

## BOOK REVIEW

# INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY (1774-1950)

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**Review by Chander Pal Singh**

Present being the continuation of past, and past being synonymous with history, it follows that history is a part of the present. There is no escape from history wherein lie many of the roots of the problems being faced in the present. *India in the Shadows of Empire* by Mithi Mukherjee argues very convincingly that 1950, the year in which independent India adopted its Constitution, did not mark a discontinuity in many respects and India is still living in the shadows of the British Empire. In other words, independence from the colonial rule did not mark a complete break from the colonial past. At the same time, Mukherjee provides an alternative historical narrative of the British Empire in India and India's struggle for independence under the Indian National Congress and Gandhi. Mukherjee's argument is novel and bold and she goes beyond the existing schools of Indian historiography to bind together the whole of colonial India as well as post-colonial developments with the help of a unifying framework or discursive structure. The present work is bound to become a major landmark in understanding and writing of Indian history and initiate fresh debate in little explored areas of historical and contemporary enquiry.

Being a legal and political history, *India in the Shadows of Empire* focuses on the role of judicial institutions and juridical categories and practices in shaping of India's political history. Mukherjee identifies the dialectic of twin notions of imperial justice as equity and liberty providing a discursive framework for the British Empire in India as well as the anti-colonial representational politics under the Indian National Congress. The discourse of justice as equity was passed on to post-colonial India through the colonial origins of Constitution of independent India and is amply reflected in dynasty-based leadership, fractured and caste-based polity, reservation policy, centralized state planning among other ills.

Mukherjee's central argument is that the British Empire in India was based on two competing and collaborative political discourses: the discourse of the 'colonial' and the discourse of the 'imperial'. Discourse of the 'colonial' implies discourse of governance driven by ideas of territorial conquest, power, violence, domination, and subjugation of the colonized. Whereas the discourse of the 'imperial' was based on supranational deterritorialized discourse of justice under natural law, and was critical and censorial towards the arbitrary exercise of power by the colonial government even as it claimed to speak on behalf of the people of India.

According to Mukherjee, discourse of justice in the British period had its origins in three crucial moments first of which was the famous impeachment trial of Warren Hastings who was tried for high crimes and misdemeanors against the people of India in 1788. Hastings defended his actions in India in the language of colonial discourse of power.

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Prosecutorial speech of Edmund Burke representing the case of the people of India put forward the imperial discourse of justice under natural law as the possible basis for British rule in India. India represented by Burke came to occupy the persona of a plaintiff for justice in the House of Lords-the highest court of appeal in British Empire. For the next century and half, Mukherjee argues, this persona of a plaintiff for imperial justice that India was to remain turned to the British Empire as the ultimate judge, until Gandhi brought the discourse of justice to an abrupt end in 1920.

Second moment was the establishment of the Supreme Court in Calcutta in 1774 by the British Parliament. Unlike in Europe, the idea and practice of representation in India did not develop as a legislative-political practice, but developed in and around the British law courts introduced into India in the late 18<sup>th</sup> century. Supreme Court was established with the specific purpose of serving as external check on the government of East India Company that had come to acquire absolute political and executive power without any external or internal restraint. The Supreme Court had a unique role in India both as the sole legitimate space for the representation of grievances and complaints against the EIC's administration and as the predominant lawmaking or legislative body in the absence of a formal legislature and clearly laid out laws. In its active efforts to restrain the arbitrary exercise of power by the Company's bureaucracy, the Supreme Court in colonial India turned into a site for public critique of power in the name of justice under natural law. Thus Supreme Court helped develop a new culture of lawyer and his client, the judge, the jury and the observing public. In the Supreme Court colonial power was subjected to public scrutiny and was forced to answer to imperial justice in the language of law. The spectacle of high ranking Company government officials being tried in public caught the public imagination and gave the court the notion of justice. Mukherjee makes a very interesting assertion that contrary to common belief that it was the Supreme Court as the theatre of Justice – and not the countless treatises on politics by the philosophers in the West- that emerged as the primary historical source of much of Indian thinking and imaginings about politics and the state. It was under these precise historical circumstances that the figure of the lawyer emerged as the quintessential public representative and no wonder much of the Indian leadership in British India was constituted by lawyers.

After 1857 revolt, the third critical moment according to Mukherjee, the discourse of colonial versus imperial dimmed into background and in its place dialectic discourses of justice as equity and justice as liberty became prominent. Major worry for the colonial rulers was that different communities constituting India, though seemingly hostile to each other, were capable of uniting against the colonial government, making impossible the continuation of Empire in India. If the British Empire was to survive in India, it had to both find a way to overcome its foreignness as a source of provocation for new uprisings in the future and also to dismantle all sources of Indian national unity and identity- cultural, political, and historical- and thus render the very idea of India meaningless. Thus the broad policy of the British government was designed to turn the foreign origin of the colonial state into an advantage and to deny India its national unity and identity. To achieve these objectives, the twin discourse of justice as equity and justice as liberty were introduced.

The first explicit articulation of justice as equity was the Queen's Declaration of 1858 after British crown replaced the East India Company as the ruler of India. Notion of justice as equity was opposed to the concept of justice under the natural law. It was grounded in the conscience of the monarch. Monarch was the source of all justice, compassion and mercy. Courts administered justice on the ruler's behalf and not as impersonal system of justice. In notion of justice as equity, it was implicit that India was society of warring communities that needed an outside force to rule over it. Torn by internal conflict, India was in urgent need of a neutral and impartial power at the helm of the state to secure both justice and order. It was implicit that only an alien foreign power could be trusted to be neutral and impartial. In this discourse, India in itself was a society in chaos without a being or identity. The Empire alone with its foreign origin could confer unity and identity on it. A divided Indian society needed a foreign imperial government more than British itself needed a colony in India. It was only as a colony that India could be itself.

If Justice as equity justified the permanence of the British rule in India, Justice as liberty allowed the British Empire to present itself on a pedagogical mission whose ultimate objective was to take India in the direction of self-government. This new dialectic of the twin discourses of justice as equity and justice as liberty replaced the earlier dialectic of the colonial and the imperial, even as they incorporated much of the substance of the earlier discourses.

Categories of justice, equity, and liberty deployed in post-1857 India were anchored in the figure of the Queen. It was as subjects to the principles of '*liberty, equity, and justice*' that India became subject to the British monarchy. Reverse was as true.

Marxist and Nationalist schools see Indian National Congress as the first nationalist organization on an all India scale. But Mukherjee argues that it was on the basis of the imperial discourse of justice as equity and liberty that the INC developed an anti-colonial discourse and movement. Indeed it was in the early Congress; faith in the inherent justice of

the Empire and its promise of liberty that its opposition to colonialism was grounded. The goal of Home Rule movement that Congress launched in its most radical phase before Gandhi took on the political leadership was not the same as the demand for national freedom, because home rule, in so far as it sought legislative powers within the Empire, assumed the ultimate sovereignty of the British monarch. Mukherjee emphasizes the point that as far as the Congress was concerned; it was not as citizens of India that Indians were going to become free, but as citizens of the Empire.

With the emergence of Gandhi, a political breakthrough was achieved, both in the form of a demand for complete national independence rather than imperial justice, and in launching of a mass movement as opposed to the politics of elite pleading and petitioning.

In the post-1857 India, portrayed by the British Empire as a society deeply and permanently fragmented, each community found itself to be in minority, always afraid that in the event of national independence and the departure of the British Empire it would become vulnerable to domination by other more powerful communities. This development undercut the very possibility of a discourse of political freedom in India, because only a group that could hope to constitute a majority and govern a democratic polity in free India would have the incentive to fight for national independence under the discourse of political freedom. British policy was designed precisely to prevent such a majority from emerging. The colonial hope was that this fragmentation of Indian society into innumerable minorities would keep it trapped in the discourse of imperial justice with no access to the discourse of political freedom, thereby making the British Empire permanently indispensable to Indian society.

It was under the Gandhian leadership that anti-colonial movement was able to break out of the trap laid earlier. The author contends that Gandhian teleology of freedom was different from the western discourse of political legislative freedom based on the ideas of national identity, nation state, private property, and individual rights or in nutshell, ideas of individual and collective self or identity. Gandhian ideas of freedom (*renunciative freedom* according to Mukherjee) were derived from ancient Indian tradition like Upanishads and the Gita where the objective of the human life was to rise above selfish identities and ultimately attain the *moksha* or communion with the higher Self. Gandhi was himself a part of the historical legacy that developed in the wake of encounters between Indic and Western discourses and traditions of freedoms in the colonial period. Immense appeal of the Gandhian mode of politics compelled the Congress to suspend its own teleology of imperial justice and work towards national independence. But Gandhian discourse of renunciative freedom was unequipped and unwilling to offer a legislative discourse of governance to the new state of independent India. Gandhi had rightly called upon Congress to disband itself as a political party after independence was achieved but Congress could not forget its original and essential nature of being grounded in imperial justice of equity.

After the independence, Gandhian discourse of renunciative freedom receded into the background. As the reins of the government fell into the hands of the Congress, it resurrected the temporarily suspended discourse of imperial justice as equity as the discourse of the governance and made it the foundation of the Indian constitution. This was only natural because Indian Constitution was a natural culmination of the constitutional reform process which started after 1857 in the form of Act of 1861, and evolved into the Acts of 1892, 1909, 1919, and 1935. Mukherjee cites Dr. Ambedkar among others to prove that most of the provisions of Indian Constitution were lifted from the Government of India Act of 1935 without changing a comma. The other element of the legacy of justice as equity, the imperial monarch, soon reproduced itself in the dynastic leadership of Indian National congress, represented by the Nehru-Gandhi family, continues even today. That framers of Constitution did not look into Indian tradition is well known but Mukherjee emphasizes the point that in sharp contrast to Western constitutions based on the category of freedom, anchored in collective identity or individual property, the Indian constitution was grounded in the category of justice as the sovereign legislative principle. Moreover, what is most shocking is that founding fathers did not publically debate or discuss the philosophical foundations of Indian Constitution at all.

*India in the Shadows of Empire* by Meethi Mukherjee can be regarded as a logical extension of the work started by Bernard Cohn, her mentor at the University of Chicago. The main text is accompanied by very useful and comprehensive bibliographic notes as footnotes where Mukherjee analyses alternative readings and approaches in perspective. Thirty six page long bibliography at the end of the book hardly leave any relevant source. The book is recommended to all those who are willing to have a fresh look at India's colonial past and also the present.