British,” Naoroji was not referring to the people in charge of the government (who were British), but the actual mode of governance, and by extension the term “British” referred to the fundamental principle on which, he thought, it ought to have been based. In fact, he was precisely critiquing the tendency of the government to identify colonial rule in India with rule by the British people, thereby reducing the colony to the status of mere property in the hands of the latter. Naoroji’s critique assumed a homology between the terms “un-British” and “unjust.” British rule meant the rule of justice, and any deviation from the principle of justice would transform it into an “un-British” despotic rule.

Thus, in the discourse of Naoroji and the Indian National Congress, the term “British” did not simply refer to the territorial or national identity of a people but was elevated to the status of a principle.11 In this discourse, on the one hand, the term British came to be deterritorialized from a particular geographical, legal, and political unit and reconstituted in justice as a principle. On the other hand, justice itself was deterritorialized from the context of English common law as a system of national laws and reconstituted in the idea of empire.

In what follows, I locate the beginnings of the evolution of this homology of the term “British” with the principle of justice in terms of the historical construction of a denationalized and deterritorialized discourse of empire in the impeachment trial of Warren Hastings. My primary question is—under what imperatives and through what discursive and strategic maneuvers was the discourse of empire constructed as a deterritorialized discourse of justice? How did this homology between the categories of justice and empire come about and how was it institutionally grounded?

The Trial

The impeachment trial of Warren Hastings took place in the last two decades of the eighteenth century in the midst of political turmoil and party intrigues in the British Parliament following the loss of the American colo-

11. Burk’s writings and speeches were extremely popular with Indian nationalists in the late nineteenth and twentieth centuries, so much so that the British colonial administration in India, believing that his works encouraged disloyalty, interdicted his writings at Calcutta University. Many of Burke’s famous speeches were memorized by leading Indian National Congress members and frequently recited in political meetings. See Ganesh Prashad, “Whiggism in India,” Political Science Quarterly 81 (1966): 412–31.
nies. As Bowen has pointed out, the years between 1756 and 1783 were of particular imperial instability, when Britons vigorously sought to rework ideas of empire, governance, rule, and supremacy. 12 An integrated concept of the British empire, according to David Armitage, had already emerged throughout the British Atlantic world by the 1730s, and both imperial officials and provincial elites had come to share some basic conceptions of what distinguished the British empire from both past empires and contemporary imperial formations. While Protestantism, commerce, and maritime supremacy had emerged as some of the British empire’s distinguishing attributes, what contemporary observers saw as crucial to British imperial identity was the idea of liberty, the notion that its inhabitants, unlike those of other empires in the past and in the present, were free. This freedom was embedded in, and found expression in, institutions like the law (particularly the common law), property, rights, and the Parliament, which were exported all over the British Atlantic world. 13

As the British Atlantic empire grew in size and prosperity in the eighteenth century, the precise relation between empire and liberty became one of the central points of contention. Metropolitan and provincial spokesmen on both sides of the Atlantic world debated vigorously both the nature of the constitutional relationship between the metropole and the colonies and the possibility of viable institutions that would balance the needs of empire and the requirements of liberty. The question that had emerged in these debates as fundamental was whether the colonies should be reduced to perpetual dependencies of Britain (as in the case of imperial Rome), which would make laws and appoint governors over them, a model that was advocated by metropolitan spokesmen like James Abercromby, Henry McCulloh, William Shirley, and others, or whether the relationship between the metropole and the colonies was to be a more balanced partnership (advocated by provincial spokesmen like Benjamin Franklin) in which the colonies would be more in the position of self-governing confederates, as in ancient Greece. 14 Closely related was the other critical question, were


colonists to share equal rights and liberties with all Englishmen, or did the necessities of empire require that they be reduced to a greater level of dependence than other Britons and denied the liberties and privileges that were enjoyed by British subjects in the metropole?

In the years preceding the impeachment trial, the reasons for the American Revolution were still being hotly debated in political circles in England, but there was little dispute about the main problem—the inability of the two sides, the colonists and the English Parliament, to come to an agreement on the constitution of the British empire and the distribution of power within it. As Jack P. Greene has pointed out in his analysis of the American Revolution, for a century and a half preceding the Revolution, there had been no explicit articulation of the precise relationship between the metropolis in England and the American colonies within the larger structure of empire. Thus, when the debates over the English Parliament’s right to tax the colonies came to the fore during the Stamp Act Crisis in 1764–65 and the Townshend measures in 1767–72, there was little by way of precedent in the British constitution that could point to a resolution of the crisis.15

At the center of the constitutional debate between England and the American colonies was the nature of the legislative relationship between the metropolis and the colonies, specifically whether, and to what extent, America was to be legislatively subordinated to the British Parliament. The argument of the colonists for “constitutional multiplicity” within the empire, for each of its constituents to be autonomous entities with their own legislatures, but under the British Crown, was unacceptable to the majority of people in England, who insisted on the indivisibility of sovereignty and asserted that, without the maintenance of legislative supremacy of the British Parliament over the colonies, the empire would cease to exist.16 The American Revolution was the result of a direct clash between two legislatures, the British Parliament on the one hand and the colonial legislatures on the other, and as Greene points out, “in the absence of any impartial tribunal to settle constitutional disputes between the center and the peripheries” of the empire, there was no means of resolving the conflict by law.17


17. Greene, Understanding the American Revolution, 85.
At around the same time as the conflict between the British Parliament and American colonies was heating up, another affair at another corner of the world was beginning to occupy the attention of the English people. This involved the increasing financial and political influence in Parliament of the East India Company, a mercantile body, that, on the basis of its trade monopoly in the East, derived from a charter from the British Parliament, had amassed enormous fortunes from India, over which it was also rapidly extending its political power. Registered with the London Stock Exchange, this trading company, that had also become the government in Bengal, was effectively directed by a group of jobbers and brokers who, for all practical purposes, had become legislators for Bengal, determining policies for the Company’s government on behalf of the shareholders of the company. However, the Company, in order to avoid the responsibilities of rule in the colony, had consistently refused to acknowledge the fact that it was no longer simply a mercantile body, but had come to acquire state power in eastern India.

The most important goal for this company’s government in Bengal, in keeping with the logic of the stock exchange, was to make the maximum profit from the colony in the shortest possible time. The profit from India primarily came in two forms: (1) rent collected from cultivators at high rates, and (2) profits from often unfair trade practices. Since the government had established monopoly power over trade, it was in the position to fix prices on goods that the cultivators brought to the market after paying the rent and then to sell them at high margins in European markets or to other European trading companies. The immediate consequence of this double squeeze on the cultivators was large-scale devastation and pauperization of the Indian peasantry, leading ultimately to famine within the first fifteen years of the company’s rule.

It was in the wake of these governmental practices that complaints against the East India Company’s government and its oppression and plunder of

the people of India started pouring into England from India. The prospect of a second empire in the east intensified the already heated debates about empire in England, particularly because the emerging colony in India was not a settler colony, like those in America, but was based on conquest, requiring new strategies of rule and new ideologies of governance and legitimacy. There was an awareness that Indian wealth had become crucial to the economic stability of England, and some imperial theorists like Thomas Pownall even argued that the loss of India might cause a “national bankruptcy” and result in the ruin of the whole edifice of the British empire. Yet, the old fear that an extended empire and the inflow of this vast wealth into the English system would corrupt institutions within England and eventually result in the collapse of the British constitution, and, with it, both empire abroad and liberty at home, was an equally powerful argument that resisted the drive toward imperial expansion.21 In this new context, the constitutional implications of colonization and rule over a large alien population became a particularly urgent concern for metropolitan thinkers who began to debate not only how the constitutional relationship between Britain and this new empire of conquest was to be constructed but also the institutional framework within which empire was to operate.

Lord North’s Regulating Act of 1773 was the first of the Parliamentary Acts that sought to impose restraints on the Company’s authority in India and make it accountable to the British state. The primary goal of the Regulating Act was to create institutional barriers against the exercise of arbitrary power by the governor and the rampant corruption of the Company’s servants by introducing a system of checks and balances in the Company’s administration and establishing a proper mode of administering justice in India. With this purpose in mind, the Act created the institution

21. Bowen, “British Conceptions of Global Empire,” 14. Parallels between the corruption that the East India Company’s servants were introducing into England (particularly through the practice of buying seats in Parliament and thus threatening the existing political balance in the House of Commons) and the corruption in the days of the declining Roman Empire were not hard to imagine. Edward Gibbon in his The Decline and Fall of the Roman Empire, published between 1776 and 1788, attributed the ruin of the Roman Empire to “immoderate greatness,” specifically, to the destruction of the virtue of the republic by the corruption that was the inevitable result of the acquisition of an extensive empire. It was the opportunity that empire provided to military commanders and economic speculators to acquire power that could not be controlled by law and conflicted with the virtue of equality, and the inevitable corruption that arose out the governance of the empire by military commanders, independently of the republic that ultimately resulted, in Gibbon’s view, in the absorption of the city of Rome by the empire and thus in its ultimate decay. To contemporaries of Gibbon, the East India Company’s emerging system of governance in the new colony in the east threatened to plunge the British state down a similar path of decline. See Edward Gibbon, The Decline and Fall of the Roman Empire (New York: The Modern Library, 1932).
of the Supreme Court, an independent judiciary under the direct authority of the British Parliament, with the responsibility of acting as an effective external check against the absolute powers of the Company's administration in India. Bringing with it English common law, the Supreme Court was given jurisdiction over all persons in Bengal, Bihar, and Orissa. It had the power and responsibility to protect the "natives" of India from the Company's officials by prosecuting all offenses by the latter and even issuing summons against the governor-general and council in the event of cases being brought against the Company itself. It was also given the right to review and veto all laws passed by the governor-general's council, the supreme executive and legislative body in Bengal. Within the council itself, the Act placed severe restraints on the governor-general's actions by the requirement that all executive and legislative decisions be sanctioned by a majority vote in the council (over which he had no power of veto).22

The Regulating Act, however, failed in its objective of making the Company's administration in India accountable to the British state. Instead, the multiple levels of conflict over sovereignty that it unintentionally precipitated in India between the governor-general and his council on the one hand, and between the Company's executive and the Supreme Court as an autonomous external judiciary on the other, effectively brought the administration in India to a standstill. The situation was rendered more confusing by the conflict between English common law, which the Supreme Court brought with it to India, and the native systems of law, which already held sway in courts in the provinces of Bengal under the authority of the governor-general and council. These conflicts and contradictions made it imperative for the Parliament to intervene once again in the affairs of the Company in India by establishing a select committee of enquiry into the Bengal judiciary in 1781 under the guidance of Edmund Burke. Ultimately, there were two more Parliamentary Acts—Fox's India Bill of 1782 and Pitt's India Bill of 1784. The first of these Acts tried to resolve the fundamental conflict between the Company's trading interests and its responsibilities as a government by attempting to bring the administration of India under the direct control of the Crown. The second, in contrast, proposed that the Company retain control over the administration in India while, at the same time, a Board of Control was created in London, subordinate to Parliament, that would supervise the activities of the Company in India.

However, both these bills could accomplish little in terms of controlling the Company's commercial and political power, even though they problematized, for the first time, the contentious relationship between the

commercial interests of the East India Company and its political powers of governance in the newly emerging colony. While Fox’s India bill was defeated in the House of Lords, sealing the fate of his ministry itself, Pitt’s bill accommodated all the demands of the East India Company and left it almost entirely intact, fanning the view that his ministry was, in fact, in league with the Company.23

It was in the aftermath of the loss of the American colonies and the failure of the Regulating Act of 1773 and the two India bills in Parliament to bring about effective reform in the East India Company’s administration in India that the impeachment trial of Warren Hastings began in 1788 in Westminster, charging the governor-general of the East India Company’s administration in India with corruption, bribery, high crime and misdemeanors. After impeachment in the Commons, the case finally moved to the House of Lords, the highest court of appeal in England, where Edmund Burke and his team of managers launched a prosecution for the final verdict.

Conquest, Property, and National Interests:
The Discourse of Colonial Sovereignty

I begin with an analysis of the arguments in defense of Warren Hastings that fundamentally challenged the very legal authority of the British Parliament to try him for crimes committed in India. The defense was constructed around two major claims about sovereignty. The first was based on an identification of the sovereignty that the East India Company exercised in India with its chartered rights, granted to it by the English Parliament.24

When Fox had introduced his bill in Parliament, based on the principle that the Company’s commercial affairs ought to be separated from its functions as a government and, therefore, that its “patronage” should be taken away, the representatives and spokesmen for the Company had strongly opposed that bill.25 In all the debates in Parliament about its administration in India, the Company had insisted that the bill was an encroachment on their chartered rights and their rights to private property, that it aimed at annihilating a body of commercial people and destroying their property,

25. Patronage referred to a system wherein the Directors of the East India Company had the right to dispose of appointments in the East India Company’s administration in India, such as those of civil servants, writers, cadets, and assistant surgeons for the Company’s armies, and barristers and attorneys for the Company’s courts. Each Director had at his disposal at least six or seven appointments in a year, and often, some Directors sold their patronage to buy and maintain seats in Parliament. See Philips, The East India Company, 14–17.
and that it was, therefore, a despotic bill by its very nature. The Company had asserted that the territorial revenues of India could not be considered as belonging to the British government, any more than could the East India Company’s commercial concerns be so considered, for both of these fell within the private property of the Company as a chartered body. In fact, they had argued, what was being attempted on the pretext of giving stability and permanency to the property of the inhabitants in India was a destruction of the rights of Englishmen in England. 26 The defense of Warren Hastings in the impeachment trial continued this line of argument.27

The second and more radical claim was that the “crimes” in India that Hastings was being tried for, such as aggressive offensive wars against “native” rulers, treaty violations, and abuse of judicial authority, were, in fact, legitimate exercises of sovereign power in the new colony. When faced with a compelling account of the political nature of the Company’s operations in India, Warren Hastings defended his actions as the governor-general, making certain assertions about the source and nature of the sovereignty of the Company’s administration in India.

In so far as the source of this sovereignty was concerned, Hastings claimed that the Company had inherited the sovereignty over Bengal through a grant of the Diwani (the right to collect revenue) from the Mughal emperor.28 Rejecting the legitimacy of the English Parliament’s repeated


27. This claim needs to be seen in terms of a long history of contentious debates in late seventeenth and early eighteenth-century England between the supporters of English settlers and planters in America, intent on expanding British possessions in the new colony on the one hand, and opponents of colonization of America on the other. The opponents argued that, besides unfairly dispossessing the Native Americans of their land, colonization was enfeebling England, and, even if allowed to continue, the colonies ought to be kept in a position of strict dependence to the mother country. See Barbara Arneil, John Locke and America: The Defence of English Colonialism (Oxford: Clarendon Press, 1996) and James Tully, An Approach to Political Philosophy: Locke in Contexts (Cambridge: Cambridge University Press, 1993). To a large extent the East India Company was reformulating the same contention in the context of the newly developing colony in India. This colonial claim that property rights in the new colony could not be interfered with by the Crown was closely tied to the Lockean argument that property was essentially grounded on man’s labor and preceded the state. The state’s only function was the protection and preservation of property and any attempt to interfere with property was an exercise in tyranny. See John Locke, Second Treatise of Government, ed. C. B. Macpherson (Indianapolis: Hackett Publishing Co., 1980), 18–30, 65–68.

28. This right to revenue collection, or Diwani, was obtained from the Mughal Emperor Shah Alam at the conclusion of the battle of Buxar (1764) in which the East India Company’s army under Robert Clive defeated the combined troops of the Mughal emperor and the Nawab of Awadh. Rather than declare themselves the new sovereigns of Bengal and Awadh, the
attempts to bring the Company’s administration in India under its control, as reflected in the Regulating Act of 1773 and the two Parliamentary Bills of 1783 and 1784, Hastings asserted that since this sovereignty had nothing to do with the English Parliament, it was beyond its jurisdiction and had to be exercised in accordance with Mughal laws, customs, and conventions regarding sovereignty, not with those of the English.

The sovereignty which they (the soubahdars, or viceroys of the Mughal Empire) assumed, it fell to my lot very unexpectedly, to exert; and whether or not such power, or powers of that nature, were delegated to me by any provisions of any act of parliament, I confess myself too little of a lawyer to pronounce. I only know that the acceptance of the sovereignty of Benares, etc. is not acknowledged or admitted by any act of parliament; and yet, by the particular interference of the majority of the council, the Company is clearly and indisputably seized of that sovereignty. If therefore, the sovereignty of Benares, as ceded to us by the vizier, have any rights whatever annexed to it (and be not a mere empty word without meaning), those rights must be such as are held, countenanced, and established by the law, custom and usage of the Mogul empire, and not by the provisions of any British act of parliament hitherto enacted. Those rights, and none other, I have been the involuntary instrument of enforcing.29

This claim about upholding indigenous customs, usages, and rights was not surprising, given that Hastings, in his position as governor-general in India, had been a staunch opponent of the imposition of English common law on the people of India and one of the most enthusiastic patrons in the East India Company of indigenous learning, particularly in the field of law. As governor-general, he had encouraged the systematization of different and often conflicting systems of law in India by commissioning some of the first translations into English of ancient Hindu and Muslim legal texts and setting up educational institutions for the teaching of indigenous law.30

East India Company persuaded the emperor to grant them the right to the land revenues of the province of Bengal on the payment of a small annual tribute, thus taking on the role of a tributary under the de jure sovereignty of the Mughal emperor. As a result of this settlement with the Mughal emperor, sovereign power in Bengal was split, with the East India Company controlling the reins of power by controlling the machinery of revenue collection, and the puppet ruler of Bengal continuing to bear the responsibilities of maintaining law and order and criminal administration. See Mukherjee, Rise and Fall, 268–84.


However, even as Hastings encouraged the systematization of India’s legal traditions that, he believed, was necessary for the administration of civil and criminal justice and the ultimate stability of British rule in India, he also asserted that these very traditions allowed for the exercise of arbitrary and exceptional power by the sovereign in the political domain as a matter of state necessity.  Moving from the source to the nature of sovereignty, Hastings, rather than deny the accusations of arbitrariness, argued that, in fact, in India, sovereignty in practice could mean nothing but despotism. According to him, this despotism that he inherited from the Mughals was provoked by the nature of the people themselves. It was a reaction to a permanently rebellious population, rather than a conscious choice on the part of the government:

The Hindoos, who never incorporated with their conquerors, were kept in order only by the strong hand of power. The constant necessity of similar exertions would increase at once their energy and extent, so that rebellion itself is the parent and promoter of despotism. Sovereignty in India implies nothing else. . . . The whole history of Asia is nothing more than precedents to prove the invariable exercise of arbitrary power.

What justified absolutism in India, then, and necessitated the unhindered exercise of sovereign power (in contrast to England where it was illegitimate), was a set of exceptional circumstances that could only be likened to the state of civil war, anarchy, and chaos, described by the political philosopher Thomas Hobbes in his book Leviathan, as a stage antecedent to the emergence of the state. Resorting to the familiar Hobbesian discourse of sovereignty, Hastings contended that, given this natural state of rebellion, since the sovereign’s power alone could guarantee the security and preservation of life and property, it necessarily had to be unlimited and unquestioned, and notions such as justice and liberty could have no existence independent of his will.

34. In making this claim, Hastings was also asserting the need to remove the institutional checks that the East India Company had imposed on his authority by making his decisions as governor-general subject to the approval of the members of the Council. In seeking the concentration of authority in his own hands, he claimed that, as governor-general, he was ultimately the representative of the British Crown and, therefore, had to exercise royal sovereignty in India in accordance with the interests of the king. These, he contended, were absolute and subject neither to the interests of a commercial body, the East India Company, nor to Mughal power. See Neil Sen, “Warren Hastings and British Sovereign Authority in
Painting a picture of a society in a state of perpetual war, Hastings articulated the state’s relationship with the people in terms of a permanent conflict, where the people were “rebels” and enemies of the state on an a priori basis. Thus, the wars that he had waged as governor-general against native rulers and people, or his breaches of faith and treaty violations, were, Hastings argued, not “crimes” but necessary and legitimate responses to rebellious governors and people and, to that extent, were punitive in nature. With respect to the Rohilla wars, he asserted that they were necessary because the Rohillas had refused to pay for the protection that the Company’s government had given them against invasion. “We made war with them, on just grounds surely, unless any other process than that of the sword can be devised for recovering the rights of nations.”35 Similarly, in referring to his policy towards the Marathas, Hastings asserted that he had pursued war because peace could be attained not by concessions and entreaties, but by the “terrors of a continued War.”36 Affirming “as a fact unquestioned and unquestionable that we derive our original title to our possessions in Bengal from the sword alone,” Hastings contended that the new political base of the colonial state had to be force, as it had been for the Mughal state, for, without force, chaos and anarchy would ensue and the very existence of the colonial state would be at risk.37 Under the permanent threat of the dissolution of authority, the whole structure of the newly established colonial government could have but a single object, security, and the only bond between the subject people to the colonial government was that of fear.

It was the necessity of fighting these perpetual wars against a rebellious population that also made it imperative, Hastings asserted, for the East India Company’s officials in Bengal to take bribes and presents, acts that had been condemned as crimes by Burke and his prosecutorial team. Given the limited revenue available to the Company’s state in India, others sources of funds had to be found in a “time of most pressing Necessity, in


37. The Defence of Warren Hastings, Esq., late Governor General of Bengal, at the Bar of the House of Commons, upon the matter of the several charges of High Crime and Misdemeanors, presented against him in the year 1786 (London: Printed for John Stockdale, 1786), 82.
order to relieve the Exigencies of the State” which were “in such imminent Danger and Distress, that every little Aid of this Kind became an object of National Consequence.”38 Thus, Hastings argued in his defense that every policy that he had pursued in India had been dictated by the necessity of preserving the East India Company’s state in India and not by his personal corrupt motives.

Sovereign power under the exceptional conditions in India had to be, as Hobbes had argued, absolute and unlimited. As the holder of this absolute power, Hastings had neither the obligations to respect previous covenants, nor was he bound by any laws. In opposition to theories of the natural freedom of the people that were relevant for England, it was the doctrine of the natural subjection of the people and patriarchal despotic power that was appropriate for India. The will of the sovereign was supreme and could not be subject to positive laws, and therefore, notions such as crime, punishment, and rights had little relevance.39

Deterritorialized Justice and the Discourse of Imperial Sovereignty

It was against the “colonial” discourse of sovereignty, based on the twin ideas of government as corporate property on the one hand, and arbitrary power on the other, that Edmund Burke developed what I have called the imperial discourse of justice. Faced with this unique logic of colonial discourse, he had two distinct tasks. First, he had to prove that the East India Company in its role in India was not simply a mercantile corporate body, but operated as a government, and that, therefore, the logic of private property, as defined by the common law, was not sufficient to account for the Company’s operations.40 Second, he had to prove Warren Hastings’s characterization of “native” sovereignty false by arguing, on the one hand, that both the Mughal and Hindu rulers in India had well-developed systems of laws, which precluded the exercise of arbitrary power by the sovereign, and on the other, that Hastings’s contention about a permanently rebellious population was historically and factually unfounded.41

As it turned out, Burke comprehensively developed both these lines of argument to great effect. He began his prosecution by establishing that the

40. Burke, Speeches, 1:58–95.
41. Ibid., 104–26.
Mughal and Hindu kings of India were not arbitrary rulers. On the contrary, they ruled in accordance with established systems of jurisprudence, that were, in fact, far more advanced than those in England and Europe: “... those people lived under the Law, which was formed even whilst we, I may say, were in the Forest, before we knew what Jurisprudence was. ... it is a refined, enlightened, curious, elaborate, technical Jurisprudence under which they lived, and by which their property was secured and which yields neither to the Jurisprudence of the Roman Law nor to the Jurisprudence of this Kingdom. ...” 42 He asserted that the rights of the people of India had been established long before the advent of the colonial state, and it was, therefore, obliged to protect the people in their rights.43

However, in so far as this trial involved two exclusive national/municipal systems of laws, customs, and jurisprudence, Indian and English, it presented a series of jurisprudential dilemmas. Under what jurisprudence could an English tribunal try one of its own subjects for violence and “crimes” against an alien population? Could a subject of England be tried in the name of the laws of an alien land? How could those acts of violence be translated into the juridical language of crime and punishment? How was the Company’s claim of corporate property, that was firmly based on English common law, to be delegitimated, while, at the same time, retaining the basis of the trial in some form of jurisprudence? Finally, how was the discourse of the will that was the basis of Hastings’s defense, and also the basis of continental jurisprudence, to be firmly rejected in the discourse of empire?

These series of dilemmas were made even more acute by the fact that impeachment involved a trial for public crimes that were political in nature and, therefore, directly engaged some of the fundamental questions of politics—sovereignty, rights of an alien population, and rules of war. Thus, as Burke pointed out, it was not simply Warren Hastings as an individual, or the specific criminal acts that he, and the government he headed, might


43. In opposition to the Hobbesian theory of absolute sovereignty that discursively framed Hastings’s defense, the political thinker John Locke had proposed that the state of nature, rather than being characterized by chaos and anarchy, was a state in which people had property and rights. These rights were only conditionally surrendered to the monarch and the people had an obligation to obey only so long as the state worked for their good. In claiming that the rights of the people of India were prior to the state, Burke was resorting to this political tradition in England that prioritized the liberty of the people against claims of absolute power of the sovereign. As the king was subordinate to the law in England, as the Mughal and Hindu rulers in India were subordinate to the laws in India, so Burke argued, Hastings and the Company’s government in India had to necessarily be subordinate to law. See John Locke, Second Treatise of Government, 101–24.
have engaged in, but the colonial state itself, and the principles and maxims on which its discourse was founded, that were being indicted in this trial. The judgment given in this trial, therefore, would be crucial, because it would serve as a precedent and constitute the primary source of a critical discourse on colonialism in India. Emphasizing this point in no uncertain terms, Burke reminded the judges: “According to the judgement that you shall give upon the past transactions in India, ... connected as they are with the principles which support them, the whole character of your future government in that distant empire will be unalterably decided.”

Burke was well aware of the historical significance of this trial and the unprecedented nature of the dilemma that faced the judges. As he pointed out, this trial brought forth a new set of conditions for “it has a relation to many things, it touches many points in many places wholly removed from the ordinary beaten orbit of our English affairs.” This case could not be contained and tried within any of the exclusive municipal traditions since “this cause is not what occurs every day in the ordinary round of municipal affairs.” As a consequence, the trial presented a rupture between the traditional national systems of legal discourses and the emerging reality of empire: “... hitherto we have moved within the narrow circle of municipal justice. I am afraid that, from the habits acquired by moving within the transcribed sphere, we may be induced rather to endeavour at forcing nature into that municipal circle, than to enlarge the circle of national justice to the necessities of the empire we have obtained.”

The necessities of empire made it imperative that the familiar world within which the East India Company’s operations had been discussed so far be abandoned. Burke launched a vigorous attack against what he termed Hastings’s “plan of geographical morality.” Hastings had claimed that two different territorial systems of laws and customs ought to be applied to judge the nature of the Company’s affairs in India and his actions as the governor-general—the common law, on the one hand, that protected the Company’s chartered rights as a corporate body, and, on the other, the tradition of arbitrary political rule as a phenomenon peculiar to India and the Asiatic state, which the Company had inherited from the Mughal empire, granting them immunity from any judgments grounded in the standards of English common law.

... these gentlemen have formed a plan of geographical morality, by which the duties of men, in public and in private situations, are not to be governed by their relative relation to the great Governor of the universe, or by their

44. Burke, Speeches, 1:9–10.
45. Ibid., 19.
46. Ibid., 18.
relation to mankind, but by climates, degrees of longitude, parallels not of life but of latitudes; as if, when you have crossed the equinoctial, all the virtues die. . . . This geographical morality we do protest against. Mr Hastings shall not screen himself under it; . . . the laws of morality are the same everywhere. 47

But on what theory of jurisprudence was this new discourse of empire to be based, if not on municipal law? For this, Burke turned to a discourse of jurisprudence that over the last two centuries had become central to legal debates, particularly in Europe—the discourse of natural law. 48 “There is but one law for all, namely that law which governs all law, the law of our Creator, the law of humanity, justice, equity:—the law of nature and of nations. So far as any laws fortify this primeval law . . . such laws enter into the sanctuary, and participate in the sacredness of its character.” 49

The historiography on Burke has not adequately accounted for the irruption of the discourse of natural law in his speeches during the trial. Given Burke’s status as one of the greatest and most articulate exponents of common law jurisprudence, the privileging of natural law over common law jurisprudence in this trial has been read by some scholars like John MacCunn and Leslie Stephen as a sign of inconsistency, and even political opportunism, while others like Charles Vaughan have dismissed it as a rhetorical digression. 50 Yet others like Peter Stanlis, while rightly recognizing and emphasizing the importance of natural law in Burke’s thought, particularly in his speeches on India and to some extent Ireland, have tried to suture all the seeming disparities into one coherent whole by finding the jurisprudence of natural law at work in all of Burke’s writings, thus ignoring the obvious shift from Burke’s earlier writings on judicial and political issues. 51

47. Ibid., 94.
49. Burke, Speeches, 1:504.
51. Stanlis, Edmund Burke and the Natural Law, 231–33. Stanlis sees no inherent contradiction between Burke’s appeal to common law on the one hand and to natural law on the other. Rather, in his interpretation, the two have a “close reciprocal relationship” in Burke’s
To understand why Burke created a sharp disjuncture between common law and natural law jurisprudence in this trial and privileged the latter in the context of the emerging empire in India, it is necessary to lay out the different senses in which the term common law was used in eighteenth-century England. First, it referred to a substantive system of territorial municipal laws specific to England, based on English customs and traditions. Second, it referred to a particular set of judicial procedures and practices such as adversarial rules of procedure, due process of law, trial by jury, and judgment based on precedents, that guaranteed protection against arbitrary power. Third, in a more general sense, common law jurisprudence referred to the process of making laws, locating the source of law in customs, tradition, and history, rather than in positive legislation based on the will of the legislator, or legal codes based on abstract rules. Thus, implicit within common law jurisprudence were both universal normative principles of how laws were to be made and what procedures were to be followed in courts—principles that could be and were carried by British colonizers to different parts of the world in the process of building empire—and also particular claims about rights deriving from specific British territorial and municipal laws.

In the context of England, where the common law applied only to Englishmen, it was possible for legal scholars like Blackstone to argue for the compatibility of universal principles implicit in both common law and natural law jurisprudence and to attempt to ground English common law in natural law and what he called the “eternal principles of justice.” However, in contrast, in the emerging eastern empire, where the real challenge was determining the extent to which English common law and the rights that derived from it were universal and could be applicable to an alien people, it was the conflict and clash between the principles of universality and par-

---


53. Blackstone maintained that there was a root connection between natural law and common law: “For [God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former . . . . The law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other . . . . [No] human laws are of any validity, if contrary to this and such of them as are valid derive all their force, and all their authority . . . from this original.” See William Blackstone, Commentaries on the Laws of England (facsimile of 1st ed., 1765–69; Chicago: University of Chicago Press, 1979), 1: Introduction, 2:40–41.
ticularity in common law that had acquired critical importance. The central question was, could the people of India make an equal and universal claim with British subjects to the rights deriving from the principles implicit in common law, or was common law a particular territorial system of laws and procedures that only Englishmen, who had carried it with them to the colonies, could claim as their common inheritance?

The collective assertion of Englishmen in eighteenth-century India had been that the rights deriving from the substantive and procedural elements of common law was a particular English inheritance to which they had an exclusive right. For example, in cases in which the Company’s servants were accused of committing crimes against “natives,” they rejected the authority of “native judges” in indigenous courts to try them and claimed that they had the special right to be tried by a jury of peers (i.e., Englishmen) in an English court, a right granted exclusively to them by common law and not to indigenous people. This made it impossible to prosecute Company servants and Englishmen in general who had committed crimes against Indians.54 The Supreme Court instituted by the Regulating Act of 1773 tried to remedy the fundamental injustice of the situation by introducing procedural principles of equality, making it possible for Indians to bring cases against the British. Yet it failed to establish equality before the law as a universal principle in India, primarily because its jurisdiction did not extend to the courts in the provinces outside the Presidency town, over which the governor-general and council had authority. Also, its attempt to introduce substantive elements of English common law (particularly in criminal cases) in India, where native systems of law already held sway, made it unpopular with the people of India and was criticized by Burke himself as an unwarranted imposition on the colonized.55 Thus, the claims by Englishmen in India to exclusive rights based on the procedural and substantive elements of common law continued well into the nineteenth century, depriving the people of India of any grounds on which they could claim impartial justice against the crimes of the colonizing English.56

56. As late as 1883, when Sir Courtney P. Ilbert, a Law Member of Lord Ripon’s legislative council, proposed a bill to end the judicial privilege of Europeans not to be tried by Indian justices, Europeans in India launched a massive agitation that forced the government to withdraw the bill and substitute a much weaker act that permitted the defendant to insist on a jury trial, where half the jurors were European. See Burton Stein, A History of India (Oxford: Blackwell Publishers, 1998), 272–73.
In contrast to the earlier British empire in America, where the colonists, being largely English, had been able to claim the rights of Englishmen and make common law jurisprudence the source of impartial justice, in the case of India, the Indian population could not make any such claims, as the protections of English common law did not extend to them.57 Thus, it was the inadequacy of common law jurisprudence as a substantive system of British laws to serve the needs of the newly emerging imperial formation in the east that made it necessary for Burke to privilege the discourse of natural law in this trial. In order to give the people of India an equal claim to justice with Englishmen, and make it possible to indict Warren Hastings and the East India Company’s servants for their crimes against an alien population, it was imperative to turn from common law to the principles of natural law as a higher system that, in so far as it was supranational, could be the source of impartial justice for both colonizer and colonized.

It was to found the discourse of empire in the east on a deterritorialized notion of justice, humanity, and equity that Burke brought into play two synonymous notions of natural law and the law of nations, which not only had precedence over all positive/municipal laws but, in fact, constituted the ground on which the latter had to be justified. It was the conceptual split between the discourse of natural law and that of municipal law that cracked open the space for a critical juridical discourse on arbitrary colonial practices. This allowed Burke to strategically deploy the discourse of natural law to reign in the discourse of sovereign arbitrary will and claims about the extra-legal nature of war, on which Hastings’s defense had been based.

Natural law, in its modern form, was first comprehensively articulated by Hugo Grotius in the early seventeenth century precisely to limit the violence and plunder associated with the unlimited nature of war at a time of incessant strife between nations, particularly in the context of colonial expansion.58 The question that Grotius was trying to answer was whether

57. This is why, in America, efforts by people like James Otis to ground colonial rights in natural law did not succeed. Colonists preferred to resort to the much stronger and more easily defended argument that they were protected by English common law. In making this argument, they excluded non-British inhabitants of North America such as slaves and native Americans from the claim to equal rights. See James Otis, “The Rights of the British Colonies Asserted and Proved,” in Pamphlets of the American Revolution, 1750–1776, ed. Bernard Bailyn (Cambridge: Belknap Press of Harvard University Press, 1965–), 1:409–82. Also see Shannon, Indians and Colonists, 99.

nations were justified in waging wars on other nations, killing their people, and pillaging their wealth with impunity, or if there were limits to how far nations could go, even in war, and whether aliens had rights in war. Grotius’s answer in no uncertain terms was that there were limits to what could and could not be done in a war, that wars needed to be justified.59

Grotius’s most important achievement was the characterization of war in terms of justice, as just and unjust wars, whereby he brought the phenomenon of war within the range of the discourse of jurisprudence. No longer was war perceived as the result of a total breakdown of the legal and the judicial, but could even be thought of as its very extension and continuation, to the extent that it was a just war. To be characterized as just, wars had to fulfill certain criteria. Apart from the procedural requirement of a prior declaration, wars required just causes such as self-defense and defense of property and could not be fought simply for purposes of self-aggrandizement or plunder. Thus, Grotius set up a homology between war and judicial proceedings, thereby marking a break with all preceding discourse, in which war signified the moment of the dissolution of all laws with which one could judge actions.60

In making this argument, Grotius was challenging the existing discourse of sovereignty, founded on the writings of Bodin, in which war was the ultimate moment of the exercise of sovereignty, and any consideration of setting limits to war was a contradiction in terms.61 By bringing war within the domain of the discourse of justice, Grotius brought sovereignty within its domain too. In making the concept of justice supranational and universal, the discourse of natural law made states initiating wars vulnerable to the charge of waging criminal wars, and, therefore, under appropriate institutional conditions, indictable in a court of law. This opened up the space for a critical juridical discourse about war and its consequences.

At the trial, Burke deployed the existing discourse of natural law to the colonial setting in India, thus creating a second strata of discourse from which colonial discourse articulated by the East India Company could

---

59. See the Prolegomena in Grotius, The Law of War and Peace.

be critiqued. Rejecting Hastings’s claim that the wars that the Company had waged in India against native monarchs and people were a legitimate exercise of sovereign power against a habitually rebellious population, Burke argued that, on the contrary, it was Hastings and the Company’s government that had waged criminal offensive wars against the people of India, leaving them no choice but to resist. Each case of rebellion that had broken out against the authority of the East India Company’s government in India was provoked, Burke asserted, by the criminal policies, treaty violations, breach of trust, and violence perpetrated by Warren Hastings and the Company’s government.

The war against the Rohillas, in Burk’s view, was one of the most flagrant examples of an unjust war waged against a peaceful people, for there was no proof that the latter had engaged in any acts of hostility or aggression against the Company, or the King of Awadh, Nawab Shuja Dowla, with whom Hastings had entered into a criminal alliance for their extirparation. In the case of Benares, rebellion broke out when Hastings, in gross violation of the treaties and agreements of peace and friendship signed between the Company and the king, Chait Singh, guaranteeing the latter the protection of the East India Company on the payment of a regular tribute, not only attempted to criminally extort enormous bribes from him, but on his failure to pay, insulted and imprisoned the king, confiscated his property, and tyrannically expelled him from those territories that he had held on the basis of repeated agreements with the Company. The “Bloodshed, War and Confusion” that resulted from this “unjust war,” Burke argued, were “solely imputable to the Misconduct, Violence, Tyranny and culpable Provvidence of the said Warren Hastings.”

Finally, in Bengal, it was the exorbitant rents imposed by the Company’s government on the peasants, and the cruel and inhumane methods deployed by their agents to extort payment, that ultimately resulted in unarmed rebellion in the districts of Rangpur and Dinajpur. In so far as all these rebellions were defensive and fought for the preservation of life and property, in Burke’s opinion, they were just, legal, and legitimate.

In characterizing the widespread rebellions in India as just resistance, whose roots lay in the flagrant violation of treaties by the Company, Burke, while deploying the principles of natural law, was also marking a critical departure from earlier natural law theorists, who, until then, had debated the justice and injustice of wars primarily from the perspective of European colonizing states. The discourse of natural law had been developed in the period of expanding colonialism to govern relations between European states and to prevent wars between them. Many natural law writers had

62. Marshall, Writings and Speeches, 6:143.
argued that the principles of natural law did not apply to nations and people lying outside Christian Europe, who, therefore, had no rights under natural law.\textsuperscript{63} Even those natural law theorists who constructed rules that sought to limit aggrandizement by European colonizers in the Americas and Asia and wrote with sympathy about the rights of the colonized (i.e., the native Americans, in the American case) denied the “natives” the absolute right to resist, justifying the European acquisition of territory and property in non-European lands on grounds of just war (if, for example, the right of free passage and free missions was denied).\textsuperscript{64}

In his speeches in the impeachment trial, Burke unequivocally inserted into the history of natural law discourse and the domain of just wars an alien and non-European colonized people’s absolute right to resistance against aggressive colonizing powers, whether states or private companies. In so far as self-preservation was an obligation imposed by nature, the colonized people, he argued, had not just a right, but a duty to rebel against sovereign authority if it was tyrannical. Asserting that the same Law of Nations prevailed in Asia as in Europe, Burke contended that the right of resistance was not reserved just for the people of England and Europe, but could be found to be a fundamental right written into the very constitution of Mughal rule in India.\textsuperscript{65} The Muslim ruler of India, far from being arbitrary, had to be by the laws of the country “a protector of the person and property of the subjects and a right of resistance is directly established by Law against him and even a duty of resistance.”\textsuperscript{66} Thus, if the people of India had resisted Hastings, in so far as the right of resistance was written into their very laws and, at the same time, guaranteed by the universal law of nations and of nature, their resistance was both legal and just.

In so far as Warren Hastings’s discourse of sovereignty was based on

\textsuperscript{63} Tuck, The Rights of War and Peace, 40–46.

\textsuperscript{64} Francisco de Vitoria was one natural law writer who had emphasized equality between Christians and non-Christians in international law, in reference to the rights of Indians in South America. See his De Indis et de Iure Belli Relectiones (1557), ed. Ernest Nys and trans. John Pawley Bate (Washington: Carnegie Institution, 1917). However, ultimately, he justified the Spanish occupation and annexation of territory and the subjugation of indigenous people on grounds of just war (if right of free passage and free missions was denied). For a rich analysis of the development of European thinking on international law and the rights of the colonized, see Georg Cavallar, The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria (Burlington, Vermont: Ashgate Publishing Company, 2002).

\textsuperscript{65} For a comprehensive history of the application of the principles of the law of nations to India from the sixteenth to the eighteenth centuries, see C. H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967).

\textsuperscript{66} Marshall, Writings and Speeches, 7:275.
Justice, War, and the Imperium

617

the will, Burke argued, it exceeded the domain of law and was, therefore, illegitimate and even criminal. For the idea of the will in any form was a negation of the very idea of law. In sharp contrast to continental political philosophy and jurisprudence of sovereignty, which founded law variously on the notion of general will and universal will, Burke deployed the discourse of natural law to argue that any construction of laws, either on the basis of general will or metaphysical principles of reason was, by its very nature, illegitimate.67 Man, in Burke’s view, was not above law, but was always already subject to a preexistent law. As he asserted, “man is born to be governed by law; and he that will substitute will in the place of it is an enemy to God.”68 In so far as Hastings had made his will the law, he had exceeded the bounds of legality, thus giving the people of India a natural right of resistance against his acts of aggression.

While arguing that the Mughal emperors were not arbitrary or despotic, Burke resorted to the discourse of natural law to contend that, even if some instances of arbitrary power could be found in Mughal history, all discourses of sovereignty based in the will were illegitimate. “Those who give and those who receive arbitrary power are alike criminal, and there is no man but is bound to resist it to the best of his power, whereever it shall show its face to the world. Nothing but absolute impotence can justify men in not resisting it to the best of their power.”69 Such a transfer of arbitrary power was a crime because “no man (could) lawfully govern himself according to his own will, much less (could) one person be governed by the will of another.70

The culmination of these just wars of resistance against Hastings and the Company’s government, Burke was convinced, could be nothing but civil war, a state in which all bonds between the colonial government and the people would be broken, and the two parties would consider each other as enemies and acknowledge no common judge.71 Such a state of affairs would surely imply the end of empire in the east as it had in the west. It was, therefore, imperative for the preservation of empire that a conceptual and institutional frame be constructed that would provide for a just and impartial settlement of disputes between the new colonial rulers and their subjects, and, thereby, foreclose the possibility of a recourse to arms. In

69. Ibid.
70. Ibid., 99.
opposition to the dyadic model of war in which the colonial government and the people of India faced each other as enemies, a triadic model would have to be created in which the empire itself would occupy the third position of the judge, the position of justice, neutrality, and impartiality, and mete out necessary punishment to the perpetrators of crimes, even those committed by colonial rulers like Warren Hastings.

The American Revolution had clearly shown that the empire could not be maintained for long by the forcible subordination of the colony to Parliament and the municipal laws of the metropole. Imperial justice, then, had to stand above the particular laws of different countries that formed the empire, so that the empire and the nations within it would constitute a complex whole. In the new imperial discourse, the empire was not simply to imply a hierarchical relationship between nations and the direct subordination of India to England. For it was not by subordinating the colonies to the laws of England, but precisely by deterritorializing the concept of justice from the soil of England and raising it above her national laws, laws of property, and rules of evidence that the discourse of the nation could be transformed into the discourse of empire.

The substantive elements of common law being municipal in nature were not adequate for imperial purposes, which had a larger and different field of operation. However, once the conceptual leap to natural law and imperial justice was made, the principles of common law jurisprudence once again came into play. The supremacy of the law over the will had been a rallying point for the Lords and the Commons for centuries in England in their struggle against the king and had been an integral part of common law jurisprudence from Bracton through Coke to Blackstone.72 The common law tradition in England identified customs, conventions, and habitudes as the sources of law: “... this (law) is a choice not of one day, or one set of people, not a tumultory and giddy choice; it is a deliberate election of ages and civilizations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions and moral, civil and social habitudes of the people, which disclose themselves only in a long space of time. ...”73

Placing himself in this tradition, Burke saw law not in terms of its deliberate construction by a process of philosophical reflection, or political decisions based on the notion of general will, or the will of the monarch,


but as immemorial custom that acquired its force and binding power from long usage. In Burke’s view, laws could only be found and declared by political institutions like the parliament—“all human laws are, properly speaking, only declaratory. . . .”74

The political implications of such an insistence on locating the source of law in longstanding customs was brought out by J. G. A. Pocock in his study on what he called “the common law mind.”

[T]he attraction which the concept of the ancient constitution possessed for lawyers and parliamentarians . . . resided . . . in its value as a purely negative argument. For a truly immemorial constitution could not be subject to a sovereign. . . . In an age when people’s minds were becoming deeply, if dimly, imbued with the fear of some sort of sovereignty or absolutism, it must have satisfied many men’s minds to be able to argue that the laws of the land were so ancient as to be the product of no one’s will, and to appeal to the almost universally respected doctrine that law should be above will.75

Thus, a convergence took place in the trial between two independent traditions of jurisprudence—one, based on common law, and the other, based on natural law. On the one hand was the tradition of Brackton, Coke, Hooker, and Blackstone, and on the other, Grotius, Pufendorf, and Vattel. One grew out of the historical struggle between the king and the Commons and developed along the idea of the supremacy of law, and the other, out of the necessity to rein in centuries of destructive wars between the nations of Europe. One developed as an exclusively national tradition. The other began as an international discourse intended to regulate international relations. However, what was common to both of them, and what made their convergence in Burke’s discourse possible, was their common goal to set limits to the will of the sovereign by locating the law in a “time out of mind,” rather than in the legislative command of the sovereign.

Institutional Realignment: Toward the Creation of a Supranational Tribunal

While recourse to natural law provided Burke with a supranational and deterritorialized discourse of justice, it was essential that this discourse be grounded in an institutional site that was not tied down by the discourse of national interests. There was a crucial antimony between the conceptual

74. Ibid., 145.
and the institutional at the very heart of natural law theory, which, while constructing a discourse of universal justice over and above national interests, was unable to conceive of an institution that could enforce natural law against the will of individual sovereigns. The imperative of judicial neutrality and impartiality, which was fundamental to the jurisprudence of natural law, was rendered ineffective by the fact that the enforcement of justice was left by these theorists in the hands of national sovereigns. This defeated the very purpose for which the theory was developed in the first place. In practice, the international order, as it had come to be constructed after the Treaty of Westphalia, was predicated on the sovereignty of individual states and the sanctity of pacts and treaties. This antimony of the institutional and the conceptual was noted by Kant, in his “Perpetual Peace,” where he objected to the idea of just wars, specifically on the ground that the absence of a suprastate legal body, which could take decisions in an impartial and neutral way, defeated the idea of just wars. In the absence of such a body, with clear rules and fixed procedures of taking decisions, any claim in the name of justice appeared voluntaristic and, therefore, lost its required legitimacy.76 This debilitating antimony between the conceptual and the institutional had plagued natural law theory for many decades, and many treatises had been written on how it could be resolved.77

In Hastings’s trial, Burke sought to resolve this antimony by grounding the imperial discourse of justice in the institution of the House of Lords in its judicial capacity. To understand why Burke saw the House of Lords as the only institution in England capable of performing the role of a supranational tribunal with regard to empire, it would be appropriate to look briefly at its role in British history.78 In the course of British history, the House of Lords had come to acquire a unique position as an institution in

77. Gottfried Wilhelm Leibniz, Leibniz: Political Writings, ed. Patrick Riley (Cambridge: Cambridge University Press, 1972), 165–83. The only other natural law theorist to envision an ad hoc supranational authority capable of conducting collective sanctions against lawbreaking nations was Emmerich de Vattel. See his The Law of Nations, 154.
78. British historiography has in the past paid little attention to the critical role of the House of Lords and the Crown in the creation and preservation of empire. This neglect can be attributed to what David Armitage has called the “persistent reluctance of British historians to incorporate the Empire into the history of Britain.” See Armitage, Ideological Origins of the British Empire, 13. Also see Antoinette Burton, “Who Needs the Nation? Interrogating ‘British’ history,” in Cultures of Empire: Colonizers in Britain and the Empire in the Nineteenth and Twentieth Centuries: a Reader, ed. Catherine Hall (New York: Routledge, 2000), 137–53. British historians have assumed a separation between the British nation that is seen as domestic and the empire that is viewed as external to the nation. They have either completely ignored the empire in their analysis of the growth of the British nation or assumed that intellectual, political, and institutional developments in England occurred
which politics, even at the highest level, had been brought under the gaze of justice, not just in the domestic arena but also with respect to the empire. This role derived from its historical position as the council of the Crown, who was both the ultimate source of justice within the realm (subjects had the right to appeal to his mercy and sense of equity when they felt that the courts of common law had failed them), and the supreme arbiter of justice in the empire.  

The House of Lords, as Turberville described it, was different from the House of Commons in that it was a law-maker by two different methods—by the process of passing bills, which it shared with the Commons, and also by the process of interpreting the laws of the land as the supreme court of the land. Commenting on what he called “the union of the judicial and political character” in the House of Lords, Macaulay, the renowned historian of England, pointed out that it was “not a mere accidental union.” “The fact is,” he argued, “not only that a Judge may be made a Peer, but that all the Peers, as Peers, are necessarily Judges. . . . the supreme Court of the realm is a great political assembly; that to this assembly go up all appeals from all Courts of equity and law in this country, from the Courts in Ireland and Scotland. . . .”

independently of empire and were not in any significant way affected by its existence. So that while the British state did formulate policies for its imperial possessions, it was not in any way seen to be constituted by empire. As P. J. Marshall put it, “. . . the needs of empire led to no structural reform of the British state. It developed on its own with little regard to what was happening in the empire.” See P. J. Marshall, “Imperial Britain,” The Journal of Imperial and Commonwealth History 23 (1995): 382–83. Thus, while the role of institutions like the Crown, the Privy Council, the House of Lords, or the House of Commons has been studied exhaustively in relation to English politics, little is known about how these institutions responded to imperial needs, or, indeed, of any attempts at reconstructing or realigning these institutions in terms of empire.

79. In the context of the empire, the king was not simply a national sovereign but was also an imperial sovereign, for it was common allegiance to him that united the empire as a whole. See Holdsworth, A History of English Law, 10:340–76. This point was emphasized in no uncertain terms during the American revolution by colonists who claimed that what bound them to England was their loyalty and allegiance to the Crown, and not any form of subservience to the House of Commons. See J. G. A. Pocock, “Political Thought in the English-Speaking Atlantic, 1760–1790: The Imperial Crisis,” in The Varieties of British Political Thought, 1500–1800, ed. J. G. A. Pocock, Gordon J. Schochet, and Lois G. Schwoerer (Cambridge: Cambridge University Press, 1993), 262. This imperial role as the arbiter of justice in the empire already placed the Crown in an ambivalent position in which any narrow consideration of national interests could be construed as a betrayal of imperial trust and responsibility.


As the highest court of appeal for Ireland and Scotland (which, together with England, formed part of the British imperial formation since the seventeenth century, as David Armitage has pointed out \textsuperscript{82}), the House of Lords was already historically placed in the position of an supranational tribunal that was required to rise above narrow English national interests and play the role of an impartial judge in cases involving the conflicting interests of England, Scotland and Ireland.\textsuperscript{83} With respect to other parts of the empire, it was the institution of the Privy Council (earlier the King’s Council and composed of members of the House of Lords) that was responsible for addressing imperial appeals from all the dominions of the Crown, excepting Great Britain and Ireland.\textsuperscript{84}

What made the House of Lords particularly suited, in Burke’s view, to take on the role of a supranational tribunal with respect to the empire was that, in so far as its members were not elected, it was not a representative body, having, in Blackstone’s words, “neither the same interests, nor the same passions as popular assemblies.”\textsuperscript{85} Thus, it was always in a position, unlike the House of Commons, to dissociate itself from popular nationalism and the discourse of national interests and could, therefore, be deployed as the site for a deterterritorialized discourse of imperial justice.\textsuperscript{86} The British

\textsuperscript{83} Holdsworth, \textit{A History of English Law}, 11:6, 26.
\textsuperscript{84} Luke Owen Fike, \textit{A Constitutional History of the House of Lords from Original Sources} (New York: Macmillan and Co., 1894), 308. The difference between the institutions of the House of Lords and the Privy Council was that, while the House of Lords was a representative judicial body that included representative peers from Ireland and Scotland, the Privy Council was a royal council, adjudicating on behalf of the Crown. The Privy Council’s “judgement” was more in the nature of a recommendation on which the Crown made the final decision. Also, a clear hierarchy was instituted between these two courts, with the Privy Council serving as the ultimate court of appeal for the colonies, while appeals from the United Kingdom itself were heard only by the House of Lords and were not subject to the jurisdiction of the Privy Council. See D. B. Swinfen, \textit{Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986} (Manchester: Manchester University Press, 1987), 1–21.
\textsuperscript{85} Blackstone, \textit{Commentaries}, vol. 4, chap. 19, 258.
\textsuperscript{86} The independence of the House of Lords has been noted by the foremost constitutional scholars of England. As Walter Bagehot observed, the House of Lords was more independent than the House of Commons because, having “no constituency to fear or wheedle,” it was best placed to form disinterested judgments. Walter Bagehot, \textit{The English Constitution: and Other Political Essays} (New York: D. Appleton and Company, 1911), 180. Historians of the House of Lords have commented on the fundamental role that the upper House was seen to play in the mixed and balanced government of the eighteenth century by serving as the “equipoise” of the constitution. See A. S. Turberville, \textit{The House of Lords}, 33; C. C. Weston, \textit{English Constitutional Theory and the House of Lords}, 1556–1832 (New York: Columbia University Press, 1965), 1–8; Michael W. McCahill, \textit{Order and Equipoise: The Peerage and the House of Lords}, 1783–1806 (London: Royal Historical Society, 1978), 12–38.
Parliament had the unique ability to appear in two configurations—one, at ordinary times when it played a legislative role, and the other, during times of impeachment, when the two Houses of Parliament split themselves into two institutional and enunciative personae, the House of Commons taking on the role of the accuser/pleader, and the House of Lords that of the impartial judge. This allowed a possible discursive reconfiguration of English political institutions in reference to the newly emerging empire, so that, while the House of Lords could take on the position of impartial and neutral judge, the House of Commons could occupy the role of the petitioner/pleader on behalf of the colony, setting aside their respective legislative roles.

The addressee of this imperial discourse of justice was the conceptual persona of an impartial judge. The institutional shift from a legislative assembly to a court of judicature was rendered essential, Burke told the Lords, because the House of Commons as an institution had failed to rise above the idea of national interests, which overdetermined its proceedings, and develop a comprehensive discourse of empire, thus rendering imperative "the plenary justice" of the House of Lords. Burke, therefore, reminded the Lords of this absolutely essential imperative of impartiality and neutrality:

...it is feared that partiality may lurk and nestle in the abuse of our forms of proceeding. It is necessary, therefore, that nothing in that proceeding should appear to mark the slightest trace, should betray the faintest odour, of chicane. God forbid that when you try the most serious of all causes, that when you try the cause of Asia in the presence of Europe, there should be the least suspicion that a narrow partiality utterly destructive of justice should so guide us, that a British subject in power should appear in substance to possess rights which are denied to the humble allies, to the attached dependents of this kingdom. ...

87. Charles Howard McIlwain points out that Parliament as an institution itself developed as a judicial body, a high court, and it was only later in its history that the functions of adjudication and legislation were separated, with the House of Commons becoming primarily a legislative body, and the House of Lords continuing to have both a legislative and an adjudicative role. See his The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England (New Haven: Yale University Press, 1910). This historical role made it possible in Burke's view for the Parliament to split itself into two judicial roles with respect to empire, the House of Commons taking on the role of a lawyer and the House of Lords taking on the role of an impartial judge.

88. Burke, Speeches, 1:19.

89. Ibid., 17.
In this discourse, the empire was to stand above the governments, both in England and in India, in its impartiality. The complex whole that was to comprise the empire was to be triadic, in the sense that the empire would emerge as the third person, standing above and in between the two parties—the two nations, England and India. The space of impartiality was to be constituted in the discursive position of the third person, the judge.

What is striking about this argument for the displacement of the legislative by the judicial in the case of India is the sharp contrast with the American case, in which Parliament even went to war with the American colonies to assert its rights to exercise parliamentary sovereignty over America. J. G. A. Pocock has argued that the heart of the American problem for Britain had been less the maintenance of imperial control than the preservation of essentially English institutions, particularly the unity of the Crown and Parliament, which the colonists were calling into question by claiming allegiance to the Crown, but not to the legislative authority of the House of Commons. In the end, Pocock contended, Britain preferred to lose her American provinces rather than modify her political institutions to accommodate them, for to give up on the unity of the Crown-in-Parliament was to give up on the idea and practice of liberty itself, which, in British history, had come to be indelibly tied to the existence of this institution. 90

It was in this historical context of the loss of the American colonies that Burke sought to convince the political establishment in England that the preservation of empire in the east need not necessarily imply the repudiation of existing British institutions. Rather, the only way to preserve empire without giving up on liberty at home, and, at the same time, preventing rebellion in the colonies and ensuring that the rights of the colonized were preserved, would be to foreground the juridical dimension of the existing institutions of Parliament with respect to empire, and to create a confederation not by legislative subordination to the House of Commons, but by a judicial attachment to the Crown and the House of Lords. 91

Whereas the American war was fought in the name of the sovereignty of Parliament, Burke sought to preempt such a war in the east through a judicial reconfiguration of English political institutions and the construction

91. Burke’s proposition of reconstituting the House of Lords as a supranational tribunal, while not implemented in British in the eighteenth century, became a critical issue for the empire in the late nineteenth and early twentieth centuries. It was in this period that nationalists in Australia, Canada, and other colonies demanded that the distinction between the Privy Council and the House of Lords be abolished and a common imperial tribunal be created. This would include colonial representatives and render judgments impartially on appeals from the courts of all commonwealth countries including the United Kingdom itself. See Swinfen, Imperial Appeal, 1–112, 178–218.
of a discourse of imperial justice in terms of natural law. Burke, who ruled out the viability of a judicial intervention in the case of America, spent fourteen years developing a comprehensive judicial discourse to situate India in the larger framework of the British empire. Burke the legislator (in the case of America) appeared in the enunciative persona of a lawyer to articulate the new imperial discourse of justice, while the people of Indian emerged, not as a people asserting their freedom, but as supplicants to justice at the bar of the House of Lords. “Exiled and undone princes, extensive tribes, suffering nations, infinite descriptions of men, different in language, in manners and in rites—men separated by every barrier of nature from you, by the providence of God are blended in one common cause and are now become supplicants at your bar.”

This was a decisive moment in the history of empire, when, even as one phase of the British empire had drawn to a close in America, the second phase was beginning to take shape, calling for a fundamental realignment of the highest political institutions in England in terms of its relationship with its new colonies.

The institution of the House of Lords, Burke argued, needed to be constituted as that liminal space, that narrow space of exteriority outside the state, where politics and the state itself would be brought under the gaze of justice, or what Burke called state morality. Burke defined the nature of this institution and its jurisdiction: “For this great end your lordships are invested with great and plenary powers: but you do not supersede, you do not annihilate, any subordinate jurisdiction; on the contrary, you are auxiliary and supplemental to them all.” This supplemental discourse was to be that of empire founded on the notion of state morality and located in the House of Lords in its judicial aspect.

The discursive and institutional status that Burke gave to the judiciary found its sharpest formulation in his observations on the Revolution in France. In the course of criticizing the revolutionary government in France for abolishing the French parlement, which was an autonomous institution functioning as the highest court of appeal, and for bringing the judicature under the direct control of the national assembly in accordance with Rousseau’s idea of the supremacy of the legislative “general will,” Burke

92. Burke, Speeches, 1:16.

93. Burke saw a clear connection between the loss of the American colonies and the need for preserving empire in the east. As early as 1777, criticizing the policies of the English government and the East India Company in India, he wrote, “Some people are great lovers of uniformity—they are not satisfied with a rebellion in the West. They must have one in the East: They are not satisfied with losing one Empire—they must lose another. . . .” See Marshall, Writings and Speeches, 5:40.

94. Ibid., 11.
argued: “Whatever is supreme in a state ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state.”

In sharp contrast to general political theory, that identified the judiciary as one of the three organs of the state, the legislature and the executive being the other two, Burke located the judicature not just exterior to the state, but as a balance against the power of the state. What he brought out were two sets of antinomies—the conceptual antinomy between justice and power, and the institutional antinomy between the judicature and the state. In the Burkean scheme, justice and power were exclusive categories that had to be distinguished from contemporary political and constitutional phrases like judicial power. In Burkean discourse, power meant the power to dominate and was synonymous with political domination. Since the concept of justice and the institution of the judicature were deployed against political domination, they were exterior to the domain of power. Justice thus was articulated in its critical difference from the power of the state.

By discursively situating the judicature exterior to the state, Burke’s discourse sought to create a split between the idea of empire and England as a nation, where the empire would emerge as a supranational juridical formation, “a refuge of afflicted nations” with its accompanying discourse of what he variously called “superintending,” “supplemental,” or “imperial justice.”

Conclusion

In discursively linking the idea of empire in India with a supranational deterritorialized theory of justice in the impeachment trial of Warren Hastings, Edmund Burke proposed a radical alternative both to the dominant

96. Burke, Speeches, 1:58.
97. This explains why Burke refused to interpret the English Revolution of 1688 in political terms as a popular revolution that brought people to political power but rather in juridical terms as an attempt at the restoration of the constitution that had been violated by the Crown. Burke, Reflections on the Revolution in France, 35. Also see Stanlis, Edmund Burke: The Enlightenment and Revolution, 216–50.
98. Marshall, Writings and Speeches, 7:694.
100. Ibid., 11.
101. Ibid., 17.
discourse of colonial sovereignty in eighteenth-century England, based on notions of conquest and domination of the colonized, and the complementary discourse of the law of nations that had come to be predicated, after the Treaty of Westphalia, on the absolute sovereignty of individual states. While the discourse of natural law had attempted to set limits to colonial aggrandizement by emphasizing the universal and transcendent principles of justice and equity, it, too, came to be subordinated to the principle of national sovereignty and national interests of states. It was clear to Burke that the discourse of international law, grounded as it was on the discourse of national interests, was not only inadequate, but, in fact, fatal to the future of empire in the east. It had promoted the ruthless appropriation of property and wealth in the colonies, which was not only corrupting the political system in England and destabilizing the European balance of power but was also provoking widespread rebellions on the part of the colonized in India, threatening the very existence of empire. If empire was to be saved in the face of this growing resistance, it was imperative, in Burke’s view, that the imperial authority recognize the rights of the colonized, particularly their rights of “just resistance” against the oppression and violence of the colonial regime. It should also take steps to prevent such oppression in the future. However, the crucial question that inevitably arose from such a recognition was, on what legal grounds could empire continue to be justified and legitimized, and what steps could be taken to preserve empire against the threat of civil war and the ultimate dissolution of all bonds between the rulers and the ruled?

Burke’s proposal was that the empire become the site of a deterritorialized universal justice that would rise above the national interests of Britain and serve as an impartial arbiter between the English colonial state in India and the colonized Indian society. The construction of this triadic discourse of supranational imperial justice was predicated on the possibility that the imperial formation could split itself three ways into the enunciative personae of the plaintiff, the defendant, and the impartial judge. With the people of India as the plaintiff and the East India Company’s government as the defendant, the House of Lords in its judicial capacity could take on the role of a supranational tribunal, a fair and impartial arbiter, that would address the grievances and complaints of the colonized society against the colonizing state. This triadic imperial juridical formation, grounded on these three institutional and enunciative personae, would be constructed in opposition to a dyadic colonial political formation, in which the East India Company’s government saw itself locked in perpetual conflict with its other, the “rebellious population” of India. By deterritorializing the notions of law and justice from their national territorial moorings, the imperial discourse of justice would make possible the internalization of
otherwise potentially violent conflicts, and even civil war, while transforming them into juridical discursive conflicts between the colonized society as plaintiff and the English colonial state in India as defendant. In this model, colonial state power in India would no longer be the sole source of its own legitimacy, but would have to accede to the ultimate juridical sovereignty of the imperial.

The House of Lords, however, eventually acquitted Hastings on all counts in April 1795, thus failing, in this case, to rise, as Burke had proposed, beyond partiality and national interests to the position of a deterritorialized, imperial tribunal. The question is, does this verdict diminish the historical significance of the trial and the Burkean discourse of juridical imperial sovereignty? Considering the nature of the case and its historical implications that unfolded over the next two centuries, I would argue that the question of Hastings’s conviction or acquittal was of marginal importance to what the trial accomplished in a larger sense.

The crucial historical significance of Burke’s efforts in the impeachment trial is that they were not aimed simply at seeking a judicial decision on the facts of Hastings’s crimes in India. Indeed, Burke was aware, even as he prosecuted the case, that the ultimate verdict on the facts of the case could go in Hastings’s favor, in part due to the corruption and weakness of the judges, and in part due to what some judges could perceive as a lack of sufficient evidence from the standards of common law. Thus, even as he sought to create “a train of clear solid juridical Evidence, fit to establish the facts,” what was at stake for Burke in the larger sense was to lay out in the event of the trial the legal and moral parameters of a new discourse of empire for the future. In so far as there was no preexisting legal or political consensus, let alone a set of established laws, on the rights of an alien people in the colony against the arbitrary rule of the colonial state, the trial was much more than a regular judicial event. It was also a legislative moment in the history of British empire in India when, for the first time, an institutional framework and discourse of relevant laws and principles were articulated to make the colonial regime in India legally accountable for its policies and actions in the colony.

From this perspective, the very articulation of this discourse of imperial sovereignty and alien rights during the trial was an event of enormous historical significance for the future of empire. Indeed, so effective were Burke’s speeches in the trial in delegitimizing the colonial state in India that it would take all the ingenuity of a James Mill and a John Stuart Mill,

103. Ibid., 110.
the founding and leading minds of British liberalism, to mount an intellectual campaign to rescue the colonial state in the nineteenth century and restore its legitimacy and supremacy. It was in the process of contesting the Burkean discourse of empire, which was firmly anchored in legal and moral principles, that James Mill was to construct an alternative discourse of empire based on the notion of a hierarchy of civilizations. The Burkean argument granted the colonial state in India legitimacy on the basis of how it carried out its legal and moral responsibilities toward the colonized society as the other. By contrast, in Mill’s discourse, the superiority of British civilization alone was to be established as a self-legitimating and self-evident principle that needed no further legal and moral arguments.

The continuing historical significance of Burke’s discourse of juridical imperial sovereignty for India can also be seen in its frequent deployment by both colonial and anti-colonial proponents in the course of the nineteenth century. On the one hand, whenever the colonial state came under serious threat in India, for example, during the Indian Revolt of 1857, it inevitably fell back on the Burkean discourse of imperial justice as an assurance to Indians and as a way to tide itself over the crisis. On the other hand, in so far as Burke’s speeches in the trial had performatively

104. The major book in this regard was James Mill’s History of British India, originally published in 1820. It became a textbook for British administrators in India in the nineteenth century and was to be the intellectual foundation of British colonialism. See James Mill, The History of British India, 10 vols. (London: J. Madden, 1858). It is one of the ironies of history that while Burke, who has been characterized as a leading conservative thinker, sought to defend the rights of Indians against the arbitrariness of the colonial state, it was leading liberal intellectuals like James Mill and John Stuart Mill, who resolutely defended the absolutist nature of the East India Company’s government. This demonstrates how misleading a decontextualized and uncritical use of terms like “conservative” and “liberal” could be. For further discussion of the relationship between liberal thought and empire, see Bhikhu Parekh, “Decolonizing Liberalism,” in The End of “Isms”? : Reflections on the Fate of Ideological Politics after Communism’s Collapse, ed. Alexander Shtromas (Oxford: Blackwell, 1994), 85–103, and Mehta, Liberalism and Empire, 46–114.

105. The Queen’s Proclamation of 1858 that followed the Indian Revolt of 1857, a national conflagration that had threatened the very foundation of British rule in India, sought to stabilize imperial control over India by resurrecting once again Burke’s discourse of imperial justice. Declaring an end to the East India Company’s rule in India, the Queen’s Proclamation pledged justice and equity to the native population and promised to uphold the ancient rights, usages, and customs of India. See Readings in the Constitutional History of India, 1757–1947, ed. S. V. Desika Char (Delhi: Oxford University Press, 1983), 299–300. It is significant that the British government brought out an edition of Burke’s impeachment speeches soon after the Indian Mutiny in 1857 to enable the public to understand the deeper causes of the conflict between the colonizers and the colonized. See Speeches of the Managers and Counsel in the Trial of Warren Hastings, ed. Edward Augustus Bond (London: Longman, 1859–61).
creating an enunciative position for the colonized people as subjects rather than as simply the objects of the colonizer’s speech, it was not surprising that the discourse of the Indian National Congress in its early years was articulated almost entirely within the discourse of justice originally offered by Burke. Indeed, by the early twentieth century, the strength of anti-colonial movements compelled imperial administrators to reconcile to a very Burkean claim on the part of nationalists in India and other parts of the empire that the only way in which the empire could be held together was if it reconstituted itself as a loose judicial union bound together by justice under the Crown and a supranational tribunal.106

Finally, in addition to its historical significance, the other question that could be pertinent here is, what significance does Burke’s Indian involvement hold for an understanding of his political thinking in general? Burke’s vision of a specific triadic political configuration for the British empire in India, combining the British colonial state in India, Indian society, and the deterritorialized imperial judicature, seems to have been grounded in a more general conceptual configuration of the state, the society, and the supreme judicature. In the light of the findings of this article, it appears that serious consideration needs to be given to the role that this complex triadic configuration may have played in overdetermining Burke’s entire political vision.

106. See the debates over dominion status and the establishment of a commonwealth court in the first half of the twentieth century in Swinfen, Imperial Appeal, 88–218, and Edward McWhinney, Judicial Review in the English-Speaking World (Toronto: University of Toronto Press, 1956), 49–60.