FROM PLEADER TO LEADER: LEGAL PRACTICE AND THE BIRTH OF POLITICS IN INDIA (1772-1920)

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DECLARATION

Certified that the dissertation entitled "**From Pleader to Leader: Legal Practice and the Birth of Politics in India (1772-1920)**, submitted by **Mithi Mukherjee** is in partial fulfilment of the requirement for the award of the degree of Master of Philosophy of this University. This dissertation has not been previously submitted for any other degree of this University or any other University and is her own work.

We recommend that this dissertation be placed before the examiners for evaluation.

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It happened one evening in the Spring of 1991 when Gautam and I were discussing the introduction of British Law into India, Gautam suddenly asked, "How is it that there were so many lawyers in the Indian National Congress?"

It was with this simple question that my long search for an understanding of the complex and intricate relationship between colonial legal practice and Indian politics began.

For this question to grow into a practical and workable hypothesis, I required months of preliminary research, intense discussions and ample time. Without Prof. S. Bhattacharya's patient forbearance with the innumerable modifications made in course of developing the hypothesis, his gentle guidance and complete freedom, in spite of the short time span allowed to an M.Phil dissertation, it would not have been possible for me to develop a theme that would provide the focus of research for many more years to come. My deepest gratitude to him!

I am very grateful to Baba, Mani and Anakaka for digging out the most elusive of books from the most abandoned of libraries and also sharing in the joys and worries of

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As this work was completed with total freedom, the errors and faults are wholly mine.

Mithi Mukherjee

20/07/1992 MITHI MUKHERJEE

To The Memory of

Edmund Burke

"Let my endeavours to save the Nation from that shame and guilt be my monument; the only one I ever will have. Let everything I have done, said or written be forgotten but this."

Edmund Burke

The Correspondence of Edmund Burke

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INTRODUCTION

What is irreducible in modern day political practice is the whole idea and practice of representation. It is with this idea and practice of representation, that, what we call democracy, the most momentous invention of modern politics, was born.

In our hypothesis, the idea and practice of representation is not original to the space of political practice. Its birth dates back to the beginning of modern day legal practice which developed in and around the law courts. Under certain conditions and at a particular point of time it came to outgrow the legal space provided to it by the law courts and carved out another, separate and relatively autonomous space of political practice. Whereas legal practice was dominated by the pleader, political practice came to be dominated by a new figure called the leader. It is this internal mutation within the general continuity of representational practice, that would be the subject of enquiry in our dissertation. Our dissertation - **From Pleader to Leader: Legal Practice and the Birth of Politics in India, 1772-1920** - derives its name from this hypothesis.

It is in view of the above that this dissertation aims at linking up two apparently separate domains of academic pursuit, viz., the history of legal practice and that of political practice. The demarcating line between legal practice and political practice was not a marked feature of colonial India. Some of the most noted Presidents of the Indian National Congress were also successful lawyers and successive legislative councils were marked by an overwhelming presence of legal practitioners and judges. Was this phenomenal rise of a new sort of political figure - the pleader as a political celebrity, a symbolic defender of the "public" against injustice and an advocate of their "rights" against the British state merely a historical co-incidence, or did this affinity between legal and political practice have some deeper ground?

While not denying the above stated empirical relationship between legislative practice and political practice, the present argument seeks to go beyond that. The nationalist movement had a problematic relationship with contemporary legal practice, its discourse and values. The major difference between the early National Congress, and the later Congress was that, whereas the former not only situated itself within the circle provided by legal practice but tried in a certain sense to complete the circle by

bringing what was political practice within it, the latter took it as a constraint and tried to over come it in different ways. While Gandhi, through the politics of non-violence, sought to overcome it while remaining within it, the "terrorists" through their politics of violence rejected it in toto, by situating themselves outside the circle of legal practice.

Legal notions provided in a certain sense the frame within which the entire nationalist articulation of Indian conditions organised itself. The discourse of the early nationalists rigorously tried to abide by the rules and regulations that bind the discourse of a pleader within a court. While not denying the influence of western political thinkers, it is important to note, that if one follows the line of argument of the early nationlists, one finds certain consistent traits always implied but never consciously acknowledged. Their arguments do not derive from a set of principles but always proceed by way of simile, metaphor, analogy and example or, to use the legal terms, 'precedents' and 'illustrations'. 'Illustrations' are related to analogies from the British system, and 'precedents' take the form of statements of British administrators which were given the status of judgements. The early nationalist leaders were lauded primarily for their skills in oratory and their speeches which were addressed to the Government,

not as a political opponent but as an impartial judge. Decisions taken in the Legislative Council, which for the later nationalists were political acts, were for the early nationalists, matters of passing judgement-judicial acts. The early nationalists visualised their position as 'pleaders' before the government on behalf of the Indian people, and when they agitated for representation in the Legislative Council they meant only the right to plead and the right to be heard. 'No judgement without being heard' appeared to be their maxim. It is in this context that one can understand the implied definitions of terms like 'imperialism', exploitation', 'corruption'. 'Imperialism' was identified with the good of the subjects, and what was termed as 'exploitation' by later nationalists and radicals was seen as administrative malpractices and corruption, more cases of injustice and 'un-British' acts of the executive rather than the inevitable and logical consequence of 'imperialism'.

The language of the early nationalists however was neither specific nor original to them, for there was not a thread in what is called early nationlist discourse, that did not have its origin in Edmund Burke's speeches at the Impeachment Trial of Warren Hastings.[1] The early

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1. E. Burke, Speeches in the Impeachment of Warren Hastings (Delhi, 1987).

nationalists were not the first representatives of India but had their own 'precedent' in Burke, who had spoken in the same status and from the same position almost a century ago. The India that they came to know and speak of, was the India represented by Burke, as the seeker and recepient of justice in the Supreme Tribunal of England. India came to claim its identity as a nation for the first time, in and through the person of Burke. In fact it was in Burke's speeches in the Impeachment Trial that the India-Britain relationship was for the first time articulated in detail. Like the early nationalists, Burke was a politician and a member of the House of Commons of Great Britain, yet the position from where he claimed the identity of India as a 'nation' was that of a 'pleader' in Westminister Hall.

The phenomenon of Judicial-Political overlap was a marked feature of colonial India and included even the British Parliament which was not merely a legislative body for India but also the Highest Court of Appeal. After all it was in this very Court that Burke had acted as 'pleader' for India. Within India, with the establishment of the Supreme Council and the Supreme Court, the split between political and executive authority on the one hand, and judicial on the other, was apparently sought to be asserted. But essentially, political and judicial authority was

distributed between them, to the extent that, whereas the Supreme Council was by right not only the Court of Record but also the highest court of appeal for the province, the Supreme Court had the right to veto any legislation by the Supreme Council. The founding of the Legislative Council - which was also the coming together of the Supreme Council and the Supreme Court - was an attempt to simulate the court on the one hand and the British Parliament on the other. When the Legislative Council developed in India, it was established by statute that a number of its members had necessarily to be judges of the Supreme Court.

The split between the executive and the judiciary and the founding of the Legislative Council provided the early nationalists with the space to develop a politics which was carried out as a critique in the form of complaints that had to be redressed. It is in this context that the administration in its turn developed a complexed network of systematic reporting of judicial affairs in an attempt to mould itself accordingly.

Yet there would come a day in the course of Indian history when the voice of the pleader would be stifled in the domain of politics. In 1920, a Resolution banning practicing lawyers from becoming leaders, moved by Mahatma Gandhi and passed in the Calcutta Congress of 1920, sealed

the fate of 'pleaders' in Indian politics. With this momentous break, a totally new language would take over which would articulate India's identity and problems in an entirely different manner. From the 'pleader's' unquestioned obedience to the law, to the 'leader's' demand to be a legislator and the sole maker of law - Indian politics moved out from the courtroom to carve out a relatively autonomous domain of its own.

Before proceeding with my argument, I would like to give a brief historiographical survey to place my theme in perspective.

The historiography of early nationalist politics is either accusative and condemning or apolegetic and laudatory. The best example of accusative history in Ranajit Guha's piece 'Dominance without Hegemony'.[2] The elite, he argues, 'collaborated' with the colonial state by agreeing 'to abide by a common set of rules based on the British constitutional parliamentary model' thus 'compromising' the 'subjects right to rebel' in their attempt to use "the nation as a stepping stone to power". Thus, history writing is reduced to proving motives which are pregiven. While

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2. R. Guha, 'Dominance Without Hegemony and Its Historiography' in Ranajit Guha (ed.), Sulaltern Studies VI: Writings on South Asian History and Society (Oxford, 1989).

history became interrogation, its writing is in the style of passing the last judgement. By dismissing the early political leaders for never seeking the destruction of the colonial state through violence, Guha is not only reducing politics to violence but at the same time, instead of explaining how their kind of politics came to be, he is trying to dismiss, what was then called politics as no politics at all. Thus in his history, the accused (elite or liberal bourgouisie) have no history, only deails.

The Cambridge historians, Gallagher, Johnson and Seal[3] are equally accusative. They assert that politics, for the early Indian politicians, was merely a process of haggling for selfish gains in British institutions where they represented their social groups or patrons. These historians tend to reduce political to social, where, whatever political not only becomes the reflection and extension of social but also a means for social as if political practice had nothing specific of its own. The individual is made the unit and the agent of history and his personal motives alone provide its driving force. History thus effortlessly fits into sociological categories and remains history only to the extent that it talks about past society. Not only do we

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3. J. Gallagher, G. Johnson and A. Seal (ed.) Locality, Province and Nation: Essays in Indian Politics, 1870-1940 (Cambridge, 1973).

differ on the basic premise of such a mechanistic argument but also on the point of enquiry. While the Cambridge historians pursue the career of a professional, we pursue the career, not of legal practitioners, but of the entire practice itself.

On the apolegetic side are historians like Nanda[4] and Bipan Chandra.[5] Bipan Chandra's notion of 'nation in the making' suggests a preconceived blueprint, a telos of a future nation which then realized itself through what is called nationalist politics. Politics in this sense becomes merely a vehicle of nationalism and its own history, or how a certain kind of politics came to be, is ignored. With history being provided with the telos of nationalism, politics itself is never made a theme and thus becomes reduced to details. It would be relevant in this context to question whether nationalism itself was the product of a new kind of politics.

The history of law has so far been seen in terms of 'impact on' - either the impact of Anglo Indian law on the agrarian economy (Washbrook[6]) on the nature of dispute

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4. B.R. Nanda, Gokhale, The Indian Moderates and the Raj (Delhi, 1977).

5. B. Chandra, India's Struggle for Independence (N.Delhi, 1989).

6. D. Washbrook, "Law and Agrarian Society in India", Modern Asian Studies, 1981.

settlement (Cohn[7]) etc. or reversely the impact of European ideas (Stokes[8]) and Indian belief systems and attitudes of British administrators and judges (Derrett[9]) on Anglo Indian Law. Although important scholars in the field, these historians have ignored the mode in which a system - administration of justice or law courts - links laws to the society, thereby reducing the system to being a mere instrument of law. The identity and therefore history of the legal practice is merged and dissolved into the identity and history of law as a set of written codes.

My attempt would be to write the history of the legal practice, which established itself as a separate domain, while interacting with other domains.

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7. B.S. Cohn," Notes on Disputes and Law in India" in An Anthropologist Among the Historians and Other Essays (Oxford, 1990).

8. E. Stokes, The English Utilitarians and India, Oxford, 1959.

9. J.D.M. Derrett, "The Administration of Hindu Law by the British, Comparative Studies in Society and History, 1961.

CHAPTER - I

REPRESENTING THE UNREPRESENTABLE:

EDMUND BURKE AND THE JUDICIAL REPRESENTATION

OF INDIA AS A NATION

In not so distant a past when the identity of India as a nation had not yet become a fact, it was a question. Or, to be more exact, it was more of a question than a fact. Its existence was not taken for granted. It existed as a question, a problem. Any attempt to answer this question or suggest some solution to this problem was not a matter of merely stating some obvious facts by a school boy, but, a matter of intense debates and discussions among the adults and the enlightened ones. It was a matter of taking sides. No wonder, initially, this question and its answer did not appear on the pages of school textbooks but in the numerous booklets and leaflets brought out by different political groups as part of their propaganda campaign to make political converts.

There are two such leaflets attached in the appendix to the Report of 1887 Congress. One is called the English translation of The Tamil Catechism on the Indian National Congress and the other a conversation between Molvi Farid-

Ud-Din, M.A., an advocate and Rambaksh, a villager. These leaflets have been drafted in the form of a series of questions and answers aimed at instructing the people. Here I quote two questions from these leaflets:

"Which country is India"?,[1] and "Moulvi Sahib, there is a great talk nowdays of Re-pre-sen-ta-tion and Re-pre-sentative Ins-ti-tutions, but what does it all mean?"[2]

One would not feign innocence, the juxtaposition of these two questions is deliberate. What is the relationship between the question of the identity of India as a nation and the question of representation and representative institutions? Was the first question possible without the second? Were representational practice and the representative institutions launched on the solid and sure foundation of the identity of India as a nation, or, was the banner of India as a nation and its ideology designed in the course of a long history of representational practice? In short, was there an India as a nation before it was represented?

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1. Report of the Third Session of the Indian National Congress held at Madras, 1887, Appendix II, English Translation of the Tamil Catechism on the Indian National Congress by M. Viraraghava Charian, B.A., p.199.

2. Ibid., Appendix III, Conversation between Molvi Farid-ud-Din, MA and Rambaksh, p.205.

The idea is to discover the link between the identity of India and representational practice by way of an historical inquiry. But before embarking on this enquiry, to make things clearer for our convenience, we shall hazard a hypothesis. The hypothesis is - There was no India before it was represented; that the identity of India was conditioned by the mode of representational practice given in that particular period. We are deliberately using the term, modes of representational practice, because - and it is one of the aims of this dissertation to show it - it has existed in more than one mode. Political practice, to the extent that the idea and practice of representation forms its basic premise, the bottomline, is only one of such modes. In a sense, and this is an important theme of our enquiry, political practice has evolved out of -, is modelled on- and marks a break from a different mode of representational practice, namely judico-representational practice which is born in - and with the establishment of British instituted law-courts. Our aim would be to enquire into the conditions of the emergence of this representational practice. When, where and how was the foundation of this representational practice laid? What were the internal mutations and shifts within this practice? In short, in a sense, this dissertation is an attempt to enquire into the conditions of

the emergence of political practice as one of the relatively autonomous modes of representational practice.

The limitation of this chapter, as of others, is that it does neither pretend nor attempt to be exhaustive in its enquiry. It is more an attempt to make a brief test of the above given hypothesis and work out a possible course for further enquiry in future. Therefore, it is extra-selective in the choice of its sources and exemplary in nature. In this chapter we shall conduct our enquiry mainly concentrating on the speeches given by the great British Parliamentarian and statesman, Mr. Edmund Burke, in the course of the Impeachment Trial of Warren Hastings in Westminister Hall in England. We shall have two sections in this chapter. In the first one, called 'Of India Unrepresentable', we shall talk about the conditions which made the representation of India difficult, if not impossible, and how it encouraged a stream of discourse to condemn India to its unrepresentable past. In the second section called 'Of India Represented' we shall discuss the conditions under which India came to be represented.

I

OF INDIA UNREPRESENTABLE

After these preliminary remarks, we come back to our main theme. After asking the question, "Which country is India?", the Tamil Catachism on the Indian National Congress goes on to give an answer, with an air of obviousness, surity and not without a touch of political innocence, "India is only another name for the country that is known to many people as Bharata Varsha", and then fixes its boundary, "It extends over a wide area, from the Himalayas on the north to Cape Comorin, which lies 153 miles South-West from Rameswaram. The Bay of Bengal and the country of Burmah constitute its eastern boundary. On the west it is bounded by the Arabian Sea and Afghanistan. Its length from north to south is about 1600 miles, and its breadth from east to west is nearly the same. Its total area is forty-five lakhs of square miles. It has a population of about twenty-five crores and sixty lakhs".[3] Here is the sure voice of an Indian National Congress that saw the image and name of Bharata Varsha reflected and written in the mirror and board of the map of India. Everything that falls within the length and breadth of this map would belong to and derive its

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3. Ibid., Appendix II, p.99.

identity from it, from the unity of this map. The unity of this map is like the unity of a body to which every limb on it belongs. But the unity of a body is not a pregiven fact which could be taken for granted. The unity of this body is due to the unity of the person who claims this body as his own and who, whenever it (the body), is threatened, can defend and represent it in a law-court or on the battlefield. The body is a claim. It is more of a claim than a fact. In short, a body is a body because it can be claimed, personified and represented. If seen in this perspective, India was a claim. And, after all, this image of India was disseminated into the masses as the part of a political campaign to make political converts, who would then stand up to defend it (image). This act of the Indian National Congress of representing India was not so much a passive act of describing a reality that was pregiven as an act of creating and claiming the reality simultaneously. An act of representation was an act of creation. However, the problem is not so much of exposing the fact that there was no India and that it was constructed, invented or fabricated by the Indian National Congress. Rather it is that, there was no Indian National Congress before, which would have done it and that historical conditions of its formation must be inquired into.

How much of this clamour about India was a fact and how much of it was a claim, is immediately revealed if we turn to a different stream of discourse which, however, shares the same problematic of the representability of India. "I ask at starting", writes Strachey in his book called 'India', "this elementary question: What is India? What does this name really signify?" and then goes on to say, "The answer that has more than once been given sounds paradoxical but it is true. There is no such country and this is the first and most essential fact about India that can be learned."[4] Thus, the Congress' India is revealed a mirage - "there is no such country" - more the dream of a thirsty and indulgent man than the observation by the clear gaze of a contented pair of eyes. India, then, was a dead word. It signified nothing, represented no reality. It was a name neither owned nor disowned by anybody, a call to which nothing responded. It was just a mark, a signboard on a landscape and not a name at all - "India is a name which we give to a great region including a multitude of different countries. There is no general Indian term that corresponds to it. The name Hindustan is never applied in India, as we apply it, to the whole of the Indian continent.[5]

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4. Sir John Strachey, G.C.S.I., India (London, 1888), p.2.
5. Ibid., p.2.

Yet, even this discourse that says that India signifies nothing can not do without this word. It better SIGNIFY nothing than not signify at all. It better represent non-reality [of India] than not represent at all. Therefore, this discourse, even while denying it, creates India as an empty space, a space of silence, an absence. As one would have noticed by now, this representation of India is no less a claim than its representation by the Congress. Whereas the Congress staked its claim to the being of India, Strachey did so to its [India's] nothingness or non-being. India thus claimed would become India denied. And as India did not exist beyond and before its representation, the only way to claim its nothingness was by denying the existence of any body of people which would claim to represent it [India]. No wonder, Strachey, in the Appendix of his book, ends up arguing for a ban on the 'seditious' Indian National Congress.[6] Mr. Strachey's arguments go to deny not so much the existence of India which, as he said, did not exist, as they deny the existence of the Indian National Congress which claimed to represent it [India]. In short, it was an argument more against the claimant [the Congress] than the claimed [India].

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6. Ibid., Appendix.

Here we will shift our attention to the different twists in the argument of Mr. Strachey and follow them to get more clues to the problem of the identity of India as a nation and its representability. The impossibility of representing India, according to Strachey, resulted from the simple historical fact that it was not a nation at all. "I have spoken of the different countries of India, but they are not countries in the ordinary European sense. An European Country is usually a separate entity, occupied by a separate nation more or less socially and politically distinct. But in India... there are no nations of the modern European type".[7] Therefore, India was, not only, not a nation itself, but, unlike Europe, had no nation within it.

If India was not a nation, that is because it had no unified body of its own. It was all difference and no unity. All parts and no whole. It was a deaf and dumb mass, a confusion of differences. "This is the first and most essential thing to learn about India - that there is not and never was an India" because it never possessed "according to European ideas, any sort of unity, physical, political, social or religious".[8] "European civilization has grown up under conditions which have produced a larger measure of

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7. Ibid., p.4.

8. Ibid., p.5.

uniformity than has been reached in the countries of the Indian continent, often separated from each other by greater distances, by greater obstacles to communication and by greater differences of climate. The diversities of language, religion and race are as wide in India as in Europe".[9] "The differences between the countries of India, between for instance, Bengal and the Punjab or between Madras and Rajputana, seemed to them [Indians themselves] immense and beyond comparison, greater than that existing between the countries of Europe".[10] Again, "There are no countries in civilized Europe in which the people differ so much as the Bengali differs from the Sikh and the language of Bengal is as unintelligible in Lahore as it would be in London", and "An educated Mohammedan gentleman of Northern India has more in common with an Englishman than with a Bengali graduate of the University of Calcutta".[11] But, India was beset not only with social, linguistic and cultural differences but also with natural differences and therefore climatic differences. "To one, for instance, who has gained his knowledge of India in lower Bengal, India is a country of almost constant heat and damp, luxuriant vegetation, rivers, tanks, rice-fields

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9. Ibid., p.3.
10. Ibid., pp.2-3.
11. Ibid., p.3.

and coconuts, with few cities and no monuments of art, densely inhabited by a mild and timid population. To such an India as this, a vivid imagination could hardly conceive a completer contrast than the India of Agra or Labore. Instead of one of the dampest and greenest countries of the earth, you find in the early summer one of the brownest and most arid, a country scorched with the wind like the blast of a furnace, but in the winter it has the climate of an Italian spring, cold, frosty, and invigorating. In the latter season, instead of the tropical vegetation of Bengal, you find thousands of square miles covered with wheat and barley and the products of the temperate zone. It is a country with famous cities and splendid monuments, and its population is not inferior to that of many parts of Europe in manliness and vigour".[12]

Moreover, these differences had no correspondence amongst themselves. For instance, "Geographical boundaries have no correspondence at all with distinctive institutions or groupings of the people, and have comparatively little political significance. Little is gained towards knowing who and what a man is by ascertaining the state he obeys or territory he dwells in; these, being things which of themselves denote no difference of race, institutions, or

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12. Ibid., p.4.

manners". Therefore, "The European observer - accustomed to the massing of people in great territorial groups and to the ideas contained in such expressions as fatherland, mother-country, patriotism, domicile, and the like - has here to realize the novelty of finding himself in a strange part of the world where political citizenship is yet quite unknown, and territorial sovereignty just appearing... He gradually discovers the population of Central India to be distributed, not into great governments, or nationalities, or religious denominations, not even into widespread races... but into various and manifold denominations of tribes, clans, castes and sub-castes, religious orders, and devotional brotherhoods".[13] And thus India was lost in the wilderness of its differences. The voice of India would be lost in the noise produced by these differences, striking their own different tunes. India was the name of anonymity itself, a name of the unnamable. Although millions of people were its inhabitants, it was nobody's homeland. Nobody ever called it his or her fatherland or motherland. Its inhabitants were never touched by the feeling of patriotism, the feeling that makes one stand up and defend one's land. They were not citizens.

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13. Ibid., p.5.

The starkest proof of it was that "There was never... any conquest of India by the English, according to the ordinary sense of the word, conquest. The conquest was rather in the nature of an internal revolution, directed by Englishmen but carried out for the most part through the natives of India themselves", but more importantly, "No superiority of Englishmen would have enabled England to conquer by her own military power the continent of India, with its 250 million of people, nor could she hold it in subjection, if it had been occupied by distinct nations". And therefore, "the fundamental fact is that India had no jeolousy of the foreigner, because there was no India, and therefore, properly speaking, no foreigner".[14] Here we learn that India was never conquered. Its subjection to the rule of the East India Company was effected more by a coup than a conquest. If it were a nation, it would never have been conquered. The anonymity of this land called India and its populace was transferred on to Britain which operated in India, incognito, as East India Company, "because there was no India, and therefore... no foreigner". Great Britain in India, as East India Company, added just one more variety to the already existing numerous differences. In short, India did not become a colony of Great Britain as a nation by the

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14. Ibid., p.6.

mere fact of the establishment of the Government of the East India Company. How it became a 'nation' and a 'national colony' of Great Britain, in and through the law court, will become clear only later in this chapter. Till then India remained what it was, a chaos of differences.

These differences then, were a denial of the existence of India. Yet, quite unwittingly and opposed to the obvious and apparent intent of this discourse, these images and words of differences would shine forth so brilliantly only against the unity of a blackboard called India. These differences could be laid and arranged only on some ground, even if, that ground was 'nothing'. This chaos of differences could be painted on and guaranteed by the unity, in whatever sense, of a canvas. The distance between a Bengal and a Lahore could be measured only on the map - no matter how insignificant and unsignifying - of India. As it were, the discourse that represented or created these differences also represented and created the unity, although as an absence.

However, apart from, and besides all that has been said above, by far, the most important reason, why India lacked an identity as a nation, was because it did not have a representative government. Not eveybody had an access to politics and the political system. Politics was a reserve of

a few chosen ones. It was not everybody's concern. The masses were more victims of their political system than its happy bearers. Their own rulers were as much foreigners to them as Englishmen. "Indian nationalities no more exist in these so called native states than in our own territories", writes Strachey, "and the most important of these states are ruled by princes who are almost as much foreigners to their subjects as we ourselves."[15]

As the government did not involve the masses, who bore it more as a burden, the political system was an 'accidental arrangement' decided by 'inevitable powers' where a change of a government would be like a change of climate, beyond the reach of the ordinary mortals. They made adjustments with the state as they did with nature. The government was not a choice, it was a fate. "Even from the point of political allegiance, the government under which a man may be living is an accidental arrangement, which the British Viceroy or some other inevitable power decided upon yesterday and may alter tomorrow", and finally Strachey adds, "Nor would such a change be grievous".[16] And why should it be so if the govenment was a fate?

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15. Ibid., p.6.

16. Ibid., p.5.

If England had managed to put India under the subjection of the East India Company, that was also because it had a representative government. And, if India succumbed to the sovereignty of England, then it was also because despotism rules here. Whereas in England there was the rule of the people, in India, despots ruled over the people. "What enables the people of such a small country to govern this vast empire? What wonder is this?" - the Tamil Catachism asks this question and then, goes on to explain, "The kings of England are not, like the sovereigns of the East, invested with despotic authority. The people of England firmly believe that the sole end and aim of Government ought to be the good of the people, and accordingly they have constituted a National Assembly known as the Parliament, and this Parliament consists of members chosen by the people as their representatives, and it is the united body of representatives thus elected that conduct the government of the country".[17] In England the government was conducted by the representatives of the people. The rulers stood to the people as representatives to the represented. In India rulers stood to the people as despots to their subjects. The despots were not representatives. The government belonged to the despot and not to the people.

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17. Report of the Indian National Congress, Appendix II, p.199.

Hence, any threat to the government was a threat to the despot and not to the people. Whereas, in England, any and every threat to the government was simultaneously and primarily a threat to the people. While in England, people were at one, and, - at peace with their government, in India, subjects, alienated and isolated from the government, nursed a silent hostility towards their despot. Quite logically, whereas in England, people could afford to be patriotic and rise up in defence of their govenment from any outside threat, in India, this was a luxury nobody would indulge in. As we can see from this discourse, if there was one most important thing that enabled England to claim the staus of a nation and deny it to India, then, that was the presence in the case of England and absence, in the case of India, of a representative government.

As far as the un- or non-representative character of the govenment is concerned, the establishment of the Company's rule did not mark any fundamental change. It remained a non-representative government. The masses still had no access to it. "The English in India", says Burke, "are nothing but a seminary for the succession of officers. They are a nation of placemen; they are a commonwealth without a people, they are a state made up wholly of magistrates", and then "there is nothing to be in propriety

called people, to watch, to inspect, to balance against the power of office. The power of office is the sole power in that country".[18] Apart from other things, what we learn here is that, people is a functional category. Only they will be called people who have the right to watch, to inspect and, to balance against the power of office.To the extent that this right is possible only where it has been accepted in principle that the government is of the masses and for the serivice of the masses, the rise of the 'people' is simultaneous with the birth of a representative govenment. Before they emerged as 'people', Indians were mere 'natives' and 'inhabitants'. Seen thus, the rise of the 'people' is a very recent phenomenon in Indian history.

What then is the secret of this paradox by which this discourse presents and then withdraws what it calls 'India' as a nation? By what stroke of magic does this discourse make 'India' exist and disappear simultaneously? The secret, it seems, lies in the fact that to the extent that there is a Government of India, there is a 'nation' and to the extent that this Government is not a representative government and therefore lacks a people, there is no nation. The Government

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18. E. Burke, Speeches on the Impeachment of Warren Hastings (Delhi, 1987), Vol. I, p.26. First published as E.A. Bond (ed.), Speeches of the Managers and Counsel in the Trial of Warren Hastings, 4 vols. (London, 1859-61).

of India is a sovereign government which, writes Strachey, "regulates and harmonises the Government of the British provinces, controls the native states and our relations with foreign powers, provides for military defence, makes war and peace and manages those branches of the administraion which directly concern the general interests of the empire".[19] Here we have everything except the people. We have an Indian Government, which makes war and peace, an Indian army, an Indian administration but what we do not have is an Indian 'people'. There was an anonymous mass of 'natives' and 'inhabitants'. After all, does not Strachey himself say, there is "no people of India, of which, we hear so much"?[20] There are 'interests of the empire', but no interests of the 'people'.

As far as the Government of India is concerned, the chaos and confusion of differences and diversities - which made India's existence as a nation impossible - were no more inseparable contradicitons standing in its way. The chaos of differences would be given a precise and efficient shape. They would be arranged in different provinces and managed by an efficient administration. The differences that would make India's existence as a nation impossible, could not

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19. Sir J. Strachey, Op. cit, p.8.

20. Ibid., p.5.

stop it from having a sovereign government, the Government of India. Here we can see how much of Strachey's 'scholarly' discussion on India was a CLAIM to its non-being and how much of it was a fact. It was more a claim than a fact.

The political non-space of India, without a people, but inhabited by an anonymous mass of 'natives', was incapable of representing itself due to one more handicap. For, in India the 'natives' were not only subject to the tyranny and sovereignty of a despot and, later, the East India Company, but also to the tyranny and sovereignty of 'opinion'. "The caprice of opinion has a pure, unrestrained, complete and despotic power among them."[21] Here man did not acquire or possess opinion so much as was acquired or possessed by it. Man in India was not so much represented in his opinion as was marked and tattooed by it. This opinion, that Burke is talking about, is nothing but the laws of caste.

In Europe, the people had emerged sovereign in relation to law, to the extent that, they could change or make laws to shape their own destiny. "The variety of balanced opinions in our minds", writes Burke, "weakens the force of each; for in Europe, sometimes the laws of religion differ from the

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21. Burke, Speeches., vol.I, p.44.

laws of the land; sometimes the laws of the land differ from the laws of honour".[22]

Thus, in Europe, different laws were assigned different domains and spaces and by situating himself on the threshold, the margins of the laws of two domains, man could play one law against the other. Man emerged sovereign in relation to law to the extent that by playing one law against the other, he could make and change them. Man was no more a slave to his laws and by making laws he could shape his own destiny. A law was not a fate to him. What would guide him in changing and making laws was their 'utility'. Nothing could make him accept a law by reason of its mere antiquity, unless, it satisfied or answered the demands of utility. In Europe, man had emerged a legislator.

In contrast, in India, writes Burke, "the laws of religion, the laws of the land and the laws of honour are all united and consolidated in one invariable system and bind men by eternal and indissoluble bonds to the rules of what amongst them is called caste".[23] Here, there was no separation of the domains of different laws as in Europe and these inescapable laws of caste weighed man down in such a

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22. Ibid., vol. I, pp.43-4.

23. Ibid., vol. I, pp.43-4.

manner that he became its slave and could never emerge as a legislator, as a sovereign over his laws. The laws of caste were a fate to an Indian. He did not shape his destiny, he inherited it, as he inherited his fate and a caste.

Caste was a claim over the very being of man. "To speak to an Indian of his caste is to speak to him of his all".[24] Caste was not a right, it was an inescapable obligation and its loss signified death. Caste had a physical existence, a material existence and beyond it there was no life. A polluted Brahmin was removed from society as an infected limb so that he did not harm the society any further. If a Brahmin, writes Burke, "loses his caste, he does not fall into an inferior order, the Chittery, the Bice, or the Soodur, but he is thrown at once out of all ranks of society. He is precipitated from the proudest elevation of respect and honour to a bottomless abyss of contempt, from glory to infamy, from purity to pollution, from sanctity to profanation. No honest occupation is open to him. His children are no longer his children. Their parent loses that name. The conjugal bond is dissolved and quite naturally, "Few survive this most terrible of calamities".[25] As one did not choose or consent to his caste voluntarily, so, one

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24. Ibid., vol. I, p.45.

25. Ibid., vol. I, p.45.

could lose it not only by voluntary crimes, but also by involuntary acts. Caste pollution was like a disease, an infection and therefore it did not matter whether one got it by voluntary crime or involuntary sufferings so long as he got it. "It is singular that caste may be lost not only by certain voluntary crimes but by certain involuntary sufferings, disgraces and pollution that are utterly out of their power to prevent".[26]

In India, then, in contrast to Europe, law did not liberate man so much as it bound and chained him. And as such, it was more of a prejudice than law. What gave this prejudice strength and authority was not its 'utility', but, its antiquity and usage. The prejudice had become a habit with them. "To this caste they are bound by all laws of all descriptions, human and divine; and inveterate usage has radicated it in them to a depth and with an adhesion with which no other prejudice had been known to exist".[27]

Man, then, had nothing which he acquired and did not inherit and therefore was covered under the heap of tradition and custom called caste. His face was yet invisible. The anonymity of the mass of natives was due to

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26. Ibid., vol. I, p.46.

27. Ibid., vol. I, p.45.

this complete subjection to tradition. While 'man' in Europe revered novelty and change, the 'native' revered antiquity. He did not make history, he inherited it. Time was a continuous and homogenous flow of tradition. "Their (laws and institutions) stability has been proved by their holding on an uniform tenor for a duration commensurate to all the empires with which history has made us acquainted; and they still exist in a green old age with all the reverence of antiquity and with all the passion that people have to novelty and change. They have stood firm on their ancient base".[28] This idea and practice of caste, therefore, is completely opposed to the idea and practice of representation where people make and change laws, and therefore, decide their course of history and destiny, and do not inherit them as tradition and fate.

OF INDIA REPRESENTED

In the last section, we inquired into the difficulties, almost amounting to the impossibility, of representing India, and its conditions, as articulated in the contemporary discourse. We saw that India was unrepresentable. It was unrepresentable, because, it was a

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28. Ibid., vol. I, p.46.

landscape painted with a bizzare combination - or otherwise - of colours; a wilderness of differences, of all shades and varieties, at complete loggerheads with each other. It was a 'nation' denied by the multitude it 'contained'. It was unrepresentable because it had a government and no people, only a population. A population with bent back, laboriously carrying the gigantic figure of their despot. A population locked up in the prison-house of tradition, offering no access to the fresh wind of history. A population inheriting and bearing its laws as it inherited and bore its fate, not knowing the art of shaping its own destiny. And therefore, a population without a 'fatherland'.

However, there would come a day, when a member of that anonymous mass of 'natives', called Rambaksh, of village Kambakhtapur, would listen to some one who told him, "you could if you choose, so alter the system (dastur) of the Government, that it would do the things that are pleasing and beneficial to you, instead of, as now, often doing what you dislike, and, what is harmful to you"[29] and then manage, with great labour, to falter out this question, "Moulvi Sahib, there is a great talk now-a-days of 'Re-presentation' and 'Re-pre-sen-ta-tive ins-ti-tu-tions", but what

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29. Report, Appendix III, p.208.

does it all mean"?[30] Here was a man, who would think of so ALTERing "the system of Government that it would do the things that are PLEASING and BENIFICIAL to [him]".[31] The idea, that the government ought to do things pleasing and benificial to the mass or else it ought to be altered, was now being entertained by an ordinary man. He would no more be a mere victim of a political system but would shape it in such a way that it would act in his interests. But all these ambitions would be nothing without the ground of representation which they would need to fulfill these desires. And so, Rambaksh, quite logically and predictably, raises the question of representation and representative institutions.

In the answer to Rambaksh's question on representation and representative institutions, the High Court barrister says, "don't you remember last year when you and Matadin and Ramaprasad, and some thirty others of you had cases against Raja Harbans Rai... and all the cases were quite alike, and you knew well about the matter, and had the best head of the lot, they all chose you out and sent you in, to me, to the Sudder to explain all the case and get me to put in petitions for them as well as for yourself? Well, that is

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30. Ibid., p.205.

31. Ibid., p.212.

'Representation' and you were the 'Representative'".[32] Here is the High Court barrister, solving the riddle of representation and representative institution, by the example of his own profession (lawyer) and the institution (Sudder Dewany Court) he worked in. If Rambaksh was his villagers' representative, the barrister was Rambaksh's representative. In the chain of representation that linked the villagers to the judge in the court, the barrister was at the top. He was the highest representative. However, without this Sudder Dewany Court, there would have been no petition, no barrister, no representation, no representatives and therefore no cases and complaints. Who knows, probably, Rambaksh would never have asked this question or thought of altering the system of Government. The question of representation, probably, hinged on the existence of the Sudder Dewany Court, the paradigmatic representative institution.

However, if Rambaksh could be tutored into pronouncing the terms, representation and representative institutions, by a high court barrister, and could be trained in the art of representation in and around a law-court, then it was not accidental. The scene for it was set almost a century before, way back in 1788 when, in a grand and, until then an

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32. Ibid., p.205.

unheard of judicial spectacle in Indian history, the erstwhile head of the Government of India, Governor General Warren Hastings, would be charged with 'high crimes and misdemeanours' and would be made to face an Impeachment Trial in the highest court that ever existed within the breadth and length of the British empire".

"There have been spectacles more dazzling to the eye, more gorgeous with jewellery and cloth of gold, more attractive to grown up children, than that which was then exhibited at Westminister; but perhaps, there never was a spectacle so well calculated to strike a highly cultivated, a reflective, an imaginative mind. All the various kinds of interests which belong to the near and to the distant, to the present and to the past, were collected on one spot and in one hour. All the talents and all the accomplishments which are developed by liberty and civilization were now displayed, with every advantage that could be derived from cooperation and from contrast. Every step in the proceedings carried the mind either backward, through many troubled centuries, to the days when the foundations of our constitution were laid; or far away, over boundless seas and deserts, to dusky nations living under strange stars, worshipping strange gods, and writing strange characters from right to left. The High Court of Parliament was to sit,

according to forms handed down from the days of the Plantagenets, on an Englishman accused of exercising tyranny over the lord of the holy city of Benares, and over the ladies of the princely house of Oude".[33]

Here was a man called Edmund Burke, who would articulate and advocate for the first time, nothing short of "the annals of Indian suffering and British delingency". India, that never existed was, now, 'suffering'. India a non-signifying dead word which was not a name, had found its bearer in the person of Edmund Burke. He would speak in the name of India. India would finally become a name. What turned a dead and unsignifying word into a name was the very act of its 'personification' by - and in the person of Mr. Burke. That dead word and un-namable land had finally come alive and received a name in, and through the person of Burke. A land of disjointed limbs would become a body with the act of its representation by Burke.

Here, Burke in representing India's case, was leading a team of the members of House of Comons who would resent, "as their own, the indignities and cruelties that are offered to all the people of India".[34] Thus India would get its first

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33. W.H. Hudson (ed.), Macaulay's Essay on Warren Hastings (London, 1911), p.136.

34. E. Burke, Speeches, Vol.I, p.229.

lot of representatives from the members of the House of Commons, the highest political body in England. It is in these Commons that India would acquire its 'person' and a voice that would articulate its 'suffering'.

But this act, through which India managed to acquire a name and found a bearer for it, was a legal and judical act. The act of naming was a legal and judicial act. The scene of this 'act' was set in the 'theatre of justice'[35] called Westminister Hall. The Commons of England would 'represent' India in this 'theatre of justice'. In short, the Commons would represent India in Westminister Hall as pleaders in the court against 'British delingency'. "My lords", announces Burke, in Westminister Hall, during the Impeachment trial of Warren Hastings, the erstwhile Governor General of India, "you have before you the Commons of Great Britain as prosecutors".[36] Here was a strange spectacle taking place - the scence of the spectacle had shifted from the House of Commons to Westminister Hall; from the 'theatre of politics' to the 'theatre of justice'. The Commons, who represented their own country in the House of Commons, were representing India in Westminister Hall. In relation to their own country theirs was a political representation, in relation to India,

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35. Ibid., Vol.II, p.347.

36. Ibid., Vol.I, p.229.

it was a judicial representation. For their own country they appeared as politicians and leaders, for India they appeared as proscutors or pleaders. The Commons, the political representatives in their own country, appeared in gown to represent India.

Here we can see, that to the extent, India's coming into being was a judicial act of representation, it was born in a law-court. The England of law courts was not the same - or not quite so as - the England as a homeland of the East India Company. India represented by the House of Commons was not the India plundered by the East India Company. India represented by Edmund Burke was not the India plundered by Warren Hastings. Britain of 'prosecutors' was not the Britain of 'delinquents'. No matter how little distance there was between the two, 'British justice' was not the same as 'British delinquency'. India represented was not the India plundered. And therefore, in short, plundered there was no India, represented there was.

"Exiled and undone princes", says Burke in his speech, "extensive tribes, suffering nations, infinite descriptions of men, different in language, in manners and in rites - Men separated by every barrier of nature from you, by the providence of God are blended in one common cause and are

now become suppliants at your bar".[37] Here we have an India, split into the multitude of differences of all sorts, uniting itself at the bar. The blackboard, hidden behind the shining words of difference, would emerge finally as an unity. The disjointed limbs would be united into a body and would recognise its face in the person and mirror of Burke. The empty and silent space, created by the 'un-representational' discourse of a Strachey and the 'un-representational' practice of a Warren-Hastings, would be filled by the voice of Burke. India would learn how to talk about itself in the language of Burke.

But how is this unity of differences created or how are the differences united? They are united, but they are united as what? All these differences "by the providence of God, are blended in one common cause and are now suppliants at [the] bar".[38] These differences then, were all united as "suppliants at the bar" of Westminister Hall. But even here, at the bar, they were not one suppliant but many 'suppliants'. What ultimately gave them the required unity was the unity of the person and pleader called Burke. Here a multitude of men were united in one person who pleaded for them. The suppliants derived their unity from the unity of

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37. Ibid., Vol.I, p.16.

38. Ibid., Vol.I, p.16.

the pleader who represented them at the bar. In short, the unity of the multitude was basically the unity of its representer at the bar, the pleader. As we have seen in the case of Rambaksh also, it was the unity of the barrister, Moulvi Farid-Ud-Din, which helped the villagers unite in one common cause. But all this was possible, as in the case of the Moulvi, so in the case of Burke, only in the space provided by a law court. It is here, as far as the case of India is concerned, that the representational practice began. This is what we had termed, in the beginning of this chapter, judico-representational practice.

However, this trial was not merely a judicial but also a political trial and Burke's pleading for India was not just a judicial representation but also a political representation. After all, the criminal is no ordinary person but the Governor General of India himself and the prosecutor, the pleader for India, is no less a person than Burke, one of the greatest statesman in contemporary England. "In this court", Burke argues, "it is that no subject, in no part of the empire can fail of competent and proportionable justice; here it is that we provide for that which is the substantial excellence of our constitution, I mean, the great circulation of responsibility by which no man, in no circumstance, can escape the account which he

owes the laws of his country", and then he goes on to say "it is by this process that magistracy, which tries and controls all other things, is itself tried and controlled. Other constitutions have satisfied with making good subjects; this is a security for good governors. It is by this tribunal that statesmen who abuse their power, are accused by statesmen and tried by statesmen not upon the niceties of a narrow jurisprudence but upon the enlarged and solid principles of state morality".[39] The very status of the accused and the prosecutors, and the range of things involved, give this trial a political bearing.

Any decision, in favour of, or against any side, would have had great consequences for the political system in India. The judgement simultaneouslywas a legislation. By the very combination of circumstances this trial would become a legislative exercise. And it is in this vein that Burke would say, "Your lordships will see in the progress of this cause that there is not only a long connected systematic series of misdemeanours, but equally connected system of maxims and principles invented to justify them. Upon both of these you must judge... According to the judgement that you shall give upon the past transactions in India, inseparably connected as they are with the principles which support

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39. Ibid., Vol.I, pp.10-11.

them, the whole character of your future government in that distant empire is to be unalterably decided. It will take its perpetual tenor, it will receive its final impression from the stamp of this very hour".[40] Here, then was a man, a century before Rambaksh came on the scene, trying to 'alter' the entire political system in India by pleading and arguing for it in a law court. There was no mass mobilization, no political movement and yet there was a possibility that a political system could be altered. This 'possibility' of altering a political system was secured and guaranteed by the existence of Westminister Hall, the highest law court in the land. The 'natives' would now emerge as a 'people' with their 'political representation' by Burke. They would be able to make and change laws in the space provided by the law courts. Law was no more a fate. They would emerge legislators. No more, would they carry the weight of their despot as a burden but would be able to accuse them and punish them in the space provided by the law courts and make him (the erstwhile despot) work for their good.

If the Trial in Westminister Hall was also an exercise in legislation and therefore a political act, then that was also because the law courts, and therefore the Judiciary, itself had a political mission to fulfill. It was in the

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40. Ibid., Vol.I, p.10.

course of fulfilling this mission that the law court would situate itself in the space (political) between the oppressor and the oppressed and by indicting the oppressor, would hold out the hope of liberation to the oppressed. Elijah Impey in a letter to the English Parliament in 1772 after the execution of Maharaja Nandakumar writes, "No explantion would have made the native comprehend that the escape from justice... if the sentence had not been carried out into execution, had not been occasioned by the artifice of the prisoner, unless indeed, it had been attributed to corruption or timidity in the judge or a controlling power in the Governor-General in Council. I leave it to your consideration the effect any of these considerations must have had on the institution of a new court of justice among inhabitants whom the weight and terrors of their (native rulers) oppression have so enslaved, bound and depraved that the most intolerable injuries cannot rouse them to sufficient confidence to look up to the purest and fairest tribunal to accuse their oppressors".[41]

However, Burke's was not a normal case of representation. Although he was representing it, India was not his political constituency; he was not elected by the

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41. J.F. Stephens, The Story of Nuncomar and the Impeachment of Sir Elijah Impey (London, 1885), p.257.

people of India to represent them and therefore could not have spoken in the capacity of a political representative. Although he appeared as a pleader in the law court to represent them, the people of India never approached him as his clients. Burke's was a service offered unsolicited. "Your lordships", says Burke, "will hence discern how very necessary it is to become that some personage should intervene, should take upon him their representation, and by his freedom and power should SUPPLY (my emphasis) the defects arising from their servitude and their impotence" and then concludes, "The Commons of Great Britain charge themselves with this character".[42] Although unapproached and unsolicited, bound by no law, representation was being supplied to India by Burke as 'some other personage'. It was a moral act on the part of Burke. As he himself says, he was "...separated from a remote people by the material bounds and barriers of nature (but) united by the bond of a moral community."[43]

This moral representation by Burke in Westminister Hall made sense in a situation where India acted as a temptation to Great Britain and thereby, presented a threat to its morality. "The servants have almost universally been sent

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42. E. Burke, Speeches, vol.I, p.46.

43. Ibid., vol.I, p.229.

out to begin their progress and career in active occupation and in the exercise of high authority, at that period of life which in all other places has been employed in the course of a rigid education. To put the matter in a few words, they are transferred from slippery youth to perilous independence, from perilous independence to inordinate expectations, from inordinate expectations to boundless power." Burke continues, "School boys without tutors, minors without guardians, the world is let loose upon them, with all its temptations; and they are let loose upon the world with all the powers that despotism involves."[44] Here then are the youth, with all their desires and ambitions, coupled with infinite power, untamed and unconstrained by any sense of duty and responsibility that law and morality may demand from them, being let loose on India.

This untamed and unbridled power gave vent to its desires and ambitions in a system of disguise, especially developed for this purpose. It is by means of this system of disguise that the "despotic power" would dodge the watchful eyes of British law, which, otherwise, would have imposed certain duties on that power. "The whole exterior order of its (East India Company government's) political service",

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44. Ibid., vol.I, p.28.

declares Burke, "is carried on upon a mercantile plan and mercantile principles. In fact the East India Company in Asia is a state in the disguise of a merchant. Its whole service is a system of public office in the disguise of a counting house. Accordingly, the whole external order and series of the service is commercial; the principal, the inward, the real is almost entirely political."[45] In fact, "under the name of junior merchant, senior merchant, writer and other pretty appelations of the counting house, you have magistrates of high dignity, you have administrators of revenue truly royal; you have judges civil, and in some respects criminal, who pass judgement upon the greatest properties of a great country".[46]

Here we have a system where things are not called by their names. The apparent names are mere deceptions. They are more a series of code words. Although the Company government had all the political power possible, due to the system of disguises which made it appear a mere merchant, it had no responsibility. This was a classic case of political power without any political responsibility. As a system of disguise, it tried to evade British laws which might have imposed certain duties on it. "Attempts have been made",

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45. Ibid., vol.I, p.23-4.

46. Ibid., vol.I, p.27.

observes Burke, "abroad to circulate a notion that the acts of the East India Company and their servants are not congnizable here (England)".[47] Beyond the reach of British laws, the Company Government developed its own interests which were "separated both from the country which sent them out, and from that of the country, in which they act. No control upon them exists."[48]

It was under this system of disguises and corruption that India was denied the status of a nation. Neither was India given the status of a nation, nor did any other nation claim it as its colony, in a legal sense, to the extent that Britain operated incognito as East India Company in India. In short, by the mere fact of the establishment of the government of the East India Company, India had not become a 'national colony' of Great Britain. In fact, one of the demands of Burke was to declare India as Great Britain's national colony, which if conceded, would have imposed certain responsibilities on the government in India. "The East India Company, in India", observes Burke, "is not properly a branch of the British nation, it is only a deputation of individuals... in its service."[49] India,

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47. Ibid., vol.I, p.20.

48. Ibid., vol.I, p.26.

49. Ibid., vol.I, p.26.

therefore, was not colonized by Great Britain as a nation, but by some people who were the 'offset of a nation', a handful of individual adventurers. How could the law and morality of a nation, Great Britain, be brought to bear on India, unless it was declared a national colony? It was in and through this system of disguises, beyond the reach of law, that India, unrepresented, anonymous and still not a national colony, was plundered and laid waste by Warren Hastings. In such a system where responsibility could not be pinpointed, the 'natives' of India had no one to complain to against the arbitrary authority of the government. Their cries remained unheard, their complaints unredressed. When Strachey, in his un-representative discourse claimed, the 'nothingness' of India, he was basically making this claim on behalf of this un-representative government which operated in the disguise of a merchant without any responsibility of a state to the people.

As parts of the same moral community, the interests of India and Great Britain happened to coincide. The moral representation of India by Burke was also an attempt to preserve and keep intact the moral fabric of Great Britain itself. "The prosecution of the Commons... is a prosecution not only for the punishing of a delinquent, a prosecution not merely for preventing this and that offence, but it is a great censorial prosecution, for preserving the manners,

character and virtues that characterize the people of England".[50] This act of moral representation was also an act of moral purification. "In all this", declares Burke, "I have only opened to you the package of this business; I have opened it to ventilate it, to give air to it. I have opened it that a quarantine might be performed; that the sweet air of heaven might be let loose upon it and that it may be aired and ventilated."[51]

The government of East India Company, headed by Hastings, as a system of disguise and corruption, which generated a huge amount of corrupt and unaccounted money, marked and anticipated the moral fall of Great Britain itself and would jeopardize the liberty and freedom of the British themselves. "Our liberty is as much in danger as our honour and our national character. We, who here appear, representing the Commons of England, are not wild enough not to tremble, both for ourselves and for our constituents, at the effort of riches... We dread the operation of money. Do we not know that there are many men who wait... to let loose all the corrupt wealth of India, acquired by the oppression of that country, for the corruption of all the liberties of this, and to fill the Parliament with men who are now the

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50. Ibid., vol.I, p.449.

51. Ibid., vol.I, p.448.

object of its indignation? Today the Commons of Great Britain prosecute the delinquents of India - Tomorrow the delinquents of India may be the Commons of Great Britain."[52] Moreover, it was not only the corrupt money but also the vices that went with it, which threatened the very moral fabric of Great Britain. "My Lords, the House of Commons has already well considered what may be our future moral and political condition when the persons who come from that school of pride, insolence, corruption and tyranny, are more intimately mixed up with us of purer morals. Nothing but contamination can be the result, nothing but corruption can exist in this country, unless we expunge this doctrine out of the very hearts and souls of the people. It is not to the gang of plunderers and robbers, of which I say this man is at the head, that we are only, or indeed principally, to look. Every man in Great Britain, will be contaminated and must be corrupted if you let loose among us whole legions of men, generation after generation, tainted with these abominable views and avowing these detestable principles. It is therefore, to preserve the integrity and honour of the Commons of Great Britain that we have brought this man to your lordship's bar."[53]

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52. Ibid., vol.I, p.449-50.

53. Ibid., vol.I, p.487.

If it was possible for both nations, Great Britain and India, to be part of the same moral community and have the same moral representative, that was only because, both of them were under the jurisdiction of the same British law court. The law of morality of India and Great Britain had their guarantee in the existence of British law courts. It was in this law court and by this moral representation of Burke that India, which did not exist by the mere fact of the establishment of the government of East India Company in India and in the unrepresentational discourse of Strachey, came to be recognized as a nation with its own rights and privileges, one of which was the right and privilege of representation. "The people of India therefore come, in the name of the Commons of Great Britain, but in their own right, to the bar of this House, before the supreme royal justice of this kingdom, from whence originally all the powers under which they have suffered, were derived."[54]

Westminister Hall, although acting in the capacity of a law court, had on its shoulders, the responsibilities of domains, otherwise separate, such as politics, morality, and, last but not the least, religion. No wonder Burke called it a 'temple of justice'[55] where the 'law of our

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54. Ibid., vol.I, p.21.

55. Ibid., vol.I, p.483.

creator' prevailed. "There is but one law", observes Burke, "namely the law which governs all law, the law of our creator... so far as any laws fortify this primeval law... such laws enter into sanctuary and participate in the sacredness of its character.[56]

And as "justice emanates from the Divinity",[57] the act of pleading for justice is not merely a judicial, political or moral but also a sacred act, an act of worship of the Divine. "It is not only in the House of Prayer that we offer to the first cause the acceptable homage of our rational nature - my lords, in this House, at this bar, in this place, in everyplace where his Commands are obeyed, His worship is performed".[58]

However, according to Burke, "the highest act of religion, and the highest homage which we can and ought to pay, is an imitation of the divine... and that by this means alone we can make our homage acceptable to Him."[59] Here therefore, an act of worship was the act of imitating the 'Divine attributes'. God, for Burke, was a model to be imitated.

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56. Ibid., vol.II, p.440.
57. Ibid., vol.II, p.440.
58. Ibid., vol.I, p.232.
59. Ibid., vol.I, p.232.

If Burke, while representing India, also managed to worship God and therefore imitate Him, then, that was also because God Himself, when He "appeared in a human form, he did not appear in a form of greatness and majesty, but in sympathy with the lowest of the people, - and thereby made it a firm and ruling principle, that their welfare was the object of all government."[60] Worshipping God was, therefore, nothing but imitating Him in His character as the servant of the people and their representative against the tyranny of a government. Representing God as the Supreme Power then was no more to be a privilege of the king but the sacred duty of all. On their part, the judges would be worshipping God by giving judgement in favour of the people. Any service to God was simultaneous with the service of the people.

Great Britain, therefore, had to govern India as a 'sacred trust',[61] from God. Any failure in serving the people of India was a betrayal of the 'sacred-trust' and therefore, of God Himself. Seen in this light, the establishment of a system of oppression and corruption, the violation of justice and the destruction of the life and property of the people of India by Hastings was the betrayal not only of the people of India, but also of God Himself and

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60. Ibid., vol.I, p.230.

61. Ibid., vol.I, p.472.

therefore, it was not only a crime but also a sin - "like sin's opening the gates of hell"[62] - which could have been atoned in suffering the punishment awarded by the judges at Westminister.

What is important here, however, is the fact that the violation of a 'sacred duty' could be represented against, in the law court. In that sense 'the service of the people' as a sacred duty, also became a legal obligation for a government, by virtue of its being legally enforceable. It became a legal right of the governed, then, to have a government which worked for the welfare of the people. "The soverign's rights are undoubtedly sacred rights", but they are so only because they are "exercised for the benefit of the people, and in sub-ordination to the great end for which alone God has vested power in any man or any set of men.[63] "This notion of sovereignty, with its sacred duty to the people, however, was, and could have been guaranteed only in and through the existence of a law court. No wonder, the Bishops of England were present in the House of Lords as the 'representatives of that religion"[64] and simultaneously as judges.

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62. Ibid., vol.II, p.382.

63. Ibid., vol.II, p.5.

64. Ibid., vol.I, p.230.

The question here is not just how much of politics went into missionary activities but how much of religion went into judicial and political activities. Politics and the administration of justice were to be carried out in the spirit of religion. To that extent a politician himself would act as a missionary, or rather, a political missionary. The Government of India, then, would be a missionary Government established and carried out in the name of God for the political salvation of the people of India. The importance of Burke does not prove that the British in relation to India, were missionaries as well as political and judicial representatives, but that in that culture, judicial and political thought was truly engaged in the religious status of man.

CHAPTER - II

FORMATION OF THE LEGISLATIVE COUNCIL AND THE BIRTH OF POLITICS AS PLEADING

"We are to decide by this judgement whether the crimes of individuals are to be turned into public guilt and national ignominy; or whether this nation will convert the very offences which have thrown a transient shade upon its government, into something that will reflect a permanent lustre upon the honour, justice and humanity of this kingdom".[1] Thus spoke Burke in course of the Impeachment Trial of Warren Hastings. By what magic does this threat of 'individual crime' becoming 'public guilt and national ignominy', get converted into "a permanent lustre upon the honour, justice and humanity" of the British Empire? Surely not by defending the Governor General Warren Hastings who established British rule in India, but, rather, by bringing him to the dock for his impeachment. If the existence of the Company and its head, Warren Hastings could cast "a transient shade upon its government" it was the guarantee of their punishment in the existence of Westminister Hall, that gave it a "permanent lustre".

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1. E. Burke, Speeches on the Impeachment of Warren Hastings (Delhi, 1987), vol.I, p.10.

British rule in India might have been established by the shrewd machinations and plunder of a Warren Hastings, but it continued because a Burke, standing in the Supreme Tribunal of England had represented and articulated Indian suffering against the offender, Hastings. England might have been tempted into India, but she stayed because Burke transformed this temptation into a duty, a responsibility pledged in a law-court. The British Empire in India might have been established by the sword of a "delinquent", it was however held by the "sword of justice". Almost a century later, Rashbehari Ghosh would say "It is frequently said that India is held by the sword. This is perfectly true. But the sword by which the country is held, has both a finer temper and a keener edge than the rude weapon of the soldier, for it is the sword of justice".[2]

If a Governor General of India, Warren Hastings could be brought to trial, if a Burke could represent and plead for India, if a temptation could be converted into a duty, then the space and occasion for all this would be provided in and through the existence of a law-court.

Long after the Impeachment Trial of Warren Hastings, the law court would remain the only solace of an aggrieved

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2. Budget Speech for 1907-8 in Speeches delivered on Various Occasions (Calcutta, 1915), p.138.

nation and its people. It continued to be the only external check on the authoritarian and arbitrary tendencies of the British Government in India. Rammohan Roy in an appeal to the King-in-Council in 1828 writes that "The idea of possession of absolute power and perfection is evidently not necessary to the stability of the British government in India since Your Majesty's faithful subjects are accustomed to seeing private individuals citing the government before the Supreme Court where the justice of their acts is fearlessly impugned, and after the necessary evidence being produced and due investigation made, the judgement not infrequently given against the government, the judge not feeling himself restrained from passing just sentence by any fear of the government being thereby brought into contempt". The Government of India then was not seen as an absolute power but one that was accountible for every act to an external authority, the Supreme Court which would hear grievances of the subjects and punish government officials for unjust acts. And it was on this that the stability of the British Empire in India rested. Rammohan Roy continued "Public resentment cannot be transferred from the delinquents to the government itself while there is a prospect of remedy from the highest authorities; and should the highest in the country turn a deaf ear to all complaint, by forbidding grievances to be even mentioned, the spirit of

loyalty is still kept alive by the hope of redress from the authorities in England". The loyalty of the people is then based on the space for representation and the scope of redressal of grievances that is provided by the separation of the executive from the judiciary at the higher levels. Thus "the attachment of the Natives of India" writes Rammohan, "must be as permanent as their confidence in the Honour and Justice of the British nation which is their last Court of Appeal next to Heaven. But if they be prevented from making their real condition known in England, deprived of the hope of redress, they will consider the most peculiar excellence of the British Government as done away".[3]

Here what Raja Rammohan Roy seems to be talking about is a hierarchy of courts, at the top of which, is the Parliament itself. As long as there is full scope for grievances to be heard in the highest Court, the Parliament, their faith would remain unshaken in British justice, no matter what happened in India.It was to guarantee the access to Parliament, the highest court for redressal of Indian grievances and complaints, that an elaborate and complex system of records was maintained which were regularly

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3. Appeal to the King-in-Council on the Freedom of the Press in Selected Works of Raja Rammohan Roy (New Delhi, 1977), p.110.

transferred to Parliament. Regular enquiries by Parliament through the Select Committees ensured a thorough investigation of the affairs of India. It is with an eye to this that H.T. Princep, when asked about the existence of any checks against abuses in the constitution and government of India, remarks: "I think the best security you have for good government, is the necessity of recording everything that is done, and copying on the record every letter that is written to government and every answer; the necessity of reporting all matters and transmitting them periodically for review by the Court of Directors, appears to me also to be a very wholesome check and such a check as has never, I believe, been applied in any other government; we in India consider that as the best security that can possibly be established against misconduct or irregularity of any kind".[4]

The administration in its turn developed a complex network of systematic reporting to mould itself according to the principles of the judiciary. Reports began to give detailed analysis of the judicial cases lost by the Government and measures were taken to avoid situations in the court which would raise doubts about the

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4. Evidence before the Select Committee of the House of Commons, Parliamentary Papers, 1852, vol.12, p.73, q.865.

administration's conformity with the law as upheld by the judiciary.

However, lower down on the hierarchy, below the Parliament, a Supreme Court was created in India with the intent of exercising a check on the Supreme Council. Although, apparently, with the establishment of the Supreme Council and the Supreme Court, the split between political and executive authority on the one hand and judicial on the other, was sought to be asserted, however, essentially, political and judicial authority was distributed between them to the extent, that, whereas the Supreme Council was by right not only the Court of record but also the highest Court of appeal for the province, the Supreme Court had the right to veto any legislation passed by the Supreme Council. However, the jurisdictional boundary line of these two institutions was not so clearly laid down. Whereas the Supreme Council wanted the Supreme Court to confine itself to Calcutta, not rarely, the Supreme Court claimed its jurisdiction over the areas beyond Calcutta.

Not surprisingly, therefore, this confusion of political and judicial authority and jurisdiction led to frequent clashes of authority between the Supreme Court and the Supreme Council. The matter reached an embarrassing crisis in the famous Cossyjorah case in 1779 when the

refusal of the Raja of Cossyjorah to submit to the writ of the Supreme Court, on the instruction of the Governor General, led to a confrontation between the Sheriff's armed forces and the troops of the Company.

Although the regulating Act of 1781 sought to redefine the jurisdiction of the Supreme Court and the Council, the 'natives' continued to witness situations of power clashes between these two highest institutions of their kind in India. They remained at loggerheads with each other. It was this embarrassing confusion of authority in India, which provoked Macaulay to remark in his famous speech in the House of Commons on 10th July, 1833, "You have two supreme powers in India. There is no arbitrator except a legislature [the House of Commons] fifteen thousand miles off"., and according to him, "Such a system is on the face of it an absurdity in politics".[5] This situation was 'absurd' because there was a legislature, which could have played an 'arbitrator' between the two, but was so far off from the site that it was rendered ineffective. Therefore, unless the legislature was brought close to the site, the problem would remain unresolved. In short, the idea was to institute something on the line of the British Parliament in India.

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5. T.B. Macaulay, Speech in the House of Commons on 10th July 1833 in G.M. Young (ed.), Speeches by Lord Macaulay with His Minute on Indian Education (London, 1935), p.147.

However, much before, Edward Burke with great foresight had not only apprehended the problem, but had suggested a solution too. Not long after these power clashes between the Supreme Court and the Council had occurred, in 1783, Burke, while introducing and defending Fox's India Bill, spoke on the problem of how "to exclude all possibility of a corrupt partiality, in appointing to office, or covering from enquiry and punishment, any person who had abused or shall abuse his authority".[6] The problem in short, for Burke was how to put a check on the then Governor General Warren Hastings, 'the head of a system of corruption' and his future heirs. The inevitable solution that came to Burke's mind was "to regulate the administration of India upon the principles of a court of judicature".[7] Here, therefore, in Burke's scheme of things for India, a law-court would be relegated and elevated to the status of a model, a model 'Re-pre-sen-ta-tive ins-ti-tui-tion'. The 'principles of a court of judicature' would become the inner principle of the Indian administration. A law-Court would no more be only an external check on the administration, but, would sneak into

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6. E. Burke's speech on Fox's India Bill in the House of Commons on 1st December 1783 in P.J. Marshall (ed.) The Writings and Speeches of Edmund Burke: vol.5, India: Madras and Bengal 1774-1785, (Oxford, 1981), p.444.

7. Ibid. p.444.

the interiority of the administrative space. It would be interiorized into the functioning of the administration itself. In short, the entire Indian administration would be regulated on the principles of representation where public servants would work under the guidance and supervision of representatives of some sort, and the government, as a whole, would be accountable for all its acts to these representatives. It is this buffer zone of representational space within the general scheme of administration, the internationalization of the court of judicature, that would exercise a check on the too frequent clashes between the Supreme Court and the Supreme Council.

However, Burke's scheme of regulating the administration on the principles of the Court of judicature and Macaulay's desire to bring the Legislature closer to the site of clashes between the Supreme Court and the Council, would take concrete shape, only long after, in 1853, in the structure of the Legislative Council and the principles of its functioning. In the structure and principles of this Legislative Council the images and principles of two representative institutions, a law-court and the British Parliament, overlapped each other.

It was established by statute that a certain number of Legislative Council members had to be judges. The exact

number of these judges was three, one chief justice of the Supreme Court and the other two puisne judges. The presence of at least one of them was essential for discussion on any legislative matter. Here one can see the influence of Bentham's postulate that judges should be allowed to sit in the Legislative Council as the representatives of the people.[8] This postulate was appropriate for India, especially in view of the perceived lack of public spirit amongst Indians which was seen as a positive obstacle for a scheme of representation to work in the arena of legislation. Stephen Lushington, while replying to the inquiries of the Select Committee in 1830, said that, "it is vain to expect that the feeling of personal interest shall of sudden become subservient to the principles of patriotism and public good or that they should take upon themselves, what they consider to be duty of the sovereign, to the sacrifice of their own time and domestic concern".[9] Here, then, we have the judges taking over the role of public representatives and fulfilling their part of the political mission in India. The role of the judiciary in the Legislative Council became so important that James Mill

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8. Quoted in Macaulay, A speech delivered in the House of Commons on 1st of June, 1853 on Exclusion of Judges from the House of Commons, Speeches, p.341.

9. Evidence before the Select Committee of Parliament. House of Commons, 1830, Parliament Papers, p.153.

objected to the placing of "legislative power entirely in the hands of the judges, who would overrule the members of Council in a field where they would distrust themselves, and become sole legislators, making the laws which they themselves administer, and thus of necessity rendered political organs, rather than what they ought to be exclusively, instruments for the distribution of justice".[10]

However, as we have pointed out earlier, the entire idea of a Legislative Council was formed also in the image of the British Parliament. Whereas Lord Dalhousie remarked that in the Legislative Council, a Free Parliament was being set up,[11] Lord Broughton, another member of the British House of Commons, "had great doubts about this Council altogether". He was afraid the "working of it would be that we would have a sort of little Parliament in Calcutta, and that the Governor General would lack something of the authority which he thought it was perfectly necessary he should possess".[12] In so far as the 'Great Parliament' had delegated its authority to the 'little Parliament', the Legislative Council in India, it had also internalized

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10. Ibid, No. 735-I 0/1831-2, pp. 44-6.

11. Quoted in S.V. Desika Char (ed.), Readings in the Constitutional History of India, 1757-1947 (Delhi, 1983) Introduction, p. xlix.

12. Speech in the House of Commons on 8th August, 1853. Parliamentary Debates, Third Series, Vol. 129, pp. 1444-5.

itself into the Government of India. 136 rules modelled on the procedure of the British Parliament were made applicable to the Legislative Council. With discussion becoming oral and the proceedings of the Legislative Council being carried on in public rather than in secret, increasing public attention came to be focused through an expanding press on legislation, with different newspapers discussing and debating every Act being passed by the Legislative Council. It was around these discussions on the Acts of the Legislative Council that, what is known as public opinion emerged as a political force.

The investment of the Legislative Council with the forms and modes of proceeding of the House of Commons resulted in its rapidly assuming the character of a representative and debating society, assembled for purposes of enquiry into and redressal of day to day grievances. In a letter to the Secretary of State for India in December 1859, Lord Canning regretted that an impression had been created that the Council could order reports and returns from the local administration, that long debates could be held on the question of Public interest and that measures could be introduced independently of the executive.[13]

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13. Letter to the Secretary of State for India, dated 9th December 1859, A Selection of Papers Relating to the Constitution and Functions of Legislative Councils (Calcutta, 1886), pp. 30-1.

The independence of the Legislative Council was emphasized for two reasons, firstly, that the over-ruling power of the Governor General was undermined, their being no assurance that the proposal of the Executive Government would be accepted by the Legislature and second, the presence of the judges of the Supreme Court who were in no way subordinate to the Company. No wonder resistance to any extra-interference on the part of the Governor General came from the Chief Justice, Barnes Peacock, also the Vice President of the Legislative Council. He claimed that it was the Council's duty to act independently in the exercise of the important functions vested in them, and not be mere registrars of the decrees of government. He declared, "as long as he had the honour of a seat in the Council, he should claim the right to exercise within those walls a free and independent judgement and to abstain from giving any vote except after mature deliberation and according to his own conscience".[14] Therefore, we see that the status of its members and forms of its proceeding, made it extremely difficult, if not impossible, for the Governor General to push every whim of his through the Legislative Council.

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14. Speech on the Trade and Professions Bill on 30th August 1859, Proceedings of the Legislative Council of India, for January to December 1859, pp.704-5.

Although the Act of 1861 restored the supremacy of the Executive Government in legislative proceedings and stifled the voice of the judiciary in legislative affairs by dropping the judges and replacing them by non-official-British and Indians, yet even in this apparent defeat of the Judiciary in the Legislative Council, the principles of representation would emerge victorious. For the first time, an Indian would figure in the list of the Legislative Council members. The judges were made to concede their place to the Indian representatives. It was as if Burke himself was handing over the charge of representing India to Indians themselves. Although they had no right to vote and were selected by the Governor General himself, the idea that Indians should represent themselves had triumphed. The same Indians, for whom law was like fate, would be making and changing their laws and thereby deciding the course of their history. The continuous flow of tradition would give way to the ripples of history. Almost seventy years after Burke had represented them, Indians would emerge partial legislators - partial because they had only the right to be heard and were selected by the choice of the Governor General and not elected by the people. They would only be pleaders in the Legislative Council, pleaders selected by the Governor General.

If the Legislative Council was conceived in the double image of a Court and a Parliament, that is also because Parliament itself -- as far as its relationship with India was concerned -- acted in the image of a law-court. In 1853, in the course of a discussion on legislation, in the British Parliament, on the future administration of India, Lord Albemarle remarked - "Legislating at this stage of business is very much like placing ourselves in the position of a judge who should pass sentence upon a prisoner without waiting for the verdict of jury".[15] Here we see that the space and the structure of the Parliament is recast in the image of a court. All the characters of a court are present -- Parliament members as so many judges, the Select Committee as the jury, and India as the prisoner. However, one character is very conspicuous by his absence, the pleader or counsel. The act that recasts Parliament in the image of a court also creates, simultaneously, the vacant space of a pleader.

Long after Albemarle had made this remark, Madan Mohan Malaviya, as if reacting to the same remark, in connection with the Legislative Council, argued, "in the reformed Councils the Government will be exactly what they now are -

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15. Speech in the House of Lords, April 7, 1853, in Hansard's Parliamentary Debates, 1853, p.548.

the final arbiter of all questions that may be brought before the Council - in other words, they will occupy the position of a judge in deciding all questions affecting our purses, our character, in fact our whole well being. The sole privilege we are praying for is to be allowed to choose our own counsels to represent our cases and conditions fully before them". and then concludes, "The privilege of selecting one's own counsel is not denied even to the most abandoned of criminals under British rule. Why then should it be denied to the loyal and intelligent subjects of Her Gracious Majesty?"[16] Here the entire Legislative Council is modelled on the image of a law-court. Let no one think that the use of a law-court is just as a metaphor and therefore, should not be taken seriously as far as the actual workings of the Legislative Council was concerned. However, as we know, from its inception the idea of a Legislative Council was conceived in the very image of a court and as we also know of the history of law courts and its political mission, we can, therefore, say that this metaphor of a law-court cannot be attributed to the lack of words on the part of Malaviya. If the image and metaphor of a law-court had been so persistent since Burke onwards, then it was because the

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16. Speech on the Reform of the Legislative Councils, Sixth Session of the Indian National Congress, Calcutta, 1890 in Speeches of Pandit Madan Mohan Malaviya (Madras, 1910), p.24.

law-courts constituted the extrinsic condition of a representational practice at all levels, including the Legislative Council. In fact, Malaviya uses this metaphor of a judge and a counsel as supporting evidences or arguments to strengthen the demand for representation in the Legislative Council. To the extent that the workings of the Legislative Council did not measure up to an ideal law-court, the use of this metaphor becomes a critique of the Legislative Council. Actually, the demand is in the form of a complaint which if redressed would mean organizing the Legislative Council on the model of a court - the existence of the law-court was so much taken for granted. In the midst of so many 'claims', it was the only 'fact', the 'fact' that had become the ground for all other 'claims'.

However, Malaviya is not the first one to demand representation in the Legislative Council - representation was granted to Indians way back in 1861. What, however, Malviya is demanding is that selection or election of the representatives should be left to the people and not to the Governor General, as was the practice. This was the biggest handicap of Indian representation in the Legislative Council. "In the first place, the natives who sit in these Councils are not chosen by us, but by the Government. If they displease us, we can't turn them out; but if they displease the Government, it takes care not to reappoint

them after the lapse of two years for which such gentlemen are appointed... Then, too, Government mostly chooses not people who will fight for our rights, but more or less, foolish big men who will do what they are told by the Government".[17]

To the extent that the Legislative Council came to imitate the British Parliament, another set of accusations were levelled against it. As the Tamil Catachism says, "The Councils in India resemble the Parliament of England only in name. They are called the Legislative Councils. As at present constituted, the Councils are mere shams and have no independent power. Their members are entirely powerless to regulate the expenditure of Government, even to the extent of a single piece, nor could they alter or cancel the laws which the Government resolves to enforce". However, not all the representatives selected by the Government were bad, "few of the natives who have hitherto sat in Council have tried to do good for us", but they were also rendered ineffective, for "the system is such that even if every one of them were clever men and did their very best, they could yet do nothing. For they constitute only a small minority in the Council, and the only question that comes before them

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17. Report of the Indian National Congress, 1887, Appendix II, p.200.

are new laws. They are not allowed to ask a question even, or learn anything about anything else connected with the administration of the country... for these Councils are mere shams".[18]

All these demands, however, for elected representatives and increase in their number and power, even if they were fulfilled, would not turn the Indian representatives into the rulers of their own country. No, they would remain pleaders. The demand to be rulers was never on the agenda. "The Executive Government shall possess", resolves the Congress, "the power of over-ruling the decision arrived at by the majority of the Council, in every case in which, in its opinion, the public interests would suffer by the acceptance of such a decision...".[19] And therefore, as we can see, the Indian representatives demanded only the right to be heard, to plead for the interests of the people. However, the final judgement on what was good or bad for the people remained in the hands of the Executive Government. The Legislative Council would remain a law-court to the Indian representative and he, a pleader.

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18. Ibid., p.200.

19. The Congress Plan for the reconstitution of the Legislative Council, 30th Dec. 1886 in the Report of the Second Session of the Indian National Congress held at Calcutta, pp.41-2.

But, the Legislative Council, to the extent that it was a court, came lower down in the hierarchy of courts, at the top of which was the British Parliament. And therefore, while demanding the right to plead their case in the Legislative Council, where the Executive Government had the right to give judgements, the Congress would retain the right to appeal to the higher court, in this case, the British Parliament. The Resolution says that in any case in which the Executive Government over-rules the majority decision, "on a representation made... by the overruled majority, it shall be competent to the Standing Committee of the House of Commons... to consider the matter, and call for any and all papers or information, and hear any persons on behalf of such majority or otherwise, and thereafter, if needful, report thereon to the full House".[20]

As long as the British Parliament remained the 'highest court of appeal' for the Indian pleaders, it was the guarantee and hope of any improvement in the courts lower down, like the Indian Legislative Council. The pleadings of the Indian representatives had to be directed not so much to the Government of India, as to the Parliament in England. "Agitation must be created in England... it is there that the judges sit and our advocates must plead our case before

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20. Ibid., pp.41-2.

the judges in England and not the judges in India".[21] The British Parliament was the supreme arbiter on every issue, "Parliament is the arbiter of our destiny, it alone will give the redress and relief which we humbly pray for".[22]

As long as the bureaucracy remained the organization of public servants, and the British Parliament and the Indian Legislative Council, positioned on the hierarchy of courts, accusing the bureaucracy, or going against the Legislative Council, did not mean any disloyalty to the British Government, but only a case of last appeal to the highest court on the land, the British Parliament.

It is in this perspective, and under these conditions that we can understand such expressions which are apparently contradictory. "The people of India had no complaint against the British people and Parliament. They had from them everything they could desire. It was against the system adopted by the British Indian authorities in the last century and maintained up till now that they protested".[23]

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21. B.G. Tilak, Speech in the Congress Session of 1904, Samagra Lomkanya Tilak, vol.7, Towards Independence (Poona, 1975), p.422.

22. D. Mitra's Speech in the Taxation Meeting, 2nd March 1878 in Bholanauth Chander, Raja Digambar Mitra, C.S.I., His Life and Career (Calcutta, 1893), p.240.

23. D. Naoroji's Speech in the British House of Commons, 1897, in A.M. Zaidi (ed) Dadabhai Naoroji, Speeches and Writings, vol.I (N.Delhi), 1985, p.122.

The English nation was a noble nation... It was on the whole just, frank and generous".[24] It was this image of England that was the only true image. All else was false and illusory. "England should not be judged by those Anglo Indians who regard India as an oyster to be opened with the sword -- such men are false to the King and the country".[25] The early nationalists repeatedly assured the British Government that their complaints against the officials did not mean disloyalty to the British nation. In fact, they reminded their British rulers, that it was they who had taught them to regard Government, even by the best executive in the world, with distrust.[26]

It was under these general conditions, where the law-court was the only 'fact' and the ground on which other 'claims' were made and where any act of representation was an act of pleading, that legal notions came to provide the frame within which the entire nationalist articulation of Indian conditions organized itself. If we observe the political discourse of the early nationalists closely, we

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24. Hindoo Patriot, 27th December, 1873.

25. R. Ghosh's Speech at the Calcutta Congress, 1906 in A.M. Zaidi (ed.), Speeches and Writings of Dr. Sir Rashberi Ghosh (Madras, 1929), p.20.

26. B.C. Pal's Speech on the Congress Resolution for Repeal of the Arms Act, 1887, in Writings and Speeches, vol.I: Bipinchandra Pal (Calcutta, 1958), p.3.

find that their discourse rigorously tried to abide by the rules and regulations that bind the discourse of a pleader within a court. Their political arguments do not derive their strength from a certain set of principles or ideology but always proceed by way of simile, metaphor, analogy or example, or to use the legal terms, 'precedents' and 'illustrations'. Before discussing how these legal notions framed the political discourse of the early nationalists, I would like to briefly examine, in each case, what these words imply in legal terminology.

The doctrine of judicial precedent, or the rule of 'stare decisis' in the English legal system, lays down that a judgement issuing from a superior court, is binding on any inferior court and must be followed in the future, until it is overruled by a court of superior degree to that from which the precedent originated. For the doctrine of judicial precedent to operate efficiently it was essential that the court be organized into some proper system of hierarchy. All the courts in England in the hierarchical order from the House of Lords, the Court of Appeal, the Court of Criminal Appeal, the Divisional Court, the High Court, to the Country Courts and the Magistrates Courts were all bound by the previous decisions of the House of Lords, by those of the

Court higher than itself and also by its own previous decisions.[27]

When we examine the political discourse of the early nationalists closely, we find that they are conferring the status of judicial precedents to political statements and declarations made by British statesmen and administrators, thus attempting to make these binding on all future government decisions and actions. For example, Gokhale in demanding the reduction of the Salt Duty in 1902, quotes statements by Sir James Westland, Lord Cross, David Barbour, Lord George Hamilton and others and complains that, "In view of these repeated declarations, it is a matter of great surprise, no less for intense regret and disappointment that the government have not taken the present opportunity to reduce a rate of duty, admittedly oppressive, on a prime necessity of life, which as the late Prof. Fawcett justly argued, should be as free as the air we breathe and the water we drink".[28] The demand then was that the government should act on the 'judgements' given by so many noted statesmen and administrators. Again Gokhale, in demanding the association of Indians with the administration, remarks, "A

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27. B.K. Acharyya, Codification in British India, Tagore Law Lectures, 1912 (Calcutta, 1914), p.143.

28. G.K. Gokhale in the Budget Speech of 1902 in J.S. Hoyland (ed.), Gopal Krishna Gokhale, His Life and Speeches (Calcutta, 1947), p.76.

succession of great statesmen, who in their day represented the highest thought and feeling of England, have declared that, in their opinion, England's greatest work in India is to associate the people of this country, slowly it may be but steadily with the work of their own government. To the extent to which this work is accomplished will England's claim to our gratitude and attachment be real...".[29]

Rashbehari Ghosh, in attempting to make his demand for the separation of the executive and judicial functions invincible, quotes elaborately the declarations of a host of administrators, like Sir Harvey Adamson, Sir Frederick Halliday, Sir John Peter Grant, Sir Bartle Frere, Sir Cecil Beadon, Sir Barnes Peacock, who had all condemned the system in which the two functions were combined.[30] Dadabhai Naoroji, in convincing the House of Commons, that the main features of administration in the last century in India were gross corruption and oppression, explicitly requests the House to observe that he would "put his case (of the conditions of Indians under the East India Company's administration) in the words of Anglo Indian English statesmen only and would not say a single word as to what

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29. Gokhale, Budget Speech of 1905, Ibid., p.100.

30. R. Ghosh in a Speech in the Town Hall, Calcutta, 18th April 1919, Speeches and Writings, p.233.

the Indians themselves said"[31] and goes on to quote the statements as judgements of Sir John Shore, Lord Cornwallis, Sir Thomas Monroe, Macaulay and others. The political discourse of the early nationalists abounds with such quotations. In conferring on 'political statements' the status of judgements, the Indian 'leaders' were also in a sense attempting to hierarchize political institutions in the manner of courts and making the precedents of higher political institutions and authorities like Parliament binding on those lower on the hierarchy.

Illustrations, as Macaulay defined them, were instances of the practicable application of the written law to the affairs of mankind. When the judicial definitions of technical terms in the legal codes lacked clarity, they were followed by a collection of cases as illustrations, which explained the reasons for their adoption. Just as much law was made by judicial decisions, so also law was also made by illustrations, in the numerous cases in which they determined points about which, without their guidance, there would be room for difference of opinion even among learned and able judges.[32]

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31. D. Naoroji's Speech in the British Parliament. August 14, 1894, Speeches and Writings, p.125.

32. Acharyya, Codification, p.139.

When the early nationalists pleaded for the enactment of certain laws in India, they very often used analogies from Britain and Europe, conferring on them the status that 'illustrations' had in the law-court, to convince the British government of the fairness and practicability of their arguments. Madan Mohan Malviya pleaded, "The privilege of selecting one's own counsel is not denied even to the most abandoned of criminals under British rule. Why then should it be denied to the loyal and intelligent subjects of her Gracious Majesty.[33] To have elected representatives to plead India's cause before the government was likened to a prisoner selecting his own lawyer to plead before the judge. And if this was a law for England, the demand was that the right of the people to select their own representatives should equally be a law in India. Gokhale, protesting against the speedy passing of the Land Alienation Bill in the Bombay Legislative Council, argued "Does anyone imagine that a measure of such far-reaching tendencies would have been introduced in England and rushed through Parliament with so much precipitation in spite of the unanimous protests of the people? And I submit that the deliberation which becomes in England a duty of government, owing to the power of the electors, should also be recognized by the British

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33. Malaviya, Speeches, p.25.

government in India as a duty under a sense of self restraint".[34] In refuting Lord Curzon's assertion in his Convocation speech that public opinion in India could not be the opinion of the public because they were uneducated and did not have opinions in political matters at all, Rashbehari Ghosh remarked, "If Lord Curzon is right, then there can be no such thing as true public opinion even in England; for there are many questions on which controversies between different classes of the community must arise from time to time... Is it therefore to be said that public opinion in England is merely sectional?"[35] The argument then was that, if, in spite of differences of opinions and controversies, there was a general public opinion in England, then so it was in India, which should have an equal right to representation. English examples and illustrations were also used to derive strength and to convince the Indian public of the methods of agitation. "The noblest and most beneficent measures of the country... have been the outcome of constitutional agitation". S.N. Banerjee asked his countrymen to remember the emancipation of the Negro Slaves,

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34. G.K. Gokhale, Speech on the Land Alienation Bill in the Bombay Legislative Council, August 23, 1901, Life and Speeches, p.57.

35. R. Ghosh, Speech on 10th March 1905 in Calcutta in Speeches delivered on Various Occasions (Calcutta, 1915), p.161.

the enactment of the Catholic Emancipation Law, the repeal of the Corn Law and the enactment of the Reform Law,[36] which had all been the products of constitutional agitation. Illustrations from England and Europe were thus seen as laying down the law and the path along which agitation in India was to proceed and the attempt was to convince the English statesmen to enact in India those laws which prevailed in England.

As long as the hope and possibility of judicial representation was kept alive, every act by the British government in India unfair to the 'natives' was dubbed an 'unjust act'. It is only through an understanding of the intricate and complex relationship that existed between the English nation and India that any clue to the implied meanings of words like nationalism, imperialism, corruption, exploitation, etc.can be found. The British Government was a national government as "The Sovereign who identifies himself with the nation... is a national sovereign"[37]. "Imperialism in the best and truest sense does not mean privilege and

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36. S.N. Banerjee, Speech in Town Hall, Calcutta, 3rd April 1879, in G.A. Natesan (ed.) Speeches and Writings of Hon. Surendranath Banerjee (Madras, 1918), p.208.

37. C. Shankaran Nair, Presidential Speech at the Thirteenth Session of the Indian National Congress, 1897 in J.K. Majumdar (ed.) Indian Speeches and Documents on British Rule, 1821-1918 (Calcutta, 1937), p.128.

supremacy but good government and equal rights. It was this spirit which inspired Chatham when he pleaded for the better government of India and Ireland. It was this spirit which sustained Burke in that famous trial which has made his name familiar as a household name in India".[38] While imperialism was identified with the good of the subjects, what was termed "exploitation" by the later nationalists and radicals was seen as administrative malpractices and corruption, more cases of injustice and "un-British" acts of the executive rather than the inevitable and logical consequences of imperialism. This is most evident in Dadabhai Naoroji's book "Poverty and Un-British Rule in India" in which poverty in India is attributed not to colonial exploitation but to 'unjust' and therefore 'un-British' acts of the administration.[39] The early nationalists did not talk of exploitation but of "financial injustice" and "breaking of pledges". Dadabhai Naoroji complains that "The British people and Parliament have been making the most solemn pledges for more than sixty years by Resolutions, by Acts of Parliament and by Proclamations in the name of the British people and by the mouth of the Sovereign. The Indian authorities on the other hand have been violating these

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38. Ghosh, Calcutta Congress of 1906, Speeches and Writings, p.19.

39. D. Naoroji, Poverty and Un-British Rule in India (Delhi, 1962).

pledges in letter and in spirit with unblushing openness. The British people have pledged themselves to treat Indians as British subjects. But the British Indian system treats them as mere subjects of a foreign despotic rule".[40]

If Parliament identified with , and represented the wishes and interests of the people of India, she did so as much from a sense of moral and religious duty and a consciousness of the responsibilities involving a 'sacred trust'. In the tradition of Burke, the early nationalists also 'believed the British government to be "an instrument in the hand of God for the salvation of my people (Indians)"[41] and saw England "not as a conqueror but as a deliverer, who had come to India, with the ready acquiescence of the people, to heal and settle, to substitute order and good government for disorder and anarchy".[42] Politics then was as much a religious missionary activity and the ethics of Christian morality that pervaded the judico-political discourse of Burke, dominated the discourse of the early nationalists. "A great empire is

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40. D. Naoroji, Speech on the Fear of Russian Invasion, September 1895, Speeches and Writings, p.230.

41. B.C. Pal, Congress Resolution for Repeal of Arms Act, Writings and Speeches, p.3.

42. R. Ghosh, Calcutta Congress of 1906. Speeches and Writings, p.19.

permanently maintained... by the righteousness of her laws, by her respect for the principles of justice. To believe otherwise appears to me to assume that there is not a God in Heaven who rules over the affairs of men and who can punish injustice and inequality in nations as surely as He can in the individuals of which they are composed".[43] Almost a century ago, Burke, standing in Westminister Hall had almost in identical words, warned the English nation of Judgement Day when Divine Providence would punish her for the oppression and desolation of a defenceless people whom He had placed in her care. Now when India was emerging as a vibrant political nation, the political discourse of her early leaders continued to be inspired by the same spirit.

Just as England's advent in India was Providential, the self government of India by her own people was also the Will of the Divine. "Self-government is the ordering of nature, the will of Divine Providence. Every nation must be the arbiter of its own destiny."[44] As the people of India had not mastered the art of self-government, and could not do so without the help of the British, it was the political and

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43. S.N. Banerjee, Ripon Memorial Speech on 11th December 1884, Speeches and Writings of Hon. Surendranath Banerjee (Madras, n.d.), p.408.

44. S.N. Banerjee, Speech on 30th December 1886, Report of the Second Session of the Indian national Congress at Calcutta, 1886, pp.98-100.

sacred mission of the English nation, to "raise two hundred millions of fellow subjects to the rights of fellow citizenship".[45] And only when the Indians showed themselves "fit for such responsibility" would "the English nation retire from India, their task completely accomplished and their duty done".[46] It is in this vein that the Parliamentarian, Lord Russell remarked in the House of Commons, "The people of India do not like us, but they scarcely know where to turn to if we left them. They are sheep literally without a shepherd".[47] The notion of a "sacred mission" embodied within itself a pledge, a pledge that England would retire from India when her mission was complete, when she had rendered India capable of self-government, which was the will of Divine Providence.

Long back in 1788, Edmund Burke in the Trial at Westminister Hall, had aroused in the English Parliament and people, a consciousness of the responsibilities involving a 'sacred trust', viz., India. Echoing those very words, Burke's heirs, the early nationalists of India, reminded the

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45. D. Naoroji, Speech at Forrester's Hall, London on 14th April 1890, Majumdar, Speeches, p.146.

46. R. Ghosh, Budget Speech for 1907-8, Speeches Delivered on Various Occasions, p.139.

47. Lord Russell, Speech in the House of Commons, June 24, 1858, Hansard's Parliamentary Debates, 1858, p.652.

British nation of that sacred pledge made long ago. In so far as this sacred responsibility and pledge had been articulated within the precincts of a law court, it was a legal responsibility and the Indian politicians, as pleaders, were pleading with the government to fulfill their pledge.

"There is a close relation between the science and practice of politics and the science and practice of law. In fact, both may be described as one science, the science of distinguishing right from wrong".[48] Politics remained a plea for justice, and not a cry for freedom! Free, the Indians always were under the British Empire. "India possesses under British rule the privileges of a free people... freedom of thought and expression is essential to freedom of political life".[49] The question then was how this freedom was to be exercised. As long as freedom meant the freedom to plead, the entire question of its exercise would be about who was going to plead for whom, where and how. The body of India was finally claimed by the person born in the Indian National Congress. Why, did not somebody shout "Congress ji ki jai?"[50]

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48. Mr. C. Vijiyaraghavachariar, Presidential Address to the Thirty-fifth Congress, Nagpur, 1920, in G.A. Natesan (ed.) Congress Presidential Addresses (Madras, 1934).

49. B.C. Pal, Writings and Speeches, p.5.

50. Report, 1887, Appendix II, p.204.

CHAPTER - III

BIRTH OF THE LEADER AS LEGISLATOR

"The [Congress] resolution calls upon all lawyers to make greater effort to suspend practice", failing which, wrote Gandhi, they should "not expect to hold office in any Congress organization or lead opinion on Congress platforms". Here, in these momentous words of Gandhi, an era of more than a century completely dominated by lawyers, seems to have come to an end. Options left to them were clear, "Lawyers, who have hitherto led public opinion, have either renounced practice or public life". The reason was "that a lawyer president of the provincial committee cannot lead its province to victory, if he does not suspend his practice."[1] The lawyer's practice had become a stumbling block in the way of the Indian National Congress. And any attempt to restore these lawyers to their, old status of 'leaders' would be nothing less than committing a "national suicide".[2] In just over a century lawyers had been reduced to a living anachronism on the Indian political scene.

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1. M.K. Gandhi's article 'Practicing Lawyers' in Young India of 30th March 1921, taken from M.K. Gandhi, Young India, 1919-22 (Madras, 1924), p.367.

2. Ibid., pp.368-69.

Long back in 1788, Burke, one of the all-time greatest statesmen and politicians, had to don a gown and act a pleader to give India a language to articulate its identity and suffering. It was Burke who had taught India the art of accusing and punishing the 'arbitrary authority' of the Government in the law-court. India, then, had discovered its first representative in the person of Burke. This judico-representational practice, initiated by Burke, was carried on for about two decades even after the formation of the Indian National Congress in 1885. The early Indian National Congress leaders, who later came to be known as 'Moderates', rarely uttered a word which had not already figured in Burke's speech. In one gesture, by a single resolution in the 1920 Calcutta Congress, Gandhi, himself a lawyer by training, threw off that gown, as if it were getting suffocating. It was in this gesture and in the words of the resolution, that a leader was born. The gown thrown off, a leader would emerge. A new era would start. The politico-representational practice would be set in motion and with it India would acquire a new language to articulate its identity and suffering. The pleaders with their gowns would finally depart from the scene. The judicial representative had been born in a court, the new leader was born on a party platform.

In the new language of the new leader, the pleaders had always "represented the arm of the authority".[3] The people would discover that all the while, those pleaders, instead of representing them, had represented the authority of the Government because, "they have accustomed us to think that we can satisfy our wants only through the Government instead of teaching us that the Government is a creation of the people and merely an instrument for giving effect to their will".[4] Whereas the pleaders would grant the Government the status of a master and a judge, who would grant things to the people only after laborious pleading, petitioning and humble requests, the leaders would reduce the Government to the status of a mere instrument in the hands of the people. Every act and proclamation of the Government should bear the mark of the will of the people and the government should have no will of its own. Instead, it should carry and give effect to the will of the people. The pleaders, when they attributed a will to the government, colluded and co-operated with them - "no one co-operates with the government more than lawyers through its law-courts".[5] To the extent

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3. M.K. Gandhi's article 'School Masters and Lawyers' in Young India of 17th April 1924, Ibid. p.1426.

4. Ibid., pp.1426-27.

5. M.K. Gandhi's article 'Courts and Schools' in Young India of 11th August 1920, Ibid., p.335.

that the government was given the status of a judge, the pleaders and judges were "first cousins, and one gives strength to the other."[6]

For the new leader, "the chief thing to be remembered is that without lawyers, courts could not have been established and without the latter the English could not rule".[7] The pleaders were now blamed for colluding with the British empire in laying its foundation in India through the law courts - "it is through courts that a government establishes its authority".[8] In the new language, "it is wrong to consider that courts are established for the benefit of the people. Those who want to perpetuate their power do so through the courts".[9] The courts then were not meant to distribute justice but were a device to keep people under subjection.

As long as the law courts remained neutral to the nature of the government and its laws, they were merely a law-enforcing agency. They implemented even an unjust law

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6. M.K. Gandhi, Indian Home Rule, Fifth edition (Madras, 1922), p.59.

7. Ibid., p.59.

8. M.K. Gandhi, 'Courts and Schools', Young India, p.335.

9. M.K. Gandhi, Indian Home Rule, p.58.

with the same care and ruthlessness as they did a just one. They only administered laws without ever giving a thought to their impact on the life and liberty of the people. And in this vein of neutrality, "when they support the authority of an unrighteous government. They are no longer a palladile of liberty, they are crushing houses to crush a nation's spirit. Such were the martial law tribunals and the summary courts in the Punjab", in which the law courts appeared "in their nakedness".[10] And therefore, as long as pleaders did their pleading in these 'crushing houses' they were only helping them crush the nation's spirit, instead of raising it. Pleading, therefore, in such situations, was an anti-national act.

Moreover, the very act of pleading, because of its nature, was an act of loyalty to the government. "Lawyers interpret laws to the people and thus support authority".[11] For the pleaders, the existence of law was an apriori fact. Any questioning of law was beyond the logic and scope of their existence. As pleaders, therefore, they could not have led the public to the position of a legislator. Moreover, by

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10. M.K. Gandhi's article, 'The Hallucination of Law Courts' in Young India of 6th October 1920, in Gandhi, Young India, p.350.

11. M.K. Gandhi, 'Courts and Schools', Ibid., p.335.

ensuring the interpretation of even an unjust law, they were merely obstructing the people's march to the position of a legislator. Therefore, as long as pleaders remained leaders, the hope of the people remained trapped within the four walls of the court, and could not have emerged out of it. The very logic of their existence gave people a false hope that justice could be obtained by subtle interpretations of laws, no matter who made it. It would keep people's eyes diverted from the legislator to the judge. In fact, even in the person of a legislator they would only see the face of a judge. As pleaders, it was sacrilege to them to think of themselves in the position of legislators. They remained "officers of the court. They may be called honorary office-holders".[12] As office-holders in a law court their ultimate loyalty rested with the government. Theirs was an act of mis-representing and mis-leading the people.

These law courts were like that "Satan", who "mostly employs comparatively moral instruments and the language of ethics, to give his aims an air of respectability".[13] These law courts were mere deceptions - they were satans in disguise as 'angles' of justice. It is in these 'satanic'

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12. Ibid., p.335.

13. M.K. Gandhi, 'The Hallucination of Law Courts', p.351.

law-courts that the pleaders were running their "speculative business"[14] which was "as degrading as prostitution".[15]

Whatever good, the lawyers had done to the people or nation was because "The lawyers are also men, and there is something good in every man. Whenever instances of lawyers having done good can be brought forward, it will be found that the good is due to them as men rather than as lawyers". As a profession, however, pleading "teaches immorality, it is exposed to temptation from which few are saved".[16]

In this situation the Indian National Congress could have achieved anything substantial only if it managed to help people get rid of the "hallucination of law courts".[17] "...so long as we regard with superstitious awe and wonder the so-called palaces of justice", "we can not gain the desirable status".[18] "If we were not under the spell of lawyers and law courts and if there were no touts to tempt us into the quagmire of the courts and to appeal to our best

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14. Ibid., p.352.
15. M.K. Gandhi, Indian Home Rule, p.59.
16. Ibid., p.56.
17. M.K. Gandhi, 'The Hallucination of Law Courts', Young India, p.349.
18. Ibid., p.351.

passions, we would be leading a much happier life than we do today."[19]

Therefore, the call to boycott the law courts was an attempt by the Indian National Congress to break free from the 'spell' of those lawyers and their law courts. "The motive" writes Gandhi, "as the preamble of the original resolution clearly states, is to undermine the government's prestige by the non-cooperation of parties to the institution on which the prestige is built".[20] To the extent this call to boycott was successful, they had "successfully demolished the prestige of these institutions, and, therefore, to that extent, of the government".[21] The false prestige of the privileged classes", such as laywers had "suffered a shock from which", writes Gandhi, "I hope it will never recover".[22]

However, one more reason why the pleaders could not have played the role of leaders any more was that different kind of qualities were required for leaders which were, too often absent in pleaders. "When no one else had the courage

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19. Ibid., pp.349-50.

20. M.K. Gandhi, 'Practising Lawyers', Ibid., p.369.

21. Ibid., p.368.

22. M.K. Gandhi, 'School Masters and Lawyers', Ibid., pp.1426-27.

to speak they [the eminent lawyers] were the voice of the people and guardians of their country's liberty. And, if today the majority of them are no longer accepted as leaders of the people, it is because different qualities are required for leadership from what they have exhibited hitherto".[23] What was required of a leader was not the art of oratory but "courage, endurance, fearlessness and above all self-sacrifice".[24] "A person belonging to the suppressed classes exhibiting these qualities in their fulness would certainly be able to lead the nation; whereas the most finished orator, if he have not these qualities, must fail".[25]

It was impossible to "conceive of the possibility of the movement, which is one of self-sacrifice, succeeding if it is led by lawyers who do not believe in self-sacrifice". "I can certainly imagine" Gandhi continues, "a brave and believing weaver or cobbler more effectively leading than a timid and sceptical lawyer. Success depends upon bravery, sacrifice, truth, love and faith; not on legal acumen, calculations, diplomacy, hate and itself".[26]

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23. M.K. Gandhi, 'Cobblers vs Lawyers' in Young India of 29th Sept. 1921, in Gandhi, Ibid., p.370.

24. Ibid., p.370.

25. Ibid., p.370.

26. M.K. Gandhi, 'Practising Lawyers' in Young India of 25th August 1921, Ibid., p.369.

All these disabilities of pleaders, enumerated by Gandhi, had their origin in the nature of the position they occupied between the judge or the government on the one hand, and the client or the people on the other. Theirs was the job of a go-between, a middleman. As Gokhale himself observed in 1904, those 'p-leaders' "wanted to act as interpreters between the rulers and the ruled to explain on the one hand, to the people, the intentions of the Government and to represent on the other, to the rulers, the grievances of the people".[27] Their job was worthwhile only so long as the people approved of the intentions of the government and the government, on its part, sincerely tried to redress the grievances of the people. If anything went beyond this, where a conflict between the government and the people became immanent, there the job of the pleaders would be rendered irrelevant. They would have to retire from the scene.

As p-leaders they were incapable of espousing any other faith or belief than the faith and belief in the supreme and unquestioned authority of the judge or the government before whom they pleaded. As p-leaders they could not have believed in the almighty strength of the people, although they could

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27. G.K. Gokhale, Speech on the 25th July, 1904 at Madras in D.G. Karve and D.V. Ambekar (ed.) Speeches of Gopal Krishna Gokhale (Poona, 1966), p.156.

sympathise with their grievances. For them the judgement of a judge in the court or that of the government in the Legislative Council was the ultimate truth and any thought of going beyond this would have been a sacrilege. As p-leaders they could not have suggested to the people, as it is said, 'to take law in their own hands'. Under no condition whatsoever was it possible for the p-leader to go to the gallows in place of his client or the people he represented, because, the 'crimes' committed by a client or the people could not have been attributed to him. The nature and logic of the p-leaders' job did not demand from them the courage to die and sacrifice themselves for the cause of those they represented. 'Legal acumen, calculations and diplomacy' were the essential parts of their job.

Once the inadequacies of the representational space provided by the law courts and the Legislative Council, modelled on the law courts, and with it also the inadequacies of politics as pleading, came to surface, the 'brave and believing weaver' and the 'cobbler' of Gandhi relieved the 'timid and sceptical lawyer' from the responsibilities of leading the Indian National Congress.

However, the inadequacies of the representational space provided by the law courts were realized, almost a decade and half before Gandhi struck the final blow, by Tilak,

during his trial in the Bombay High Court in July 1908. He was accused of sedition and exciting disaffection amongst the people against the government, in and through his Marathi Newspaper, 'Kesari'. In this trial the judge was an Indian called Mr. Daver and it had a nine member jury which consisted of seven British and two Indians. Tilak was pleading his own case.

In one of his articles called 'The real meaning of bomb', which was included as evidence in the trial under the category of 'seditious writing', Tilak noted that because of "...the spread of the idea of nationality the old national character of natives is undergoing a change" and then goes on to say that "an opposition has arisen between the national character of India and the institutions of Government, and time is approaching for action being taken to bring about a harmony - an action of revolution.[28] In this trial, the opposition and 'disharmony' between 'the national character' and government institutions, and, the conflict and tension produced thereby, were amply reflected. Moreover, the pleading of Tilak had all the qualities of that 'action' that was needed to bring about the 'harmony'.

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28. Translation of the Marathi leader in 'Kesari' dated 26th May, 1908 as an exhibit in the Tilak Trial of 1908 in Full and Authentic Report of the Tilak Trial, 1908 (Bombay, 1908), p.46.

To put the matter straight in terms of our perspective, in this trial, the 'disharmony' and opposition took the shape of an opposition and conflict between the law court, a government institution and the home of judico-representational practice on the one hand, and politico-representational practice, which had not yet found a home in a government institution. Whereas the law court tried to treat, what it called 'seditious politics' on its own terms, Tilak tried to bend the rules on which a law court functions, to his own political end.

The judge, Mr. Daver, in his verdict and sentence on Mr. Tilak, wrote, "it can only be a diseased and perverted mind that can think that bombs are legitimate instruments in political agitations. And it would be a diseased mind that could ever have thought that the articles you wrote were articles that could have been legitimately written... You wrote about bombs as if they were legitimate instruments in political agitations. Such journalism is a curse to the country" and then passed the sentence "...I think for a man in your position and circumstances, that sentence will vindicate the law and meet the ends of justice. You are liable to be transported for life... Having regard to your age and other circumstances, I think it is most desirable in the interest of peace and order, and in the interest of the country which you profess to love, that you should be out of

it for sometime".[29] This sentence by a judge in a law court was passed on a leader and his politics. By this sentence the law court had sought to banish politics itself, with Mr. Tilak, from this country, in the name of 'peace and order'.

In his turn what Tilak said was no less a sentence on the law court and its judge. After the verdict of the jury was given, 'His Lordship' asked the accused, "Do you wish to say anything more before I pass sentence?" And the 'accused' replied, "All I wish to say is that in spite of the verdict of the jury I maintain that I am innocent. There are higher Powers that rule the destiny of things and it may be the will of the Providence that the cause which I represent may prosper more by my suffering than by my remaining free."[30] The politics in Tilak could not be made to plead guilty. It remained 'innocent' in its own eyes. But the law court, where Burke had articulated the 'suffering' of India; the law court which had set off with the idea to 'liberate' the people of India from the tyrannical rule of the East India Company; the law court that had got Great Britain, the much desired faith and loyalty of the people of India, the same law court had become the source of 'suffering' for one of the greatest leaders of India. Instead of helping him, it

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29. Verdict and Sentence, Ibid., pp.18-19.

30. Ibid., p.18.

had become a stumbling block for Tilak on his way to lead the people of India to a representative government. Instead of giving a space and an audience to the voice of freedom, it choked it. Much before Gandhi articulated it, the 'satanic' designs of a law court were demonstrated and exposed in this trial. The hope that was trapped in the law courts, and a Legislative Council modelled on the law courts, now took refuge in 'Providence', "that higher power that rules the destiny of things". The people of India did not 'enjoy' the law courts any more, they 'suffered' it.

It is in this trial that the political side of the law courts came to be exposed, their ultimate loyalty to the government was revealed. Although this trial took place in a law court with all its legal technicalities, its political nature became too apparent not to be noticed. The Advocate General, in charge of the prosecution on behalf of the government, referring to the speech of Tilak, remarked, "I decline to be drawn into any discussion whatsoever of politics. Neither you [jury] nor his Lordship, nor I have anything whatever to do with the politics which have been the source of discussion for the past three days. Kindly remember that. Put the whole of the discussion addressed to you on the question of politics and the position of the

parties aside. You have nothing to do with that...."[31] And further, "You [jury] have nothing to do with the question of whether reforms are necessary or desirable. You have nothing to do with that"[32] and then, as if to snare the jury in legal technicalities he says, "It might be a startling proposition to you, and I intend to support it by the authority of the Chief Justice, Mr. Strachey and the Full Bench of the High Court as well as the Privy Council. It makes no difference whether the complaints against the Government are true or not, the question is, does the language used in the articles come within the provisions of section 124A?".[33] Although the Advocate General might have been able to convince the jury, the people at large thought otherwise. 'The Bengalee' noted, "Although the Advocate General, addressing the jury, resented Mr. Tilak's reference to the political character of the trial, yet both he and the entire public know that it is on account of his politics that Mr. Tilak has been punished.... This may not, of course, be the opinion of his prosecutors or the judge and the jury who tried him but, we believe such is the view of

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31. The Advocate General's Reply, Ibid., p.169.

32. Ibid., p.170.

33. Ibid., p.170.

his countrymen at large".[34] Through this trial, notes 'Bande Mataram', "You have startled the deep slumber of false opinions, you have thrilled a pang of noble shame through callous consciences".[35] These 'false opinions' and 'callous consciences' were of those who still chose to believe in the liberating ideals of the law courts.

While addressing the jury, Tilak says, "If you think that I am writing, that I am fighting, for the liberty of the people, for a change in the constitution, for a reform of government, then it will be your duty to return a verdict of not guilty", but, "if you think that a man is not honest, that a man is not writing in the interest of the public, and is a fanatic, and that he goes against the current of public opinion, then return a verdict of guilty."[36] But how could the jury have done so in its judicial capacity unless it chose to act in the manner of a public leader or a member of the public itself?

In fact, Tilak wanted the jury to identify with the opinion and interests of the people. To the jury, Tilak says, "If any 12 men taken at random from my countrymen say

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34. Article in 'The Bengalee' collected in Opinions on the Tilak Case in Ibid., p.140.

35. Article in the 'Bande Mataram', Ibid., p.139.

36. Mr. Tilak's Speech, Ibid., p.99.

that my conduct is blamable then certainly I have no right to complain. I am living amongst them, and if the people around me don't like my writings or my views, I have no right to force them down their throats".[37] Tilak wanted the jury to act as those 12 men. "You move among the people", Tilak tells the jury, "you know what is going on... it is impossible for a jury to misconceive the motives of the accused. The authorities may, the Executive government may misconceive but it is impossible for the jury to do so".[38] Tilak asks this jury, who move among the people, know their interests and opinions and identify with them, to frame the verdict. "We are not so concerned with the law as with the rights of the jury. So long as we have our own people in the jury we are quite certain that the law may be of itself rigid but that will not avail in the administration of justice".[39] Here, by addressing the jury as his 'own people', he totally identifies the jury with the people and consequently himself as their leader. Tilak, moreover, not only identifies the jury with the people, but also expects them to go beyond the given law and give judgement, because 'law may be of itself rigid'. He, in short, expects the jury to undermine the existing law in a law court!

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37. Ibid., p.95.
38. Ibid., p.95.
39. Ibid., p.99.

Moreover, Tilak articulates the position of the jury in a way which undermines the, till then, supreme authority of the judge himself in a law court, thus placing the jury above the judge. As he says, "The jurymen are the real judges",[40] and "they have an independent position, they have certain prescribed rights and they must exercise them".[41] At times, he observes, "juries in England have returned verdicts against the direction of the judges".[42]

After reminding them of their independent status and their 'prescribed rights', Tilak tells the jury, "...it is with you, gentlemen of the jury, to administer the law properly. The fault will not be of the law but will be of the jury in this case if the law is not properly administered".[43] Therefore, even in the matter of implementation of law, the jury takes over the role actually assigned to the judge. "Don't think", continued Tilak, "that you have not the power. We often speak of the judge-made law but there is also the jury-made law".[44] Here jury-made law

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40. Ibid., p.101.
41. Ibid., p.90.
42. Ibid., p.83.
43. Ibid., p.90.
44. Ibid., p.90.

is preferred to the judge-made law. At another place, while putting his case in the perspective of the liberty of the press, he says, "the liberty of the Press depends upon the common sense view and not the view of the law. The jury has not to decide merely from the summing up of the judge. The judges have to take the verdict of the jury. This is the safeguard of liberty. You are the law-makers in this case... it is jury-made law and not judge-made law."[45] Here Tilak presents the case of the liberty of press in such a way as if it was positively threatened in the hands of the law and the judge and could have been safeguarded by the jury only, following, what Tilak calls, jury-made law.

In the view of Tilak, "The judges are bound down by precedent. The judge ignores the importance of the matter and follows the precedent in order to keep up with the current of the decisions of his predecessors; and they maintain these decisions because, they say, uniformity of practice must be maintained. They say it is the law of the land; we can not change it."[46] As long as the judges were bound down by the legal logic of precedents, any shift from the current of decisions was almost sacrilege to them. And

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45. Ibid., p.97-98.

46. Ibid., p.93.

as Tilak's trial was an unprecedented occasion, requiring unprecedented measures, the judge had no use for him. He required the help of the jury who was not tied by these legal injunctions, 'legal fictions',[47] as Tilak calls them. "The jury has the right to decide not merely from the legal fiction but from a general consideration of the whole."[48] The lure of the jury for Tilak lied in its capacity to step over the legal boundary lines drawn around the judge.

The precedents cited by Tilak for his arguments were not the normal ones. He cited the precedent of the Dean of St. Assaph's case in England. In this case there took place "a remarkable struggle between jurors, lawyers, statesmen and others."[49] "It was a struggle between the juries and statesmen on the one hand, and lawyers and judges on the other."[50] "They wanted more freedom for the press and public meetings but the law would not allow it... The judges did not like it; there was a row and eventually the law of the land prevailed."[51] As Tilak himself points out, this row was finally resolved by the intervention of the Parliament.

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47. Ibid., p.89.
48. Ibid., p.98.
49. Ibid., p.90.
50. Ibid., p.93.
51. Ibid., p.90.

"I think", continued Tilak, "the times here in India are exactly the same as they were in England in 1792. There is unrest, that is admitted. And with the object of stopping it, government thinks that some people must be prosecuted and deported if possible to the Andamans or to Australia".[52] And, therefore, the jury was asked to give a similar judgement to that given in England.

These precedents used by Tilak are unusual, for, they mark the points of crisis in the history of legal practice in Britain, points at which the matter went beyond the scope of the law court and were finally settled by the intervention of the Parliament. These were the crisis points at which legal controversies turned into political confrontation. The political side of the law was revealed. In effect, then, Tilak's arguments demanded more of a political settlement than a legal one. No wonder the jury-made laws did not find place in the law books.[53] They were officially not recognized as precedents. And how could they be, if they were to support and legitimize the demand of a political settlement in the law court. They could have figured as precedents in the law books only at the risk of

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52. Ibid., p.91.

53. Ibid., p.90.

compromising the interiority and independence of the law court.

Yet, the fact remains that they were cited as precedents. And this fact only goes to prove that the trial was more political than judicial in nature, or at least Tilak made it appear so. Tilak, in fact, consciously tried to turn it into a political trial. If the law court had to measure up to the demands of Tilak, then it would have to cease to be a law court, a judicial body and turn itself into political or Legislative body.

If we keep in mind, the constant and tireless effort of Tilak to identify the jury with the people or public on the one hand, and judge with the government on the other, then the political nature of this trial becomes clear. By the subtle identification of the jury in the law court with the public outside, Tilak managed to smuggle the public into the law court and made it sit there as the jury. And by the same gesture he transformed himself into their leader in the law court. This transformation was made possible by his recognition as a public leader outside the court. The public is not only made to sit as jury in the court but also, and this is important, all the rights and authority of the judge were transferred to them. By this act, while the public-as-jury was sought to be made all powerful within the law court,

the position of the judge, who was identified with the government, was rendered irrelevant. It was nothing less than a coup in the law court.

The public-as-jury claimed for itself the sole and supreme authority in deciding the case of sedition, disloyalty or disaffection to the State. The judge as office-holder and representative of the government, had no say in deciding this case. The idea behind this claim was that the State ideally and essentially belonged to the people. Tilak, in one of his controversial articles, called, 'The Secret of the Bomb', observed, "The authorities have to conduct themselves in subservience to public opinion, in proportion to the rights of Swarajya acquired by the people. That power should remain in the hands of such authorities as may be approved by the people and that it should be taken away from the hands of such authorities as may not be liked by the people, this itself is called the rights of Swarajya".[54] But actually the State remained in the hands of an 'alien' government - "English rule is openly an alien rule".[55] This gap between what was essential and

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54. Tilak's article in the 'Kesari' newspaper dated 2nd June, 1908 included as an exhibit in the Tilak Trial of 1908, Ibid., p.55.

55. Translation of the Tilak's Marathi article in the 'Kesari' newspaper dated, 9th June, 1908, included as an exhibit in the Tilak Trial of 1908, Ibid., p.60.

ideal and what was actual, created a situation of tension and conflict between the people and the government. It was this conflict that Tilak attempted to stretch into the law court where it would appear as the conflict between the rights and authorities of the jury and the judge. Political conflict was smuggled into the judicial space of the law court.

The message of the 'coup' was clear. As long as the people had no say in the government as legislators, they would not approve of any law implemented by the law courts, with all their legal technicalities. "... as long as law-making", declares Tilak, "is not in our hands, laws which are repugnant to justice and morality would be sometimes passed. We can not obey them".[56] Without people having their own representatives as legislators, the operations of a law court would be an exercise in more deception, a farce. The court's rules and regulations had no truth, they were mere 'legal fictions'.

It was this 'farce' and these 'legal fictions' that Tilak attempted to counter by claiming all the rights and authority for the public-as-jury and thereby rendering the

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56. Speech on Home Rule by Constitutional Means on 8th October 1917 at Allahabad in Samagra Lokmanya Tilak, p.416.

position of a judge irrelevant. Tilak also claimed for the public-as-jury the right to make its own laws, taking into account the public opinion at large. Therefore, Tilak's attempt, mainly consisted in turning the public into legislators via the jury in a law court. And to the extent that Tilak himself was the unquestioned and the most popular leader, the honour of a legislator would first go to him. Although convicted, Tilak made a law defying attempt to emerge a legislator, as the representative of the public.

We have discussed in the second chapter how the Legislative Council came to be modelled upon the law court, here we have Tilak who attempted to model the law court upon the Legislative Council. Whereas the early leaders of the Indian National Congress represented their people in the Legislative Council as pleaders, Tilak attempted to represent his people in the law court as a legislator. It is this legislator in the person of Tilak who emerged as the new leader. The days of pleading as politics had gone, the days of legislating as politics had come. The journey from p-leader to leader was also a journey from the pleader in the Legislative Council to the leader or legislator in the law court.

But, whereas the early Congress leaders were recognised as pleaders in the Legislative Council, Tilak acting as a

legislator in the law court was convicted. "Mr. Tilak is the leader", observed 'Reynold's Newspaper', "of the 'popular' party. When they heard the sentence the mob broke out into rioting, and workman went on strike. Already he is a martyr, and we have been taught by history to believe that the blood of the martyrs is the seed of the Church".[57]

With this conviction, 'representation', banished from the law courts, took refuge in the streets and factories and began to be known as politics. It is this politics, which at times, would burst out in 'public convulsions', 'mass rioting' or 'factory strikes'.

"Everyone felt as if Tilak was making history"[57] - and we know why.

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57. Article in 'Reynold's Newspaper' included in Opinions on the Tilak Case in Full and Authentic Report, p.124.

58. Article in the 'Panjabee', Ibid., p.136.

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