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Colonial Constitutionalism

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L'auteur fait valoir que la constitution est un mode de colonialisme et de colonisation. Il qualifie ce phénomène de déficit constitutionnel. En sélectionant et imposant certaines règles, la constitution impose un jugment et un système de gradation. De ce fait, une altérité est créée, l'espace des autres réduit, les routes du dialogue fermées. Les racines des guerres civiles résident dans cette situation aujourd'hui. L'auteur affirme que la constitution doit être redéfinie de manière à faire une place aux exceptions et à incorporer les expériences de dialogue, afin de les rendre d'actualité dans les sociétés postcoloniales.

I

In truth, constitutionalism can be only colonial. In constituting rules, and thereby constituting itself the constitution has to make a judgement. The judgement is about what to select as the constituting rule(s). Further, it is about what rule(s) to make *de novo*, what rule(s) to inherit, co-opt, what to colonize, and what to leave out. It is about what rule(s) to make secondary, derivative. Constitution within its own world is universal, that is to say, its applicability is universal. Yet, this universe in being constituted must constitute the grades, and make up its mind about the areas to be colonized within the constitutional universe, and the areas to be left out. Colonial constitutionalism (or constitutional colonialism?) is thus not a neologism, but a phrase that indicates a reality wider than what it immediately suggests. Its topography shows that only by not being universal its claim to universal applicability is established, so is established the truth of constitutional deficit. The bond uniting the universal and the colony is ruptured when constitutionalism meets its dead end. Till then, constitutionalism cannot recoil from colonization. This is

a political question; our sensitivity to the problems of our time cannot allow us to treat the question of colonial constitutionalism as simply a methodological, epistemological, theoretical, speculative, or a discursive problem. The pressure of the dialogic politics of our time is simply immense.

The very possibility of such a juxtaposition was lost in critical thinking in the colonies for much of its time, till Tagore wrote his last essay, known as his last testament, "The Crisis of Civilization" (written in Bengali, *Sabhyatar Sankat*, later published in English, 1941). The Second World War had broken out with large-scale slaughter of humanity, the country was still under subjugation, protests were being drowned with ruthless demonstration of power, law and order, and the poet who had also been the knight of the British empire and had returned his knighthood, and in his own words had been brought up in the "ethos of enlightenment", now witnessed towards the end of his life only the dry terrain of rule, and the ruins of a civilization. What strikes us today reading the essay sixty years after it was composed, is not so much the melancholy of the tract, and the gloom and sadness of a poet glancing back to the days of his "belief in Europe's capacity to elevate humanity to a new level", but the reason of his complaint against the notion of "law and order", which he thought had been central to the misery of the civilization of India, whose son he saw as himself, and which now, he found on the verge of the end of his long life, lay in ruins because of the operation of the notions of law and order. Evidently, nationalist thinking had taken long to learn something more of the fruits of the poisoned tree of colonialism, in different words, the destiny of a translated constitutional culture.[1]

While today, with an advance of inquiries into the world of power, it is not something new to critique the notion of "law and order", the child of liberal constitutionalism, yet it must strike us why war brings to us the fallibility of this grand notion – and that is not because, war brings an end to "law and order", but war ruthlessly exhibits how constitutionalism co-habits with war, as Tagore indicated, law and order co-existing with ruins of a civilization.

War and constitution – can there be stranger bedfellows? In reminding ourselves today of the progress in the achievement in human rights, humanitarian laws, forms of autonomy, constitutional rule, and the ethos of self-determination, we remind ourselves of the great wars that have accompanied this progress, the continuing mass slaughters that precede and follow the establishment of constitutional rule in a country. In stepping beyond the received alternatives between war and constitution, lawlessness and law and order, between neo-realism and neo-ethics, what is needed is a reconstitution of the relation between politics and history. If our age of belonging to an age of criticism is true, then we must not only step beyond Kant who saw constitution as a way out of lawlessness, and look into the ways in which constitutionalism originating from the West has acquired such hegemonic rule over polities in large parts of the world that alternative notions and imaginations about politics and political societies have almost disappeared, and modes of dialogues have been largely constricted to chamber rooms of constitutional deliberations that are securely based on forces of law and order. There is a more general theoretical cause as well. If as the current age of globalisation and complex interdependence suggests an end probably forever to the project of reconstituting the empire and the need from now on to deal with an irreducible multiplicity of selves, "politics must reconstitute its own history" – its rules, conduct, behaviour not in a projected context of an imperial constitution making, but in the context of a limited power of constitution to realize dialogic politics.

In South Asia constitution has long ceased to be a matter just for constitutionalists. Legal philosophy, legal theory and legal deliberations are now continuously subjected to contending selves who are putting the bicameral character of constitutional law, namely its factual nature and ethical underpinnings, to severe test. As conflicts conflagrate into civil wars, constitutions have to explain if they are freedom guaranteeing or coercive. In other words, constitution, hitherto enjoying a validity that stems from its

origins in a colonial power, and therefore substantively free from popular deliberations, now needs to self-explain – is it a collection of norms backed by threat of state sanction or norms whose validity does not primarily stem from the state, but from the fact that these norms guarantee the autonomy of all legal persons equally? And either way, the answer faces the next question, what grounds the legitimacy of rules that can be changed at any time by the political lawgiver? What Habermas terms as "strategic approach" that is considering law as commands in the sense of factual constraints on scope for action, and "performative attitude", that is viewing law as norms to be respected for being valid precepts[2] – these two increasingly refuse to be reconciled, as citizens as the subjects of law increasingly cannot see themselves as authors of law as well. In terms of legal theory, modern legal order therefore faces increasing challenges, based, as this order has to be on the legitimacy of self-determination. Oscillating between *facts and norms*, the legal notions of rights, duties, entitlements, autonomy, equivalence, and subject-hood, belie the demands of both facticity and validity. People start speaking of democratic self-legislation, which comes to mean increasing deliberative procedures for producing law by the legal subjects. The Spanish constitutional historian Bartolomé Clavero shows how "freedom's law" that had defined the Euro-American constitutional moment in the eighteenth century had within it from the beginning norms of exclusion which helped it to define who would be free to what extent and therefore would legally prescribe the community of the legally free – only towards whom the state would be responsible for its conduct.[3] Therefore is the cardinal question: who enforces the norm and the privilege and burden of rights and responsibility on whom? And, if power is being questioned by the norm of rights and responsibility, is not the norm itself often circumscribed by configuration of power?

This presents for the constitutional state a greater problem. Constitution speaks of rights. But rights are against the state, and as norms against a state, arise "co-originally" with constitutional principles of legality. Thus rights,

supposed to deepen constitutionalism, weaken the regime by constant recourse to legitimacy from some higher-ranking moral law. Wars, particularly the declared and undeclared civil wars as in this region in Sri Lanka, India, and Nepal, often become in such situation the expression of the demand to frame other procedures for will-formation.

Modern constitutionalism tells us that constitution produces citizens in as much as citizens produce the constitution – at least this much we learnt from the constitutional culture of the West. But can this discourse of relation anticipate for itself the destiny that it meets in a faraway land like India? For example, can the constitution in a post-colonial polity like India make space for citizen with multiple identities? Or, forcing the citizen to behave as a uniform citizen, does it not relegate him/her to the status of a subject? With the hierarchical structures of modern politics being reinforced by the constitution, the citizen is once again the subject. But the irony is that he cannot become the *praja* anymore, who was neither citizen nor the subject, but who operated in relation with the ruler on a morality of mutual obligation. Modern constitutionalism replaces the morality of mutual obligation and responsibility with the principle of political exchange, a transaction – I provide you with service, you provide me with loyalty. With the State failing in its part, the citizen withdraws throwing the constitutional virtue of achieving procedural democracy to the winds. The State rebuilds itself under such circumstance not on the basis of a participating citizenry, but demarcating its subjects (who are nominally *citizens*) from *aliens* – the other, but a soul mate. The constitution can only define citizenship by separating it from alien-hood made up of refugees, dropouts, illegal immigrants, and the excommunicated sects of modern society – "terrorists" and "anarchists", yet it cannot answer, who is an alien?

To be sure, one point of beginning such an investigation into the destiny of a received constitutional culture would be to inquire into the conditions and consequences of this constitutionalism on patterns of conflict and accommodation in this region. In trying to understand the extremely volatile

field of relation between the state and the self, we shall have to therefore repeatedly go back to the issue of constitutionalism – the single most important site governing the relation in this region. Needless to say, international relations never understood its significance. And only when reconstruction of the state through the mechanism of restorative constitutions became an international agenda in the last fifteen years, that international politics started reflecting on law, legality and constitutionalism. It is in order therefore to make few remarks on the significance of a critique of constitutionalism in a new reading of post-colonial politics, particularly because we have in this region the strange co-existence of civil war and constitution, and this explains to a large extent why states of South Asia in spite of doomsday critics have not withered away, and a no war-no peace situation prevails.

In discussing different readings of the legacy of the French Revolution, Jurgen Habermas speaks of the abiding legacy of the Revolution in presenting popular sovereignty as procedure ("Popular Sovereignty as Procedure", Lecture on The Ideas of 1789, *Between Facts and Norms*). Yet, in the long explanation that he offers, he does not ask, why could only a *form of violence* offer popular sovereignty as procedure, a new mode of practice and self-determination, a new mode of communication, legitimation, and thus a new mode of "communicatively generated power"? In other words, the question that Habermas does not reflect on relates to the ability of war to present itself as a procedure of deliberations. What happens when and where war forces constitution to accept deliberations, or presents a new set of political lawgivers as deliberators of sovereignty? Or, what happens when a constitution cannot produce deliberative procedures, which originate from another set of political practices outside its precincts, namely accord, justice, recognition, and reconciliation? Clearly we are in a situation today when constitutional legitimacy is giving way to other legitimating modes of democracy and rule.

The question to be asked will be, will this entrenched constitutional culture allow new practices a broader site? And will this entrenched culture of

constitutionalism facilitate the emergence of a political society that by broadening its sphere will help the new set of practices to gain legitimacy? Going by the indications available now, the answer unfortunately seems to be negative. An all-pervasive decline of the spirit of reconciliation and understanding and of the regard for norms of justice and rights marks the region. Hannah Arendt had once said, in order to enjoy rights, we require the "right to have rights". The age of fear and black utopia - the post-September 11 times - has snatched away that fundamental right - our right to have rights. Not only constitutions everywhere are failing to be effective conflict-resolution mechanisms, they are on the contrary exacerbating these; for constitution as legal subject in post-colonial politics loses no time in asking the society to acknowledge it as an autonomous political actor, and often even before receiving an answer sits on the top of political society. The political society does not form the constitution, but the constitution increasingly becomes the power to form the political society. The deliberations in the Indian Constituent Assembly carry the traces of various alternative possibilities and alternative communicative modes between different political actors, which the constitution itself was to give a deep burial to. Similarly, the long history of accords and amendments in Sri Lanka was ultimately only a sub-player in a constitutional game that could survive only by turning its face against other possible rules of conversation with the dissenters. In such a context, to put emphasis on the public discourse of constitutional democracy is to emphasize the need to interrogate in the first place, how this public is constituted, and how this "discourse of democracy" is a constitutional essentialism that needs to be critiqued by a philosophy of alternative conversations. The African political scientist Julius Ihonvbere notes the rise of new constitutionalism in several countries of Africa. He describes how earlier even if states had constitutions, the leaders whom he calls "the big man" did not care for these constitutions, or were simply ignorant of the existence of such basic laws. There was no popular deliberation, and constitution was irrelevant to the social and political conflicts and turmoil in the country. He describes how in many of these countries new

rules are being forged through popular deliberations or at least popular coalitions are trying to formulate new basic laws, moved by experiences of conflicts and wars.[4] Habermas himself admits in *Between Facts and Norms*,

> After a century that, more than any other, has taught us the horror of existing unreason, the last remains of an essentialist trust in reason have been destroyed. Yet modernity, now aware of its contingencies, depends all the more on a procedural reason, that is, on a reason that puts itself on a trial. The critique of reason is its own work: this double meaning, first deployed by Immanuel Kant, is due to the radically anti-Platonic insight that there is neither a higher nor a deeper reality to which we could appeal – we who find ourselves already situated in our linguistically structured forms of life.[5]

The trouble with such a faith in procedure is that, reason places itself as *the* procedure and does not allow other conversations to take place. Law always places itself as *the* mode of order. Constitutional communication always places itself as *the* only way to discourse. In such situation, the critique of reason is not produced by reason but by romance, the yearning to converse anew, atypically. The romance of the democratic voyage begins first by stepping beyond what reason has laid down as the procedure of democracy – namely law, constitution, and state. If the political experiences of the post-colonial times mean anything in term of adding to the corpus of democratic learning, it is a chronicle of how reason is pushed aside often by romance, reason (of the state) by dialogue, rights by justice, and attrition by accommodation. No reason suggested this replacement. Indeed its limits produced romance, and therein, lay hopes for the next turn in the democratic journey. It is essential then, that in order to understand other ways of conversation, that the romantic tradition in communication be re-affirmed to counter corporate and state control of communicational rationality and to animate the renewal of public voice in society. Also it is important to remember that the alternative in the procedural world emerges not because of the foundations and not because of advent of new technologies. Nor does it arise out of consumer demand. Rather at distinct

points of historical rupture, radical activists seize the moment to create a new medium and a new form of conversation. Alternatives arise out of dramatic struggles of the visionaries in communication.

II

INTER ARMA SILENT LEGES - in times of war, the laws are silent. Not only the present juridical situation is shaken in the wake of national, social and political wars, even the formation of future laws for the purpose of codified rules of negotiation of differences are also suspended. Human rights law, humanitarian law, and municipal constitutional law – all are affected by war and an atmosphere of pervasive violence and interventions, which aim at stopping violence, but in turn exacerbate violence and authoritarianism at the cost of democracy and liberal values of society. We are now therefore in an age of restorative constitutions aimed at returning to liberal values, for a long time protected and reinforced by constitutional democracy, but now on the verge of collapse.

But meanwhile, by this same discourse of restorative constitutions that has within it strong marks of international big power politics, states have been reduced to half-states, their sovereignty diminished, and their internal capacity to negotiate differences and make enriched norms of justice weakened. By emphasizing transition from "anarchy", "communism", "state-controlled economy" and "one party rule", a process controlled from above and guided by international constitution experts mainly of West Europe and the United States, the politics of restorative constitutionalism faces a dilemma. Transition is both discontinuity and continuity. If restorative constitutionalism says that the earlier constitutional structure was illegal, by the same token the new constitution too has to satisfy the criterion of legitimacy. In many cases, as happened in India, the parliament becomes the Constituent Assembly (with often limited suffrage), the constitution thereby permanently suffering a

legitimacy deficit. From the legal point of view, transition raises a problem. The theory of legal continuity says every illegal change in the constitution is "revolution". "Revolution as a problem in legality and legitimacy" therefore confounds constitutionalism in its restorative functions. New constitution may affect the fundamental laws of a state or a nation, and, yet, the change is illegal under the very law that it aims to abolish. Restorative or transitional constitutions aim to sidestep the dilemma by invoking rules of succession whose aim is to regulate the legitimate process of succession or change in the regime. International law tells us that if population and territory of a state remain same, no new state has come into existence. Yet, a new government in the sense of a new order has come into being and spares no effort in emphasizing its claim that a new state has come into being. The rules of succession can only partially explain the situation, for it only partially satisfies the criterion of legality by basically arguing that the change has been peaceful, that it has been desired by the people from whom sovereignty flows, and the parliament approves of the change. But as indicated, this only partially satisfies the issue. If the legitimacy of the new order rests on the old constitution and the old legal order, then this is tantamount to an acknowledgement of the legality of the old constitutional system and its legal order. How does the liberal philosophy of law that emphasizes the rule-making capacity of the constitution above its political-symbolic role tackle this situation? One, of course, is the way in which details of rule-making occupy the centre-stage of society ignoring current practices and making many things *de novo*, the other is de-emphasizing the notion of permanent plebiscite, on the basis of which the new order had come into place first of all. We can again look back at the Indian constitution-making exercise to understand how transitional constitution devises the strategy to escape the paradox. First, a normal election, of ten on limited suffrage, is interpreted and turned into a popular plebiscite for a new constitution. Second, constitution making and governing go hand in hand, thus reinforcing the idea that constitution has to be looked at from the point of rule. Third, it inserts many of the old "rules of ruling" into the new document

thereby ensuring continuity while giving it an appearance of a collection of new rules, charters, and freedom's laws. Finally, like a silent killer, through the above devices, the new order performs its function of eliminating several co-existing choices, possibilities, and alternatives. In the anarchy of wars, partitions, and massacres constitution becomes a matter of rule. No one raises the question of tainted birth or the paradox I speak of. Constitution is taken as the natural companion or product of war, change, and anarchy – exactly as the colonial authorities in India made their successive proclamations of order during the time of mutiny, unrest, disobedience, and revolts. The discourse of responsible government proceeds in this way.

While these are the lessons about ways in which transitional constitutions can come into being, lessons clear from the Indian example, today the situation is more complicated. In the era of globalisation of constitution-making the standards of which are set by one dominant paradigm, the citizens and countries of the Third World threatened and scared start speaking of a "dangerous liaison" – the combination of global power and a weak constitutional system that is allowing authoritarianism and in turn weakening itself further by reconciling to outside interventions, and cancelling norms towards democratic politics and morality. South Asia stands at such juncture, where the career of democracy is at stake due to war, near war, intervention, failed constitutionalism, and an atmosphere of widespread violence.

From the time of Grotius theorists of state have thought of laws of war, because the right to wage war was considered the test of sovereignty, and without sovereignty there could not be a State. Even the celebrated Geneva Conventions are in that tradition of laws of war. These are not laws of peace, and except in marginal cases, laws of war cannot be deployed as laws of peace. With the UN Charter began in a substantive way the human endeavour to frame laws of peace. The liberal philosopher Rawls speaks of "laws of peoples" in an effort to enunciate the principles of co-existence of peoples and societies with different foundations.[6] Laws of peoples fall in the domain of the laws of

peace. Current events show, and here we are not referring only to the event of 11 September and events thereafter, that the formulated laws of war cannot regulate civil wars, armed rebellions, wars conducted with revolutionized means of warfare (RMA or the Revolution in Military Affairs), and wars against unrecognizable enemies. Also these laws of war cannot protect weak states, or protect civil liberties against being completely eroded by conduct of war, or uphold constitutional culture. Therefore, the question from a political point of view will be, how are we to develop laws of peace as alternative to laws of war, and show that laws of peace cannot inhere in regulation of war by certain laws? How are we to account for the fact that while on one hand, human rights laws and humanitarian laws develop, and laws of war increase in number in order to control and codify use of type of weaponry, proliferation of weapons, treatment of soldiers and civilians, and secret diplomacy, on the other hand, wars increase, various types of victims of wars grow, genocides occur, and barbarity flourishes? It is in this strange co-existence constitutionalism and violence that we must seek our answer to the relative significance of laws of war and laws of peace.

Peoples, nations, and states fight over territory; the fight lends them political identities. One can of course argue that precisely because they acquire a political identity around a territory, that they fight. In this interplay of what may be roughly said as the eternally quarrelling couple – ethno-politics and geopolitics – that we find massacres and deaths so that a political society is born on the basis of a constitution. Constitution that is supposed to do away with slaughters is ushered in by slaughters. It is in these deaths that due to the mythology of constitutionalism are considered normal, banal, and not exceptional, that we find the great agency of law and order producing constitutionally sanctioned deaths. The protocol is of keeping alive the constitution what should be kept politically alive through dialogue. Constitution always spoke of power and authority sanctioned through juridical means. It never spoke of responsibility. Michael Ignatieff in *Blood and Belonging*

speaks of the almost semi-erotic gun culture of the checkpoints and contrasts it with the responsibility of guns in yester-times when violence reminded of the need to be responsible.[7] You had the means of violence, so you had to be responsible for you could not use them indiscriminately. But that responsibility was gone with each period of restoration when the victorious power used violence on the basis of restored constitutions, to show that the event of restoration was final.

However, to understand why constitution could not generate responsibility, we shall have to inquire more. Responsibility comes from familiarity, a familial responsibility, which means also excluding those whom you know so much so well that you do not want them as part of your family. But a State is not formed with just everyone in the family, then you do not need a State, State-building means the business of including the unfamiliar in the political society to whom you do not want to be completely responsible. Therefore, the Indian Constitution followed faithfully the colonial model of the excluded and partially excluded areas, and the inner lines of various types, signifying the familiarity (and lack of) of the colonial with what lay beyond. In this way, new areas were brought in under constitutional rule. The same was with Pakistan where areas known as Balochistan and North West Frontier Province, which included the khanates (particularly the khanate of Kalat), were brought under constitutional rule. It was like repeating what the British colonial power had practiced through the acts of union with Scotland and home rule for Ireland, the Royal Proclamation of 1763 for excluded areas for the Innuits in Canada, and resembling closer to our time the process of extending constitutional rule to the Nunavut areas there through negotiation and constitutional amendment acts, including the Constitutional Amendment Act of 1982, and the Land Claims Agreement of 1993.[8] In Sri Lanka, the model of co-existing war, constitutionalism, and graded rule of territory and people was practiced most eloquently, with successive constitutional amendments about devolution of power, state religion, state language, and establishing an

administrative and military line dividing the north and parts of the east from rest of the country. Expansion of constitutional rule is a practice of colonization of spaces (areas, themes, peoples, customs), which apparently takes place through dialogue of parties, but which also speaks of certain unilateralism. Thus establishment of statehood in Nagaland was both a product of 16 point agreement of 1960 between the Indian government and some sections of the Naga people, as well as the unilateral policy of the Nehru administration to expand constitutional rule there against the wishes of a majority of local population. In Sri Lanka, from the Soulbery constitution, which guided the country from 1948 when the country gained independence, through the Citizenship Acts of 1948 and 1949, to 1972 when the republican constitution was introduced – it has been a constitutional journey marked by pacts like the Bandaranaike-Chelvanayakam pact and the devolution package, and the most unilateral act in politics, that of declaring war. The Indian history of constitutionalism of Morley-Minto Reforms, Montague-Chelmsford Reform, recommendations of the Simon Commission, the India Act of 1935, and the Cripps Mission – again it is a story of colonial constitutionalism, whose essence is conquest of new spaces through an intriguing combination of dialogue and unilateralism. One of the principal businesses of constitutional rule everywhere has been to find out its frontiers – in India, or elsewhere in South Asia, or in the current constitution-making exercise for the European Union in the West, whose political dynamics of frontier-making in all its complexities has been described recently by Etienne Balibar in an evocative essay, "At the Borders of Europe".[9] Invariably, constitution meets its frontiers, makes innovations as the colonial model has shown everywhere, but this signifies its failure also – above all a failure to converse with other political realities that lie beyond the basic juridical tract.

There is a certain bewitching power in constitutionalism that moves even the most hard- nosed political analyst to give leave to critical inquiry, and think that without constitution there is no chance of survival for the mankind.

Thus each and every notable failure of constitutionalism is followed by renewed attempt to tailor a political society that is a witness to the said failure to suit constitutional imperatives. If the captivating power of constitutionalism is built on successes, the reason is that while the failure stories are no less significant, law's self-fulfilling prophecy forces politics to conclude that the "failure" of the constitutional self is only the inadequacy of the other that should call for only more law, more basics, more order, and more juridical thinking. Constitution does its undoing through its absolutism, the constitutional acts undertaken in small and large measures leave in their wake the victims of the totalising power of the constitutional ethos, victims who would never agree to reconcile to a political existence that will be above all marked by the claim to sovereign power by a tract that places itself above all other forms of political dialogues. Its sovereignty therefore marks its limits. We can again refer to the constitutional moment in our own recent history when constitution was being sought to be imposed on the region at a time when it was being de-colonized, because the only form that the de-colonized politics could think for itself was the constitutional form, the form of passive revolution. That imagination left no room for other forms of political co-existence. Thus, the political histories of many areas became subject to the remorseless drive to bring every political existence under constitutional order, though invariably the possibilities being rejected then bounced back within no time.

Take the paradigmatic case of the post-independence history of the region - the integration of the former "princely state of Hyderabad" into the Indian Union (1948), its subsequent merger with the Andhra region and the establishment of the state of Andhra Pradesh in 1956. The modalities of the region's integration with the Indian Union was marked by specific historical circumstances since the time of the colonial rule that till date are alive though in different forms. As we know, the regime of the *Nizam* had prevented the emergence of distinct political subjects and the political articulation of cultural

and other differences in the state of Hyderabad, while in the Andhra region British rule was occasioning the development of national political parties based on the criteria of social, linguistic or religious representation. In 1948, the integration of the "princely State" into the Indian Union enjoyed considerable popular support; but this was not the only mark of the time. A very strong peasant movement led by the Communists against the feudal system also marked the time of de-colonization - a struggle that was called off only in 1951. The central government chose to implement its integration policy by resorting to force. The two sub-regions were merged; yet the complexities did not vanish, on the other hand they raised their heads in less than forty years. Not surprisingly, the official history, which is the history of constitution making, projects the process in a simple manner. The complex interplay of political, social, cultural and linguistic factors is reduced to a single narrative of state making. In 1956, the Hyderabad and the Andhra region were merged into Andhra Pradesh on the basis of linguistic criterion. Yet that constitutional destiny characterized by above all *merger* (merger of the Princely State with the Union and the merger of Andhra region and Hyderabad) is now being reopened with new political ideas that challenge the given mode of the region's territorial organization. The merger of the two Telugu speaking regions is now raising new questions. Language, which seemed to have put an enduring gloss on patterns of domination within the integrated region, is now losing its hold. The domination of the powerful Kamma caste in coastal Andhra, assertions of cultural superiority of the Andhra region over the Telangana region, and the neglect of the Telangana region by the successive governments have given rise to the demand for a separate Telangana state that would bid farewell to patterns of what is perceived as "internal colonialism". And once again a peasant struggle marks in region. The political class is aware of the limited validity of a constitutional solution that was improvised and then implemented. But it has no idea what new frontiers of political practice to broach in the emerging circumstances. The only solution that one hears is more

law, more order, more acts, more police, more paramilitary forces – all in all a greater invocation of constitutionalism.

We have of course more direct cases of the wild goose chase for bringing the decolonising world under constitutional existence. The Khanate of Kalat comprising almost the entire Balochistan was under the dynastic rule of the Ahmadzais when colonial rule was firmly established (by the Treaty of 1876 which followed the Articles of Engagement between British Government and the Chief of Kalat, Mehrab Khan, concluded in 1839, and the two Treaties and a Convention of respectively 1841, 1854, and 1863) by Sir Robert Sandeman after having poisoned Mir Nasir Khan II, the ninth Khan-e-Baloch, and finally imprisoning Mir Khudadad Khan, the tenth Khan-e-Baloch in Quetta 1893. Yet the Kalat State had remained a State outside British India, but bound by treaty with the British power. The famous Ali Brothers, the Maulana Muhammad Ali Jauhar and the Maulana Shaukat Ali, in the twenties were in touch with the eleventh Khan-e-Baloch, Mir Muhammad Azam Jan, to encourage "Quit Balochistan" movement against the colonial power. The Agent to the Governor-General held supreme position in the State and the Political Agent in Kalat was the Prime Minister. The Khan-e-Kalat was the Head of the State on paper, while the Political Agents functioned under the direct orders of the Agent to the Governor general. A ludicrous "jirga" system was the main justice system, which was neither traditional nor British. When independence came, in this case for Pakistan on 14 August 1947 and for Kalat on 15 August 1947, Jinnah put pressure on the Khan, Mir Ahmed Yar, to immediately accede to Pakistan notwithstanding the Standstill Agreement entered between the two entities – Kalat and Pakistan When the Khan protested that he needed time to consult his leaders' and mass assemblies on the modalities, the area was divided into several parts (exactly as was done in the eastern part of the sub-continent, the Naga areas by India), some were directly turned into districts, and the Khan was to find himself in prison within a decade. Pleas for a gradual union, for a plural legal system whereby laws of Pakistan and those (mostly customary

laws of political organization) of Kalat could co-exist, and for continuing the bicameral consultative system (leaders' assembly and mass assembly) were ignored by Iskander Mirza, Mir Ahmed Yar Khan was thrown into prison on 6 October 1958, many hanged, much more shot dead, and Balochistan became another victim of One Unit politics. Martial Law, the basic democracy of Ayub regime, and the "enlightened" Bhutto period that brought renewed repression on Balochistan – nothing succeeded in solving the "Baloch question".

As time went, Baloch political vision developed its own ideas on the Baloch question - namely, that former States of Balochistan and the leased areas of Kalat should be integrated into a Union to be called the Balochistan States Union; that the Union should have a Legislative Assembly elected on the basis of adult franchise and the Council of Ministers should be selected from among the elected members of the Assembly; that the Government should provide for more resources for development of the area so that its people could be brought at par with those in the rest of Pakistan; that there should be guarantee to the rulers of this Union; that the will of the Marri and Bugti people will be determined as to whether they wished to join the Union and leased areas or not; and in the same way the will of the Pathans of Balochistan to be determined with the proviso that they, all other domiciled residents and minorities will have equal opportunities in the Balochistan States Union. If these were the demands put forward by the Baloch leaders to Iskander Mirza when 1957 was coming to a close, what appear today as perfectly normal constitutional demands, in 1975 the Balochs were saying that they were ready to accept the 1973 Constitution provided that certain amendments were made. Among the proposed amendments were: Part I of the federal legislative list should contain only foreign affairs, defence, communication, and currency; the Concurrent List should be abolished; residuary subjects should be within the jurisdiction of the provinces; there should be a Council of Common Interests consisting of the Prime Minister, four Chief Ministers of provinces, four Central Ministers, and four provincial ministers with one each from each province; the

legislature for the Common Interests should rest with the Senate and not National Assembly; certain specific guarantees should be present to honour the autonomy of the provinces; there should be specific ways in which gradually most items legislation could be transferred to the provinces; and all revenues and taxes raised by the federal government should be utilized in a manner so that after the meeting the expenditure of the federal government rest of the funds so raised should do to the provinces on an agreed ratio.[10] Again these were not seditious demands. But if Yahya Khan had found earlier in 1970-71, now Bhutto also found that extension of constitutional rule in Pakistan, exactly as Nehru had realized earlier in India, needed deployment of armed means, which in turn would ensure for decades to come that the search for a valid and working constitutional system - the existence of constitutionalism itself - would need force of arms. In fact, the dynamics of the co-existence of war and constitution would determine the quantum of constitutionalism that a political society would require. Therefore, Pakistan, a nationalism caught in the eternal quest for a constitutional order, is not so much an instance of a democracy that could not come into being in this region, but the most direct example of the still unsolved puzzle – exactly how much force a society needs in order to turn itself over to constitutional order. This puzzle was to vex the once imprisoned ruler of the Khanate, Mir Ahmed Yar Khan Baluch so much that looking back at the troubled history of merger of Kalat with Pakistan, he could only cite Plato, "There will no end to the troubles of States, or indeed, my dear Glaucon, of humanity itself, till philosophers become kings or rulers in this world; or till those we now call kings and rulers really and truly become philosophers".[11]

In order to conduct a concrete analysis of that great failure of constitutionalism, we shall have to abandon the centrality of constitutions in the study of politics and polities. That model, practiced, elaborated, commented, strengthened, reinforced, and glorified hundred times, needs no such attempt any more. The theory of constitutions lends a centralized form to dialogue ignoring the myriad ways dialogue informs the politics of the people.

The Indian Constituent Assembly debates make it clear as to how power was being formed and multiple dialogues were being suspended. It is not that groups, classes, estates, nationalities were only fighting each other to death, as some of our constitution-makers with their received knowledge of Westminster ethos would have us believe. "War of all against all" was in fact suspended in favour of efforts at "measuring of all against all" in order to found the commonwealth. It is a record of a will to compose various forms of power, of the postponement of that final fight, because society had to be run, citizens had to be ruled, and therefore the act of suspending bellicosity was scripted in the political document (the classic no war-no peace document). All classic components of sovereignty while being included had been tacitly questioned there – territory, citizenship, agency to command life and death, origin of sovereign power, nature of the commonwealth, and the supreme capacity to care and rouse fear. The "basic law" was assumed to have a "basic structure", which would be defined and explained by a "basic organ". And, while constitution-making started in the country on the basis of a very limited franchise held under colonial rule, on one hand went what the French historian Max Jean Zins calls, the "carnage in the era of citizen-massacres" to form the republic – the partition deaths – on the other hand, extreme agrarian revolts, war for the possession of a frontier-territory, called Kashmir, and a re-organization of the political territory of India by integration of states and princedoms within the union. In this diffused scenario where power has been most effective by spreading out to all layers of society, we must ask few questions, namely – Was war considered the primary aim of the constitution that constituted the sovereign power? And how much had constitution to do with the process of warfare? How much did the contentions and struggles flow from the constitution? How much had notions of strategy in the generalized process of war and peace relied on the basic legal text(s)? To what extent were political institutions guided by constitutional notion of sovereignty in their involvement in war and peace? And most important, why and whence did people begin to believe *against* all evidence that constitution offered best

solution to the conundrum? It seems to me in view of my recent inquiries into the histories of war and peace in this region, that we had been barking up the wrong tree. Constitution helps, but is never the principal dialogic site, simply because it does not encode what will be called "sovereign power", and dialogue undermines that fiction of a monolithic institutionalisation of power. Beneath the compact text of a constitution, one does not have to stretch ears far to hear the drum of wars of all kinds (caste, ethnic, religious, class), the violence, passions, enmities, revenges, also strains of illusive peace, desperate truce, reconciling acts, precarious friendships promising both war and peace, and finally the tensions that cut social body, the decisive battles for which all are preparing. Sovereignty is not the explanatory principle. Its role is to provide an image in which processes of war appear to be under control, processes of peace appear as harmless enough as not to consume every organ with the fire of justice. Constitution and the fiction that it has given birth to and goes by the name of sovereignty aspires for the juridical-philosophical universality that lawmakers and philosophers have always dreamt and aspired for – the position between adversaries, the position of the centre and yet above the adversaries, the agency that imposes the armistice, the order that brings reconciliation. Dialogue by bringing forth its huge treasure of practices (including constitutional dialogues) poses before such a politics that had anointed constitution to that impossible seat questions about ways of power, the visible brutality of law and order, possibilities about legal pluralism, and about possibilities of imagining new ways of conversation. In this way it sheds light on forms of power, processes of war and peace, and processes by which peace and reconciliation become issues to be governed, its political-historical account is therefore darkly critical and intensely anti-mythical.

In this transmission of a colonial political culture of constitutionalism, we have the receipt, which was found later to be a false coupon, of a commodity that arrived in a package, which consisted of other items such as notions of rational form of administration, governance, modern electoral

representation, jurisprudence, and most of all organized forms of violence. Constitution, wherever it developed in metropolises of the world, acquired all these companions, and came to the colonies with them. It was a package with no freedom for the recipient to choose from the basket. With each of these ancillaries now under legitimacy crisis, constitution must find new pillars for support. Therefore, my argument is that, with each of the critical aspects of political rule in India – minority rights, refugee protection, participating citizenry, territorial disputes within the country and with neighbours, reconciliation with rebels, and the principle of self-determination – constitution has been found wanting, not because it lacked wisdom of its founders when it was being written, but the deficit remained in its very form – the form that teaches its authors and practitioners to exclude all other forms of dialogue, of conversation on the street, and conveys to its founders the idea, that only by homing the sovereign authority in it and un-homing others it can become a constitution. This is what I have called at the beginning of this essay the constitutional deficit – the constitutive deficit. Constitution refuses to reconcile to a position of being only a guideline; it aspires to become the sovereign. Rule by law proves to be as capricious as rule by men. Yet the fact, that the murmur on the streets continues, predicates constitutional functioning much to the dismay of the purists.

The dismay of the purists raises for us of course a different question, namely, how has the politics of constitutional sovereignty acquired such a "natural character"? In that sense, the puzzle is not how the constitutional order is found to suffer a massive deficit in the wake of war, specifically speaking of our time, in the wake of the "war against terrorism" after 11 September. The puzzle is that all along it was thought that constitution did not have that deficit; it was war that caused or brought it, at times drastically, leading to a breakdown of the liberal-constitutional order. It is useful in such moment of delusion and dismay to go back to what Bartolome Clavero calls "the constitutional moment" of our societies. Constitution resides in "freedom's

law", without a charter of freedoms there is no constitution, no need for a constitution. Clavero works on each word in that classic sentence of freedom's law, namely, "All men are by nature equally free and independent and have certain rights", and shows how each crucial word in that line, "men", "by nature", "equally", "free", "independent", "certain" and "rights" had distinct origins of excluding and transmuting other words, namely "person", "by law", "responsibility", etc; and how the juridical acts of exclusion and transmutation formed the Euro-American constitutional moment of late eighteenth and early nineteenth centuries. Freedom's law in India ushered in the rights-based discourse completely erasing the discourse of state-responsibility, sympathy, welfare, forgiveness, co-existence, devolution, and collective existence. We have our work of going back to our constitutional moment, our freedom's laws, and their antecedents – our task of labouring on the constitutional moment of our societies, thereby finding out how the constitutional moment was constituted by inclusions, transmutations, and integral deficits. Pakistan had its constitutional moment in 1972-77, Nepal in 1990-1993, societies of Central Asia or East Europe have similarly undergone in recent past their moments of constitution-making marked by their freedom's laws, invocation of past charters, laws that have at the same time excluded and supplanted many contesting notions and categories. In that sense, we shall have to work exactly opposite of the ways in which Granville Austin and others work, that is to say, in order to understand the constitution while they follow the subsequent traces of constitutional working through judgements, commentaries, amendments, and commissions, we shall have to work backward on the lineage of freedom's laws. The political strategy of the former reading is a colonizing strategy - to establish constitutional supremacy (or moan the lack of it); the strategy of the latter is to establish the nature of constitutional deficit, the constitutive deficit of our time and freedoms. Thus each of the fundamental principles of constitutional democracy, given to us by the American Constitution, namely consent of the governed, limited government, open society, sanctity of the individual, and rule of law, appears in our constitutional moment by

substituting other principles. If constitution is taken as a case of rule-bound conversation, we must modify this description, therefore, to say that the constitutional moment is a case of, to borrow words from Tilly, "contested conversation".

Here is a matter of delight for the ironic in discussing the destiny of a translated constitutional culture. The theory of translation says that this traffic is two-way, notwithstanding the unequal position of the two ends and two flows. If streets have predicated constitutionalism in India, have not streets of the world translated in their way(s) the constitutional culture of liberal democracy back to its home, the metropolises of the West? This is a curious history of globalisation we shall require much imagination to fathom. I do not have the occasion here to write of the double destiny of translated constitutionalism, therefore let me restrict myself to few observations.

III

The country that was instrumental in sending constitutionalism to many parts of the world has been an extra-ordinarily war-like state, fighting all kinds of wars intermittently and sometimes concurrently. Imperial control and imperial internalisation have insulated the British subject against others, and if they have ever imagined the existence of others, mostly these existences have been dismissed as imaginary others, their constitutional culture they thought remained free of the interaction with several peoples and several histories. At most, this interaction was said to have been among white peoples of England, Wales, Scotland, Ireland, Canada, New Zealand, and Australia – the suburbs, neighbourhoods, empires, and colonies. English events became British events, English summers became British summers, and though with the rise of nationalism in Wales and Scotland and a significant fall in support to the Tories in these areas, there began a re-definition of British-hood, it was quite impossible for British constitutional politics to be non-white or be more than a

four-nation (England, Wales, Scotland, and Ireland) agglomerate that would be tolerant of more than just a "Celtic fringe" or "Irish madness". But the imperial history, again a two way history, lodged something deeply inside the history of modern Great Britain and United Kingdom with the politics of de-colonization, commonwealth, and immigration – that *something* being the black and brown histories of separation followed by these histories claiming space back within the cosmopolitan sphere by claiming place within the metropolis.

The centrality of Protestantism, loyalty around institutions including the monarchy, the surviving scare of a Catholic restoration, the "habit of looking through the Catholic glass darkly", the constant labour discontent, racial anxiety, and the fear and actuality of recurrent wars with countries of Europe and rebels in colonies – all these made British constitutional politics what it is, namely a distinctly individualistic politics based on separation with others, which is almost a straight development from imperial mechanisms in defining identity, a politics of parting company, and yet it has become a politics that is most marked today by a "post-imperial fog" of European union, dissolution of British-ness into an Atlantic-ness by holding onto the American apron, and the increasing inflow of coloured people that make British constitutional politics begin its "long march out of history". Speaking of "Britishness and Otherness", Linda Colley has reminded us in the celebrated essay, "Britishness and Otherness – An Argument",

> As a character in Sulman Rushdie's *The Satanic Verses* remarks: 'The trouble with the English is that their history happened overseas, so they don't know what it means.'…Unless we appreciate their contacts with the imaginary Other, we will fail to understand them, and they will scarcely be able to understand themselves.[12]

In short, externalities in constitution making are significant to understand the strategies of rule in an age when the principles of governing are not made in isolation, but in relation to other principles and voices. The current wave of restrictions on civil and political freedoms in the metropolitan

countries where constitutional culture was made once upon a time – and this is significant that restrictions are never on all, but always on some - shows only the return of the native to civilization. Aliens are now almost everywhere upon us, we who are the children of constitutional culture, and since constitutions when began had not defined who the aliens were, now have to define them through its undoing.

A contemporary report brings out the situation with all its double-edge. A correspondent in *The Guardian* wrote on 5 March 2002,

> Those of us who opposed the bombing of Afghanistan warned that the war between nations would not stop there. Now, as Tony Blair prepares the British people for an attack on Iraq, the conflict seems to be proliferating faster than most of us predicted. But there is another danger, which we have tended to neglect: that of escalating hostilities within the nations waging this war. The racial profiling, which has become the unacknowledged focus of America's new security policy is in danger of provoking the very clash of cultures its authors appear to perceive.
>
> Yesterday's Guardian told the story of Adeel Akhtar, a British Asian man who flew to the United States for an acting audition. When his plane arrived at JFK airport in New York, he and his female friend were handcuffed. He was taken to a room and questioned for several hours. The officials asked him whether he had friends in the Middle East, or knew anyone who approved of the attacks on September 11. His story will be familiar to hundreds of people of Asian or Middle Eastern origin. I have just obtained a copy of a letter sent last week by a 50-year-old British Asian woman (who doesn't want to be named) to the US immigration service. At the end of January, she flew to JFK to visit her sister, who is suffering from cancer. At the airport, immigration officials found that on a previous visit she had overstayed her visa. She explained that she had been helping her sister, who was very ill, and had applied for an extension. When the officers told her she would have to return to Britain, she accepted their decision but asked to speak to the British consul. They refused her request, but told her she could ring the Pakistani

consulate if she wished. She explained that she was British, not Pakistani, as her passport showed. The guards then started to interrogate her. How many languages did she speak? How long had she lived in Britain? They smashed the locks on her suitcases and took her fingerprints. Then she was handcuffed and chained and marched through the departure lounge. "I felt like the guards were parading me in front of the passengers like their prize catch. Why was I put in handcuffs? I am a 50-year-old housewife from the suburbs of London. What threat did I pose to the safety of the other passengers?"

Last week, a correspondent for the Times found 30 men and a woman camped in a squalid hotel in Mogadishu, in Somalia. They were all African-Americans of Somali origin, who had arrived in the US as babies or children. Most were professionals with secure jobs and stable lives. In January, just after the release of Black Hawk Down (the film about the failed US military mission in Somalia), they were rounded up. They were beaten, threatened with injections and refused phone calls and access to lawyers. Then, a fortnight ago, with no charges made or reasons given, they were summarily deported to Somalia. Now, without passports, papers or money, in an alien and frightening country, they are wondering whether they will ever see their homes again. All these people are victims of a new kind of racial profiling which the US government applies but denies. The US attorney general has called for some 5,000 men of Arab origin to be questioned by federal investigators. Since September 11, more than 1,000 people who were born in the Middle East have been detained indefinitely for "immigration infractions". The Council on American-Islamic Relations has recorded hundreds of recent instances of alleged official discrimination in the US. Muslim women have been strip-searched at airports, men have been dragged out of bed at gunpoint in the middle of the night. It reports that evidence, which remains shielded from the suspect, of the kind permitted by the recent US Patriot Act, "has been used almost exclusively against Muslims and Arabs in America". In the US, people of Middle Eastern and Asian origin are now terrorist suspects. Some officials appear to regard them as guilty until proven otherwise. Similar policies appear to govern the judicial treatment of

detainees. During his press conference on December 28, President Bush initially mis-underestimated a question, and provided a revealing answer. "Have you decided," he was asked, "that anybody should be subjected to a military tribunal?" Bush replied, "I excluded any Americans." The questioner pointed out that he meant to ask whether Bush had made any decisions about the captives in Guantanamo Bay. But what the president had revealed was that the differential treatment of those foreign fighters and John Walker Lindh, the "American Talib" currently being tried in a federal court in Virginia, is not an accident of process, but policy. He couldn't treat a white American like the captives in Camp X-ray and expect to get away with it. These attitudes pre-date the attack on New York. Patterns of Global Terrorism, a document published by the US counter-terrorism coordinator in April, appears to define international terror as violence directed at US citizens, US commercial interests or white citizens of other nations. Non-whites are the perpetrators of terror, but not its victims. In Angola, for example, the "most significant incident" in the year 2000 was the kidnapping of three Portuguese construction workers by rebels. The murder of hundreds of Angolan civilians is unrecorded. In Sierra Leone, terrorism, the report suggests, has afflicted only foreign journalists, aid workers and peacekeepers. In Uganda, the Lord's Resistance Army's appears to have done nothing but kidnap and murder Italian missionaries. The Democratic Republic of Congo, where terror sponsored by six African states has led to the deaths of some 3m people, isn't mentioned. Yet domestic terrorism in the United Kingdom and Spain is covered at length...

At the same time this policy establishes splendid opportunities for terrorists with white skins, as they become, to the eyes of officials, all but invisible. This is the morass into which Tony Blair is stepping. "These are not people like us," he said of the Iraqi leadership on Sunday. "They are not people who abide by the normal rules of human behaviour." Some would argue that this quality establishes their kinship with British ministers. But to persuade us that we should go to war with Iraq, Blair must first make its leaders appear as remote from ourselves as possible.

> The attack on Iraq, when it comes, could in a sense be the beginning of a third world war. It may, as hints dropped by the US defence secretary, Donald Rumsfeld, suggest, turn out to be the first phase of a war involving many nations. It may also become a war against the third world, and its Diaspora in the nations of the first. (George Monbiot, http://www.guardian.co.uk/Columnists/Column/0,5673,661948, 00.html)

Of course the impact of the boiling cauldron, that the globe has become today, is most in the United States among all the countries with constitutional culture. Arabs or Muslim Americans feel that they belong to the enemy camp, which has to suffer specifically targeted hostility. Hundreds of young Arab and Muslim men (sometimes women too) have been picked up for questioning and detained. The public approval for lynching the Arabs and Muslim Americans is great, exactly as it was among white Americans some scores of decades ago when the Afro-Americans were similarly lynched there. Immigrants fear to speak out against this condition, though America has been always an immigrant republic. The constitution does not seem to be of a nation whose laws are passed by citizens of all types and hues, citizens who are all immigrants, but by God who is white immigrant. The US Constitution does not provide for different levels of American-ness, nor for different levels of approval of different types of "American behavior," yet the constitutional history of that land has witnessed in the past strong guard against "un-American" activities. The Constitution expressly separates church and state, yet the mixing of religion (Christianity) and State by leaders continue. The Patriot (Proved Appropriate Tools Required to Intercept and Obstruct Terrorism) Act (passed in November 2001) is against whole sections of the First, Fourth, Fifth and Eighth Amendments. It has given a cornucopia of powers unrestrained by answerability and responsibility to the Justice Department, and it permits procedures that give individuals no recourse either to a proper defence or a fair trial, permits secret searches, eavesdropping, and detention without limit. The American State will not be restrained by international legality in these matters,

as the open declaration by the American government not to apply Geneva Convention to the prisoners at Guantanamo Bay shows. The government can abduct people and make them prisoners, detain them indefinitely, and decide unilaterally whether or not they are prisoners of war. The declaration of war, "Operation Enduring Freedom", sanctions an increase of military spending to over $400 billion per year, and in order to do so, practically repeals the Bill of Rights. The Homeland Defense Command is an overnight-created wall within the "nation" against aliens; it will not only guard the nation against Mexico and Canada, but the extra-terrestrials within who will have escaped the drawbridges that will be drawn and the doors that will be bolted. In this scenario existing now at the beginning of a new century, we shall have to only leap back one hundred and fifty years to find out how constitutions not only established law and order, but were themselves founded on the basis of a secured order, when colonizing and constitution-making went hand in hand. And, therefore, with the same thing happening today, "a gloating and still undead Henry Kissinger", can point out, this is "the best thing since Metternich last dined with the Czar."[13]

Once again, we cannot miss here the organic link between constitutional colonialism and colonial constitutionalism. You colonize constitutionally, and only by colonizing you constitute order. Colony is not there outside, but here, right within. In this globalisation of fear and terror, "the steroid of all empires", we have the new pattern of constitutionalism that can only be the final imaginable offering to the sacred history of law and order.

One can point out some more things in this connection. As it is said, *blood in the beginning, blood at the end*. To have constitution, you must shed blood, and bloodshed must be enough to make its redundancy explicit. Thus, in the present situation, constitutional culture in the West, no so much here, (or as much?) is vexed with finding out appropriate constitutional response to new deaths and new wars. To give a glaring stance, neither the US constitution nor a liberal constitutional norm of which the Geneva Convention is a product, gives

a clue as to whether the Taleban prisoners of the US-Afghan war are prisoners of war, in the same way if the Al-Queda prisoners are prisoners of war. Did these prisoners have ranks, a command structure, did they follow laws of war in waging war against the United States, and, was it a war if the answers are all in the negative? If it was not war regulated by its laws, but a straight matter of criminals to be hunted down, smoked out of holes, shot dead or hanged or electrocuted, then does it call for a new war crime tribunal? Probably, it will be more important to remember in this context, that while individual determination of/for justice is the essence of liberal jurisprudence, the situation is increasingly one of group determination for meting out justice. Thus, the prisoners at Guantanamo Bay are held as a group, no individual determination of guilt/justice is being made. Punishment will be on group basis, that is, simple membership of an organization will call for severest punishment, exactly what Nazi jurisprudence was in Germany. To be truthful, liberal jurisprudence has always combined individual determination with group determination. And while daily crime was brought to justice on the basis of individual determination, crime thought to be extra-ordinary was brought to justice by group determination. Thus, the English colonial army hanged men of village after village from the trees by the roadside they passed through while suppressing the mutiny of 1857; the US dropped atom bombs in 1945 on the population of two cities in Japan - an enemy country; the French army punished entire hamlets in Algeria for sheltering the Liberation Front people; Israel blockades entire refugee quarters in the Gaza and West Bank for sheltering militant Palestinians, and collective punishment has been always the norm, in this way, everywhere. Here again to be true, if the principle of liberal justice had thought of the individual as the maker and recipient, the group was always there as the shadow. Post-colonial theory, particularly of violence, tells us that colonial violence has made structures of violence in post-colonial society deep, and our intimacy with the violent rulers has made us what we are today. Well, that theory needs to be reminded and developed to that extent, as to how the violence has impacted on the liberal rule back at *home*, the groups to be

punished have to be determined by a criminal jurisprudence that hitherto based itself on individual determination of guilt. Indeed, liberal constitutionalism had always advanced the notion of individuated justice while combining with it the enterprise of juridical construction of community for the purpose of administration of law and order, and disbursal of protection and punishment.[14] By the same token today, liberal theory of justice has admitted the need for group rights without immense soul-searching.

If Marx has seemed almost alone through the high noon of colonial constitutionalism in recognizing that the rational foundation of constitutional politics is singularly incapable of addressing the issues of real, physical acts of control, domination, subjugation, rule, violation of relations, and the disuniting and disembodying of selves, there is nothing to complain. For, the abyss over which the state, constitution, public sphere, civil society and all other official registers uncertainly hover, is the world where the mono-logic existence of authority is being incessantly challenged, where dialogue is challenging the power of unilateral legislation and the codes thereof, where as Marx suggested in so many of his writings, the deepest privacy of power is contested by innovative acts of the masses of which political conversation is one of the most pronounced ones.

All this can be retold in another way, namely that,

- Constitutionalism can co-habit with colonialism and neo-colonialism, indeed it can exist in the long run only by such cohabitation.
- This relationship intrinsic to constitutional culture is not specific to a metropolis-colony relation, but is applicable to both - the colony, which on gaining independence replicates the relationship the moment it becomes a constitutional polity, and the metropolis, which must find internal areas to be colonized within its constitutional domain.

- This is because, constitution while concerning itself with "way" (procedure), is concerned with above all truth, and this concern cannot but be adversarial to other ways or procedures.
- Constitution aims at universalising its principles by including even violence and war, what should have been anathema to it, within its ambit.
- Constitution in its nature is general, yet its audience is specific.
- It houses dialogue, but colonizes it in a way that all other dialogic forms in politics are killed.
- In the clash between facts and norms, the constitution becomes a casualty, for it loses any possibility to have self-understanding.
- Since constitutional arguments are compelling or irresistible only by juridical means, that is to say, means that have colonized or ex-communicated other means, its loses moral validity and open-ended nature. A heavy moral responsibility sits on its shoulders with the burden of judgement - an accountability that can meet its satisfaction only in death.
- By treating constitutions as historical products, outcomes of contentious situations, we shall realize that in creation of democracy, resisting arbitrariness of power, framing rules of rights and justice, struggling for constitutionalism and then struggling against it and going beyond it, dialogues on the streset have major role to play.
- Constitutionalism emerges from two phenomena – (a) formation of states, and (b) the geopolitical and geo-cultural realities of spaces to be annexed that mark the reproduction of constitutional conditions. Though these two are viewed often separately, a model that looks at constitution as the product of confluence of the two refreshes our understanding about the possibilities and limits of constitutional practices and acts.
- Finally, a constitutional act is never about reaching truth, not even juridical truth, but about determining the relation of the constitution with truth.

With constitutionalism now being pushed to the wayside in the daily grind of "contentious politics", re-defined to accommodate "exceptions", and above all being compelled to co-live openly with war, violence, and colonial practices, the model of constitutionalism as the guarantee of peace and order, that began with Kant (for example, Third Definitive Article of *Perpetual Peace*), and that has served social sciences so long need to be re-examined in the light of other dialogic experiences. The other conversations that animate our political existence are not ghosts that disturb the nation, therefore calling for a painful rite of exorcism. On the other hand when objections mass up in the dark chambers of constitutional politics to these conversations on the street which appear to the former as madness, we need to remember, perhaps, perhaps with bit of irony, that conversations on the street are already pushing constitutionalism from its assured place to the extent that constitutional rule has once again started bearing traces of the madness of the street. In the fifties and sixties of the last century with the colonial war in Algeria at its height Sartre had written again and again that the constitutional behaviour of the French political class resembled in a perverse way the behaviour of the colonized. Indeed, Sartre would have been happy to see, were he to be alive today, and which he had hoped for so much, the last act in the opera on the return of the native to the gentle constitutional culture of the metropolis - the grand return of the wretched of the earth.[15]

[My debt is to Ghislaine Glasson Deschaumes, editor, *Transeuropeennes*, for forcing me to think of the arguments here that thus began with a note for her journal. My similar debt is to Francois de Bernard, the editor of the online work on globalisation, www.mondialisation.org]

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Endnotes:

1 Rabindranath Tagore, *Crisis of Civilization* (Bombay: International Book House, 1941); I am not however referring to the English Edition; the quoted phrases are my translation from the Bengali Edition.

2 Jurgen Habermas in *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass: The MIT Press, 1998), pp. 447-462.

3 I am indebted to Rada Ivekovic for allowing me access to this extra-ordinary essay of Bartolome Clavero, "Freedom's Law and Oeconomical Status – The Euro-American Constitutional Moment in the 18th Century" (Seminar in the Department of History and Civilisation of the European University Institute, Fiesole, Italy, 28 February 2002).

4 Julius Ihonvbere, *Towards the New Constitutionalism in Africa* (London: Centre for Democracy and Development, 2000); also his lecture, "Engaging the Leviathan – Constitutionalism and the New Politics in Africa", Annual Minority Rights Address, organized by the International Centre for Ethnic Studies (Colombo), Geneva, 18 May 2001.

5 *Between Facts and Norms*, preface, p. xli.

6 John Rawls, "The Law of Peoples" (1993) in See Samuel Freeman (ed.), *Collected Papers of John Rawls* (Cambridge, Mass: Harvard University Press, 1999).

7 Michael Ignatieff, *Blood and Belonging* (London: Routledge, 1993).

8 See in the context the work by Ward Churchill, *Struggle for the Land – Native North American Resistance to Genocide, Ecocide and Colonization* (Winnipeg: Arbeiter Ring Publishing, 1999, and by Jan Penrose, the Canadian geographer, on the Nunavut lands and people, "The Limitations of Nationalist Democracy – The Treatment of Marginal groups as a Measure of State Legitimacy", *Hagar – International Social Science Review*, 1 (2), 2000, pp. 33-62.

9 Etienne Balibar, "At the Borders of Europe", trans. Erin Williams, conference paper delivered at the invitation of the French Institute of Thessaly and the Philosophy Department of the Aristotle University of Thessaly, Greece, October 1999.

10 These demands raised by Ghaus Bux Bizenjo are documented in details by A. H. Kardar, *Pakistan's Soldiers of Fortune* (Lahore: Ferozsons Ltd., 1988), pp. 254-261.

11 Mir Ahmed Yar Khan Baluch, *Inside Baluchistan – Political Autobiography of Khan-E-Azam* (Karachi: Royal Book Company, 1975), p. 193. For various documents of treaties, agreements, mergers, and resolutions, see Part II of the *Autobiography* containing nineteen documents as appendix.

12 Linda Colley, "Britishness and Otherness – An Argument" in Michael O'Dea and Kevin Whelan (eds.), *Nations and Nationalisms – France, Britain, Ireland and the Eighteenth Century Context* (London: Voltaire Foundation, 1995), p. 77.

13 *New Left Review*, 12, November-December 2001, p. 50.

14 In this connection it is rewarding to read accounts of how colonial administration made juridical sense out of communities existing in colonies. See for example, Amrita Shodhan, *A Question of Community – Religious Groups and Colonial Law* (Calcutta: Samya, 2001); also Ranabir Samaddar, *Memory, Identity, Power – Politics in Junglemahals 1890-1950* (Hyderabad: Orient Longman, 1998).

15 Jean Paul Sartre's preface to Frantz Fanon's *The Wretched of the Earth* (1961), later included in Jean Paul Sartre, *Colonialism and Neocolonialism*, trans. Azzedine Haddour, Steve Brewer, and Terry McWilliams (London: Routledge, 2001); on Sartre's contribution to a radical anti-colonial politics and to a subsequent radical post-colonial theory, see Robert J.C. Young's preface to *Colonialism and Neocolonialism*.