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Introduction

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One of the responses to the political turmoil in which the world has been thrown after the annus mirabilis of 1989 is renewed interest in laws and constitutionalism. Rarely people expect today that a constitution will solve an acute political or social conflict, or that a particular constitutional culture can be the answer to today's fundamental questions of political existence. Indeed, to the wicked people, the inability of constitutions to address those questions being so obviously insufficient, the question is, how had we in the first place believed so long in the capacity of constitutions to deliver peace? To some of the realist historians the long peace that we had during the almost forty years of post-war era was not due to liberal constitutional ideas, but to a strategic balance of power between two great adversaries, that gave the world not only world peace, but social peace too, local, and regional peace also, in the sense that the world never became a runaway world. The argument of John Lewis Gaddis, which I briefly mention here, has its long antecedent in the history of thinking on conflicts.[1] After all, the realist thought that political and military power and its symmetry brings peace in the last analysis, and nothing else can, had always paralleled the hope of Kant, Burke, and others that constitutionalism promoted peace by solving conflicts. Why is there, then, a renewed interest in law and constitutionalism in this conflict-ridden age?

We can hazard three answers. First, in this age of restoration (of liberalism, of peace after the savagery of the Balkan war and third world civil wars in some countries such as Rwanda, Cambodia and Afghanistan), lawmakers and constitutionalists are seen to be the primary engineers and technicians in putting the state to order. From this follows the entire recent history of the proliferation and domination of jurists and lawmakers in the international political field. They can help effect the 'democratic transition', they know how to fix the nuts and bolts of the new restorative legal machines, and they can restore social peace. Second, the renewed interest in law is partly because the received lesson is that *rule by men* was bad and capricious, *rule by order* is equally arbitrary, while *rule of law* is rule of rules. Courts,

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statutes, constitutions, basic laws, jurists' heritages, verdicts, arbitrations, and commentaries – all those great characteristics by which a modern legal-constitutional system is marked – represent Law and help a political society to escape, forget, and transcend its foundational violence. Third, all conflicts call for neutrality (if there is no conflict, there is no need to be neutral), and law appears as congealed neutrality.

These foundational beliefs of the modern age are not only characteristic of the Euro-American world, the processes of decolonization world over also contributed to those beliefs. Indeed, more than Kant or Burke, or the *Federalist* fathers, colonial politics and decolonization had contributed to the universal ascendancy of *rule of law*. The problems of rule and governing deepened the belief in the capacity of law, at the same time aroused interest in the actual record of this universal social instrument. Law showed that if conflicts could not be solved (or conflicts need not be solved, they are matters of relations required to be governed), they could be negotiated in the interest of rule and government and the *defence of the realm* could be built only with the help of a structure of orders that necessitated law and constitution.

The significance of the present set of papers lies in that examination of actual record. The collection is also unique because it gives the colonial and post-colonial experiences a justified place of significance in studies of law and constitutionalism, for it shows that while Montesquieu, Kant, and Burke each in their own way were promoting the spirit of laws, on the other side of the world a more significant history of law making was being enacted in order to defend a particular rule, and a particular type of government. As many researches, including the papers collected here, have shown, the colonial history of law making was essential to the entire legal culture and tradition of the Euro-American world. The colonial history left a permanent legacy on constitutionalism everywhere; it had taught the rulers that governing by law making was not to be a pure process, rule of law had to be mixed appropriately with rule by men and rule by orders. The other legacy was again something that again neither Kant nor Burke wrote of – it was that constitutionalism was to be built on the principle of difference. Race, gender, caste, communal identity, and locality – all, and most fundamentally race, built this principle of difference. Constitutionalism and law making did not invent difference; they only gave them formal shape in the light of the principle of governing on the basis of the principle of difference. At times, constitutionalism took away the right to be different also, in the sense that everyone had to subscribe to the homogeneity that the legal order was creating. Thus exclusions and inclusions evolved as the two strategies of rule, playing on the fundamental reality of difference.

The last point I wish to make of this particular collection of papers relates to the way in which the collection addresses the antinomies of violence and dialogue – the two fundamental processes by which politics runs. Both play on forms of power. Both require no pre-explanation, both act as site of political strategies. Burke wanted to avoid the antinomy by thinking of a machine called the constitution in which every small detail would have a specific function, and constitution would act as the fountainhead of laws fixing every such small detail of society. He said,

> I must see with my own eyes, touch with my own hands, not only the fixed, but the momentary circumstances, before I would venture to suggest any political project

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> whatsoever, I must know the power and disposition to accept, to execute, to persevere . . . I must see the means of correcting the plan, where correctives would be wanted. I must see the things; I must see the men . . . The eastern politicians never do anything without the opinion of the astrologers on the *fortunate moment* . . . Statesmen of a judicious prescience look for the fortunate moment too; but they seek it, not in the conjunctions and oppositions of the planets, but in the conjunctions and oppositions of men and things. These form their almanac.[2]

This collection shows the interplay of violence and the dialogic functions and powers in the process of rule by law, known as *rule of law*. Law allows this interplay as it occupies the middle space. But how does it ascribe to itself this space? The brief answer is that it can occupy the middle ground by claiming to reach all spheres of life, by claiming universal applicability. Law occupies manners and morals, education, and civil religion. It has the goal of setting up the practical arrangements for a permanent moral reform intended to cancel out the effects of the social interest groups, which are constantly arising and active in society. It ceaselessly defends and restores the purity of the individual conscience. Thus, political laws, civil laws, and criminal laws have the essential supplement in the form of custom and common law (the basis on which manners and morals stand) – a power that great legislators too have to bear in mind. Laws therefore impact on constitution by bearing on the latter the stamp of common sense – both together make the great machine of rule, governance, and continuity.[3]

What happens to popular revolutions then? Constitution cannot allow daily plebiscite or daily dialogues to determine political relations in as much as it cannot allow unregulated violence. No rule can leave the people to their passions alone – the passions of blood and friendship. Popular passions need the bridle of deliberation of the wise, and thus the science of governing has to be combined with the art of keeping popular passions in check by innovating ways of selecting the wise men who can control the fury below. Constitutionalism thus raises the issue of political representation and citizenship. This collection discusses therefore quite appropriately the politics of representation and the dynamics of the political subject called the citizen, who is at once the symbol of both subjection and subject-formation. The collection throws unexpected shafts of light on the mysterious process of a people becoming subjected to ruling politics and at the same time becoming political subjects in their own right.

That of course is another topic, to which another number of Diogenes will hopefully devote itself at some time. In presenting this collection, I am grateful to the Maison des Sciences de L'homme, Maurice Aymard and Gilles Tarabout in particular, the contributors, and finally to Luca Scarantino whose interest saw this collection through to this publication originating from an intense deliberation for three days in Paris in the bitter winter of this February.

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Notes

1. John Lewis Gaddis (1987) *The Long Peace – Inquiries into the History of the Cold War*. New York: Oxford University Press.
2. Edmund Burke (1975). Cited in Alexander M. Bickel, *The Morality of Consent*, pp. 15–16. Yale: Yale University Press.
3. The principal jurist among the fathers of the Indian constitution, B. R. Ambedkar repeatedly emphasized what can be called the juridical common sense in defending draft articles of the Indian constitution and opposing certain major amendments moved against those draft articles; see for example, his speech to the Constituent Assembly on Article 61.

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