

Rechtsgeschichte Legal History

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg20>
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 20 (2012)
<http://dx.doi.org/10.12946/rg20/104-124>

Rg **20** 2012 104–124

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The Rule of Law against the Rule of Greed: Edmund Burke against the East India Company

Zusammenfassung

Am Ende des 18. Jahrhunderts gelangte Bengalen mit einem Schlag unter die Herrschaft der East India Company. Die ehemalige Handelskompagnie war zum Souverän eines Landes in der Größe Frankreichs geworden und sollte später den gesamten indischen Subkontinent beherrschen. Die Kompagnie wurde weder von indischem, noch von britischem Recht oder von Völkerrecht in ihrem Tun kontrolliert. Daher konnte sich die Gier der Kompagnie wie die ihrer Mitglieder ungehindert entfalten, was die unangenehmsten Konsequenzen für die eingeborne indische Bevölkerung hatte. Die indische Frage erregte das Interesse von Edmund Burke. Er sah in Indien eine Metapher für seine Heimat Irland und hatte Angst vor einer Korruption der britischen Politik durch das Geld und den Einfluss von Briten, die sich in Indien bereichert hatten. Er machte es sich zur Aufgabe seines Lebens, gegen die Gier der Kompagnie zu kämpfen, indem er ein Impeachment-Verfahren gegen Warren Hastings anregte, den Ersten General-Gouverneur von Bengalen. Um eine Verurteilung Hastings zu erreichen, war es notwendig zu zeigen, dass er das Recht gebrochen hatte. Aber welches Recht? Burke griff auf Naturrecht und Römisches Recht zurück. Von dort nahm er den Grundsatz »Eundem negotiatorem et dominum«. Damit ist gemeint, dass man nicht zugleich Händler und Souverän sein kann, hat der eine doch seinen Profit zum Ziel und der andere das Wohlergehen der Bevölkerung. Zwar wurde Hastings nach mehreren Jahren freigesprochen, doch trug Burke mit diesem Prozess dazu bei, die englische Herrschaft in Indien zu zivilisieren. Seit neustem wird seine Position von der Schule der Postkolonialisten bekämpft: Er hätte dafür eintreten sollen, dass die Briten Indien verlassen anstatt ihre Herrschaft zu verbessern und damit zu verlängern.

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Abstract

At the end of the 18th century Bengal suddenly came under the rule of the East India Company. The former trading company had become the sovereign, first, of a country the size of France, and eventually of the whole Indian subcontinent. The Company was not controlled by any positive law, be it Indian, British or international. As a consequence, the Company's individual and corporate greed reigned supreme, with the most dire consequences for the native Indian population. The Indian question aroused the interest of Edmund Burke. He saw in India a metaphor for his native Ireland and was suspicious of the corruption of British politics by the money and influence that the Company's men had gained in India. He therefore made it the aim of his life to fight the Company's unrestrained avarice by fostering an impeachment trial against Warren Hastings, the first Governor General of Bengal. In order to get Hastings convicted it was necessary to show that he had infringed the law. But which law should Hastings' judges apply? He resorted to Natural Law and Roman Law. Thence he took the maxim »Eundem negotiatorem et dominum«, that is to say, commerce which aims at profit, and government which aims at the welfare of the population, are irreconcilable. Though after many years Hastings was acquitted, Burke contributed by this trial to civilising British rule in India. Burke's stance has recently been criticised by the post-colonial school: He should have pleaded for the British to quit India rather than improving their rule and thereby prolonging its existence.

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Jakob Fortunat Stagl

The Rule of Law against the Rule of Greed: Edmund Burke against the East India Company*

An aliud Romae aequum est, aliud in Sicilia?
(Is justice in Rome one thing and in Sicily another?)
Cicero, In Verrem II 46 (117)

I. Introduction: »Blondes have more fun«

It is one of the perceptions of our time that »blondes have more fun«. Why should this be? An echo perhaps of the much-repeated dictum that

»gentlemen prefer blondes«. How come? How can one explain their choice and what are the consequences of their preference? A clue may be found in this picture:



* Many people helped in the course of writing this article: above all Claudia Baumann, my father Prof. Justin Stagl and John Clifford as well as my friends Pierre Friedrich and Thomas Windhöfel.

In the centre you see a statuesque brown woman offering a bowl filled with jewellery to a white woman sitting above her. The white woman examines a pearl necklace she has just taken out of the bowl. She is delighted but does not give anything in return to the brown woman. That seems strange. For what reason should the brown woman give her jewels to the white woman as a present? »Diamonds are a girl's best friend«, aren't they? Maybe the gentleman on the right side has something to do with this inexplicable generosity. By the fancy apparel and the curious stick he wears we can tell he is Mercury, the god of merchants and of thieves. The latter qualification gives us a hint. Just beneath the white woman we discover a lion. The lion is a beast of prey, and as such he takes what he gets without paying compliments. Though he does not bare his teeth he might intimidate the brown woman by his sheer presence. We can conclude that she is terrified into making a gift of her jewels or to say it frankly she is being robbed by the white woman with the lion's help. Thus Mercury finds himself in a double winning situation: he can propose to the white woman who has just received a very handsome dowry thanks to the brown woman's forced generosity. Or, if he killed the lion and restored the jewels to the brown woman, he could propose to the brown woman. This would be a truly chivalrous deed and certainly make an impression on the brown woman. Yet, Mercury is obviously more interested in the white woman. Why does he seem to prefer white women like so many other gentlemen? Is it just cowardice or is there some deeper reason for Mercury's choice? This is the main question of the present inquiry.

The people depicted in this allegory represent certain nations. The brown woman, telling by the colour of her skin and her hair, is from India and the other people carrying loads are obviously from different regions of Asia. A small piece of cloth on the lion's back shows a part of a Union Jack telling he is the heraldic symbol of Britain. Taking these details into account we may infer that the brown

woman represents »India« and that the white is »Britannia« herself. The title of this painting is, indeed, »The East offering its riches to Britannia«. The Honourable East India Company commissioned it from the painter Spiridione Roma.¹ It was finished in 1777 and from thereon decorated its headquarters, the East India House in London.²

II. Colonial India: From Extortion Racket to compulsory Public School

The Company's presence in India began during the 16th century together with the Portuguese and the French trading companies. Initially, the Company traded in spices and later also in silk and cotton. In the second half of the 18th century enormous profits were made by exporting Indian-grown opium to China and importing Chinese tea to the western markets. At that time the Indian subcontinent was divided into a myriad of more or less independent principalities and fiefdoms as well as two big states, the Mogul Empire in the north and the Federation of the Marathas in the west. Bengal, which was crucial for the China trade, was a fief of the Moguls. In 1757 Bengali forces were defeated by Company troops in the Battle of Plassey (Pôlashir Juddho) after quarrels on tax issues between the Company and the ruler of Bengal had descended into violence. A little later the Mogul Emperor granted the Company the right to collect taxes in Bengal as well as in Bihar and Orissa (Odhissha). Thereby the Company became the true sovereign of a very rich territory the size of France while the former rulers of Bengal became its puppets. In order to secure these territorial gains the Company got increasingly involved in Indian politics and protected its possessions with as many ensuing wars as necessary to get rid of all rivals in India, especially the French and the Maratha Empire. During the first century after Plassey, India was directly and indirectly ruled by the Company, but after the Rebellion of 1857³ the Crown took

1 BOWEN (2006); LAWSON (1993); R. MUKHERJEE (1958).

2 ARCHER (1965) 401, 406.

3 The »First war of Independence« from the Indian perspective. REINHARD (1988) 17s., is critical of this patriotic expression because a national programme was lacking at the time.

over officially. British India commonly known as the Raj⁴ remained a British colony until 1947.⁵

A colony is basically an extortion racket on an international scale.⁶ Edmund Burke (1729–1797)⁷ gave the following description of this system in India:

The Tartar [= Mogul] invasion [in India] was mischievous; but it is our protection that destroys India. It was their enmity, but is our friendship. Our rule there [in Bengal], after twenty years, is as crude as it was the first day. The natives scarcely know what it is to see the grey head of an Englishman. Young men (boys almost) govern, without society, and without sympathy for the natives. They have no more social habits with the people than if they still resided in England – nor, indeed, any species of intercourse, but that which is necessary to making a sudden fortune, with a view to a remote settlement. Animated with all the avarice [greed] of age, and all the impetuosity of youth, they roll in one after another; wave after wave; and there is nothing before the eyes of the natives but an endless, hopeless prospect of new flights of birds of prey and passage, with appetites continually renewing for a food that is continually wasting. Every rupee of profit made by an Englishman is lost forever to India.

Yet, this system of extortion could possibly be justified if the British did any good in India, if they collected taxes not to enrich themselves but to enrich the country they were governing. But this is not the case as Burke goes on:

With us are no retributory superstitions, by which a foundation of charity compensates, through ages, to the poor, for the rapine and injustice of a day. With us no pride erects stately

monuments which repair the mischiefs which pride had produced, and which adorn a country out of its own spoils. England has erected no churches, no hospitals, no palaces, no schools; England has built no bridges, made no high-roads; cut no navigations, dug out no reservoirs. Every other conqueror of every other description has left some monument, either of state or beneficence, behind him. Were we to be driven out of India this day, nothing would remain, to tell that it had been possessed during the inglorious period of our dominion, by anything better than the orang-utan or the tiger.⁸

The situation thus described by Burke could not last forever. On the one hand the British got increasingly involved in the Indian's troubles, and the more they got involved the less the racket paid.⁹ On the other hand their heart softened; »the third generation makes the gentleman« the saying goes. The white man questioned himself whether greed really was a justification for exploiting another nation because it belonged to another race. And the answer was that his rule over the »black«¹⁰ man could not be justified as plain exploitation but only as recompense for bestowing on the black man the blessings of the white man's culture and civilisation – just as Burke points out.¹¹ Without being noticed – the process took place in a »fit of absence of mind«¹² – the business changed: the extortion racket was turned into something like a compulsory public school¹³ with an Empress as headmistress,¹⁴ a Viceroy as Provost and an ancient and civilised people as pupils paying high fees.¹⁵ The school metaphor is all the more justified, when one thinks of Thomas Babington Macaulay's (1800–1859) most influential »Minute on Education«. Its declared aim was to create a class of Indians »in blood and colour« who were to be »English in taste, in morals and in intellect«.¹⁶

4 This is a Hindustani word originally meaning ›king‹ or ›rule‹; cf. MERRIAM WEBSTER, Dictionary i.v.

5 For Indian History see the Oxford History of India (1981); WOLPERT (1989); DONIGER (2009).

6 GRÜNDER (1987).

7 Biography: O'BRIEN (1992); KIRK (1997); LANGFORD, in: Oxford DNB i.v.; Works: ed. London 1886–1889.

8 Speech on Mr. Fox's East India Bill, in: BURKE vol. II (1886) 194s.

9 Cf. REINHARD (2000) 485–490.

10 Native Indians were generally called »blacks«.

11 METCALF (1994) 2–5, points out the fact that this ideology was originally developed regarding Catholic – that is to say barbarous! – Ireland; cf. also OSTERHAMMEL (2011) 647s.

12 Allusion to SEELEY (1897) 10: »We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind.«

13 It is noteworthy that General Dyer, responsible for the massacre of Jallianwalla Bagh in Amritsar, saw himself as some kind of schoolmaster; METCALF (1994) 229.

14 In 1876 Queen Victoria was given the title of an »Empress of India«. This was a showy and romantic idea of Disraeli.

15 On taxation see REINHARD (1988) 12.

16 On the Minute see METCALF (1994) 34, 39.

Yet, the benefits of this new system were less noticed by the Chancellor of the Exchequer than by the Minister of Labour.¹⁷ This enormous public school needed an immense staff of teachers and beadles.¹⁸ Though one will not get rich as a teacher or beadle one can earn a lot of prestige and give one's life meaning. And there is even a further, a more spiritual benefit and that is racism.¹⁹ The meanest or most humble member of the teacher nation stands – in racist terms – above the highest dignitary of the schoolboy nation.²⁰ To give an example: In the British clubs all over the subcontinent, »natives«, even if they were Indian Princes, were not admitted, with the sole exception of the Calcutta Club. This club was founded in 1905 on the initiative of the Viceroy Lord Minto, who had found it impossible to invite an important native Indian industrialist to dinner in the existing Bengal Club in Calcutta (Kolkata).²¹ This opportunity to look down on somebody else simply because he was shorter and darker than oneself assuaged the great tension within the highly stratified teacher nation.²² Eventually this public school idyll also became intolerable, not so much because of its inhumanity but because it became increasingly difficult to justify. The teacher-nation had educated so many pupils that the pupil-nation had acquired all the skills scheduled in the curriculum.²³ So why should head and stomach of the body politic remain white and the sweating limbs remain black? The only possible explanation was that the black man was of an inferior nature, of a »lesser breed« in the words of the Raj's poet laureate, Rudyard Kipling (1865–1936).²⁴ At this moment racism lost its character as a comfortable side effect

and became essential to legitimise the whole enterprise. The more it gained importance the more it became uncompromising and malicious²⁵ – just remember Gandhi's (1869–1948) train-coach incident.²⁶ James Fitzjames Stephen (1829–1894), an important colonial administrator and theorist, observed on the question whether native Indian magistrates should have the power to try not only native Indian but also European subjects in an open letter to The Times:

The British Indian government is essentially an absolute government, founded, not on consent, but on conquest. It does not represent the native principles of life or of government, and it can never do so until it represents heathenism and barbarism. It represents a belligerent civilisation, and no anomaly can be so striking or so dangerous as its administration by men who, being at the head of a government founded upon conquest, implying at every point the *superiority of the conquering race, of their ideas, their institutions, their opinions, and their principles, and having no justification for its existence except that superiority*, shrink from the open, uncompromising, straightforward assertion of it, seek to apologize for their own position, and refuse, from whatever cause, to uphold and support it.²⁷

The same line of thought was perfectly put into words by Kipling with that touch of romanticism and bad taste which was also part of the Raj:

Take up the White Man's burden-/Send forth
the best ye breed-/Go bind your sons to exile/

17 This position in the Cabinet was created only in 1916, therefore the wording is a bit anachronistic.

18 OSTERHAMMEL (2011) 655–661; REINHARD (1988) 12.

19 On this see METCALF (1994) 80–81, 92–94 (with reference to gender), and REINHARD (1988) 17s.

20 This truth is analysed with the greatest subtlety by SCOTT (1966–1975), a work of literary genius and deep historical insight. See also METCALF (1994) 160s.

21 See <http://www.calcuttaclub.in/history.html> (6 June 2011). This incident is referred to on several occasions in SCOTT (1966–1975).

22 Just remember SARTRE's (1946) 30, dictum that anti-Semitism is the »poor man's form of snobbishness« (snobisme du pauvre). The arch-colonialist Cecil Rhodes was conscious of this; see the quotation in GEHLEN (1986) 107s.

23 METCALF (1994) 160s., 208s.

24 A famous and very ambiguous phrase from RUDYARD KIPLING's poem »Recessional« (1895). Some say that by »lesser breeds« he did not mean people from the colonies but rather the Germans a.k.a »Huns«.

25 OSTERHAMMEL (2011) 1214ss.; METCALF (1994) 199–214; REINHARD (1988) 9s.

26 JUDITH M. BROWN, Gandhi, Mohandas Karamchand, in: Oxford DNB 372s.

27 Letter to The Times, 1 March 1883; cited after METCALF (1994) 210. This makes one think of Friedrich von Schiller's famous lines: »It is the curse of an evil deed that it inevitably must procreate new evil deeds« (Das eben ist der Fluch der bösen Tat./Daß sie, fortzeugend, immer Böses muß gebären); Wallenstein/Die Piccolomini, V 1.

To serve your captives' need;/To wait in heavy harness,/On fluttered folk and wild-/Your new-caught, sullen peoples,/Half-devil and half-child.²⁸

III. Putting Greed on Trial: the Impeachment of Warren Hastings

Our main concern, however, is not this final stage of colonialism but the beginning of it. That means the period when the colonial rule shifted from extortion racket to compulsory public school. In India this transition is marked by the personalities of the first three significant Governors of Bengal. The first one was Robert Clive (1725–1774), the conqueror of Bengal and founding father of the Raj.²⁹ Clive was a man of action, driven forward by insatiable personal greed, supported by a sturdy constitution and the absence of any scruple. He was so effective that he came back to England as one of the richest men of his time. Warren Hastings (1732–1818),³⁰ the second in line, was more sophisticated and cultivated, especially as an orientalist.³¹ His greed was less personal than corporate. With Machiavellian cunning and, if necessary, blithe ruthlessness he sucked up all the riches he could get out of the territories under his command.³² The third one, Lord Charles Cornwallis (1738–1805), was a moderate soldier and honest administrator, inspired by ancient virtue more than by modern greed.³³ He was the first truly respectable of the Raj's many rulers and has been called the 'Justinian of India'.³⁴ The change from Hastings to Cornwallis, from racketeering to respectability, coincides with the famous impeachment trial of Hastings.³⁵

Impeachment is the juridical process, in which ministers and other powerful persons are accused by the House of Commons and tried by the House

of Lords for high crimes and misdemeanours committed in office.³⁶ Hastings' main opponent was the already mentioned Edmund Burke. He was responsible for the House of Commons' decision to impeach Hastings and later became one of the managers of his prosecution before the House of Lords. In British History there have not been many impeachment trials and the one for Hastings is regarded as a major political event of the 18th century. This eminence is due to the high rank of the persons involved, the issues at stake and the scandalous implications of the charges.

Hastings certainly had been a most efficient colonial administrator. His achievements in defending the Company's position against the Marathas and the French would have won him a peerage and high office in government, had he not come under a cloud by his impeachment. Burke was a prominent politician in his time and remains one of the most important political thinkers. It has been justly observed that there were greater statesmen for Burke was never tested in high office, that there were more systematic and more original philosophers and – given his defects of delivery – even greater orators, though his written speeches were regarded as the acme of oratory throughout the 19th and 20th centuries.³⁷ But possibly there has never been a statesman capable of understanding practical political problems from their roots to their ramifications with such a degree of philosophical insight, political acumen and moral stamina.³⁸ In Burke's mind the highest theory and morale of politics and the practical ends and exigencies of the day merged. His most famous achievement, his stance against the French Revolution, can be seen as a continuation of his opposition to the British rule in Ireland and India. When all Europe succumbed to the blandishments of revolutionary ideology, Burke refuted single-handedly the Revolutionaries' dogma

28 The White Man's Burden (1895). On Kipling's complex attitude towards the Raj see ORWELL (1946) 116–131, and METCALF (1994) 161–163.

29 HUW VAUGHAN BOWEN, in: Oxford DNB i.v.; Marshall (1988) 70–136.

30 PETER JAMES MARSHALL, in: Oxford DNB i.v.

31 BROCKINGTON (1989).

32 See O'BRIEN (1989).

33 ALSAGER RICHARD VIAN, in Oxford DNB i.v.

34 For this see METCALF (1994) 17.

35 MARSHALL (1965); WHELAN (1996). The classic on this topic is, of course, MACAULAY (1841). On this masterpiece of literature and its afterlife see EDWARDS (1989).

36 ARNOLD-BAKER (2008) 684s., and LOEWENSTEIN (1967) 14s. For the history and scope of impeachment in general see BRADLEY (1989).

37 A rhetorical analysis is given by SAMET (2001). But it is, of course, a malicious

idea to reduce Burke's stance to oratory, to make of him a post-modernist *avant la lettre*.

38 This evaluation is to be found in the article on Burke, Edmund by the VISCOUNT MORLEY OF BLANKHAM, in: Encyclopaedia Britannica, 11th edition, New York, 1910–11, i.v.

that mankind could be saved by what Burke called »armed doctrine«. He meant a political doctrine which, though the fruit of theoretical deliberations, acknowledged no higher law than the will of those in power. For he knew that they would use this power for their own purposes. This made him the founding father of conservatism in public opinion,³⁹ a claim that is only partly justified. Conservatism tout court is merely a formal principle – there are even conservative communists. Burke, however, did not support the conservation of every status quo but that of a distinct set of moral rules: Natural Law.⁴⁰ In this, as in many other respects, Burke shows himself a true pupil of Cicero.⁴¹ For it is above all Cicero who imported Natural Law to Rome from Athens.⁴²

1. *Natural Law against »Geographical Morality«*

Since antiquity many philosophers, lawyers and Fathers of the Church have held the opinion that there is a body of legal rules in force without our consent and not alterable by our will.⁴³ The main exponents of this doctrine are Plato, Aristotle, Cicero⁴⁴ and St. Tomas Aquinas.⁴⁵ This body of rules is derived from nature to all mankind thanks to reason. The underlying concept of »nature« is not purely materialistic but nature is seen as imbued with reason, especially Aristotle's »four causes« among them the all important final cause (»telos«). Natural law is not simply divine law and, therefore, tied to a certain religion, Christianity in this case. Its binding force and the possibility of its perception are not bound to any particular religious belief. Among the Ten Commandments the first three do not belong to Natural Law.⁴⁶ These commandments are binding only for the people

of Israel and later for the Church. But the commandments four to ten are the very core of Natural Law and binding for everyone.⁴⁷ These rules are the basis for developing more detailed and explicit rules for specific situations under changing circumstances. According to Natural Law the happiness of human society lies in keeping to these rules. From these principles follows the precept of Natural Law that there is no order of precedence among human races; a universal law can make no exemptions to the advantage of one or to the harm of other groups of people.⁴⁸ Slavery infringes also Natural Law because it gives man absolute power over man.⁴⁹ And absolute power violates Natural Law: »power tends to corrupt, absolute power corrupts absolutely« (Dalberg-Acton).⁵⁰ This corruption necessarily leads to the breach of the commandments four to ten.⁵¹ As the case of slavery shows insight into the vicious nature of an institution can take time and its abolition even more time but in the end Natural Law prevails.⁵²

Natural Law is the very core of Burke's political philosophy⁵³ and he uses this thinking against Hastings who asserted that doing wrong in Britain did not mean doing wrong in India:

[Y]our Lordships know that these gentlemen [belonging to the Company] have formed a plan of geographical morality, by which the duties of men, in public and private situations, are not to be governed by their relation to the great Governor of the Universe, or by their 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 ...⁵⁴

39 KIRK (1995) passim.

40 Cf. KIRK (1995) 8, 16s., 30s. et passim.

41 CARNALL (1989).

42 KASER 54s.

43 MESSNER (1984) passim; WALDSTEIN (2001) passim.

44 BRANDT (1984).

45 SPECHT (1984).

46 »I am the God, thy Lord; Thou shalt have no Gods before me. Thou shalt not call my name in vain. Remember the Sabbath and keep it holy.«

47 »Honour thy father and thy mother. Thou shalt not kill. Thou shalt not

commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbour. Thou shalt not covet thy neighbour's house. Thou shalt not covet thy neighbour's wife.«

48 MESSNER (1984) 559–563.

49 MESSNER (1984) 230, 232, 336s. The debate about slavery is much more complex since slavery was present as a social institution in the Gospel, in Roman Law and Society and all over the world until recently.

50 DALBERG-ACTON (1907) 504.

51 MESSNER (1984) 701.

52 Cf. FLAIG (2011), passim.

53 STANLIS (1958), passim. This interpretation of Burke was marred for some time by the fact that Burke vigorously attacked the doctrine of »natural rights«. On this see STRAUSS (1953) 294ss.; WHELAN (1996) 275–291. Further references can be found in GURIOIAN (1981).

54 Opening Speech in the Impeachment of Warren Hastings, in: BURKE Supp. vol. I (1889) 93s.

To understand Burke's wrath against Hastings and the East India Company it is helpful to know some biographical details: Burke was Irish by birth, his mother and sister were Roman Catholics. Most probably Burke himself was a crypto-Catholic during his lifetime; at least he wanted to be received into the Church on his deathbed.⁵⁵ As an Irishman with Catholic roots he knew exactly what oppression by a foreign power meant. By attacking Hastings Burke presumably attacked the archetype of the cold-blooded and expedient Englishman, who had for centuries destroyed, ransacked and ravaged Ireland. India was for him, to a certain degree, a metaphor for Ireland.⁵⁶

2. *The charges against Hastings*

Over the years Burke had collected evidence for 22 charges of impeachment against Hastings. The House of Commons accepted only four of them as a due basis for impeachment before the House of Lords.⁵⁷ These charges were:⁵⁸

1. Benares: The principedom of Benares (Varanasi) belonged to Bengal in some way or other. After taking over Bengal the Company had made a financial settlement with the ruler of Benares. According to the prosecution Hastings had made unjustified demands on the ruler in order to cover the financial needs of the Company during wartime and thus provoked him to revolt. Hastings defended himself by asserting that this ruler had been a scoundrel and the Company had absolute power over him anyway.⁵⁹

2. The Begums of Oudh (Awad): Oudh at that time was not under the Company's suzerainty but still under that of the Mogul Emperor. Yet, the Company had an agreement with it whereby the Company would station troops there for which Oudh had to pay. Oudh was seen as buffer state for Bengal so both sides were considered to benefit from this settlement. The prosecution's case was that Hastings had recovered the ruler's debt to the company by robbing his mother and grandmother, the famous Begums of Oudh, in a brutal way: The zenana (the women's quarters) had been stormed by British troops⁶⁰ and the Begum's eunuchs had

been questioned under torture. Hastings's defence was similar to the one in the case of Benares: he maintained the Begums had supported rebellions in Oudh and other places and their dowries had been liable for the ruler's debt.⁶¹

3. Presents: Company servants were not allowed to receive »presents« (bribes) from Indians. Public administration should not be on sale. The prosecution tried to prove that Hastings had nonetheless accepted bribes for the Company, also pocketing some of the money for himself. This accusation touched the very essence of British rule in India. In practice the Company apparently sold everything to the highest bidder: kingdoms, high offices and the right to collect taxes. After having acquired the right to collect taxes in Bengal, the Company had sold it at district level to the highest bidding »tax farmer«. After rumours of serious disturbances had arisen in the district of Rangpur, a report was commissioned by the Company. Burke used the report to describe the effects of this system:

And here, my Lords, began such a scene of cruelties and tortures as I believe no history has ever presented to the indignation of the world ... they began by winding cords around the fingers of the unhappy freeholders [free peasants] of those provinces, until they clung to and were almost incorporated with one another; and then they hammered wedges of iron between them, until, regardless of the cries of the sufferers, they bruised to pieces and forever crippled those poor, honest, innocent, laborious hands, which had never been raised to their mouths, but with a penurious and scanty proportion of the fruits of their own soil; but those fruits [i.e. opium] (denied to the wants of their own children) have for more than fifteen years past furnished the investment of our trade with China, and been annually sent out, and without recompense, to purchase for us that delicate meal with which your Lordships, and all this auditory, and all this country, have begun every day for these fifteen years at their expense [i.e. tea]. To those beneficent hands that labour for our benefit the return of

55 O'BRIEN (1992) 589ss.

56 O'BRIEN (1992) 459–592.

57 MARSHALL (1965) xiv ss.

58 On some of the legal issues involved see KAHN (1989).

59 MARSHALL (1965) 88–108.

60 This is, of course, an allegation to rape.

61 MARSHALL (1965) 109–129.

the British government has been cords and hammers and wedges.⁶²

Burke, who had never been to India, was not an eye-witness of these scenes. He had gathered all his knowledge from reports given to him by opponents of Hastings within the Company. Burkes description of the »Tax Britannica« (an old pun) may, therefore, be a bit, yet, not completely exaggerated. Otherwise his following prophetic exhortation would not have found favour with the Lords:

But there is a place where these crippled and disabled hands will act with resistless power. What is it that they will not pull down, when they are lifted to heaven against their oppressors? Then what can withstand such hands? Can the power that crushed and destroyed them? Powerful in prayer, let us at least deprecate [to seek to avert evil by prayer] and thus endeavour to secure ourselves from the vengeance which these mashed and disabled hands may pull down upon us. My Lords, it is an awful consideration: let us think of it.

It looks as if this charge was well founded. The legal situation has been quite clear since the Regulating Act of 1773 prohibiting the acceptance of gifts. Hastings did not contradict the accusation of having taken presents; he denied they were bribes.⁶³

4. Contracts: This charge regarded contracts the Company had entered with traders and personnel on extreme terms. These were exceedingly uneconomical for the Company as well as useless and wasteful for the creation of jobs within the Company itself. Both kinds of corruption intended to enhance Hastings' power base with the Company. It is obvious that everything here depended on evidence. Therefore it was quite easy for Hastings to defend himself by suggesting everything he had done was perfectly correct and in accordance with the Company's interest.⁶⁴

Burke's commitment was inspired by political, moral and legal reasoning: He denounced the oppression of the Indians because for him all men

had equal natural rights. And he was opposed to arbitrary rule in India because it inevitably led to oppression and eventually to rebellion with all the dire consequences for the Indians as well as the British. In addition he pilloried the corruption of British politics by unjustly enriched former Company servants, the so-called Nabobs. This motive is obviously derived from Roman history, which is an important inspiration for Burke: During the republican era the relationship of the provinces to the city of Rome was the paramount constitutional problem. And the career of someone like Caesar clearly showed what could happen if outstandingly successful provincial administrators participated in metropolitan politics with the help of their gold and the loyalty of their former subordinates.⁶⁵

3. *Natural Law against »arbitrary power«*

During the impeachment trial two legal issues were of overriding importance: the intricate question of evidence and the even more difficult question of applicable law.⁶⁶ The House of Lords had established the principles of judging questions of evidence by applying the strict standards of Common Law.⁶⁷ It was an almost impossible task to prove any of Hastings' wrongdoings by such standards. Hastings had had all the time, means and opportunities to tamper with the facts – just consider that it took an East Indiaman half a year to sail from Britain to Bombay (Mumbai). Apart from that many prejudicial questions of Indian law were highly controversial. Obviously, the person who knew Indian ways best was Hastings himself, having done business in India for over 35 years.

Was India just a victim of the Company's corporate and Hastings' personal greed, just as the prey is the victim of the lion? Were the Company and Hastings as its executive chief bound by rules of law? If the Company was bound by law, which law would it be? There was no positive law regulating the Company's relationships with Indians and Indian states. Common Law only applied to the members of the British community in India. Native law, that is to say Muslim or Hindu law just regarded the Company's relationship to Indians –

62 Speech on the Impeachment of Warren Hastings, Fifth Day, in: BURKE Supp. vol. I (1889) 187.

63 MARSHALL (1965) 130–162.

64 MARSHALL (1965) 162–179.

65 RAINER (2006) 162–185.

66 M. MUKHERJEE (2005) 607ss.

67 MARSHALL (1965) 69ss.

if at all, not to Indian states like the Mogul Empire or the principality of Oudh. Concerning these relationships the only possibility was International Law as laid down in the classic of Vattel's ›Le droit des gens‹ (1758). But did it apply?

For Burke, however, the decisive issue was not which law should be applied. As a true believer in Natural Law he was convinced that ›robbing‹⁶⁸ others was a crime by any law:

Mr. Hastings has no refuge here. Let him run from law to law; let him fly from common law, and the sacred institutions of the country in which he was born; let him fly from acts of parliament ... still the Mohamedan law condemns him ... let him fly where he will – from law to law – law, thanks God, meets him everywhere – arbitrary power cannot secure him against law; and I would as soon have him tried on the Koran, or any other eastern code of laws, as on the common law of this kingdom.⁶⁹

Hastings maintained he had held ›arbitrary power‹ in his capacity as Governor-General of Bengal; his actions were not to be judged by any rules, be they Natural Law, Indian law or whatever else. Hastings held the theory that in Bengal the Mogul Empire had bestowed its own arbitrary power on the Company.⁷⁰ The arbitrariness of Asian government is one of oldest and most deep-rooted western prejudices regarding the East and was one justification for the Raj.⁷¹ Briefly summarized the argument is: The Asians are less than the Europeans because the individual does count less in the East than it does in the West. A ruler in Asia can do as he pleases because the individual does have no value (›oriental despotism‹). Because of that Asians are servants and Europeans their masters by nature. In the following excerpt Burke refutes this view at length. Burke first points out that ›abusus non tollit usum‹, that

abuse does not take away use, that it is not an argument against proper use:

Will you ever hear the rights of mankind made subservient to the practice of government? It will be your lordships' duty and joy – it will be your pride and triumph to teach men, that they are to conform their practice to principles, and not to derive their principles from wicked, corrupt and abominable practices of any man whatever. Where is the man that ever before dared to mention the practice of villains, of all the notorious predators, as his justification? To gather up, and put it all into one code, and call it the duty of a British governor. I believe so audacious a thing was never before attempted by man.⁷²

Having done so Burke analyzes the idea of arbitrary power in itself. Under Natural Law such a thing as arbitrary power cannot exist, the very idea is wicked.

He [viz. W. Hastings] have arbitrary power? My lords, the East India Company have no arbitrary power to give. The king has no arbitrary power to give. Neither your lordships, nor the Commons, nor the whole legislature have arbitrary power to give. Arbitrary power is a thing which no man can give. My lords, no man can govern himself by his own will; much less can he be governed by the will of others. We are all born – high as well as low – governors as well as governed – in subjection to one great immutable, pre-existing law, a law prior to all our devices and all our conspiracies, paramount to our feelings, by which we are connected in the eternal frame of the universe, and out of which we cannot stir. This great law does not arise from our combinations and compacts; on the contrary, it gives to them all the sanction they can

68 Robbing may considered strong language – it was, too, in Burke's time. We use this word for authenticity's sake since Burke used it himself: ›My Lords, the Managers for the Commons have not used any inapplicable language. We have indeed used, and will again use, such expressions as are proper to portray guilt. After describing the magnitude of the crime, we describe the magnitude of

the criminal. We have declared him to be not only a *public robber himself*, but the *head of a system of robbery*, the *captain-general of the gang*, the chief under whom a whole predatory band was arrayed, disciplined, and paid«. Speech in the Impeachment of Warren Hastings/First day of reply, in: BURKE Supp. vol. II. (1889) 153.

69 Opening Speech in the Impeachment of Warren Hastings, in: BURKE Supp. vol. I (1889) 118.

70 According to KAHN (1989) 148ss., this could not have been the case under Muslim law.

71 METCALF (1994) 6–15.

72 Opening Speech in the Impeachment of Warren Hastings, in: BURKE Supp. vol. I (1889) 98–101.

have. Every good and perfect gift is of God: all power is of God; and He who has given the power, and from whom alone it originates, will never suffer it to be corrupted. Therefore, my lords, if this be true – if this great gift of government be the greatest and best that was ever given by God to mankind, will He suffer it to be a plaything of man, who would place his own feeble and ridiculous will on the throne of divine justice?

The fight against arbitrary power, be it in Ireland, France or, as in this case, India, is the very core of Burke's political endeavour. Man is given power in order to make other men comply with the precepts of Natural and not to use them as the puppets of his whim. Power can, therefore, never be arbitrary but is always contained by the precepts of Natural Law like the Commandment »Thou shalt not covet thy neighbour's house thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's« (Ex. 20,17). But what if man declared that he would prefer to be governed by someone whose power is *not* contained by Natural Law but by someone who has arbitrary power? Here is Burke's answer:

If, then, all dominion of man over man is the effect of the divine disposition, it is bound by the eternal laws of Him that gave it, with which no human authority can dispense; neither he that exercises it, nor even those who are subject to it; and, if they were mad enough to make an express compact, that should release their magistrate from his duty, and should declare their lives, liberties and properties, dependent upon, not rules and laws, but his mere capricious will, that covenant would be void. This arbitrary power is not to be had by conquest. Nor can any sovereign have it by succession [like the Company from the Mogul Emperor]; for no man can succeed to fraud, rapine, and violence. 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, wherever it shall show its face to the world. Law and arbitrary power are in eternal enmity.

Any kind of contract bestowing arbitrary power upon someone or any act trying to transfer it must be void because it is against Natural Law. But, there is also a more practical argument against arbitrary power. How will those who have it use it? To their good or to that that of others? For us who have seen the consequences of arbitrary power in the last century Burke's answer may be a bit commonplace but it must have been pretty audacious when he pronounced it for the first time: The rule of will inevitably leads to the rule of greed, as Burke observes. The order of Natural Law will be destroyed if the will of the individual becomes supreme:

An arbitrary system indeed must always be a corrupt one. *My lords, there never was a man who thought he had no law but his own will, who did not also find that he had no ends but his own profit.* Corruption and arbitrary power are of natural unequivocal generation, necessarily producing one another.⁷³

What should the Company have done in Burke's view? For a merchant profit is the essence of his profession and the same held true for the Company. It was a corporate commercial interest and as such dedicated to the profit of its shareholders. Such a commercial interest on political terms is a contradiction because one cannot combine the merchant's dedication to profit with the sovereign's dedication to the welfare of his subjects. And the common good according to Natural Law is the ultimate goal of society.⁷⁴

4. »Eundem negotiatorem et dominum«

A Company dedicated to profit and having the power of a sovereign would become a »big robbery« in St. Augustine's words.⁷⁵ Burke expressed this idea in the form of a legal maxim of Roman law:

73 Speech in the Impeachment of Warren Hastings, Fifth Day, in: BURKE Supp. vol. I (1889) 127.

74 THOMAS AQUINAS, Summa Teologica I 2 q. 90 a 2.

75 Cf. AUGUSTINUS, De civ. Dei 4, 4: »Justice being taken away, what else, then, are kingdoms but big robberies« (Remota itaque iustitia quid sunt regna nisi magna latrocinia?).

[T]he India Company came to be what it is a great Empire, carrying on, subordinately, a great commerce: it became that thing, which was supposed by the Roman law irreconcilable to reason and propriety »eundem negotiatorem et dominum«: the same power became the general trader, the same power became the supreme lord.⁷⁶

This quotation needs some explication: Agency did not exist under Roman law. Therefore wealthy Romans had their own traders (negotiatores) in important ports like Alexandria. Usually these tradesmen were slaves.⁷⁷ The terms used by Burke, therefore, have the literal meaning that one cannot be master (dominus) and servant (negotiator) at the same time. In a figurative sense it says one cannot do two incompatible things at the same time, especially not govern and do business. Unfortunately it has not been possible to track down this maxim to any known source of Roman law as yet.⁷⁸ Though, there is a dictum of Common Law, which may be a source of our maxim: »Nemo potest esse tenes et dominus«.⁷⁹ But in my opinion the maxim is a summa extracted from Cicero, especially his Verrine orations.⁸⁰ In his speeches Burke refers to Hastings as a kind of Verres, the greedy and corrupt governor of Sicily, on several occasions: »We have all, in our early education, read the Verrine Orations ... In these orations you will find almost every instance of rapacity and peculation which we charge upon Mr. Hastings«.⁸¹

»Eundem negotiatorem et dominum«, is the very essence of Burke's criticism of the East India Company and Hastings' governorship. Government for the sake of profit is contrary to good government and the essence of tyranny. According to this maxim Burke considered it necessary to apply British standards of justice and morale in

Bengal instead of abiding by a »geographical morale and justice« as Hastings had done.

These were the principles underlying the impeachment of Hastings. However, after almost ten years of trial the House of Lords acquitted Hastings in 1795. Whether or not this acquittal had been justified has been debated ever since. Hastings was acquitted because he had saved India for Britain, not because he was innocent concerning the four charges brought up against him. He even made a remark proving his guilt: »The primary exigencies of the Company conflict with the interest of the Indian peoples who are subject to its authority.«⁸² This would only be acknowledged if you accepted Indians not to have any rights and if you treated them accordingly.

5. *Taming the Beast or killing it?*

Probably Hastings' acquittal was inevitable for political reasons but it only did little harm to Burke's achievement, at least in his own view. Some time later he wrote:

But, in truth, these services I am called to account for are not those on which I value myself the most. If I were to call for a reward (which I have never done), it should be for those in which for fourteen years, without intermission, I showed the most industry and had the least success: I mean in the affairs of India. They are those on which I value myself the most; most for the importance; most for the labour; most for the judgment; most for constancy and perseverance in the pursuit. Others may value them most for the intention. In that, surely, they are not mistaken.⁸³

Thanks to Burke the blunt and crude greed as depicted in »The East offering its Riches to Britan-

76 Opening Speech in the Impeachment of Warren Hastings, in: BURKE Supp. vol. I (1889) 22–23.

77 KASER (1971) 260ss.

78 This is not unusual with Burke; cf. CARNALL (1989) 86.

79 GILBERT (1796) 154

80 For this I am indebted to J. M. Rainer. See also CANTER (1914).

81 Speech in Reply, Ninth Day, in: BURKE, Works Supp. vol. II (1889)

407. See also Speech on the Impeachment of Warren Hastings, Fifth Day, in: BURKE Supp. vol. I (1889) 237, and Opening Speech in the Impeachment of Warren Hastings, in: BURKE Supp. vol. I (1899) 119, where Burke cites Cicero's famous pun »At sphingem habebas domi!«: One of the defendants in the Verres trial said to Cicero that he was puzzled by all these questions. Cicero replied: »But

you have a sphinx at home«, which was intended to be stolen under the guardianship of Verres in Sicily.

82 GLEIG (1841) vol. I, 184.

83 Letter to a Noble Lord, in: BURKE vol. V (1886) 124. It is worth noting that Burke dedicated about one third of his printed works to the Indian question.

nia» became unthinkable in the administration of India. He had made it clear that greed does not justify anything:

[T]he affairs of India must be restored to their natural order. The prosperity of the natives [i.e. Indians] must be previously secured, before any profit from them whatsoever is attempted. For as long as a system prevails which regards the transmission of great wealth to this country, either for the Company or the state, as its principal end, so long will it be impossible that those who are the instruments of that scheme should not be actuated by the same spirit for their own private purposes. It will be worse: they will support the injuries done to the natives for their selfish ends by new injuries done in favor of those before whom they are to account. It is not reasonably to be expected that a public rapacious and improvident should be served by any of its subordinates with disinterestedness or foresight.⁸⁴

After Burke the Raj turned into a compulsory public school and the Company no longer was a band of robbers but a board of teachers. That the public school model eventually became intolerable does not influence its progressive character at the time it was taken up. To exemplify this proposition just compare the abovementioned allegory »The East offering its Riches to Britannia« with a significant detail from Tiepolo's contemporary (1750–53) allegory of the four continents in the stairwell of the Bishop of Würzburg's residence⁸⁵ (Würzburg was one of the most important Catholic bishoprics in the Holy Roman Empire):



The former is an allegory of extortion, the latter of commerce: The European is holding a purse in his hand in order to pay for the pearl necklace offered to him by the Asian tradesman. The juxtaposition of these two allegories shows where interracial relations according to Natural Law – believed in by Burke as well as by the Bishop of Würzburg – will lead to and where the Company's self-righteous ideology of European supremacy will lead to: commerce in the former, exploitation in the latter case.⁸⁶

In the end Burke's insistence on the separation between commerce and government was successful in India: the rule of law replaced the rule of greed. He helped to establish what he himself had called »a Magna Carta of Hindostan«.⁸⁷ John Morley (1838–1923), Secretary of State for India from 1905 to 1910, as well as a distinguished political theorist and writer observed in his biography on Burke:

If he did not convict the man [Hastings], he overthrew a system, and stamped its principles with lasting censure and shame ... The lesson of

84 Ninth Report from the Select Committee appointed to take into consideration the state of administration of justice in the provinces of Bengal, Bahar, Orissa etc., in: BURKE vol. IV (1886) 29.

85 BÜTTNER, Tiepolo (1980) *passim*.

86 On the very different long range attitude of Catholicism and Protestantism towards racism and colonialism see STARK (1967) 194–244.

87 Speech on Mr. Fox's East India Bill, in: BURKE vol. II (1886) 179.

his impeachment had been taught ... the great lesson that Asiatics have rights and that Europeans have obligations.⁸⁸

IV. Perfectionist Enemies of the Good: the Postcolonial School

Yet, it is a highly contested opinion, that the impeachment was a political success enhancing the rule of law. Looking at the vast literature on Hastings' impeachment one can detect two opposing positions. Those in favour of the Raj think Hastings was a hero and therefore condemn the whole trial as superfluous and deny any consequences for India's history.⁸⁹ Admirers of Burke and those opposed to the Raj judge Hastings a villain. Even if the impeachment may have been doomed, it had nevertheless had important repercussions on British rule in India, they believe.⁹⁰ Only recently a third position has been expressed: The postcolonial school acknowledges Burke's significant influence on the course of events in India and the resulting improvements in British rule. But postcolonialists evaluate these facts differently and claim Burke was morally wrong in doing so. In their opinion the Empire was so dreadful that they disapprove of any attempt at reforms because such well-meaning manoeuvres eventually stabilized the Raj and thus prolonged its existence. If Burke had really qualified as a hero in their eyes, he would have condemned the Raj wholeheartedly and without compromise and would have told the British to »Quit India«.⁹¹ Most recently this view was put forward by the historians Nicolas B. Dirks,⁹² Victoria Tietze Larson⁹³ and Sara Suleri.⁹⁴ Interesting is also the opinion Betsy Bolton, a professor of literature

deeply steeped in postmodern cynicism and glibberish:

Burke's predominantly theatrical handling of the India question demonstrates both the contagion of colonial ambivalence and the inadequacy of romance and sensibility as political responses to the economic conflicts of colonialism.⁹⁵

The most elegant and comprehensible phrasing of this view can be found in Oscar Wilde's (1854–1900) essay ›The soul of man under socialism‹:

Just as the worst slave-owners were those who were kind to their slaves, and so prevented the horror of the system being realised by those who suffered from it, and understood by those who contemplated it, so, in the present state of things in England, the people who do most harm are the people who try to do most good; and at last we have had the spectacle of men who have really studied the problem and know the life – educated men who live in the East End – coming forward and imploring the community to restrain its altruistic impulses of charity, benevolence, and the like. They do so on the ground that such charity degrades and demoralises. They are perfectly right. Charity creates a multitude of sins.⁹⁶

In their ›Dialectics of Enlightenment‹ Horkheimer and Adorno trace this view back to Nietzsche and the Marquis de Sade⁹⁷ and give an explanation: »It is not its softness but its restraint that puts compassion into question: it is always too little« (Nicht die Weichheit, sondern das Be-

88 MORLEY (1879) 125.

89 SUTHERLAND COTTON (1910–1911); ARNOLD-BAKER (2008) s.v. East India Company 447s. Though with many disclaimers P. J. MARSHALL, in: OXFORD DNB, s.v. Hastings, Warren 791, and MARSHALL (1965) 180–192.

90 Apart from MORLEY (1879) and IDEM, s.v. Burke, Edmund, in: 11th ed. of the Encyclopaedia Britannica, 831; O'BRIEN (1992) 382s.; M. MUKHERJEE (2005) 626–630; B. SMITH (2008); V. A. SMITH (1958) 645. This stance

is also maintained by the present author.

91 »Quit India!« was the Congress's battle cry in 1942 when Britain's fortunes were at their lowest ebb and the Japanese had attacked British India in Bengal. By the British this stance was seen as blackmail, of course. The corresponding Declaration by the Indian National Congress was published by the New York Times, 27 April 1942.

92 DIRKS (2006) passim.

93 TIETZE LARSON (2009).

94 SULERI (1992) 53, 55.

95 BOLTON (2005) 883.

96 WILDE (1891) 2. SLAVOJ ŽIŽEK, a contemporary philosopher à la mode, cites this view approvingly in a recent article (2011) 65.

97 HORKHEIMER/ADORNO (1988) 88ss.

schränkende am Mitleid macht es fragwürdig, es ist immer zu wenig).⁹⁸ What are the roots of this ›Weltanschauung‹?

1. *Acting justly within an unjust Environment?*

The postcolonial school is based on the fundamental notion that one cannot act justly in an unjust situation. Everything being done in such an unjust frame inevitably shares the frame's injustice. The concept of relative justice in a given situation under certain circumstances is not acceptable for postcolonialists. They cannot believe that a relative justice is better than no justice at all. For them the only possible just action in such a situation is to destroy the unjust frame itself. This line of thought also applies to the Raj, of course. The Raj was incurably rotten because it was not democratic and because it was racist.

A. Right Life in the wrong one?

In Burke's opinion this was completely different. As far as Natural Law is concerned the system of government is not relevant; it is rather the way power is exercised – according to the principles of Natural Law or against them. Later theory would call this the ›value neutrality of forms of government‹ (Wertneutralität der Staatsformen).⁹⁹ For Burke political participation itself was not a necessary element of good government.¹⁰⁰ Concerning India this boils down to the question whether the British rule was benign or malign. The postcolonial school, of course, considers it as absolutely malign. This evaluation is far from obvious: The Raj unified India politically and linguistically. Without the Raj the subcontinent's political unification most probably could only have been brought about by innumerable wars and a common language would have been beyond imagination (before English, though, Persian (Farsi) had a similar function but only for the happy few). The Raj provided a degree of infrastructure in India like the railway system and began the process of industrialisation. Thereby the British exported to India much qualified manpower, know-how and organisational capabilities.

The educational achievement of the compulsory schooling was impressive. Most of India's modern élite, including Gandhi himself, were its alumni. And the British governed India on the whole by the same standards they applied at home and which they call the ›Rule of Law‹.¹⁰¹ This was a precondition of overriding importance for India's development after independence in 1947, as will be shown in following section (IV 2). The already mentioned James Fitzjames Stephen wrote:

The establishment of a system of law which regulates the most important parts of the daily life of the people constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which rendered it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion ... Our law is in fact the sum and substance of what we have to teach [sic!] them. It is, so to speak, a compulsory gospel [sic!] which admits of no dissent and no disobedience.¹⁰²

This shows how conscious the British were of their own influence. The attitude expressed between these lines is arrogant and brutal but it is far better than Hastings' attitude who pretended to wield absolute power and who accordingly did not care the least bit about the rights of the people he was dealing with. The introduction of the rule of law heralded in such an ugly voice by Fitzjames Stephen ultimately lead to the establishment of a relatively just political system. The reason for this development was the acceptance of the core of any law: equality.¹⁰³ This opinion was shared for example by Gopal Krishna Gokhale (1866–1915), Gandhi's ›guru‹ as we will see:¹⁰⁴ ›The greatest work of Western education [sic!] in the present state of India is ... the liberation of the Indian mind from the thralldom of old world ideas.«¹⁰⁵

There are also, of course, good arguments against the Raj: the policy of retribution after the ›Rebellion‹ of 1857 was brutal; the British tended to ossify certain structures of Indian society like

98 HORKHEIMER/ADORNO (1988) 110.

99 MESSNER (1984) 698ss.

100 For this see STRAUSS (1953) 287s.

101 On these highly contested facts see MOORE (1999); RAY (1998);

REINHARD (1988) 31–38;

WASHBROOK (1999).

102 Cited after HUNTER (1875) vol. II, 168s.

103 RADBRUCH (1993) 258.

104 WOLPERT (1962) 121.

105 Cited after WOLPERT (1962) 121.

the caste system. Their greatest sin in the eyes of some, especially modern Indians, is the policy of divide et impera concerning Hindus and Muslims. The separation based on religion played a key role in the drama of the partition of India in 1947, the ensuing conflict with Pakistan and communal violence in nowadays India respectively harassing of Hindus in Pakistan. If we leave aside the justification the Raj ex eventu and assume that the Raj as such was bad and that Hastings' impeachment made it a little better, was it, then, right or wrong to impeach Hastings?

His impeachment would only have been right if one accepted the proposition – rejected by the postcolonialists – that it is possible to act justly within an unjust situation. If the postcolonialists were right, it would have been wrong to impeach Hastings, precisely because the Raj would have become more civilized and thus more stable as a consequence. In postcolonial rhetoric, however, compromises as such seem to be reprehensible. This Manichean morality is aptly expressed in Adorno's famous maxim: »There is no right life in the wrong one« (Es gibt kein richtiges Leben im falschen).¹⁰⁶ If a given environment like the Raj does not meet the requirements of the postcolonial school – such as representative government – it is unjust. Being unjust it makes just actions within its frame impossible and even transforms them into unjust actions. Postcolonialists must for this reason, will-nilly though, assert that justice can be one thing in »Rome« and in »Sicily« another. For postcolonialists Burke was an even worse villain than Hastings who had at least been honest enough to practice and confess colonialism in its full-fledged ugliness.

B. The Fruits of Nihilism

At this point the suspicion arises that the postcolonial school is at bottom a form of nihilism.¹⁰⁷ In her famous essay »Can the subaltern speak?: Speculations on Widow-Sacrifice«¹⁰⁸ Gayatri Spivak, one the founders of this school, attacks the

British legislation against widow burning (suttee/sati) with the help of the pun »White men saving brown women from brown men«. ¹⁰⁹ Ridiculing the serious moral concerns about widow burning (Do these women really act out of faith or out of social pressure?¹¹⁰ And even if their actions were self-imposed is there a justification for burning a woman because her husband has died?) as some kind of showy Tarzan deed is, indeed, a good pun because Tarzan is, of course, a thoroughly racist character. He was modelled on Kipling's »Kim« who proves that »blood will out« (Buon sangue non mente). The idea behind the pun seems, therefore, to be: Everything the white man does concerning the black man is done for racist reasons! And everything the black man does is intrinsically good, and if what he does looks wrong like in the case of widow burning this is merely a problem of the white man's perception, and if not the white man is actually responsible for it as in the case of the caste system. An ideology based on the assumption that the white man is essentially bad and the black man essentially good is either racist on its own terms, or a deliberate distortion of reality and thus morally reprehensible as well as without any cognitive value whatsoever.

C. Roman Lawyers and Slavery

Concerning our present question: »Is it possible to act justly within a vicious environment?«, this example might come in handy to illustrate the problem: Roman economy and society were based on slavery. Legally slaves were treated like moveable things (chattels).¹¹¹ The owner of an ox could choose whether to use it for ploughing or for turning it into beefsteaks. By law the master of a slave could dispose of his working capacity as well as his life in any way he thought fit. Throughout antiquity, however, an uneasy feeling about slavery existed.¹¹² What could a statesman such as Cicero have done in this case? For postcolonialists he would have had just one possibility: to criticise slavery openly, to become an abolitionist avant la

106 ADORNO (1950) nr. 18 in fine.

107 Cf. STRAUSS (1953) 35–80.

108 SPIVAK (1985).

109 DONIGER (2009) 610–622, unfortunately shares this opinion which she disguises under a disgusting heap of rhetoric.

110 On sati cf. YOUNG (2008).

111 KASER (1971) 283ss.

112 Otherwise the efforts to justify slavery by ARISTOTLE (polit. 1, 3–7) or ULPIAN/JUSTINIAN in Dig. (1, 1, 4) were inexplicable. On this see GARNSEY (1996).

lettre. Yet, slavery continued to be as important to the ancient economy as certain natural resources like oil are to ours.¹¹³ Abolition would and could not be conceded. It would have meant the end of civilisation as it was known then. A William Wilberforce (1759–1833) – who visited Burke on his deathbed, by the way – pleading in the Roman Senate as he did in the House of Commons for the abolition of slavery would have simply been beyond imagination. Therefore the only real option was to fight slavery, to start an insurgency like Spartacus. Of course, this is not viable for everybody. If you accepted only a complete and total opposition to the wickedness systematically embedded in your own age you would ask for a Spartacus. What you would probably get instead would be a soft-hearted and soft-spoken Epicurean bemoaning the state of contemporary society when he is in his cups.¹¹⁴

The great Roman lawyers of the first three centuries after Christ took a different stance. They declared that all men are created free and equal:¹¹⁵ »According to Natural Law everybody is born as a free person« (Iure naturali omnes liberi nascerentur).¹¹⁶ »Slavery is an institution of international law because it entails that a person is unnaturally subjected under the command of another person« (Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur).¹¹⁷ »Regarding civil law (viz. the Law of the City of Rome) slaves do not exist as persons, but under Natural Law this is not true because all men are equal« (Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt).¹¹⁸ These were not just words:¹¹⁹ The Roman lawyers invested a lot of cunning and energy to assuage peu à peu the lot of the slaves.¹²⁰ Thus

they made sure that a handmaid's property was treated as a dowry in regard to her ›husband‹ even though it was not a dowry in the legal sense because slaves could not contract to marriage.¹²¹ Had the Roman jurists decided differently there would not have been any legal remedy for a handmaid to get back her property in case of a separation. The impact of these Roman Lawyers' doctrines in the further history of Europe cannot be underestimated, according to an authority like Wieacker.¹²² Such »piecemeal social engineering«¹²³ by Roman lawyers would not find mercy in the eyes of the postcolonialists – it humanized and thereby consolidated an evil institution.

D. Justice and the World's moral Irrationality

To understand the Roman lawyers' point of view we have to deal with the notion of Justice. Above all Justice is a virtue meaning an attitude any person should have, but actually have it in various degrees. Ulpian's definition of Justice is »the constant and perpetual will to give everybody what is due to him« (Iustitia est constans ac perpetua voluntas ius suum cuique tribuendi).¹²⁴ By attempting to mitigate the lot of the slaves – if only by those means they had at hand as legal experts within a society based on slavery – the Roman lawyers acted according to this precept.

This concept of Justice presupposes Natural Law.¹²⁵ Since the precepts of Natural Law are highly abstract, they have to be adapted to the situation at hand by Justice as a virtue. Justice is the tactics of Natural Law, one could say. To act just within an unjust framework is thus not merely possible, but necessary in order to achieve the goal of Natural Law: the happiness of society. It was

113 FINLEY (1973) 62–94.

114 Precisely this is the argument of DELBANCO (2012). See also DAVIS (2012).

115 On this see GILTAJ (2011) passim; SPENGLER, (2011); MASI DORIA (2007); STAGL (2012).

116 ULPAN Dig. 1, 1, 4.

117 FLORENTINUS Dig. 1, 5, 4. 1.

118 ULPAN Dig. 50, 17, 32.

119 For further examples see WALDSTEIN.

120 BUCKLAND (1908) 73ss., and WALDSTEIN (1986) 388ss., 397ss.

A more sober picture is drawn by WIEACKER, *Römische Rechtsgeschichte* (2006) vol. 2, 17s.

121 STAGL (2009) 11s.

122 WIEACKER (2006) (fn. 121) 88.

123 A phrase coined by POPPER (1945).

124 ULPAN Dig. 1, 1, 10 pr.

125 MESSNER (1984) 374: »Die Gerechtigkeit gründet sich auf das Recht, nicht das Recht auf die Gerechtigkeit«, in reference to THOMAS AQUINAS, *Summa Theologica* 2, II, 57, 1.

feasible to be a just person and to own slaves; one only had to treat them justly.¹²⁶ And by doing so the slave owner enhanced the view that there are no second rate human beings. He did not only assuage the lot of his own slaves but also contributed to the abolition of slavery. The imperative to act justly in all situations becomes more logical if you consider that justice is an ideal that we must strive for but which we will never attain fully. Every society is unjust to a certain degree. In Burke's words:

All these circumstances [of the Company's Rule in India] are not, I confess, very favourable to the idea of attempting to govern India at all. But there we are: there we are placed by the Sovereign Disposer, and we must do the best we can in our situation. The situation of man is the preceptor of his duty.¹²⁷

The ethics underlying postcolonial thought, however, seem to focus not on virtues but on values. Postcolonialists do not ask »What shall I do in a given situation?« but »How can I bring home the value I adhere to?« without regard to the costs. It is an example of virtue ethics (Gesinnungsethik).¹²⁸ In practice these ethics either lead to revolutions (Spartacus) or passivity (Oblomov). Avoiding this sterile alternative the ethics of Natural law enhance piecemeal improvement of present inconveniences. This is always a method of compromise, of course, and there is guilt with every compromise.¹²⁹ This is unbearable for those adhering to virtue ethics as pointed out by Max Weber: »Those adhering to virtue ethics cannot bear the moral irrationality of the world« (Der Gesinnungsethiker erträgt die ethische Irrationalität der Welt nicht.)¹³⁰

Which of these two ethics fares better, is hard to tell by abstract ratiocination. Yet the proof of a cake is in its eating and fortunately we have the means to judge our special cake. The proof is to be found in the achievements of the Indian Independence Movement.

2. *Burke's Influence on the Indian Independence Movement*

Burke with his Natural Law ethics and the politics of evolution that go with it were an inspiration to the Independence Movement in two respects. As mentioned before it is highly probable that Hastings' impeachment decisively contributed to making the Raj more humane. This more humane character of the Raj was a precondition of Gandhi's tactics of non-violence. As George Orwell (1903–1950) rightly observed, Gandhian tactics of non-violence would not have been possible in Hitler's Germany or Stalin's Russia.¹³¹ Under a comparable regime Gandhi would have perished in some camp, if he had chosen to become a martyr. He was quite aware of this himself and prepared to switch to armed resistance in case of a Soviet invasion of India, as Orwell also points out. Without the rule of law established by harsh colonialists like Fitzjames Stephen there would have been no Gandhi and without him there would have been no generally peaceful transition of power in 1947. Without such a transition of power India would have experienced serious drawbacks, violence and maybe some totalitarian regime.¹³²

Burke's second contribution to the liberation of India was his direct influence on the philosophy of the independence movement. One of its key figures was the already mentioned politician and university teacher Gokhale,¹³³ Gandhi's »political guru«. In his obituary on him Gandhi described the strategy Gokhale envisaged for the future independence of India:

To be sure, we cannot rise again till our political condition changes for the better; but it is not true that we shall necessarily progress if our political condition undergoes a change, irrespective of the manner in which it is brought about. If the means employed are impure, the change will be not in the direction of progress but very likely the opposite. Only a change

126 On this see AUGUSTINUS, De civ. Dei 19,14s.

127 Speech on Mr. Fox's East India Bill, in: BURKE vol. IV (1886) 197.

128 A term coined by WEBER (1988). On this see ZINGERLE (1995).

129 WEBER (1988) 552.

130 WEBER (1988) 553.

131 ORWELL (1946).

132 On the legitimacy of this kind of counterfactual reasoning see FERGUSON (1997) 1ss.

133 JIM MASSELOS, in: Oxford DNB i.v.; WOLPERT (1962) passim.

brought about in our political condition by pure means can lead to real progress.¹³⁴

Gokhale knew Burke's ›Reflections on the Revolution in France‹ by heart and used to cite from it on every occasion. Burke was not only read by Gokhale but everywhere in India in the late 19th and early 20th century. Some British authorities even tried to prevent the Indians from reading Burke by taking his works off the shelves of public libraries. Indirectly Burke thus became an inspiration to Gandhi and his tactics of non-violence.¹³⁵ Gandhi disapproved of revolution as a political means. It is not by chance that so many of the Indian freedom fighters were lawyers by profession – Burke would have been very pleased because this was exactly his method. India's history after 1947 is an incredible success inasmuch as India has managed to remain an open society.¹³⁶ This was only possible because India had statesmen like Jawaharlal Nehru (1889–1964)¹³⁷ and Bhimrao Ramji Ambedkar (1891–1956).¹³⁸ And statesmen of their kind were not a windfall profit but the fruit of Gokhale's and Gandhi's and, therefore, indirectly Burke's efforts. Only try to imagine the Indian freedom fighters adhering to revolutionary communism and breeding their own Mao or Pol Pot. In my opinion there is no better proof for the truth of Burke's doctrine than the history of modern India. Ganesh Prasad,¹³⁹ a pupil of the Fabian socialist Harold Laski (1893–1950) at the London School of Economics in the 1940s wrote in his study on ›Whiggism in India‹:

It seems that from his grave Burke has presided over the drama of progress in modern Britain, the British Empire, and modern India. A student of Indo-British history will find the scales removed from his eyes on reading Burke's words in a letter to Sir Hercules Langrische in 1792. Admitting the law of change as the most powerful law of nature, he argued that »all that

we can do, and that human wisdom can do, is to provide that the change shall proceed by insensible degrees«. This process has the benefits of change without its inconveniences. It prevents »the unfixing of old interests at once« – a phenomenon which is apt to breed »a black and sullen discontent« in the dispossessed. At the same time it prevents the beneficiaries »from being intoxicated with a draught of power, which they always abuse with a licentious insolence«. The transfer of power to India in 1947 was one of the best examples of this liberal process of change. Britain left India with good grace and without »a black and sullen discontent«. The Indian beneficiaries were placed in such a position that they were neither »intoxicated« with power nor could abuse power »with a licentious insolence«. Originally this method of social change was called Whiggist. Now it has been adopted by Western Liberalism and even by Social Democracy. Perhaps this is the greatest legacy of Burke to humanity.¹⁴⁰

V. Conclusion: A Vindication of ›India‹

What we have done by now is to analyse the political implications of ›The East offering its riches to Britannia‹. We have thus acquired the means to answer the one still open question of overriding importance: Why does Mercury, like so many other gentlemen, favour white women? This question is all but banal because brown women struggle with serious disadvantages in consequence of this preference. Since a dark complexion is widely regarded as racially and socially inferior¹⁴¹ women in present-day India, for example, are supposed to be as white as possible and undergo all kinds of unhealthy and expensive treatments if they want to be attractive and make good a match. This internalisation of racism is called colorism¹⁴² and has become an important social problem in

134 GANDHI (1955).

135 PRASHAD (1966); WOLPERT (1962) 296ss.

136 GUHA (2007) passim.

137 For a Biography see SARVEPALLI GOPAL, in: Oxford DNB i.v.

138 Born into a family of untouchables, he became a lawyer and in addition held a Ph.D. in economics. Associated with the Liberation Movement he be-

came one of the architects of the Indian constitution, especially concerned with questions of caste and family. He eventually converted to Buddhism because it is regarded as a way out of the caste system and is an Indian religion at the same time. Among today's untouchables of India he is a secular Saint. For a biography see FRANK MORAES, in Oxford DNB i.v.

139 A small biographical sketch can be found in a collection of his essays and articles: NAWANI (2006) IX.

140 PRASHAD (1966) 420.

141 See Wikipedia, s.v. Discrimination based on skin colour (18 December 2011).

142 See the article ›Blackout, in: Newsweek, 7 March 2008.

India.¹⁴³ By now we have taken the habit of reaching out for Burke whenever someone is oppressed, in this case women of a darker complexion like most women in India. In his tract on the ›Sublime and Beautiful‹ Burke observes:

Men are carried to the [opposite] sex in general as it is the [opposite] sex, and by the common law of nature; but they [men] are attached to particulars [individuals] by personal beauty. I call beauty a social quality; for where women and men ... give us a sense of joy and pleasure in beholding them, they inspire us with sentiments of tenderness and affection towards their persons; we like to have them near us, and we enter willingly into a kind of relation with them, unless we should have strong reasons to the contrary.¹⁴⁴

Can dark pigmentation be one of the ›reasons to the contrary‹ Burke is speaking of? We can prove by the Scripture that black people are just as beautiful as white people and that interracial love has the sanction of divine authority: We refer to the ›Song of Solomon‹. This is the story of the King Solomon's love for a beautiful young woman of colour. She says of herself: ›I am black, but comely, O ye daughters of Jerusalem.‹ Her lover goes on: ›Behold, thou art fair, my love; behold, thou art fair; thou hast doves' eyes. /Behold, thou art fair, my beloved, yea, pleasant: also our bed is green. /The beams of our house are cedar, and our rafters of fir.‹¹⁴⁵

Therefore the ›reasons to the contrary‹ so many men feel must have other origins. Beauty is a ›social quality‹ as Burke rightly observes.¹⁴⁶ From a social point of view dark skin colour is associated with schoolboy-nations and the white colour with the teacher-nations. For at least the last two centuries white colour had globally enjoyed a higher social status. Racial prejudice is nothing but an ossified social status and this status is the product of a regime that could not have had any permanent justification for its being racist. A political system based on the permanent mastery of one race over the other violates Natural Law. The historical consequences of such a regime, for example the contention that white races have higher social values are therefore against Natural Law as well. Hence we may state that the contemporary man's preference for white women is against natural law. According to Natural Law men should have no ›reasons to the contrary‹ regarding brown women. Accordingly gentlemen should not prefer blondes and brown women should have just as much fun as white women. And we can finally conclude that Mercury should take care to save ›India‹ from the lion, bearing in mind that

›right deeds be Thy motive, not the fruit
which comes from them!‹
(*Bhagavad Gita* [Transl. by E. Arnold]
II – *The Book of Doctrines*)

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