1. Constitutions

Every country has its own constitution ... ours is absolutism moderated by assassination.¹

Constitutions imagine a world that does not exist, and present it as if it existed.²

This book seeks to examine how authoritarian regimes constitute themselves, with reference to several historical projects. The purpose is to further develop the ‘constitutional question’: why do autocracies need a constitution? What purposes do they serve and which audiences do they aim to address? The possible motives of autocrats and plausible strategies that they may pursue will be considered in Chapter 8.

As an introduction, I outline some authoritarian constitutional moments in history. These will take readers from the horrors of a civil war battleground, through the cradle of socialism and the Soviet Union, to two casualties of colonialism and a site of nationalism, and finally to consider the constitutional question in a fascist setting.

1. SCENES AND PROJECTS³

1.1 A Wartime Constitution

In January 2011 the Kingdom of Silence blossomed – albeit briefly – through the ‘Arab Spring’. That same year and the next, Syria suffered a ‘baptism of horror’.⁴ Peaceful protests against poverty, unemployment, nepotism, censor-

¹ Comment by a Russian contemporary of the nineteenth century, quoted by Hill, C. and Menzel, J. eds. (2008), *Constitutionalism in Southeast Asia* (Singapore: Konrad-Adenauer-Stiftung), 5.

² Bhatia, G. (2018), ‘Review’, in: *International Journal of Constitutional Law* 16, 1364 ff.

³ This chapter draws very much on Frankenberg, G. (2018), *Comparative Constitutional Studies – Between Magic and Deceit* (Cheltenham: Edward Elgar Publishing).

⁴ After 40 years of dictatorship, member of the opposition Riad al Turk saw Syria as a ‘Kingdom of Silence’; see Aimee Kligman’s interview with al Turk in: *Washington Examiner*, <http://exm.nr/LAN26R/> (last accessed 18 July 2018). Concerning the Arab

ship and oppression were met by the despotic regime of Baschar al-Assad with violent repression, which soon escalated into a uniquely cruel war against its own people.⁵ Amid bloodshed and state terrorism, the use of heavy artillery against rebel groups, the mass arrest of critics of the regime and members of the opposition, and the deportation of thousands of families, children and opponents, al-Assad indulged in a bizarre ‘constitutional moment’. On 26 February 2012 he held a referendum on a new Constitution that had been drafted by a hand-picked committee pursuant to his demands. Ironically, the old Constitution of 1973 had already been superseded by a 1963 emergency law, which was temporarily lifted by al-Assad in April 2011 in an empty gesture to appease protesters. Just two days after the referendum, al-Assad issued Decree 94, publishing his Constitution of the Syrian Arab Republic.

In theory, the new Constitution promised two significant changes: divesting the ruling Ba’ath Party of its leadership role in state and society in favour of political pluralism; and limiting the president’s term to two seven-year periods.⁶ However, this pluralist rhetoric was undermined by Article 8, Section 4, which declared unconstitutional significant elements of plurality (notably religion) as follows: ‘Carrying out any political activity or forming any political parties or groupings on the basis of religious, sectarian, tribal, regional, class-based, professional, or on discrimination based on gender, origin, race or color may not be undertaken...’ It also remains to be seen whether al-Assad will indeed step down at the end of the constitutionally allowed two terms.⁷

Spring, see Manhire, T. ed. (2012), *Arab Spring. Rebellion, Revolution and a New World Order* (London: Guardian Books); Ventura, L. (2017), ‘The “Arab Spring” and Orientalist Stereotypes: The Role of Orientalism in the Narration of the Revolts in the Arab World’, in: 19 *Journal of Postcolonial Studies*, 282 ff.

⁵ Yassin-Kassab, R. (2016), *Burning Country: Syrians in Revolution and War* (London: Pluto Press). See also the dramatic report ‘from the inside of the revolution’ by Samar Yazbek (2016), *The Crossing: My Journey to the Shattered Heart of Syria* (London: Ebury Press); and the relatively sober but not very convincing analysis of International Crisis Group Working to Prevent Conflict Worldwide (2011), ‘Popular Protest in North Africa and the Middle East (VII): The Syrian Regime’s Slow-Motion Suicide’, in: *Middle East/North Africa Report*, Nr 109, 13 July.

⁶ ‘The leading party in the society and the state is the Socialist Arab Ba’ath Party’ (Article 8 of the 1973 Constitution of Syria) now reads: ‘The political system is based on the principle of political pluralism.’ It takes a great deal of faith and denial to believe that these words mean what they say.

⁷ Article 88: ‘The President of the Republic is elected for 7 years as of the end of the term of the existing President. The President can be elected for only one more successive term.’ al-Assad was elected in 2007 (97 per cent) and 2014 (88.7 per cent). Since there was no other candidate, and hence no choice, the election was strictly speaking nothing but an acclamation.

Apart from the cynical nature of these revisions, the question remains as to what might have driven al-Assad to partly reconstitute his regime – a question that will be answered in Chapter 8. One might assume that the ‘useful tyrant’⁸ was astute enough to recognise that constitutions were invented not only to limit government and promote unity, but also to serve as instruments of deceit. Hence, the revision might have been intended to disguise an authoritarian move: to conjure the constitutional magic of order, while the country was in fact drowning in chaos.

This strategy links al-Assad with other autocrats cut from similar cloth. They include Recep Tayyip Erdoğan, the president of Turkey, who has pursued a slightly less murderous political agenda – his assaults on the Kurds notwithstanding. Following a conspicuously amateurish attempted coup in 2016, Erdoğan deployed an autocrat’s customary tools: the declaration and repeated extension of a state of exception; mass arrests of members of the public services, teachers, prosecutors and judges; intimidation; show trials and imprisonment of journalists; and a revision of the Turkish Constitution to establish a political and normative order to his liking. His plan worked: the majority of the Turkish people⁹ supported Erdoğan in establishing a presidential sultanate.

1.2 Constituting Soviets

Amid violent civil war during and in the aftermath of the October Revolution, the Bolshevik cadres opted for a different strategy, following a path of constitution-making distinguished by its revolutionary rhetoric and practices. Instead of projecting a reformist agenda for the exercise and legitimation of power, they established, through their 1918 Russian Constitution, the dictatorship of the proletariat, comprising workers, soldiers and peasants, which had been propagated during the October Revolution. The Preamble sanctioned decisions already made by the revolutionary All-Russian Congress:

The declaration of rights of the laboring and exploited people (approved by the Third All-Russian Congress of Soviets in January 1918), together with the Constitution of the Soviet Republic, approved by the fifth congress, constitutes a single fundamental law of the Russian Socialist Federated Soviet Republic.

⁸ See the documentary *Bashar al-Assad – der nützliche Tyrann*, directed by Antoine Vitkine, www.zdf.de/dokumentation/zdfinfo-doku/bashar-al-assad-der-nuetzliche-tyrann-108.html (last accessed 12 June 2018).

⁹ Newton, S. (2017), *The Constitutional Systems of the Independent Central Asian States. A Contextual Analysis* (Oxford: Bloomsbury), 55 ff; Frankenberg, G. (n 3), 46 ff.

The drafters introduced two key words – ‘development’ and ‘transition’ – and a general principle – ‘socialist legality’ – to contextualize rights, powers and constitutionalism in general within the overall socialist project: ‘Being guided by the interests of the working class as a whole, the Russian Socialist Federated Soviet Republic deprives all individuals and groups of rights which could be utilized by them to the detriment of the socialist revolution.’¹⁰

While the 1918 Constitution intervened in an ongoing struggle – arguably to prejudice and seal its outcome by legitimizing the authority of the Bolsheviks – the first Constitution of the Soviet Union inaugurated the birth of the Soviet Union, uniting Russia, the Ukraine, White Russia and the Transcaucasian Republics of Armenia, Azerbaijan and Georgia. The document reiterated the official Manichaeic narrative by pitting the (good) socialist camp of ‘reciprocal confidence and peace, national liberty and equality, the pacific co-existence and fraternal collaboration of peoples’ against the (evil) capitalistic camp, marked by ‘national hate and inequality, colonial slavery and chauvinism, national oppression and massacres, brutalities and imperialistic wars’.¹¹

According to the ‘laws’ of historical materialism, the authority of the Soviet Union (and subsequently of other socialist states) had to be reconstituted whenever political and socio-economic development reached a new stage, at least ideologically. In 1936, the Stalin Constitution expressed the new correlation of class forces and consolidated the principles of the new socialist state. In 1977, the Brezhnev Constitution documented, in strong constitutional rhetoric, a further step in the transition from socialism to communism. In its preamble, it extolled the ‘developed socialist society’ and declared triumphantly that the aims of the dictatorship of the proletariat had been fulfilled, and therefore – with a touch of magic – that ‘the Soviet state has become the state of the whole people’, and not only of the workers and peasants.

One wonders why socialist states – or rather, cadres – pursued this path and adopted the rhetoric of liberal-political constitutionalism, instead of relying on authoritative party programmes and four or five-year plans, or inventing a different vocabulary. As power maps, socialist constitutions remained inconsequential because no political status could be derived from texts that did not adequately describe the power of the people’s representatives, the party and the party elites. As charters of rights (if they contained any) modelled on the liberal paradigm, they conveyed a different normative grammar insofar as rights were granted only relative to duties, placed in the shadow of the overriding interests of state and society; and, in the absence of an institutional

¹⁰ 1918 Russian Constitution, Number 23; similarly Article 24 of the 1924 Constitution.

¹¹ 1924 Constitution of the Soviet Union, Part I.

arrangement administering justice, could not in fact be enforced. One also wonders why socialist constitutions, given their basically programmatic and symbolic nature, became obsolete rather than being revised with the political and socio-economic transition to the next historical stage: 'The constitution of a socialist state must change with the transition of society from one historical stage to another... The constitution adopted in 1936 conformed to the period of the consolidation of socialism... Naturally, the chief provisions of this constitution are now obsolete.'¹²

'Naturally'? Neither nature nor the nature of things or the semantic surface explains why socialist constitutional documents are not amenable to amendment; and some of them show that they are, and why socialist regimes tend to be (re)constituted in the first place: to revitalize their miraculous power of transformation or to affirm their authority. It seems that they obey the law of 'planned obsolescence'¹³ not because they are treated like commodities, but rather because of their specific role in the context of Marxist-Leninist theory¹⁴ – that is, to ratify a new stage of socio-economic development and a new form of authoritarian government:

The fundamental problem of the constitution of the Russian Socialist Federated Soviet Republic involves, in view of the present transition period, the establishment of a dictatorship of the urban and rural proletariat and the poorest peasantry in the form of a powerful All-Russian soviet authority, for the purpose of abolishing the exploitation of men by men and introduction of socialism, in which there will be neither a division into classes nor a state of autocracy.¹⁵

1.3 Two Postcolonial Charters

The 1805 Constitution of the *Empire d'Haiti*, with a forerunner in 1801, deserves to be remembered for documenting the first successful revolt against slavery; yet it was (deliberately?) forgotten until recently.¹⁶ After the suc-

¹² See Unger, A.L. (1981), *Constitutional Development in the U.S.S.R.* (London: Methuen), 174 f, quoting the programmatic statement made by Nikita S. Khrushchev, then first secretary of the Communist Party of the Soviet Union.

¹³ Bulow, J. (1986), 'An Economic Theory of Planned Obsolescence', in: 101 *Quarterly Journal of Economics*, 729 ff.

¹⁴ Newton (n 9); Frankenberg (n 3), 46 ff.

¹⁵ 1918 Russian Constitution, Number 9.

¹⁶ Liberated from obscurity notably by Sibylle Fischer's insightful analyses of 'post-revolutionary constitutions', Fischer, S. (2004), *Modernity Disavowed: Haiti and the Cultures of Slavery in the Age of Revolution* (Durham NC: Duke University Press), 227 and 260. For a different perspective on the silencing of the Haitian revolution, see Trouillot, M.-R. (1995), *Silencing the Past: Power and the Production of History* (Boston MA: Beacon Press).

successful revolt against slavery and colonial occupation, the new elite not only declared 'slavery ... forever abolished', but also unmistakably – and with a racial twist – stated their commitment to an egalitarian society:

The Citizens of Hayti are brothers at home; equality in the eyes of the law is uncontestedly acknowledged, and there cannot exist any titles, advantages, or privileges, other than those necessarily resulting from the consideration and reward of services rendered to liberty and independence.¹⁷

On the cusp what would be called 'modernity', Haiti's 'Black Jacobins' went far beyond the French revolutionaries' abolition of privilege when they introduced, under the umbrella of the modern narrative, the concept of racialized citizenship:

[T]he 1805 Constitution contains what in today's lexicon would be called a set of radical postcolonial aspirations, a community imagined, through a legal narrative, as capable of doing something none of its models had done before: identifying both blackness and humanity as the basic signifiers of citizenship.¹⁸

One must bear in mind that the constitutional regime of the United States coexisted quite comfortably with slavery until the Thirteenth Amendment was passed in 1865. And even thereafter, the slaveholder logic was confirmed two years later by the infamous *Dred Scott* decision of the US Supreme Court;¹⁹ as well as by the 1896 decision in *Plessy v Ferguson*,²⁰ which declared racial segregation constitutional and inaugurated the doctrine of 'separate but equal'. In a similar spirit, the French *Déclaration des Droits de l'Homme et du Citoyen*, in all its philosophical splendour, did not prevent France from establishing colonial regimes, treating colonized populations as a lesser species than *hommes* and attempting, through a colonial war, to undo the liberation of slaves in Haiti. In stark contrast, the authoritarian regime of Haiti dared to confront Anglo-American and in particular French constitutionalism – more

¹⁷ 1805 Constitution of the *Empire d'Haiti*, Article 3.

¹⁸ Gulick, A. (2008), 'We Are Not the People: The 1805 Haitian Constitution's Challenge to Political Legibility in the Age of Revolution', in: 78 *American Literature*, 802. See also: Garraway, D.L. (2008), "'Légitime Défense": Universalism and Nationalism in the Discourse of the Haitian Revolution', in: Garraway, D.L. ed., *The Tree of Liberty* (Charlottesville: University of Virginia Press), 63, 80.

¹⁹ *Dred Scott v Sandford*, 60 US. 393 (1857). The majority of the Taney Court held that 'a negro, whose ancestors were imported into [the US], and sold as slaves', whether enslaved or free, could not be an American citizen and therefore had no standing to sue in federal court; and that the federal government had no power to regulate slavery in 'the federal territories acquired after the creation of the United States'.

²⁰ *Plessy v Ferguson*, 163 US 537 (1896).

bravely, the elites – with a rupture and consistency more radical than the 1776 and 1789 declarations,²¹ as well as the 1791 Bill of Rights, by reversing the slave-master relation:

There cannot exist slaves on this territory, servitude is therein forever abolished. All men are born, live and die free and French.²²

No whiteman of whatever nation he may be, shall put his foot on this territory with the title of master or proprietor, neither shall he in future acquire any property therein.²³

Rather than feigning colour blindness and ignorance of the reality of slavery and racism, ‘the Haitian constitutions take the opposite direction and infuse distinctions of skin color with political meaning’:²⁴

All acceptance [*sic*] of colour among the children of one and the same family, of whom the chief magistrate is the father, being necessarily to cease, the Haytiens shall hence forward be known only by the generic appellation of Blacks.²⁵

It is true that the Haitian documents contain diverse accents and provisions that seem contradictory or reflect ‘tensions and conflicting desires’,²⁶ such as the combination of liberty and slavery; the affirmation of French sovereignty (‘All men are born, live and die free and French’); the declaration of the Haiti Constitution of 1801 as ‘part of the French Empire, but ruled under particular laws’; and the sacredness of property (1805). Yet the Haitian post-revolutionary constitutions testify to an enlightened spirit and the courage to address the problems of social reality, rather than sweeping them under the carpet. The results differ sharply from liberal individualism and modernity; but by the same token, critique ‘white universalism’ and defy it with both a ‘black universalism’ and the political-constitutional resignification of a racial category:

Calling all Haitians, regardless of skin color, black is a gesture like calling all people, regardless of the sex, women: it both asserts egalitarian and universalist intuitions and puts them to a test by using the previously subordinated term of the opposition as the universal term.²⁷

²¹ Fischer (n 16) 201.

²² Toussaint Louverture’s Constitution of 1801, Article 3.

²³ Dessaline’s Constitution of 1805, Article 12.

²⁴ Fischer (n 16) at 227.

²⁵ Dessaline’s Constitution of 1805, Article 14.

²⁶ *Ibid*, at 228.

²⁷ Fischer (n 16) at 233.

Although Haiti fulfilled the promises of the Enlightenment and the ‘modern project’ – and of the era of democratic revolutions – by abolishing slavery and proclaiming racial equality,²⁸ the mainstream of constitutional historiography and comparative constitutional law has thus far overlooked the constitutional revolution in Haiti, failing to understand what it means. In fact, it purported to write a constitution for an overwhelmingly illiterate society and to recognize former slaves as actors on the constitutional stage; braver than ‘Federalists’ and ‘Anti-federalists’ or members of the *Assemblée Nationale*, the authoritarian Haitian drafters came up with generically ‘black’ Madisons and Lafayettes.

Haiti’s two early modern charters were short-lived, but should not be dismissed as ephemeral documents. They raise the question of why the authorities (an emperor and high-ranking military officers) constituted and reconstituted Haiti. Correcting Hegel’s rather foolish ethnocentric remarks about Africa²⁹ (Haiti would not have been treated much better), Haiti should be taken more seriously.³⁰ The Constitution of 1805 certainly reflects a spirit of triumph after years of bloodshed and war, defeat and struggle against various colonial powers.³¹ The constitution makers must have realized that they would provoke the French colonial power with their black universalism, a stronger stance on equality and a more radical farewell to privilege:

There shall exist no distinction other than those based on virtue and talent, and other superiority afforded by law in the exercise of a public function. The law is the same for all whether in punishment or in protection.³²

The Citizens of Hayti are brothers at home; equality in the eyes of the law is incontestably acknowledged, and there cannot exist any titles, advantages, or privileges, other than those necessarily resulting from the consideration and reward of services rendered to liberty and independence.³³

²⁸ Nesbitt, N. (2008), *Universal Emancipation: The Haitian Revolution and Radical Enlightenment* (Charlottesville: University of Virginia Press, 2008); Buck-Morss, S. (2009), *Hegel, Haiti, and Universal History* (Pittsburgh: University of Pittsburgh Press); Garraway (n 18), 63.

²⁹ Hegel writes in his philosophy of history (1837): ‘Herewith we leave Africa, only to never mention it again later. For it is no historical part of the world, it has neither movement nor development, and what happened... in its north belongs to the Asian and European world.’ Hegel, G.W.F. (2015), *Vorlesungen über die Philosophie der Geschichte, Werkausgabe* vol 12 (Berlin: Suhrkamp), 163.

³⁰ Since 1805 to the present, Haiti has had more than 20 constitutions.

³¹ James, C.L.R. (1938), *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution* (London: Secker & Warburg Ltd).

³² Constitution of 1801, Article 5.

³³ *Ibid*, Article 3.

They were also aware that the abolition of slavery was a thorn in the side of their slave-holding neighbours, notably the United States. Why risk their newly acquired freedom when other autocrats, and even the United States, condoned slavery?³⁴ One might guess that the Haitian Constitutions aimed to legitimize the new political order, to herald the postcolonial era and to mobilize Haitians – exhausted from war and destitution – to support and defend their state. All of this seemed to justify taking some risk.

1.4 Constituting the ‘Burmese Way to Socialism’

Burma suffered for decades under British colonial domination; as did first Burma and then Myanmar under the brutal rule of the military. While the country can compete with Haiti when it comes to the bitter experience of colonial suppression, it is perhaps even more deeply divided along ethnic and religious lines. Ethnicity and religion triggered revolts and wrote the script for a series of coups, as well as the permanent repression of the population – especially its ethnic minorities. Since 1948 – ‘released into independence’, as its British colonial masters tended to absolve themselves from the atrocities of their rule – Burma has been a battleground of separatist movements, religious struggles between Buddhists and Muslims,³⁵ military coups and – particularly since 2007 – protests and demonstrations against the military regime.³⁶ What began in 1962 under General Ne Win as a lie about progress – the ‘Burmese way to socialism’ – continued as a series of repressive practices of several

³⁴ Napoleon reversed a 1794 decision of the French National Convention and reintroduced slavery in the French colonies. The US Founding Fathers lived quite comfortably with this institution and considered slaves as chattels and private property. Not even the 13th Amendment (1865) put an end to slavery, because the US Supreme Court confronted the Abolitionists with two infamous rulings which asserted the authoritarian and racist internal structure of the country: *Dred Scott* confirmed that slaves were private property, while *Plessy v Ferguson* 163 US 537 (1896) justified segregation through the ‘separate but equal’ doctrine. The African-American population had to wait until 1954 (*Brown v Board of Education*) and the Civil Rights Legislation ten years later to experience a constitutional Haiti in the United States. See Kluger, R. (1975), *Simple Justice* (New York: A. Knopf); and Plumelle-Urbe, R.A. (2004), *Weißer Barbarei. Vom Kolonialrassismus zur Rassenpolitik der Nazis*, (Zurich: Rotpunktverlag).

³⁵ See Smith, M. (1991), *Burma. Insurgency and the Politics of Ethnicity* (Ann Arbor: University of Michigan Press).

³⁶ Holliday, I., Htun Aung, M. and Joelene, D. (2015), ‘Institution Building in Myanmar: The Establishment of Regional and State Assemblies’, in: 55 *Asian Survey*, 641 ff. Cheesman, N. and Farrelly, N. (2018), *Conflict in Myanmar: War, Politics and Religion* (Singapore: ISEAS – Yusof Ishak Institute); https://diepresse.com/home/politik/aussenpolitik/610133/Burma_Geschichte-eines-leidenden-Landes/ (last accessed 14 June 2018).

juntas and ended in 2015 (for the time being) with the country's first elections, which were gracefully accepted by the commanders of the 'controlled democracy'.³⁷

Unsurprisingly, constitutions were but a cameo in the history of military authoritarianism in Burma/Myanmar. By virtue of training and routine, which become second nature, soldiers develop an affinity for rules and standards that directly guide behaviour, like the regulations of military service. Those who are comfortable with command and control are likely to react with suspicion to constitutions that encompass spheres of values and porous principles. This is one reason why, in 1988, the Constitution was suspended by the *de facto* state of exception. Twenty years later, the regime sought to accommodate protest and discontent with a new Constitution. With military discretion and almost politeness, the preamble allocated responsibility for past mistakes and wrongdoings:

In order to gain independence *speedily*, the Constitution was *hastily* drafted, and it was adopted by the Constituent Assembly on 24th September 1947. After attaining independence, Parliamentary Democracy System was practiced in the State in accord with the Constitution of the Union of Myanmar. However, *as democratic system could not be effectively materialized*, the new Constitution of the Socialist Republic of the Union of Myanmar was drafted based on the single party system, and after holding a National Referendum, a socialist democratic State was set up in 1974. The Constitution came to an end *because of the general situation* occurred in 1988.

Later, due to public aspirations, the State Peace and Development Council made efforts to adopt multi-party democratic system and market economy in accord with the National situation ...

Despite *many difficulties and disturbances* encountered the National Convention, it was unwaveringly reconvened in 2004 in accord with the seven-step Roadmap adopted in 2003. As the National Convention was able to adopt the Basic Principles and Detailed Basic Principles for formulating a Constitution, it successfully concluded on 3rd September 2007.³⁸

The phrase 'many difficulties and disturbances' refers to the riots across the country that accompanied the debates of the National Convention in 1993. Surprisingly, these debates ended in 2008, when the government decreed to submit the draft to the people of Myanmar in a referendum. Somewhat miraculously, 98.12 per cent of the population reportedly participated in the referendum, with a staggering 92.48 per cent voting in favour – despite the fact that the Constitution was and still is extraordinarily controversial. Critics

³⁷ Zin, M. (2016), 'Burma Votes for Change: The New Configuration of Power', in: 27 *Journal of Democracy*, 116 ff.

³⁸ Taken from the Preamble of the 2008 Myanmar Constitution – emphasis added.

interpreted the constitution making as a manoeuvre to pacify the nationwide protests and prevent the head of the opposition, Aung San Suu Kyi, from becoming president.³⁹ *Divide et impera* (divide and rule) appears to have been the strategy with regard to the protest movement.

1.5 Downslide into Authoritarianism

In Hungary, a constitutional transition from Soviet-style socialism to a project of socialism and a subsequent era of post-socialism appeared to be completed when the Hungarian Constitution of 1949 – which had been modelled on the Stalin Constitution of 1936 – was comprehensively and sustainably revised in 1972 and again in 1989. In a first and rather cautious step, the Constitution of 1972 reinvented the ‘Hungarian People’s Republic’ as a ‘socialist state’, still integrated in the ‘socialist world system’, in which private property was guaranteed and (agricultural) cooperatives were promoted. After the Iron Curtain came down, the constitutional revision of 1989 aimed to prepare for a ‘peaceful political transition to a multi-party system, parliamentary democracy, and law-rule accomplishing the social market economy’, and to shed the authoritarian traditions of the past. Parties and elections were positioned as the engines of the transition, while the Constitutional Court and the commissioner for civil rights would function as godfathers. After partially reconstituting itself, Hungary seemed on the path towards stable democratization.

However, this supposed model student of transformation went on to surprise the world with a revamped Constitution in 2011 that invoked the ghosts of the darkest past.⁴⁰ The Basic Law – a text informed by the history of salvation and the Book of Revelation – became the centrepiece of the conservative revolution. The originally conservative, then increasingly radically nationalist Orbán government and the governing *Fidesz* Party celebrated the Basic Law as the end of Hungary’s transition to democracy.⁴¹ Their opponents criticized the Basic Law as a slide into a new authoritarian rule. The principle that the whole Constitution must be interpreted in accordance with the ‘National Avowal’ –

³⁹ Because of her marriage to British citizen Michael Aris and her two children’s British citizenship, Aung San Suu Kyi was disqualified from the office of the president pursuant to Article 59 of the Constitution.

⁴⁰ See the contributions to *Sonderheft Ungarn. Aus Politik und Zeitgeschichte*, H. 29–30 (2009), www.bpb.de/apuz/31841/ungarn/ (last accessed 12 December 2019).

⁴¹ Scheppele, K.L. (2018), ‘Autocratic Legalism’, in: 85 *The University of Chicago Law Review*, 545 ff, with further references. See also Lendvai, P. (2016), *Orbán’s Ungarn* (Vienna: Kremayr & Scheriau).

‘we, the Nation’ – and the achievements of the ‘historical constitution’⁴² cast a pall over the allegedly democratic transition. The references to ‘our king and founder, Saint Stephen I’, to Christianity and to national culture do not follow the rules of a democratic grammar; even less so the restrictions on the freedom of communication for the benefit of ‘the dignity of the Hungarian Nation’, the freedom to study and conduct research and the independence of the judiciary for the sake of national unity: ‘The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation ...’⁴³

The essence of the fundamental law is captured not by the democratic republic, but by the sacred Crown, which embodies the imaginary continuity of the Hungarian constitutional state and ‘the unity of the nation’ (see the Preamble). According to this peculiar nationalist understanding of the Constitution, the Crown – not the monarch – functions as the symbolic agency of sovereignty and towers above all worldly powers and the political general will of the people; but not the nation.

Thus far, critiques of Orbán’s constitutional package have focused on its flagrant illiberalism – notably the nationalization of the media and the dismantling of the Constitutional Court and the lower courts.⁴⁴ However, another aspect of authoritarianism should not be overlooked: the Basic Law also legitimizes repressive measures such as censorship and limitations of freedom of speech and academic freedom. Moreover, flanked by a politics of history, historical martyrdom and apocalypse, the Basic Law contains the ingredients for a new form of imaginary community based on the illusion of a collective identity underpinned by xenophobic paranoia. It is not altogether clear why Orbán committed himself to this constitutional project – which, as he well knew, would antagonize the European Commission, because it strays quite evidently from European values.⁴⁵ However, he also knew that the imposition of sanctions pursuant to Article 7 of the Treaty on European Union was unlikely, because the Commission would find it difficult to summon the necessary ‘qualified majority’ to pursue these cumbersome proceedings.

⁴² Pichl, M. (2019), ‘The Constitution of False Prophecies: The illiberal Transformation of Hungary’, in: Alviar and Frankenberg, *Authoritarian Constitutionalism*, 240 ff; Uitz, R. (2015), ‘Can you tell when an illiberal democracy is in the making?’ in: 13 *I.CON*, 279 ff.

⁴³ 2011 Constitution, Article 9, Section 5.

⁴⁴ Editorial, ‘A Test for the European Union’, in: *New York Times*, 1 August 2014, www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html (last accessed 12 July 2018); for a more elaborate discussion, see Chapter 7.

⁴⁵ Treaty on European Union, Article 2.

1.6 Enabling Fascism

The infamous Enabling Act of 23 March 1933 for all intents and purposes ended the constitutional democracy of the Weimar Republic, the first German democracy that was proclaimed (twice) in 1919, and paved the way for the Nazi dictatorship.⁴⁶ It followed on the heels of the *Reichstag* Fire Decree, which had already begun to abolish civil and political freedom and transferred state powers to the executive. Technically, the Enabling Act was an amendment to the Weimar Constitution of 1919, which secured the necessary two-thirds majority after the rules of parliamentary procedure were manipulated by the Nazi president of the *Reichstag* and – more importantly – the opposition (Communists and Social-Democrats) were variously arrested, prevented from attending Parliament, intimidated and prevented from voting by the Nazi stormtroopers who illegally monitored the vote in the *Reichstag*.

Under the Act, the government – which is to say the *Führer* – acquired the authority to pass laws without parliamentary consent or control. With certain exceptions, these laws could diverge from the Constitution:

Laws enacted by the government of the *Reich* may deviate from the constitution as long as they do not affect the institutions of the *Reichstag* and the *Reichsrat*. The rights of the President remain unaffected.⁴⁷

Laws enacted by the *Reich* Government shall be issued by the Chancellor and announced in the *Reich* Gazette.⁴⁸

Thus, the Enabling Act ‘enabled’ the executive power and effectively eliminated the two chambers as active players in the German representative system – and politics. While their existence was formally protected by the Enabling Act, it will be shown later that, for all intents and purposes, the Act reduced the *Reichstag* to a mere stage for Hitler’s rhetorical performances (see Chapter 7).

Hitler never trusted jurists and despised the law. Nevertheless, he made sure that his dictatorship had the appearance of legality. The Enabling Act – which has been labelled the constitution of the dictatorship – was extended twice, in 1937 and 1941. The extension was an empty formal act because the ban on all other parties assured its safe passage through the *Reichstag*. In 1942, the *Reichstag* passed a law giving Hitler the power of life and death over every citizen, effectively extending the provisions of the Enabling Act

⁴⁶ Officially, ‘*Gesetz zur Behebung der Not von Volk und Reich*’. See Evans, R. (2003), *The Coming of the Third Reich* (New York: Penguin Press); Kershaw, I. (2015), *To Hell and Back. Europe 1914 – 1949* (New York: Penguin), 142 ff and 283 ff.

⁴⁷ Enabling Act of 23 March 1933, Article 2.

⁴⁸ *Ibid*, Article 3.

for the duration of the war. But why did he bother having the Enabling Act extended three times? He had established a ruthless, murderous, totalitarian dictatorship; who was he trying to impress with this quasi-constitutional manoeuvre? What purpose could the Enabling Act serve after the *Reichsrat*, representing the states, had been abolished – notwithstanding that Article 2 of the Enabling Act protected the existence of this institution, and that the Law for the Reconstruction of the *Reich* (1934) had done away with federalism, transferring and centralizing the powers of the states in the hands of the *Reich* and leaving the *Reichsrat* impotent?

The constitutional projects of authoritarian regimes discussed here, albeit briefly, avail themselves very selectively of the conventional rhetoric and instruments of political authoritarianism. They are not very explicit about purposes and audiences. In Chapter 8, I will offer some ideas on how to deal with them more systematically.

2. CONSTITUTIONAL WORLD-MAKING

Constitutions are more than texts or projects. Some are weak; some make things happen. Their performative power is not self-executing, though. It crystallizes in the way they claim, through interpretation and application, to represent reality and contribute constructively – and not unrelated to artistic activity – to ‘world-making’.⁴⁹ They notably transform a population into a ‘people’ as *pouvoir constituant* and agent and object of self-government. They turn a piece of land into a ‘territory’; declare territory and government a ‘state’; and alter a plurality of social groups and classes, organizations and individuals into a ‘nation’ (or another unified construct, such as a state or union).⁵⁰ They convert things we say into opinions and what we own into property. Even constitutional definitions become dogmatic or commanding.

Constitutional world-making operates with a vocabulary and abides by the rules of a grammar that cannot be unlocked and understood through reading alone: texts must rather be unpacked and interpreted. Thus, constitutions become more or less impressive *commanding* texts. The charters of autocracies, whatever their worth, are no different.

From a distance, constitutions can be recognized as performing their world-making with authority – a quality and relationship that will be explained in Chapter 3. ‘Higher law’ accentuates the elevated status of constitutional norms. ‘Fundamental’ or ‘basic law’ refers to the *authoritative* distribution of

⁴⁹ Goodman, N. (1978), *Ways of Worldmaking* (Cambridge, MA: Hackett).

⁵⁰ Constitutions lend a political-legal form to modern types of the ‘society of individuals’ – Elias, N. (2010), *The Society of Individuals* (Dublin: UCD Press).

rights and freedoms, distinction of social values and allocation of powers to agents and agencies of a state, union or supranational government. Beyond the juridical terminology, constitutions can be read as scripts for the resolution of basic social conflicts or instruction manuals for the operation of government.

Apart from world-making with authority, the appeal of constitutions is predicated on their versatility and their peculiar combination of magic and deceit.⁵¹ Their versatility is brought to bear in diverse modes of application. They became a signum of modernity, regardless of fundamental laws that preceded the constitutional ‘threshold era’ from the end of the eighteenth century to the first decades of the nineteenth century. The Virginia Bill of Rights and the US-American Declaration of Independence started the ball rolling in 1776. The French Rights Declaration followed in 1789. Then came Haiti’s Constitutions of 1801 and 1805, commencing a century of experiments – notably in Europe⁵² and Latin America⁵³ – constituting absolutist and constitutional monarchies, presidential and parliamentary democracies, empires and republics, military regimes and despotism, centralized nation-states and federal unions, and more.

According to a conventional reading, constitutions ‘lay down’ the principles, institutional arrangements and procedures of authoritative decision-making with which societies seek to manage the problems of self-government and social integration. Due its transformative force, the constitutional project is therefore of interest for authoritarian regimes; even more so as these regimes – as will be shown later – cope with the contradictory nature of modern sociality and integration by shifting it towards homogenous communities of tribes, religions and cultures, and by excluding strangers and other groups they consider to be deviant or to undermine the universalization they seek to promote through the constitution.

Like any other government, autocracies have to deal with *authority* that generates and legitimizes binding decisions, as well as *integration* – that is, finding a way to bring about social cohesion.⁵⁴ For these purposes, constitu-

⁵¹ For a more detailed discussion, see Frankenberg (n 3), Ch 1.

⁵² See Frankenberg (n 3), 156 ff.

⁵³ From 1810 until 2015, 195 constitutions were counted among 18 Latin American countries; Negretto, G. and Couso, J. (2018), ‘Constitution-Building Processes in Latin America’, Discussion Paper 3 (Stockholm: International IDEA); Gargarella, R. (2013), *Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution* (Oxford: Oxford University Press).

⁵⁴ Frankenberg, G. (2003), *Autorität und Integration* (Frankfurt am Main: Suhrkamp). See, for instance, Constitution of Malaysia, Number 160B: ‘Where this Constitution has been translated into the national language, the Yang di-Pertuan Agong may prescribe such national language text to be authoritative, and thereafter if there is any conflict or discrepancy between such national language text and the English language text of this Constitution, the national language text shall prevail over the English language text.’

tions also come in handy for authoritarian regimes. Because of their status as supreme or higher law, situated at the top of the legal hierarchy, they claim higher authority⁵⁵ for the institutions of autocracies and protect them from easy revision. To this effect, Article V of the US Constitution originally protected slave-owners and traders from any law that would attempt to curtail the importation of slaves. By the same token, the dual role of the king of Morocco as monarch and spiritual ruler is constitutionally sacrosanct.⁵⁶

After the threshold era, the constitution flourished and proliferated as the globally accepted model for societies to distinguish their political order as monarchic, republican or democratic, liberal or social, based on the rule of law or on the recognition of human rights. Based on their constitutions, states sought access to regional or international organizations, such as the Council of Europe, the Organization of African Unity and the United Nations. It is plausible to assume that autocrats exploit the authority of constitutions for their political world-making, however abhorrent it may be. It will be shown that authoritarian constitutionalism very selectively draws on the arsenal of liberal and democratic constitutionalism, privileging the archetype of the political manifesto, focusing on values and fabricating an imaginary community.

3. BETWEEN MAGIC AND DECEIT

For more than 200 years, constitutional projects have oscillated between the attribution of special powers – which I call ‘magical powers’ or simply ‘magic’ – and the fabrication of false facts, such as the inaccurate representation of power.⁵⁷ For just as long, regimes of all kinds – especially authoritarian governments – have taken advantage of constitutional enchantment and pretence. The magic that should be inherent in constitutions reveals itself in different forms and abstraction. On the one hand, as mentioned above, it transforms individuals into bearers of rights and, by contract or law, populations of a territory into members of imagined communities (‘people’). On the other hand, rule is magically turned into a text. The nation is an imaginary community that one believes to be both sovereign and inherently limited. According to

⁵⁵ Kelsen, H. (1945), *General Theory of Law and the State* (Cambridge: Harvard University Press).

⁵⁶ ‘The King, Commander of the Faithful [Amir Al Mouminine], sees to the respect for Islam. He is the Guarantor of the free exercise of beliefs [cultes]. He presides over the Superior Council of the Ulema [Conseil supérieur des Oulema], charged with the study of questions that He submits to it’ (Article 47 of the 2011 Constitution of the Kingdom of Morocco).

⁵⁷ For a more elaborate discussion of magic and deceit, see Frankenberg (n 3), especially Ch 1.

Benedict Anderson, it is imaginary because the members of even the smallest nation usually neither know nor meet nor even hear from most of the other members; though in the imaginations of all, the notion of their connectedness exists and is kept alive. Communities differ not in their authenticity or falsity, but in the style and modality in which they are presented.⁵⁸

The style of that imagination was and is characterized by the constitutional vocabulary: declarations of rights, proclamations of independence or complete constitutions. By sleight of hand, these texts – their rhetoric, supported by rituals and procedures – convert personal rule into the modern, abstract idea of governing (see Figure 1.1): the ‘government of laws and not of men’.⁵⁹ The magic makes power disappear, depersonalizes rule and transforms the personal duty of loyalty of the ruled to the ruler into abstract legal obedience based on external behaviour: the constitution as another Wizard of Oz.

It was mentioned previously that constitutional speech acts – such as enshrining rights catalogues or values, declaring the people sovereign or turning to history – are performative acts. They communicate ideas (popular sovereignty or democratic dictatorship, equal freedom or liberation from slavery); they open up new horizons (constitutional monarchy or democratic dictatorship). They also initiate events, such as referenda, elections or states of emergency. It is therefore not inappropriate to say that the people do not declare or constitute *themselves*, but are rather constituted by the constitution, empirically by the constitutional elites, at the moment of the declaration.⁶⁰

Constitutional magic works depending on how norms, ideology, myths and the symbolic dimension in general are brought into play. Subsequently, it seems, bills of rights, judicial decisions, doctrines, conventions, even unwritten constitutions, formulas such as ‘king/queen-in-Parliament’ and concepts such as constitutional state or constitutional democracy participate in the aura of the magical in different ways (for example, see Figure 1.2).

This aura, of course, is ultimately a deception or illusion. Common examples include the mantra of US constitutionalism that the Constitution is colour-blind; or the counter-mantra of the Haitian Constitution (1805); or the Syrian despot’s attempt to conjure a constitutional moment during his merciless war against his own people. With borrowings from their holy scriptures,

⁵⁸ Anderson, B. (1983), *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (London: Verso).

⁵⁹ Constitution of Massachusetts, Part I, Article XXX. See Franz Neumann (1980), *Die Herrschaft des Gesetzes*, (Frankfurt am Main: Suhrkamp).

⁶⁰ See Derrida, J. (2002), ‘Declarations of Independence’, in: *id*, *Negotiations: Interventions and Interviews, 1971–2001* (Stanford: Stanford University Press), 46 ff.; and de Ville, J. (2008), ‘Sovereignty without Sovereignty: Derrida’s Declarations of Independence’, in: *19 Law and Critique*, 87 ff.

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Source: Novastan.org, www.novastan.org/de/kirgistan/kirgistan-amtseinfuehrung-von-sooronbaj-dscheenbekow/ (last accessed 14 December 2019).

Figure 1.2 A magic moment – soldiers of Kyrgyzstan bring the constitution to the inauguration ceremony, 24 November 2017

a constitution, according to one historian, ‘equals the power of one million soldiers’.⁶¹ Magic.

These examples indicate that the study of constitutions – of *all* constitutions – should equip itself with realism and combine it with a critical approach. For what appears to be linguistic magic could soon be lost in the thicket of ideology, myth, strategy or empty talk. When dealing with the charters of autocracies, realism and sobriety are particularly in demand; but they are also more easily invoked than practised. Like all constitutions, the authoritarian ones are overloaded with narratives and ideology. They tell founding myths, which one might not readily believe; refer back to experiences that reflect only a segment of history; contain political visions and fears; offer an interpretative grid for the interpretation of reality recorded with interest; and ultimately establish a framework of legality of uncertain strength and substance.

⁶¹ Wu, J. (2005), *Studien zur Rechtsphilosophie* (Beijing: Qinghua University Press).

Neither an exact description of the world we live in nor a diagram of the actual functioning of political institutions can be expected from constitutions. In this respect, the term ‘operating manual of the state’ has not only a polemical but also an ironic meaning. Above all, the centres of power are not accurately localized in any constitution; and notably liberal constitutions remain silent about the power of private property. Constitutions should therefore be read not as blueprints, but preferably as narratives or, contingent on their fuzziness, *aspirational* texts that point to the future and indicate what societies or their elites have in mind – for example, Cuba’s determination ‘never to return to capitalism’; Rwanda’s commitment to ‘prevent and punish the crime of genocide’; Pakistan’s ‘unrelenting struggle against oppression and tyranny’; or Belarus’s defence of its ‘independence and territorial integrity’.

At the same time, constitutional documents may provide clues as to how societies and their elites or leaders want to manage the government’s business – or try to hide their interests, intentions and stratagems. Examples include the following

[N]ever again be struck by the horrors of war through the actions of the government ...⁶²

In the coming years, the fundamental task of the nation is to concentrate its forces on socialist modernization. Under the leadership of the Chinese Communist Party and the guidance of Marxism-Leninism and Mao Zedong’s thinking, the Chinese people of all nationalities are following the socialist path ...⁶³

While authoritarian regimes can be expected to assume and not discuss the (constitutional) legitimacy of their power, they generously invoke some kind of community to provide individuals and groups with the phantasm of a cohesive collective. There are different options to proceed down this path of magical transformation: a ‘more perfect union’⁶⁴ and ‘nation’⁶⁵ appear to have been evoked as standard communities.⁶⁶ While authoritarian regimes adopt the common rhetoric (‘people’, ‘nation’, ‘republic’, ‘union’), on closer scrutiny their constitutions shift the emphasis from the (ritually affirmed) rights of the individual to the privileged interests of the community. The Chinese Constitution conjures up the ‘Chinese people of all nationalities’. Hungary’s Basic Law celebrates the ‘intellectual and spiritual unity’ of the nationalities that ‘live with us’, thus revealing the beginnings of a strategy of repelling

⁶² 1947 Constitution of Japan.

⁶³ 1982 Constitution of the People’s Republic of China, Preamble.

⁶⁴ 1787 Federal Constitution of the United States.

⁶⁵ For example, 1789 French Constitution and 1853 Argentine Constitution.

⁶⁶ Echoed by the ‘ever closer union of the peoples of Europe’ (EU Treaty 1992).

refugees and migrants. Indonesia's Constitution affirms 'faith in the One and Only God, just and civilized humanity, Indonesia's unity and democratic life'. The Iranian Constitution (1979/1989) sites the God-fearing people in the cross-border, religiously founded *Ummah* – the community of all Muslims. North Korea transforms the 'People's Republic' into the 'socialist fatherland'. So far, so innocent or symbolic.

The next step, however, treats the demands of the community with partiality. Subtly and deceitfully, the Chinese Constitution distinguishes 'sacred public property' from citizens' 'lawful property' (Article 13), and combines every citizen's enjoyment of rights with obligatory legal-constitutional duties (Article 33). Iran's Constitution denies individuals and groups 'the right to infringe in the slightest way upon the political, cultural, economic, and military independence or the territorial integrity of Iran under the pretext of exercising freedom' (Article 9). The North Korean Constitution fosters 'a world outlook centered on people' (Article 3) and a 'people-centered (social) system under which the working people are the masters of everything and everything in society serves them' (Article 8). In consequence 'the rights and duties of citizens are based on the collectivist principle: "One for all and all for one"' (Article 63). More cautiously, the Hungarian Constitution proclaims in its Preamble: 'We hold that individual freedom can only be complete in cooperation with others.'

How can one take constitutions seriously without being tricked by the motives and strategies of autocrats that inform them? How can attempts to harness the magic of constitutions be distinguished from outright deceit? It seems evident that a mere examination of constitutional texts is not sufficient; this must be complemented by a contextual analysis. Nonetheless, one begins with the text itself. Whether written in good faith or in bad faith, the constitutions of authoritarian regimes are related to their context and examined, as far as possible, at the levels of regime and rhetoric. Taking these texts seriously requires, first, a conceptual clarification of authority and authoritarianism. In order to avoid dismissing the constitutions of authoritarian regimes merely as deviations from the constitutional ideal of liberalism, attention then turns to authoritarian elements of liberal constitutional theory and practice.

4. BASIC CONSTITUTIONAL PATTERNS

The diversity of constitutions can be captured in four archetypes that allow for numerous hybrids: constitution as manifesto, contract, statute (higher law) and programme or plan. Needless to say, these archetypes or dominant patterns characterize only the basic structure of constitutions. They have a different use value in authoritarian settings.

The *contractual* archetype functions as a real pact of allegiance among sovereign princes (eg, the 1871 Constitution of the German Empire), a treaty

of the union of sovereign states forming a federation (eg, the original 1787 US Constitution without the Bill of Rights; the Federation of Malaysia), a supra-national confederation (eg, the Commonwealth) or a similar interconnection of states (the European Union). The constitutional contract structures the *pouvoir constituant* as an internal relationship between discrete contractual parties, which are usually signatories ('We the Undersigned') representing the members of the union, federation or confederation. As regards their content, constitutional contracts focus on organizing institutions and allocating powers. If demarcating territory and borders is problematic, these become constitutional issues – in particular, in partitioned and internally fragmented countries.⁶⁷

When constitutions result from revolutionary struggles, political liberation movements or other social processes, they often do so in the style and wording of a *political manifesto*. Manifestos come across as ceremonial, apodictic, unilateral declarations that contain generally accepted messages about historical experience, political vision and the actors' intentions. The form suggests evidence, the content truth – such as the classic introduction to Virginia Bill of Rights in its first article:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

It is typical of manifestos that (in most cases, self-declared) representatives *declare* and *proclaim* (rather than explain) in the name of a collective – preferably the nation; some invoke the world – what historical truth, theoretical insight⁶⁸ or simple necessity commands. This means that manifestos are moulded by their authoritarian style:

We, therefore, the *Representatives* of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude

⁶⁷ For further details, see Frankenberg (n 3), 223 ff.

⁶⁸ 'Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important Theory of "Three Represents", the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship, follow the socialist road...' – 1982 Constitution of the People's Republic of China, Preamble. North Korea trusts the 'genial' theoretician Kim Il-sung (1972/2016 Constitution).

of our intentions, do, *in the Name, and by Authority of the good People of these Colonies*, solemnly publish and declare ...⁶⁹

I will cease to exist before I yield to a connection on such terms as the British Parliament propose; and in this, I think *I speak the sentiments of America*.⁷⁰

Compared to other constitutional charters, the manifesto remains rudimentary; addresses common goals and values, consented rights and principles; but abstains from making concrete statements or laying down rules concerning the organization of government. In contrast to negotiated contracts of more or less equal partners, the unilateral, top-down speech acts, references to necessity and history as well as value paternalism are likely to appeal to constitutional elites of authoritarian systems:

We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago...

We honour the achievements of our historical constitution and we honor the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation.⁷¹

In the neighbourhood of the political manifesto resides the constitution as a *plan* or *programme* of socio-economic development. Real existing socialism developed this archetype to perfection as a kind of five-year plan. Under the guidance of historical and dialectical materialism, the socialist cadres translate the laws of scientific socialism and the necessities of a planned economy into constitutional documents with a limited lifespan.⁷² Their accessory connection with ideological parameters and the (officially determined) stages of socio-economic and political development submit programme/plan constitutions to frequent revisions, which document, for example, the transition from 'dictatorship of the proletariat' to 'people's democracy', then 'socialist democracy' and finally 'communist democracy'.

The *coded constitution* or constitution as a statute of higher law represents the most complete or comprehensive pattern, as will be discussed below. It has proliferated worldwide and may be considered superior to the other

⁶⁹ *A Declaration by the Representatives of the United States of America*, 4 July 1776, National Archives of the United States, www.archives.gov/founding-docs/ (last accessed 12 December 2019).

⁷⁰ Thomas Jefferson [1775], quote from Hazelton, J. (1970), *The Declaration of Independence. Its History* (New York: Da Capo Press), 19 – emphasis added.

⁷¹ 2011/2016 Hungarian Constitution, Preamble.

⁷² See Frankenberg (n 3), 46 ff; and Newton, S. (2017), *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (London: Hart Publishing).

archetypes, as it can incorporate contractual, manifesto and programmatic elements within its design.⁷³ Though the coded constitution, with its four modules (see below), is an instrument of liberal constitutionalism, it has been widely adopted by authoritarian regimes. Nevertheless, this adoption must be analysed very carefully to make allowance for the logic of the diverse models and practices of constitutionalism.

5. READING AUTHORITARIAN CONSTITUTIONS

Constitutions, including those of autocracies, tend to follow a similar structural design, unless they are single-purpose declarations or resolutions. In general, they are deemed (fairly) complete if they are drafted to contain the basic principles and rules for the solution of the essential problems of life in society or in a supranational environment. However, even if the structure and the outward appearance – the textual surface, so to say – are alike, it does not make for an interesting argument to maintain that authoritarian constitutions are not like liberal charters because they do not mean what they say. The standard proof is always freedom of speech. While this may be true, and in many cases it is, a more interesting approach could be to consider *what else* they could mean. To introduce this avenue of investigation, I will examine the basic structure first, in order to discover the spaces and gaps where authoritarianism could creep in. Later, having distinguished the constitution's special features, I hope it will be easier to explain the basic elements – such as rights, values/duties, organization of government and meta-rules that refer to its amendment, review and validity – and how they are modified in authoritarian constitutions.

Most constitutions follow a basic design that is composed of four elements. First, catalogues of *rights*, supported by rule of law principles and procedures, relate to questions of justice. Globally, one registers a variety of answers. Authoritarian regimes may not appreciate rights and procedures because they are intended to limit government. Therefore, it is instructive to look for clauses that confine their scope or that neutralize their normative use value. Constitutions are not always as frank about this as was the 1918 Constitution of the Federated Socialist Republic of Russia: 'Being guided by the interests of the working class as a whole, the Russian Socialist Federated Soviet Republic

⁷³ Preambles tend to follow the style not only of manifestos, but also of constitutional norms that have the character of confessions, such as the Preamble and Article D of the Hungarian Constitution. Programmes that must be implemented by the legislature come in the guise of constitutional mandates or goals, such as the protection of the environment or affirmative action policies.

deprives all individuals and groups of rights which could be utilized by them to the detriment of the socialist revolution.⁷⁴

In a rather long-winded manner, the Thai Constitution goes about limiting rights and freedoms:

Any right or liberty stipulated by the Constitution to be as provided by law, or to be in accordance with the rules and procedures prescribed by law, can be exercised by a person or community, despite the absence of such law, in accordance with the intent of the Constitution.⁷⁵

More often, rights are adapted to autocratic purposes by doctrinal schemes, ‘concretized’ by laws or merely set aside in state practice.

The second element addresses problems of how to promote the common weal. The most popular constitutional mechanisms to achieve this goal are *values* and corresponding *duties*. At times, these are turned into constitutional mandates that address the law-makers or the executive, to protect the natural environment or certain vulnerable social groups. Autocracies are likely to dwell on this module because, by definition, values and duties must be enforced from above. Hence, they come with a hard-coded, authoritarian tendency. Values can do almost everything because they are highly indeterminate and lend themselves to a variety of implementation purposes. Besides, values and duties make crucial contributions to the transformative agendas that governments may pursue. Furthermore, they can be defined to ensure loyalty or mobilize for a collective project (eg, socialism, nationalism), or to further a collective identity or illusory community.⁷⁶ Unsurprisingly, authoritarian constitutions have a penchant for values and duties, such as ‘national solidarity’ (Turkey), ‘strength, fidelity and hope’ (Hungary), ‘equality according to the Sharia’ (Saudi Arabia), ‘freedom, justice, fraternity and concord’⁷⁷ (Tanzania), and ‘the well-being and prosperity of Russia’. Romania declares ‘loyalty to the country... a sacred duty’.

The third, and often the predominant,⁷⁸ element comprises provisions covering the ‘constitution of politics’ – that is, the organization of government, the party system, elections and so on. This element is likely to be of special interest to autocracies, as long as it meets their increased demand for order. Generally,

⁷⁴ 1918 Constitution of the Federated Socialist Republic of Russia, Article 2, Number 23.

⁷⁵ 2017 Constitution of the Kingdom of Thailand, Section 25.

⁷⁶ These aspects of authoritarianism will be discussed later (see Chapter 7).

⁷⁷ The word ‘concord’ suggests that it may be difficult to successfully integrate the 125 ethnic groups and 120 languages spoken.

⁷⁸ Notably of the US Constitution of 1787, to which the Bill of Rights was added three years later.

the ‘organization of politics’ reflects historical experience, political wisdom and statecraft. It converts political visions and anxieties, strategies and plans into the construction of institutions, the allocation of competences, mechanisms of control and procedures for the appointment of decision-makers. The constitutional organization of autocracies is inclined to depend on the basic structure (eg, personal regime, military junta, one-party system) and also the need to camouflage authoritarianism in the context of a democratic environment – for example, as an electoral democracy or a competitive authoritarian system.

The fourth element concerns questions of constitutional validity and addresses the amendment, interpretation, review and protection of constitutions. These seem to be rather technical matters, but they are more than that: as meta-rules, they determine the self-reflexivity and modernity of constitutions. They make sure that constitutions generate their legitimacy on their own terms by marking the people as sovereign and tying any modification or revision to a decision of the sovereign, its representatives or institutions established by the sovereign (constitutional courts). In all probability, authoritarian governments can be expected to change those terms and tap transcendental sources of legitimacy, such as tradition or religion. Thus, Hungary invoked ‘our king Saint Stephen [who] built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago’.⁷⁹ Turkey cited ‘Atatürk, the immortal leader and the unrivalled hero, and his reforms and principles as crown witness of constitutionalism’.⁸⁰ Syria’s draft Constitution of 2017 refers to ‘the responsibility before the past, present and future generations’.

Constitutional patterns and construction elements should not be overrated in terms of what they achieve in the context of a democratic or authoritarian regime. They might clarify the view of the *possible* strategies, intentions and expectations of constitutional elites – no more and no less. It does not make sense to read constitutions of autocracies as charters of rights, however. On the whole, they are likely to be authority ‘sensitive’ – that is, preoccupied with the establishment of order and the allocation of powers, and interested in guaranteeing rights that would interfere with government. It is instructive to enquire into their mechanisms which defuse the normative force of rights and overwhelm them with common values and duties that privilege the demands of the collective (people) or government.⁸¹ It is also illuminating to explore how political authoritarianism uses constitutions to celebrate and

⁷⁹ 2011 Hungarian Constitution.

⁸⁰ 1982/2017 Turkish Constitution.

⁸¹ For example, the 1992/2013 Vietnam Constitution: ‘Human rights and citizens’ rights shall only be restricted in imperative circumstances for the reasons of national defence, national security, social order and security, social morality, and the health of

legitimize authority: no presidential inauguration does not at least pretend to follow the constitutional script! Figure 1.2 shows how President Jeenbekov of Kyrgyzstan is ‘offered’, as it were, the Constitution. And as will be shown later, Hugo Chávez’s team in Venezuela went out of its way to comply with the constitutional swearing-in of the new president – in his absence.

the community’ (Article 14); ‘Citizens’ rights are inseparable from citizens’ duties’ (Article 15); ‘The citizen must show loyalty to his Fatherland’ (Article 44).