

1. Authoritarian constitutionalism: coming to terms with modernity's nightmares

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Were the twentieth century to be remembered as the century of human rights, then its successor, one might think, could be marked by the breakthrough of liberal democracy. Both eras of brightness come with dark shadows, though. While organized violence, massacres, and torture blemish the twentieth century, authoritarianism seems to be well on its way to becoming—or making a comeback to prove itself as—the nightmare of the twenty-first. Quantitative analysts now count more authoritarian than democratic constitutions in existence.¹ No ultimate triumph of liberalism, then, and certainly no end of history—rather, further struggle between the “gentle” authority of democracy and the brutish, patriarchal forces of authoritarianism.

1. VARIETIES OF AUTHORITARIANISM

Authoritarianism derives its entitlement to exercise power and its corresponding claim to obedience from one or the other type of authority that grants protection and distributes spoils.² In political contexts, authority shifts the

¹ Freedom House, which is guided by a Global South focus, counts 40 authoritarian regimes. Recent relevant publications include “Is Democracy Dying? A Global Report” (2018) 97 *Foreign Affairs* May/June issue; Yasha Mounk (2018) *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It*, Cambridge MA: The Belknap Press. With a focus on consolidation: Juan Linz & Alfred Stepan (1996) *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Baltimore: Johns Hopkins University Press.

² From the library on authority: Hannah Arendt (1954) *Between Past and Future*, New York: Viking (“What Is Authority?”); Alexandre Kojève (2014) *The Notion of Authority: A Brief Presentation*, London: Verso (commenting on postrevolutionary Russia); Joseph Raz (2009) *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford: Oxford University Press; David Dyzenhaus & Thomas Poole eds (2012) *Hobbes and the Law*, Cambridge: Cambridge University Press.

register of rhetoric from authoritative—that is, legitimate—authorization, to authoritarian (autocratic, dictatorial, despotic, imperious, tyrannical) governance, when power holders prohibit the calling into question of their status, the legitimacy of their entitlement to obedience, and any measures they might take; or when they resort to violence. Accordingly, individual voice and collective action are reduced to subservience. In the main, authoritarian rulers determine the beginning, end, and agenda of societal discourses on the public good and other matters of general interest. In this way they insulate positions of power from erosion by debate and critique, and transform members into subjects who surrender to the sovereign their right to determine the good life for themselves.

Max Weber distinguished tradition, charisma, and rational legality as ideal-typical candidates for legitimate authority. Based on a synthesis of a large number of empirical studies, Barbara Geddes plausibly differentiated personalist, military, and single-party authoritarian regimes, as well as amalgams of the “pure types.”³ Changing the register from empirical to normative criteria of legitimacy, the philosophical, liberal discourse privileges for legitimate government the tropes of consent, democracy, trust, the social contract, and (real) discourse. Constitutional scholars derive legitimacy preferably from elections and compliance with constitutional law. In contrast, authoritarian ideologies “explain away” coercion, violence, and inequality by invoking necessity, self-preservation, security, and whatever else community may require. As Singapore’s authoritarian head of state Lee Kuan Yew once put it, “a society with communitarian values where the interests of society take precedence over that of the individual” is considered more suitable “than the individualism of America.”⁴

Authoritarian ideologies, movements, regimes, and leaders have been on the rise in national settings and the global arena, exploiting economic crises, cultural strife, and democracy fatigue. They have eroded the standing of democratic governance.⁵ Depending on definition and perspective, authoritarianism

³ Barbara Geddes (1999) “What Do We Know about Democratization after Twenty Years?” *2 Annual Review of Political Science* 115, 121.

⁴ Quoted in *International Herald Tribune* November 9–10, 1991.

⁵ A global panorama is provided by Larry Diamond, Marc F. Plattner, & Christopher Walker eds (2016) *Authoritarianism Goes Global: The Challenge to Democracy*, Baltimore: Johns Hopkins University Press; Mark R. Thompson (2004) “Pacific Asia after ‘Asian Values’: Authoritarianism, Democracy, and ‘Good Governance’” *25 Third World Quarterly* 1079; Stephen J. King (2009) *The New Authoritarianism in the Middle East and North Africa*, Bloomington: Indiana University Press; Jerzy W. Borejsza et al eds (2006) *Totalitarian and Authoritarian Regimes in Europe*, Oxford/New York: Berghahn Books. See also the following analyses and case studies in this book.

comes with different rhetorics,⁶ with varying symbolic representations,⁷ and in diverse conceptual guises.⁸ Duncan Kennedy convincingly reconstructs the catholic, monarchic, and fascist genealogies in his analysis of authoritarian constitutionalism in liberal democracy in this book.

Authoritarianism covers a wide range of autocratic practices that add up to “regimes” of governance: fascist, bureaucratic, or competitive authoritarianism; oriental despotism;⁹ personalistic or developmental dictatorship; autocracy; elitism; one-party rule;¹⁰ military regimes; rightwing communitarianism; right- or leftwing populism;¹¹ Bonapartism;¹² police states; arbitrary government; technocracy; economic authoritarianism;¹³ dual states and neopatrimonialism;¹⁴ not to forget kleptocracy.¹⁵ And there are other manifestations of authoritarianism, often but not always abetted by presidentialism.¹⁶

Unless stereotyped as liberalism’s other,¹⁷ authoritarianism eludes precise definition. Like a chameleon, it changes its appearance from one context to the other and seeks to withdraw the rules of its grammar from scrutiny. From

⁶ See Duncan Kennedy’s critical analysis of the availability of the trope of authoritarianism for very different regimes, in this book.

⁷ The iconography of authoritarianism (the Chavez regime) is analyzed by Jorge Gonzalez in this book.

⁸ For an overview see Juan J. Linz (2000) *Totalitarian and Authoritarian Regimes*, Boulder: Lynne Rienner Publishers; Mathijs Boogarts & Sebastian Elischer (2016) “Competitive Authoritarianism in Africa Revisited” 10 *Zeitschrift für Vergleichende Politikwissenschaft* 5; Steven Levitsky & Lucan A. Way (2010) *Competitive Authoritarianism—Hybrid Regimes after the Cold War*, Cambridge: Cambridge University Press.

⁹ See Nimer Sultany’s in-depth analysis of Arab constitutionalism, in this book.

¹⁰ Analyzed by Michael Dowdle through the conceptual lens of infrastructural power in China, in this book.

¹¹ Illustrated by recent political developments in European countries; see, for example, Maximilian Pichl’s study in this book of the rhetoric and practices of the Orbán regime in Hungary.

¹² See Eugénie Merieaux’ analysis and critique of Bonapartism, in this book.

¹³ The correspondences between neoliberal economy and authoritarianism in different contexts are investigated in this book by Helena Alviar and Michael Wilkinson.

¹⁴ Arguably in Chavez’ Venezuela; see Jorge Gonzalez’ chapter in this book.

¹⁵ See Scott Newton’s analysis of Central Asian kleptocracies, in this book.

¹⁶ For an exemplary study of the affinity of presidentialism and authoritarianism in Mexico: Ana Micaela Alterio and Roberto Niembro Ortega (2018) “Constitutional Culture and Democracy in Mexico—A Critical View of the 100-Year-Old Mexican Constitution” in Mark Graber et al *Constitutional Democracies in Crisis?* Oxford: Oxford University Press. See also Roberto Gargarella’s chapter “Authoritarian Constitutionalism in Latin America: From Past to Present,” in this book.

¹⁷ For a critique of the stereotypical treatment of authoritarianism as liberalism’s “other” see Norman Spaulding’s chapter “States of Authoritarianism in Liberal Democratic Regimes,” in this book.

the point of view of conceptual history,¹⁸ authoritarianism inscribes itself in modernity's book of narratives as a *collective singular*, comprising a plurality of diverse phenomena—a nightmare politically and also conceptually.

In clinical terms, authoritarianism can also be described as a pathology¹⁹—a pattern of governance resulting from the cooccurrence of diverse, distinctive symptoms, such as rigged elections or votes with highly implausible outcomes;²⁰ governing by decree; detention without trial; little, if any, protection for minorities and little, if any, tolerance of opposition; gender inequality, which suggests an intimate connection with patriarchy;²¹ extensions of constitutional tenure of office thinly legitimating sclerotic regimes' clinging to power;²² recourse to a quasidynastic principle by leaders grooming family or club members for succession; top-down administration of public arenas; manipulation of rules of accountability virtually excluding political authorities from significant popular, judicial, or media control, which is frequently replaced by appeals to symbolic support; and promulgation of emergency law, implemented by an exorbitant security apparatus of secret services, police, and military.²³ And, almost always, xenophobia.

¹⁸ Reinhard Koselleck (2004) *Futures Past: On the Semantics of Historical Time*, New York: Columbia University Press; Jan-Werner Müller (2014) *On Conceptual History: Rethinking Modern European Intellectual History*, Oxford: Oxford University Press 74.

¹⁹ For critical analysis of patterns of authoritarianism see Theodor W. Adorno "Freudian Theory and the Pattern of Fascist Propaganda" in Andrew Arato & Eike Gebhardt eds (1982) *The Essential Frankfurt School Reader*, New York: Continuum Books 118; Wendy Brown, Peter E. Gordon, & Max Pensky (2018) *Authoritarianism: Three Inquiries in Critical Theory*, Chicago: University of Chicago Press; Peter E. Gordon "The Authoritarian Personality Revisited: Reading Adorno in the Age of Trump" b20, www.boundary2.org/2016/06/peter-gordon-the-authoritarian-personality-revisited-reading-adorno-in-the-age-of-trump/?platform=hootsuite.

²⁰ Outcomes are a priori implausible when votes can only be cast for the candidates of one party or all candidates need the approval of the government (Rwanda 2017), or oppositional candidates are arrested or otherwise excluded. They become implausible when resulting from manipulated vote counting. In a rare moment of constitutional implausibility, the Preamble of the Constitution of the Islamic Republic of Iran (1979) sports its rate of approval—98.2 percent!

²¹ See Mark J. Brandt & P.J. Henry (2012) "Gender Inequality and Gender Differences in Authoritarianism" 38 *Personality and Social Psychology Bulletin* 1301.

²² In March 2018 Chinese "State Chairman" Xi Jinping's plan to have his term limit lifted was approved almost unanimously by 3,000 members of the People's Congress in order to allow him to keep his trinity of leadership posts (party, military commission, state).

²³ Frequent economic symptoms, unrelated to constitutional provisions, would have to be added, such as stagnant economic growth, rising food prices, and erratic governmental interventions.

The varieties of authoritarian regimes are marked by differently assembled clusters of common symptoms that are interconnected by a profound distrust harbored against oppositional movements, by aversion to political risks, and by nonreciprocity. These clusters (in)form the clinical diagnosis of political authority based on a set of ideas or ideologies. To name only a few: historically, authoritarianism presented itself under the guise of fascist regimes in Germany, Italy, and Spain, and statist regimes in Brazil and Portugal, during the *Estado Novo* periods. Racism was its basis not only in Nazi Germany after 1933 and South Africa's apartheid installed in 1948;²⁴ it also pervaded the Jim Crow Laws of the Southern United States,²⁵ and, mixed with the ideology of white supremacy, can be found in US President Trump's election campaign and politics today.²⁶ Nationalism was grafted onto authoritarianism during Indira Gandhi's governance of India, as well as the regimes of Gamal Abdel Nasser, Anwar Sadat, and Hosni Mubarak in Egypt, and has also been seen in many other countries. Numerous peoples have suffered under the brutal yoke of *militarism*, such as in Greece, Argentina, Chile, North Korea, Myanmar, and elsewhere. Authoritarianism demonstrates varieties of *populism*²⁷—encompassing corporatism, anti-elitism, anti-institutionalism, socialism, people's sovereignty, white supremacist ideology, xenophobia, and so forth. Populism may *mobilize*, as exemplified by “early” Peronism in Argentina and Hugo Chávez's initial campaigns, and then *demobilize* participatory energies,

²⁴ See Dennis Davis' chapter “Authoritarian Constitutionalism: The South African Experience,” in this book.

²⁵ Juan J. Linz (2000) *Totalitarian and Authoritarian Regimes*, Boulder: Lynne Rienner Publishers; George M. Frederickson (1981) *White Supremacy: A Comparative Study in American and South African History*, Oxford: Oxford University Press.

²⁶ See Ta-Nehisi Coates (2017) “The First White President” *The Atlantic Monthly* October issue; Duncan Kennedy (2017) “A Left of Liberal Interpretation of Trump's ‘Big’ Win, Part One” 1 *Nevada Law Journal Forum* 98.

²⁷ As regards the attractiveness and ambivalence of populism mediating between democracy and constitutionalism: Hans Vorländer (2011) “The Good, the Bad, and the Ugly—über das Verhältnis von Populismus und Demokratie; eine Skizze” 8(2) *SSOAR* 187–94, <http://nbn-resolving.de/urn:nbn:de:0168-ssoar-326211/>; Margaret Canovan (1981) *Populism*, New York: Houghton Mifflin Harcourt; Margaret Canovan (1999) “Trust the People! Populism and the Two Faces of Democracy” 47 *Political Studies* 2–16. From the vast literature on populism: Gino Germani (1978) *Authoritarianism, Fascism, and National Populism*, Piscataway Township NJ: Transaction Publishers; Ernesto Laclau (1977) *Politics and Ideology in Marxist Theory: Capitalism, Fascism, Populism*, London: NLB/Atlantic Highlands Humanities Press; Benjamin Moffitt (2016) *The Global Rise of Populism: Performance, Political Style, and Representation*, Stanford: Stanford University Press; Jan-Werner Müller (2018) *What is Populism?* Philadelphia: University of Pennsylvania Press.

as can be seen in Venezuela under Maduro; in Nicaragua, dominated by the autocratic Ortega cadres; or in Viktor Orbán's Hungary.²⁸

These nightmarish patterns, which can be diagnosed globally, range from Azerbaijan to Poland, from Egypt to Zimbabwe, from North Korea to Singapore, and from Japan to the United States.²⁹ They are found in Turkey under Erdoğan's allegedly "competitive authoritarian regime"³⁰ that discourages and constrains political competition, as well as in Vladimir Putin's mixture of "authoritarianism and managed democracy" in Russia.³¹ Repressive kleptocracies testify to greed rather than deranged idealism, for instance in the "stans" of Central Asia,³² in Robert Mugabe's Zimbabwe (1990–2017), and in Jacob Zuma's presidential regime in South Africa.³³ By routinizing authoritarian practices many rulers promoted neopatrimonialism, maintaining authority through personal patronage embedded in *nomenklatura* or crony networks, rather than through ideology or law.³⁴

To reduce complexity somewhat, I treat authoritarianism in the following as a configuration of ideology and its propaganda, combined with repressive performances that are shaped by leaders' personalities and socioeconomic circumstances, by cultural dispositions and political constellations. Real-existing configurations spawn varied schemes of domination featuring, each in its own peculiar manner, a mix of an executivist style of governing, participation as complicity, power as private property, and a cult of immediacy geared toward the imaginary community of leaders and people.

²⁸ See the analyses provided by Roberto Gargarella, Jorge Gonzalez, and Max Pichl, in this book.

²⁹ Regarding Japan see Hajime Yamamoto's analysis in this book.

³⁰ He recently empowered himself by decree to decide on the deportation and exchange of persons detained awaiting trial: www.tagesspiegel.de/politik/tuerkei-erdogan-baut-seine-macht-per-dekret-weiter-aus/20244188.html.

³¹ Berk Esena & Sebnem Gumuscub (2016) "Rising Competitive Authoritarianism in Turkey" *Third World Quarterly* February 19; Nikolay Petrov & Michael McFaul (2005) "The Essence of Putin's Managed Democracy," Carnegie Endowment for International Peace.

³² Thoroughly analyzed in this book by Scott Newton; see also Scott Newton (2017) *The Constitutional Systems of the Independent Asian States*, London: Bloomsbury.

³³ See *The Atlantic* (2017) "How to Build an Autocracy," www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/. For a critical assessment of apartheid and postapartheid authoritarianism in South Africa see Dennis Davis' chapter in this book.

³⁴ Gero Erdmann & Ulf Engel (2006) "Neopatrimonialism Revisited—Beyond a Catch-All Concept" *GIGA-WP-16/2006*; Michael Bratton & Van de Walle (1994) "Neopatrimonialism and Political Transitions in Africa" 46 *World Politics* 453.

2. AUTHORITARIAN CONSTITUTIONALISM: SHAM OR PHENOMENON IN ITS OWN RIGHT?

Liberal orthodoxy treats authoritarian constitutionalism (AC) not just as a contested concept, but as a mere travesty or deceitful rendition of the rules and principles, values, and institutions of what is innocently referred to as “Western constitutionalism.”³⁵ In contrast, both global proliferation and diversity call for a more nuanced understanding of AC as a phenomenon in its own right meriting critical analysis.³⁶ Setting aside the discursive hegemony of liberal constitutionalism (LC) and its sibling, democratic constitutionalism (DC) may help to advance the paradox hidden at the heart of darkness: In the face of the myriad of forms and shapes which AC may take on, one wonders why any authoritarian regime that is averse to external control, risk, and reciprocity would need—and submit to—a constitution. Why comply with a foundation document if, at the end of the day, when push comes to shove, constitutional constraints are likely to be abolished, disregarded, or manipulated? This brings us back to the query over which scholars and laymen have agonized ever since the Old Testament: why an omnipotent God would defer to a binding covenant, and why, by the same token, a society would accede to a constitution established by its own or the previous generation’s *pouvoir constituant*.

2.1 Constitutionalism in “the Proper Sense”: Inherent Authoritarian Elements

In unabashedly Anglo-Eurocentric terms, the orthodoxy of constitutionalism in “the proper sense” is characterized as a complex of liberal ideas, ideals and ideology, practices, and patterns of governance within the palisade of legality (or constitutionality), where the authority of government is believed to be derived from and limited by fundamental (and therefore higher) law.³⁷ The

³⁵ For a critique of the concept and ideology of “Western constitutionalism” see Günter Frankenberg (2018) *Comparative Constitutional Studies—Between Magic and Deceit*, Cheltenham: Edward Elgar 74–84; Zoran Oklopcic (2016) “The South of Western Constitutionalism: A Map ahead of a Journey” 37 *Third World Quarterly* 2080.

³⁶ Similar: Roberto Niembro Ortega (2016) “Conceptualizing Authoritarian Constitutionalism” 49 *Verfassung und Recht in Übersee* 339, and Duncan Kennedy’s contribution to this book.

³⁷ For example, Albert V. Dicey (1914) *Introduction to the Study of the Law of the Constitution*, 8th ed. London: Macmillan; Charles H. McIlwain (1947) *Constitutionalism: Ancient and Modern*, Ithaca NY: Cornell University Press; Maurice Duverger (1944) *Les constitutions de la France*, Paris: Presses Universitaires de France; Dieter Grimm (2016) *Constitutionalism—Past, Present and Future*, Oxford: Oxford University Press.

orthodoxy gives “obsessive attention to issues of rights,”³⁸ notably civil and political rights, at the expense of redistributive policies or social entitlements, and argues down AC as a deviant or deficient form of LC or a “not fully democratic state” (DC)³⁹—mostly as a transient phenomenon of crisis and always as liberalism’s other, bereft of rights (and separation of powers, as well as checks and balances).

The “proper sense” thesis rests on the assumption that (modern) constitutionalism brings forth an institutional ensemble forging a free political order sustained by a coherent scaffolding of legality/constitutionality—constitutional democracy. Constitutionalism is usually taken to be coextensive with LC’s canonic elements: enforceable rights, free and fair elections, separation of powers, and judicial review. In short: law-rule. Hence, the “proper sense” updates John Locke’s “limited and lawful government,” Thomas Paine’s “power with . . . right,” and Immanuel Kant’s “constitutional state.”⁴⁰ Indeed, John Locke displayed in his *Second Treatise* what James Harrington had previously made known as the “empire of laws”⁴¹ and what was later coined, with more ideological momentum, “the government of laws and not of men” (Article 30 Constitution of Massachusetts 1780). Philosophers and scholars of LCDC routinely overlook the authoritarian side of the constitutional moment: closing constitutional debate and submitting a people—the democratic sovereign—to a covenant;⁴² offering constitutional protection to some interests, claims, and

With reserve: Mark Tushnet (2015) “Authoritarian Constitutionalism” 100 *Cornell Law Review* 391.

³⁸ Roberto Gargarella (2013) *Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution*, Oxford: Oxford University Press vii; see also his incisive analysis in this book.

³⁹ As distinct from its liberal specimen, democratic constitutionalism appears to be less focused on rights and the protection of private property, and privileges political participation. See Alexander Somek (2003) “Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy” in Christian Joerges & Navraj Singh Ghaleigh eds *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, Oxford: Hart Publishing 361; Niembro Ortega “Conceptualizing Authoritarian Constitutionalism.”

⁴⁰ John Locke (1988) *Second Treatise on Government* [1690], 2nd ed Cambridge: Cambridge University Press; Thomas Paine (1994) *The Rights of Man* [1791–2], New York: Penguin; Immanuel Kant (1996) “Doctrine of Right” in *Metaphysics of Morals* [1797], Cambridge: Cambridge University Press.

⁴¹ James Harrington (1992) *The Commonwealth of Oceana* [1656] and *A System of Politics* ed J.G.A. Pocock, Cambridge: Cambridge University Press.

⁴² Jacques Derrida (1992) “Force of Law: The Mystical Foundation of Authority” in Drucilla Cornell et al eds *Deconstruction and the Possibility of Justice*, London: Routledge; Frankenberg *Comparative Constitutional Studies: Between Magic and Deceit*, Ch. VII.

actions and, with the same *coup de main*, excluding others. Those who lost, by majority decision or elite *octroi*, are relegated to the sidelines, where they have to wait for their historical chance to demystify the established authority, obtain a revision, and put into practice their version of justice and new authority, or wait for their populist moment.

Furthermore, in a traditional turn to public law and *realpolitik*, John Locke, one of LC's most influential framers, reintroduced the prerogative: "the power to act according to discretion, for the public good, *without the support of the law and sometimes even against it*."⁴³ Hence, from the very beginning, there has been a crack in the wall of the liberal citadel. And the legislative style of governing has always already been compromised by a premium for the very personal, arbitrary, executive style that undermines the liberalism of constitutions as well as disrupts, among others, Weberian formal-legal authority.⁴⁴ This style masterminds concepts such as the "dual state," the Nazi "Behemoth," the "deep state," and so on.⁴⁵

Less spectacularly but quite efficiently, run of the mill LC and DC regimes break down the prerogative into a myriad of provisions bestowing discretion on administrative agencies (or courts⁴⁶). Although discretionary power must be used "reasonably, impartially and avoiding oppression or unnecessary injury,"⁴⁷ it remains broad and has the tendency to escape judicial scrutiny, installing instead the bureaucratic dominion of expertise and routine justified as a necessary precondition of flexible governance.

There are also other institutions that are structurally related to the prerogative: obviously emergency laws, and less obviously models of militant democ-

⁴³ John Locke (1963) *Two Treatises of Government—Second Treatise* [1699], Cambridge: Cambridge University Press, ch. IV and XIV—emphasis added. For an in-depth analysis of the metamorphoses of prerogative powers see Martin Loughlin (2010) *The Foundations of Public Law*, Oxford: Oxford University Press 385–406.

⁴⁴ Max Weber (2004) *The Vocation Lectures*, Indianapolis: Hackett Books. Regarding the distinction of executive and legislative political techniques see Günter Frankenberg (2014) *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception*, Cheltenham: Edward Elgar Publishing 1–25. See also Hermann Heller (2015) "Authoritarian Liberalism?" 295 *European Law Journal* 295.

⁴⁵ Ernst Fraenkel (2017) *The Dual State* [1941], New York: Oxford University Press; Franz Neumann (1942) *Behemoth: The Structure and Practice of National Socialism*, London: Victor Gollancz; Mike Lofgren (2016) *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government*, London: Penguin.

⁴⁶ Examples are the granting/denying of certiorari and the practice of (constitutional) courts to dismiss an application without giving reasons.

⁴⁷ For example, *Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos.*, 498 US 211 (US 1991).

racy,⁴⁸ grant the executive, and in some countries also constitutional courts and parliaments, ample powers of surveillance and repression, and the right to prohibit or limit political opposition and competition.⁴⁹ In a similar vein, LCDC customs of law-rule are disrupted by executive privileges shielding ruling cadres, especially presidents or executive officers, from interventions by the legislative and judicial branches of government seeking to obtain information.⁵⁰ Authoritarian techniques infiltrate liberal governance and allow secret services to assert privileges concerning “law enforcement records” and bar information from disclosure, or protect executive and military officials from prosecution for violations of human rights.⁵¹

The prerogative and its current manifestations are deeply grafted onto LCDC and sanction authoritarian interventions in social-political processes by excluding individuals, groups, and topics from public debate. They close any such debate. They deny the reversal of decisions once taken, avoiding giving reasons by referring to necessity instead. Or they claim that there is no alternative to be considered.

2.2 “Constitutions without Constitutionalism”

Corresponding to the “one proper sense” argument, constitutions of authoritarian regimes are regarded as sham or façade constitutions,⁵² or as “constitutions

⁴⁸ The formula was originally developed by Karl Loewenstein (1937) “Militant Democracy and Fundamental Rights” 31 *American Political Science Review* 417 and 638, and Karl Mannheim (1943) *Diagnosis of Our Time: Wartime Essays of a Sociologist*, London: Paul, Trench, Trubner & Co, and adopted by some countries, for example Germany, France, and Turkey.

⁴⁹ Frankenberg *Political Technology* Chs 5–6 with further references. Robert Pildes contends that democracies, like market economies, have the tendency to limit competition by establishing structures of domination: Robert H. Pildes (2003) “The Inherent Authoritarianism in Democratic Regimes” in András Sajó ed. *Out of and Into Authoritarian Law*, New York: Kluwer Law International 125.

⁵⁰ In *United States v. Nixon* the Court held that there is a qualified privilege, which can be invoked and thereby creates a presumption of privilege. The party seeking the documents must then make a “sufficient showing” that the “Presidential material” is “essential to the justice of the case” (418 US at 713–14). See Archibald Cox (1974) “Executive Privilege” 122 *University of Pennsylvania Law Review* 1384; Charlie Savage “Explaining Executive Privilege and Sessions’s Refusal to Answer Questions” *New York Times* June 15, 2017. See *Chavez v. Public Estates Authority*, GR No 133250, 9 July 2002 (Philippines).

⁵¹ Anthony W. Pereira (2005) *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile and Argentina*, Pittsburgh: University of Pittsburgh Press 161.

⁵² The argument is elaborated with many references by David S. Law & Mila Versteeg (2013) “Sham Constitutions” 101 *California Law Review* 865. See also Walter F. Murphy (2007) *Constitutional Democracy: Creating and Maintaining*

without constitutionalism.”⁵³ Socialist charters, unless dignified with mild disdain as “aspirational texts,” have always served as one of the testing grounds for this contention—typifying the authoritarian (constitutional) style bereft of a constitutional culture. Jointly with their nonsocialist AC comrades, they run under ratings like “mere parchment barrier for power,” “paper constitution,” “Potemkin village,” “insincere promise,” “*de jure* rather than *de facto*”—“insincere” all of them.

The sham/façade allegation is beset by two major fallacies, though. First, it reduces constitutionalism, according to the liberal orthodoxy, to the guarantee of and compliance with rights and their judicial review; bypasses other not illiberal grammars, such as movement, value, or transformative constitutionalism; and has nothing interesting to say about constitutions (such as socialist constitutions) that serve different purposes. Second, and more importantly, shamming AC as mere windowdressing or deceit posits, by implication, the no-sham nature of liberal-democratic constitutions as pure *law*, not ideology, and as mapping power, not camouflaging it. While only naïve positivists will regard all constitutions as reliable charts of political power, most everyone will agree that LCDC turns a blind eye to the location and influence of private power and very inadequately represents the allocation and distribution of political power.

Instead of celebrating the—illusory—immaculacy of LCDC, one should therefore be wary of othering AC and stay aloof from the Manichean world of good/bad constitutions. With regard to *all* constitutions, it is apposite to situate them on a continuum and ask, first, whether they refer to actual state practices or else, second, which practices elude constitutional schemes and, third, require a constitutional theory that is neatly tailored to their distinct features.⁵⁴ These questions will be asked throughout this book.

a Just Political Order 14; Giovanni Sartori (1962) “Constitutionalism: A Preliminary Discussion” 56 *American Political Science Review* 853. For a different perspective see Tom Ginsburg & Alberto Simpser eds (2014) *Constitutions in Authoritarian Regimes*, Cambridge: Cambridge University Press.

⁵³ See Nimer Sultany’s analysis in this book. For further references see Douglas Greenberg et al eds (1993) *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York: Oxford University Press; Grimm *Constitutionalism*; Walter Murphy (2006) *Constitutional Democracy*, Baltimore: Johns Hopkins University Press; András Sajó (1999) *Limiting Government: An Introduction to Constitutionalism*, Budapest: Central European University Press; Hastings Okoth-Ogendo (1993) “Constitutions without Constitutionalism: An African Political Paradox” in Douglas Greenberg et al eds *Constitutionalism and Democracy: Transitions in the Contemporary World*, New York: Oxford University Press, ch. 4.

⁵⁴ For example, Newton, in *The Constitutional Systems of the Independent Central Asian States* at 86–92, outlines this type of questioning for Soviet constitutionalism. See also his analysis of network constitutionalism in this book.

2.3 Narratives of Constitutionalism

Constitutional modernity has many narratives to offer. They are “ways of imagining the real” or “worldmaking,”⁵⁵ more so than ordinary laws, and command close reading that decodes ideological subtexts and relates institutional arrangements to political constellations and economic agendas. The purpose of this introduction and of the studies here assembled is to elucidate the remixes of traditional, charismatic, and legalistic patterns of political rule, of liberalism and authoritarianism, in various social and economic settings to demonstrate the flexibility of constitutionalism and the incoherence of its diverse rhetorics. The early documents of the democratic revolutions’ era convey the struggles to get rid of *ancien régimes* and privileges, but these revolutions also established new axes of inequality. The French Constitutions of 1791 and 1814 established constitutional monarchies;⁵⁶ the Constitution of the Year I (1793) contained sweeping provisions for democratization and the redistribution of wealth but was discarded by the Constitution of the Year III (1795) that launched the Directory of the liberal republic; the Constitution of the Year VIII (1799) sanctioned Napoléon’s *coup d’état* and installed a military dictatorship. Haiti’s remarkable 1805 charter endorsed an empire and affirmed the results of the first successful revolution against slavery, adapting some elements of LC and discarding others, thus inaugurating an original brand of postcolonial, egalitarian constitutionalism.⁵⁷

During the nineteenth century and later, constitutionalism went through a series of experiments and metamorphoses in all regions of the world. They display a wide range of—liberal, illiberal, and aliberal—scaffolds buttressing the constitutional construction of political authority.⁵⁸ They testify to consti-

⁵⁵ Clifford Geertz (1983) “Local Knowledge: Fact and Law in Comparative Perspective” in *Local Knowledge: Further Essays in Interpretive Anthropology*, New York: Basic Books 167, and Nelson Goodman (1978) *Ways of Worldmaking*, Cambridge MA: Hackett.

⁵⁶ For a more thorough analysis of French constitutional history and Bonapartism see Frankenberg *Comparative Constitutional Studies*, ch. 5; see Eugénie Merieau’s contribution in this book.

⁵⁷ In particular Arts 9–14. See Sibylle Fischer (2004) *Modernity Disavowed: Haiti and the Cultures of Slavery in the Age of Revolution*, Durham, Duke University Press; Frankenberg *Comparative Constitutional Studies*.

⁵⁸ To ascertain the varieties of constitutionalism see, among many others, Spain 1812 (constitutional monarchy), 1834 (absolute monarchy), 1845 (regency), 1873 (democratic republic), 1938 (dictatorship), 1978 (constitutional monarchy); Belgium 1831 (constitutional monarchy); Chile 1833 (endorsing an authoritarian presidential regime, and after 1891 a parliamentary oligarchy); Argentina 1853 (liberal constitution); Colombia 1811 (inspired by the US Constitution), 1821 (democracy, abolition of slavery), 1866 (republic); Japan 1889 (Meiji—imperial constitution), 1947 (parlia-

tutionalism's astounding flexibility as a normative framework for democracy, its plasticity as an ideological cover narrative of political authority, and its scaffolding of legality for state action (performance).

3. DISTINGUISHING MARKS OF AUTHORITARIAN CONSTITUTIONALISM

Authoritarian constitutionalism is introduced here as one of modernity's narratives alloying rule and law. Its varieties can be located on a continuum running the gamut from LCDC to AC. They are uneasily related to a specific mix of authoritarian political technology usually informed by opportunism and a public safety dispositive,⁵⁹ a peculiar dualism of power and (private) property, versions of participation as complicity, and a cult of immediacy geared to unmediated communication between rulers and ruled as allies, to the end of creating a bond of personal loyalty within an imaginary national, ethnic, patriotic, tribal, or other community.

3.1 Authoritarian Political Technology and Constitutional Opportunism

Authoritarian power, whether obtained by institution, acquisition, or usurpation,⁶⁰ obeys the constitutional grammar of an executivist political technology that combines Machiavellian and Hobbesian styles and techniques of governing. They negotiate between autocracy and democracy, oppression and empowerment, law-rule, and the ruler's self-rule. "Technology" includes the entirety of practices, norms and principles, forms of knowledge and skills,

mentary democracy, emperor as symbol); Germany 1871 (imperial constitution), 1919 (republic); South Africa 1910 (all-white male government and racial discrimination), 1961 ("white" republic and Afrikaner nationalism based on the idea of the Boers as the "chosen people"), 1983 (apartheid, racially based representation excluding Africans), 1996 (democratic republic, egalitarian constitutionalism). See Dennis Davis' chapter in this book. See also Frankenberg *Comparative Constitutional Studies*, ch. 5; Roger Ormond (1987) "South Africa's Post-Apartheid Constitution" 9 *Third World Quarterly* 622; Dennis Davis, John Dugard, Dawid Van Wyk, & Bertus de Villiers (1994) *Rights and Constitutionalism*, Cape Town: Juta; Roberto Gargarella (2013) *Latin American Constitutionalism, 1810–1910*, and his contribution in this book.

⁵⁹ *Dispositif* is used here to denote a heterogeneous ensemble of discourses, institutions, regulatory decisions, scientific statements, and normative positions. See Michel Foucault (2004) "Security, Territory, Population" in id *Ethics: Subjectivity and Truth*, New York: The New Press 73.

⁶⁰ Hobbes (1958) *Leviathan* [1651], Indianapolis/New York: Bobbs-Merrill, ch. 17.

calculations, strategies, and tactics that state actors and institutions use in their operations.⁶¹

Even if we concede that there is a difference between Machiavelli and Machiavellianism, *The Prince* (1532) may nevertheless be read as a manual instructing governors how to run a state top down, to acquire and uphold their power while following the Machiavellian maxim: always do what circumstances demand for the procurement, maintenance, and protection of your assets and utilize all strategic options and tactical skills you deem opportune. In constitutional settings this logic has to be adapted and modified somewhat, even if governors prefer constitutions to play a minor role. Taken as a whole, rulers' constitutional compliance depends on their view regarding what is expedient to sustain their status and dominion. Respect for constitutions, or at least their manipulative power, increases where eliminating rivals or coopting opponents seems impossible or not opportune. Then tapping the public weal as a source of legitimacy or invoking constitutional provisions may be advantageous.⁶²

While Machiavellian technology focused originally on the appropriation of territory and ruling over the resident population, today's Machiavellians focus on the primary (repression, violence) and secondary (intimidation, surveillance) regulation of behavior, informal power networks, and whatever it takes to sustain their power. From a Machiavellian perspective constitutions function as an instructive *vade mecum* that affirms the status of (mostly) uncrowned heads and stabilizes state structures of dominance based on opportunism that are marked by *informality*, while operating in the shadow of hierarchy.⁶³

Informality lends itself to opportunism insofar as it subverts the distinction between regular order and emergency law by the serial extension of the state of exception (Egypt since 1958, with brief interruptions to date; France, six extensions since 2015; Turkey, seven since 2016), the arbitrary nature of justifications (neutralizing the old elites, war, anti-terror measures, and so on), and the wide spectrum of techniques of governance, ranging from constitutional democracy to constitutional dictatorship.

⁶¹ See Frankenberg *Political Technology* ch. 1 also for the following.

⁶² Also analyzed by Tom Ginsburg & Alberto Simpser (2013) "Introduction: Constitutions in Authoritarian Regimes" in id eds *Constitutions in Authoritarian Regimes*, Cambridge: Cambridge University Press 1; Roberto Niembro Ortega (2016) "Conceptualizing Authoritarian Constitutionalism" 49 *Verfassung in Recht und Übersee* 339; and Nathan Brown (2002) *Constitutions in a Non-Constitutional World: Arab Basic Law and the Prospects for Accountable Government*, Albany NY: SUNY Press.

⁶³ This metaphor I borrow from Fritz Scharpf (1997) *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Boulder: Westview Press.

The procedural and institutional dimension of informality allows authoritarian regimes to set up and rely on informal, clandestine networks (“deep states”) and channels of patriarchal masculinity,⁶⁴ which are perfectly represented by the military and much concerned about formal appearance—such as the Greek Regime of Colonels (1967–74) or the Argentine Junta (1974–83). One would also have to count the Chicago Boys, Pinochet’s willing helpers, setting up laboratories of brutal market policies in Chile and other Latin American countries. It is almost needless to say that procedural and institutional informality is the earmark of the secret services, too. They are always already operating *in Arcanum* and in procuring information from fellow services and informers they traverse a gray zone, barely covered by constitutions.

Insofar as the Machiavellian style meets with constitutional constraints, shifts from law/constitution to an “occasional virtue” or even dictates of raw power require a pseudodemocratic or pseudoconstitutional masquerade borrowed from the semantics of necessity or the arsenal of emergency law. In 2018, when Chinese Head of State Xi Jinping moved to strip himself of the term limit that had previously been in place (Article 79 Constitution of The People’s Republic of China, 1982), he observed the established constitutional amendment procedure: a decision of the National People’s Congress (Article 62). The regimes of Russia’s Vladimir Putin and of Alyaksandr Lukashenka, President of Belarus, are both blemished by a scheme of fairly crude power management bereft of what Machiavelli might have appreciated as “occasional virtues.” In Russia, Belarus, the Central Asian “stans” and other authoritarian states, updated Machiavellian technologies convert the reason of state from the interest of the ruler “in himself” to the robust politicoeconomic benefits of leaders, elites, or other hegemonic utility maximizers, glossed over by constitutionalism, such as in the Putin–Medvedev tandemocracy.⁶⁵

By the same token, a strategic shift from LCDC to AC calls for camouflage or justification. The usual transfer apologies range from socialism (Chávez in Venezuela, Ortega in Nicaragua), distributive policies and egalitarianism, and protection from external or internal enemies (military juntas, Erdoğan, Venezuela, and many other regimes) to natural disasters offering at least tem-

⁶⁴ On management, organization, and masculinity see David Collinson & Jeff Hearn (1996) *Men as Managers, Managers as Men: Critical Perspectives on Men, Masculinities and Managements*, London: Sage. See also Juan Gabriel Valdés (1995) *Pinochet’s Economics: The Chicago School in Chile*, Cambridge: Cambridge University Press. See the illuminating analysis of Hugo Chavez’ iconography by Jorge Gonzalez, in this book.

⁶⁵ Nezavisimaya gazeta, September 2, 2008.

porary relief from constitutional constraints.⁶⁶ No masquerade is warranted if the acclaiming public relishes rather than objects to a chief executive officer's repeated abuses and breaches of constitutional law, and does not care whether they serve the maintenance of power or the public weal. Such acclaim allowed Italy's Silvio Berlusconi to enjoy and extend his sultanate (entertaining a sufficiently strong majority).⁶⁷ It remains to be seen whether the Turkish people will follow Erdoğan with equal stoicism and enthusiasm on the route to his caliphate once there is a more dramatic downturn in the economy.

In contrast to Machiavellian constitutional opportunism, a more Hobbesian style of AC would (claim to) oblige the *Leviathan* to execute a security agenda: under the umbrella of public safety, it combines its own stability and "survival" with ensuring peaceful social coexistence. Concentrated in the hands of the executive, Hobbesianism tilts toward an imperative style. While Machiavellianism tends to bank on wily opportunism, Hobbesian techniques of authoritarian governance lean on a double strategy of social control, namely to ensure the protection of state/power *and* public safety, which echoes the *salus populi* in *Leviathan* and the common good in *The Elements of Law*.⁶⁸

Updated versions of Hobbesian AC routinely operate with justifications that claim to defend a public good or the people's interest. They are charted top down in the vague terms of secondary virtues, such as order and loyalty, or the *passe-partout* values of progress,⁶⁹ welfare, peace, and public safety.⁷⁰

⁶⁶ After the Fukushima catastrophe (2011), Germany witnessed dramatically increasing opposition to nuclear energy. German Chancellor Angela Merkel, in an authoritarian moment, singlehandedly suspended the German Nuclear Power Act which she had initiated shortly before. Her nuclear U-turn qualifies as a singular Machiavellian (and authoritarian) intervention since it was dictated by the logic of preserving her party's majority position and her power. She had to dress the turn in the semantics of necessity and claimed, in the spirit of Margret Thatcher, "There is no alternative": www.spiegel.de/international/germany/out-of-control-merkel-gambles-credibility-with-nuclear-u-turn-a-752163.html/. That the U-turn was widely considered unconstitutional did not matter much.

⁶⁷ And recently encouraged the revenant to take another (unsuccessful) stab at power again. For a critique of Berlusconi's sultanate see Giovanni Sartori (2009) *Il Sultanato*, Rome: Laterza.

⁶⁸ Hobbes *Leviathan*, ch. 30, and Hobbes (2008) *The Elements of Law, Natural and Political* [1640], Oxford: Oxford University Press.

⁶⁹ It is interesting to note that Brazil's official motto, "*Ordem e Progresso*," captures the ambivalence of both maxims of political positivism (inspired by Auguste Comte), which combines industrialization and technical progress with a strong executive power and influence of the military.

⁷⁰ To list a few randomly picked but typical examples: Franco's regime was regarded by supporters (such as the journal *ABC*) as a justified means "to install a just order of things." Turkish President Erdoğan announced that the state of emergency, introduced as a temporary measure after the failed dilettante coup in 2016, would

Quite often they also rely on narratives with a transcendental spin, preferably tradition or necessity. A common good that needs defending always comes in handy (also for neoliberal economic justifications),⁷¹ as it opens the depot of measures permitting the ruler to do “whatever it takes”⁷² to intervene in social processes and political competition and to impose values, always defined from above and always claimed to benefit the community. For instance, the “rescue torture” and “rescue downing” of a renegade aircraft has sanctioned organized cruelty, that is, the killing of (innocent) passengers in the name of public security.⁷³ Likewise, Hungarian Prime Minister Orbán has claimed to support “European Christian values” that would justify the repressive, dehumanizing treatment of refugees⁷⁴—a strategy that qualifies as a Machiavellian move to secure his power by mobilizing xenophobic resentment.

In a Hobbesian milieu, constitutions are likely to function as registers of managerial regulations for operating government and also for managing disappointment. As an upshot, they tend to comprise a large arsenal of powerserving instruments, in particular rule by decree within and without the framework of emergency law, and manipulated national consultations and referenda.⁷⁵ These tools are quite conspicuously displayed. By contrast, updates of the prerogative, in LCDC constellations, are adapted to more specific situations, and their availability and application are veiled by techniques of normalization.⁷⁶

continue until the country achieved “welfare and peace”: www.nytimes.com/2017/05/21/world/europe/turkey-erdogan-state-of-emergency.html. Venezuela’s President Maduro justified his rule by decree to “defend the peace and security” of the country: <https://worldview.stratfor.com/article/can-venezuelas-maduro-afford-hold-elections>. Concerning Hungarian PM Viktor Orbán’s justification of his migration policy, see www.theguardian.com/world/2017/may/26/hungary-lgbt-world-congress-families-viktor-orban.

⁷¹ See the contributions of Helena Alviar and Mike Wilkinson in this book.

⁷² “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.” ECB President Mario Draghi’s Speech at the Global Investment Conference, London, July 26, 2012, www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

⁷³ Frankenberg *Political Technology* chs 4 and 5.

⁷⁴ Analyzed by Maximilian Pichl in Hungary, and providing further references, in this book.

⁷⁵ For references and a discussion of the various models of emergency law see Frankenberg *Comparative Constitutional Studies* ch. 9.

⁷⁶ For example, the ill-famed Article 48 (2) of the Constitution of the Weimar Republic (Germany) allowed the president, under certain circumstances, to take emergency measures without the prior consent of the Reichstag. This power was understood to include the promulgation of “emergency decrees” (*Notverordnungen*). It transformed the republic into an authoritarian presidential regime and was ultimately instrumental in handing it over to fascism. As regards the normalization of the exception see Frankenberg *Political Technology* ch. 1.

3.2 Power as Private Property

While AC safeguards the primacy of politics, its techniques establish a peculiar “intimate dualism” of power and property, gleaned from the monarchic court and household and then adapted to nonmonarchic authoritarian governance. Normatively and strategically, authoritarianism tends to operate on the basis of a property matrix. Helena Alviar García and Mike Wilkinson demonstrate convincingly in this book that economic neoliberalism entertains an affinity with political authoritarianism.⁷⁷

First, in state practice it is played out by heads of government who take their position of power (premiership, office) to be *quasiprivate property*, which implies a kind of Hobbesian “right to everything,” that is, to dispose of the commonwealth at will, thus fostering kleptocracy or at least luxuriant governance.

As far as authoritarian power emulates the logic of private property, it also adopts property’s structural bias toward the concentration of landowning and capital holdings, that is, the concentration of power in one hand, the unequal distribution of resources, and that power’s escape from public accountability, all of which are translated into the political domain. Comparable to capital’s predisposition toward “privacy,” AC disengages power from public scrutiny and responsibility. Structural and ideological affinity to property also facilitates privatization, that is, delegation of political power to corporations as representatives and executives of governments. Colonies served as parade grounds for the corporate exercise of governmental authority in “company-states” and “banana republics,” as is illustrated by many commercial companies, such as the British East India Company and the United Fruit Company in Central America and the International African Association in the Congo.⁷⁸

Second, the property concept also contains the right to determine *succession*. For the transfer of power, AC adopts from monarchies the idea of dynasty and the practice of (self-) authorization. Ergo, pursuant to a pastiche of the dynastic principle, rulers pass on their status and office to candidates of their choice—family and club members, loyal friends, personal physicians, and so on. In this way any orderly rotation of elites by popular election is suspended, and clan or party authoritarianism opens the gate to decades-long incumbency.⁷⁹

⁷⁷ See their contributions in this book.

⁷⁸ Philipp J. Stern (2011) *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, Oxford: Oxford University Press; Peter Chapman (2007) *Bananas: How the United Fruit Company Shaped the World*, Edinburgh: Canongate Books.

⁷⁹ See the incisive analyses of Central Asian superpresidentialism by Newton *The Constitutional Systems of the Independent Central Asian States* 125–52, and Newton’s contribution to this book.

The Kim dynasty in North Korea, in good Stalinist tradition, and the Assad clan incarnate hardcore versions (including the *dégagé* killing of potential rivals and critics, as also reported in Saudi Arabia). More moderate samples can be studied in Venezuela, where in 2013 Hugo Chávez anointed his loyal follower Nicolás Maduro (meanwhile flanked by his wife as vice-president and potential successor), and in Nicaragua, where the erstwhile revolutionary and now autocrat President Ortega also anointed his wife vice-president—massive anti-dynasty student protests have been seen in both countries. In Turkmenistan the dictator's dentist, Gurbanguly Berdymukhamedov, took the helm after the death of his patient Saparmurat Niyazov in 2006.⁸⁰

The global history of authoritarianism testifies to a wide spectrum of hybrids of “royal houses” and democracy. Several Gandhi generations illustrate dynastic developments in India; likewise, the Aquino family has dominated oligarchical Philippine politics for decades. In these countries and in the United States (see the Adams, Kennedy, and Bush families), the property-like management of political succession is mediated by elections. The heads of clans in Central Asian states passed on their position of power more conspicuously—and hardly impeded by orchestrated elections. In China, the Communist Party functions as the receptacle of power. It has always held the reins of succession, and has in this way ascertained that the space of power is never empty, even symbolically.⁸¹

Third, and furthermore, the informal and arcane style of governance mentioned above is internally related to power as property. Convinced that they *own* the authority they exercise, rulers are likely to assume they *are* the law and therefore need not answer for their politics pursuant to principles and procedures of accountability. Charisma and informality elucidate AC's *mélange* of Weberian forms of political authority: By undermining formal-legal rationality, it favors the leader's “magnetism,” buffered, if need be, by tradition and always supported by repression. Informality also characterizes more recent authoritarian garbs that replace legal rationality with principles of neoliberal economics.⁸²

The disengagement of accountable power and its informality prepare the ground for the transformation of politics into the mere performance of publicity. Politics becomes the mediatized enactment of politics and is reduced to

⁸⁰ It seems that members of the medical profession, if situated close enough to an authoritarian ruler, stand a good chance of succeeding him, as was the case with, for instance, Sali Berisha in Albania, François Duvalier in Haiti, and Radovan Karadžić in Bosnia and Herzegovina.

⁸¹ Claude Lefort (1986) *Essais sur le politique*, Paris: Seuil.

⁸² See Helena Alviar and Mike Wilkinson, in this book.

mere form.⁸³ This performance is reciprocated, or rather echoed, on the part of the citizens by the illusion of participation.

3.3 Participation as Complicity

One might think that, rather than participation, the constriction, manipulation, or absence of participation (as far as constitutional rhetoric gives them away) distinguish AC from DC in particular.⁸⁴ While there is a lot of evidence for this assumption, the picture is in fact more perplexing.⁸⁵ Gino Germani and, in his vein, Norman Spaulding argue that participation (not necessarily elective action, I assume), albeit accompanied and engineered by ideology and propaganda, are crucial—with the usual reservations—for the success of political authoritarianism.⁸⁶ Others see popular passivity and civil desertion as distinctive strategic features of AC,⁸⁷ and stress its fear-inducing quality.⁸⁸ Whereas the outcome of this controversy clearly depends on the historical-social context and the political constellation, I argue that participation in authoritarian regimes: (a) comprises a variety of elective and nonelective forms; (b) depends on the political-institutional arrangement (democracy, military junta, socialist regime, and so on); (c) is related to the concept of complicity; (d) serves the purpose of creating an imaginary community between rulers and ruled; and (e) is often determined by the cult of immediacy. Therefore it seems plausible

⁸³ For a thorough discussion see Jürgen Habermas (1989) *The Structural Change of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Cambridge: Polity; Gordon “The Authoritarian Personality Revisited.”

⁸⁴ Thomas H. Henriksen (2007) *American Power after the Berlin Wall*, Basingstoke: Palgrave Macmillan: “[E]xperts emphasize that elections alone, without the full democratic panoply of an independent judiciary, free press, and viable political parties, constitute, in reality, illiberal democracies, which still menace their neighbors and destabilize their regions.” Similarly David P. Forsythe (2012) *Human Rights in International Relations*, Cambridge: Cambridge University Press 231: “Illiberal democracies may have reasonably free and fair national elections based on broad suffrage, but they do not counteract the tyranny of the majority with effective protections for ethnic and religious minorities or various types of dissenters.”

⁸⁵ For a different approach see Norman Spaulding’s contribution in this book.

⁸⁶ Gino Germani (1978) *Authoritarianism, Fascism, and Populism*, New Brunswick, NJ: Transaction Books, and Norman Spaulding’s contribution in this book.

⁸⁷ The term “civil desertion” is borrowed from Marcel Gauchet (1990) “Pacification démocratique, desertion civique” 60 *Le débat* 87–98.

⁸⁸ It may very well be, however, that people are merely disenchanted by elite politics within LCDC, and therefore take the populist bait and disregard its authoritarian subtext and implications. See Max Pichl’s analysis of developments in Hungary, in this book. See also Michael Lind (2016) “Donald Trump, the Perfect Populist,” www.politico.com/magazine/story/2016/03/donald-trump-the-perfect-populist-213697.

to assume that AC comprises and authoritarian regimes need one or the other form of (mostly orchestrated) participation,⁸⁹ even if it is not legally mandated, because (or as long as) it helps curb discontent and generate loyalty and allows participants to experience the fantasy of their own political regression to a state of “desublimated ecstasy” in an imaginary community.⁹⁰

Representative democracy operates in the mode of remote control. According to the idea of representation, the people are absent but still assumed to govern themselves through their delegates as intermediaries. In contrast, authoritarian regimes establish a system of more direct controls. If following or having to follow a semi-representative path, they let people either go to the voting booth or present their complaints more openly—in *cahiers de doléances*,⁹¹ or as supplications, in imperial or other AC settings. As a pastiche of representative instruments, other authoritarian governments stage managed national consultations, referenda, or petitions.⁹² Whether customary or solicited by the regime, they function as alert mechanisms and outlets to defuse conflict and pacify society. The paradoxical yearning to hear the people’s voice regularly does not keep the powers that be from always controlling the outcome, thus shunning the risk of open dissent. Without top-down control, referenda may misfire and the performance may turn into action: in 1789 the Convocation of the Estates General triggered the French Revolution; two centuries later, Pinochet’s 1988 plebiscite, despite an onerous process and massive deception, unexpectedly ended 16 years of dictatorship in Chile and forced the despot to retreat to enclaves of authoritarianism.⁹³

Populist regimes are liable to generate and then destroy the illusion of full participation and reverse the state of “desublimated ecstasy.” Their movement agenda encourages popular engagement and promises more elective or other action than it can ultimately deliver. A populist strategy turns authoritarian once popular performance progresses to popular action. At that point, a regime

⁸⁹ See Geddes “What Do We Know about Democratization after Twenty Years?” 115.

⁹⁰ Adorno “Freudian Theory and the Pattern of Fascist Propaganda” 135; Gordon “The Authoritarian Personality Revisited.”

⁹¹ The practice in 1789, dating back to the fourteenth century: see Philippe Gateau (2001) *Les Cahiers de doléances: une relecture culturelle*, Rennes: Presses Universitaires.

⁹² As for instance in imperial China or the former German Democratic Republic. With remarkable detail: Article 41 Constitution of the People’s Republic of China (1982). See the Decree concerning Petition (1961) of the German Democratic Republic. One has to distinguish “open” consultations (such as the 2018 consulta in Colombia) from consultations with suggestive questions predetermining the outcome (Hungary).

⁹³ Instituto Nacional Democrata para Asuntos Internacionales (1989) *La Transición Chilena Hacia la Democrática*, Washington DC.

threatened by the unleashing of popular/populist energy will tilt the “agency switch,” stop mobilizing the people, and resort to rigid controls and surveillance so as to prevent democracy, or only oppositional spirit, from getting out of hand.

Avoiding risk, curbing dissent, and top-down management of conflict and disappointment also make the—already always precarious—independence of the judiciary one of the prime targets of authoritarianism. While this does not mean that courts are pawns in the hands of autocratic governors everywhere,⁹⁴ the latter demonstrate globally and over and over again a volition for shirking adverse court rulings. Manipulating, discouraging, or excluding judicial review of governmental decisions is quite common in AC settings. Between 1971 and 1980 Indira Gandhi attempted to harness the judiciary, in particular the Supreme Court, by undoing (or making) judicial appointments. When this strategy failed she finally resorted to emergency powers.⁹⁵ In 2016 Poland’s nationalist party chief, Jarosław Kaczyński, had the review rules changed; three judges of the Constitutional Tribunal, whose term had not yet expired, were replaced by handpicked eunuchs of the nationalist project. In like manner, Maximilian Pichl shows in this book and elsewhere how the Hungarian Constitutional Court was disempowered by Orbán’s *Fidesz* party.⁹⁶ In 2017 Venezuela’s President Maduro staffed the Constituent Assembly charged by him to rewrite the constitution with loyal partisans. This is not to forget F.D. Roosevelt’s court packing threat and, albeit less conspicuous, the US President’s “prerogative” to nominate Supreme Court justices—both have an authoritarian odor.

Participation in authoritarian regimes is generally orchestrated to create *complicity*. As a political strategy, rather than in the strict criminal law sense, complicity creates a marginal form of sociability which is based on the public presence of the people (in mass rallies or staged elections), requires that they

⁹⁴ See the contributions to Tom Ginsburg & Tamir Moustafa eds (2008) *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge: Cambridge University Press; see especially the insightful discussion of the relevant literature by Tamir Moustafa (2014) “Law and Courts in Authoritarian Regimes” 10 *The Annual Review of Law and Social Science* 281; see also Newton *The Constitutional Systems of the Independent Central Asian States*.

⁹⁵ On June 12, 1975, Justice Jagmohanlal Sinha of the Allahabad High Court declared Indira Gandhi’s election “null and void” on account of electoral malpractices, and debarred her from holding elected office for six years. Gandhi’s (ruling) party was given 20 days to find a replacement. She finally resorted to emergency rule because of “internal disturbance.”

⁹⁶ Renáta Uitz (2015) “Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary” 13 *International Journal of Constitutional Law* 279; Pichl on Hungary, in this book.

be at least partially informed about an agenda the regime may have, so that a quasipersonal bond between the leader and the people will be created. Thus these new accomplices share responsibility for the government's undertaking.

The rulers develop the plan of action; the rules provide legitimacy—by acclamation or favorable responses in a “national consultation” or participating in staged elections. Thus, complicity requires and controls popular engagement in an otherwise rigidly sequestered public space. Individuals are transformed first into subjects, and then into members who had better learn that their agency depends on the ruler's script of power and pervasive compliance demands.

3.4 The Cult of Immediacy

On the part of the leaders, governing amounts to more than deciding: it is also performing. Theater and spectacle are important aspects of political authoritarianism. In any regime, performance follows a script and occurs in the dramatic and both entertaining and engaging dimension of politics. Whereas democratic representation and in particular law-rule shape sober forms of governance due to the symbolic deficit of their demure style, authoritarianism tends to replace, or mantle, the temperate technique of distanced, mediated governance by/with a cult of immediacy.⁹⁷ Pervasive distrust, the quest for complicity, the informality of governing, and the desire for acclamation join forces and disembody into a theatrical *dispositif*.

Having sanded down all intermediate institutions and ousted or intimidated oppositional organizations, authoritarian rulers are tempted to turn society into an amphitheater. On its stage the main actor poses as “one of us” and appeals directly to the audience, treating the people as partisans and accomplices of his or—in fewer cases—her governance project. They are received in mass audiences (rallies, parades). Thus the ever present leader and the acclaiming public are included in an imaginary community.

Authoritarian regimes, in particular fascism and populism, testify to a preference for a theatrical style of *presentism*. Whether expressly sanctioned by constitutional law or not, autocrats seek direct access to popular emotions and reactions.⁹⁸ Parades, mass rallies, deployments of troops and partisans, national consultations, and addresses to the people, always carefully master-

⁹⁷ See Jeffrey Librett (2017) “Sovereignty and the Cult of Immediacy” IX *Konturen* 1.

⁹⁸ As is also demonstrated in Trump's style of governing today and in populist movements all over Europe.

minded from above, function as shows of the regime's omnipresence, force, and power.

Presentism and immediacy also determine the one-way communication from rulers to subjects. Their ears are chained to the Leviathan's lips, as Hobbes put it. And the people are compensated for their lack of freedom and agency with a more or less entertaining performance by the lead actor and the illusion of a personal, almost intimate relationship between rulers and ruled—all belonging to the same household dominated by the father figure—that resonates with the private property concept of power. Incidentally, this communion refeudalizes the concept of loyalty to create a phony personal bond between leaders and followers. To that effect Berlusconi communicated via TV, while US President Trump showers his constituency with Twitter messages. Turkey's President Erdoğan prefers appearances before the rallied masses. All of them favor bypassing the regular institutions and procedures of LCDC governance and seek to create an instantaneous circuit of fake, privately national communication. Hungarian Prime Minister Orbán addresses Hungarians by repeatedly staging "national consultations" (with suggestive, manipulative questions)⁹⁹ to propagate his policy choices and have them "confirmed." Most autocrats rely on mass rallies and deployments of presence.

By the same token, immediacy authenticates ad hoc the ruler's mythical, patriarchal, absolute, and sovereign authority—neither mediated by parliamentary deliberation, party instructions, and the media (Erdoğan's and Putin's regimes show quite dramatically that all mediators are natural enemies of the regime) nor constrained by court rulings. Instead, authoritarianism banks on cushioning repression with pseudoprivate gestures and images of the patriarch: In a gesture of authoritarian pornography, Vladimir Putin presents his bare torso on horseback. Mao demonstrated his virility by swimming through the Yellow River. Hitler testified to the authoritarian preference for dogs by showing himself with his German shepherd. Chávez and Maduro regularly sported jogging outfits in the colors of the Venezuelan flag.¹⁰⁰ A bit more mysteriously, Aung San Suu Kyi decorates her hair—and thus Myanmar's military regime—with a never wilting flower. Personal icons and intimate gestures infamously suggest that the political is private, and that leaders and subjects share the privacy of one and the same public space in an imaginary, yet fake community.

⁹⁹ At the time of writing the Orbán government is trying to mobilize public opinion against a (presumptive) "Soros Plan" to transfer millions of migrants to Europe: see *Frankfurter Allgemeine* September 15, 2017. The Hungarian Constitution only provides for formal referendums (Article 8).

¹⁰⁰ See Jorge Gonzalez' fascinating analysis of Venezuelan—or rather Hugo Chavez'—iconography, in this book.

While incidentally visualizing the sovereign's everyday presence and private persona, they spawn the fantasy of a personal bond that is paradoxically entrenched by the invisible border between the authoritative self and the subjected, deauthorized others. This bond constitutes the basic module of the (illusory) community which AC is laid out to establish: Orbán's Hungarian Constitution invokes a national Christian community, whereas the 1979 Constitution of Iran calls forth "the earnest aspiration of the Islamic Ummah" (Article 11). Poland's Law and Justice Party veers toward a nationalist-patriotic society. Trump's election campaign and presidency, exploiting populism as a technique of governance, were and are geared toward white supremacy—an imaginary tribal community. The rightwing Alternative für Deutschland, like other populist movements, addresses the "authentic people" purged of foreign elements—a xenophobic community. China's 1982 Constitution embraces the "Chinese people of all ethnic groups and nationalities" and Cuba's 1976 charter extols the community of workers, peasants, students, and intellectuals. The Constitution of Kazakhstan (1995/2011) follows many other documents in transforming the people into a community united by "historic fate." And there are more varieties of imaginary—national, patriotic, racist, and invariably xenophobic—community.

Whatever strategy, sanctioned or tolerated by the constitution, that an authoritarian regime may pursue to allow for or even encourage participatory action, whatever style of communication a leader may embrace, the hidden agenda is invariably determined by a scheme to bring about an imaginary community. To that end, the members of the audience are turned into accomplices of the regime. The illusion of voice, engagement, and direct communication corresponds to the fantasy that subjects partake in the leaders' ethnocentric, xenophobic, anti-Semitic, or other communitarian scheme. Within the imaginary community of rulers and ruled, the leader's autocratic image validates the followers' "twofold wish to submit to authority and to be authority [themselves]."¹⁰¹

4. AUDIENCES: WHY CONSTITUTE AUTHORITARIANISM?

Why would the Bolsheviks, after their successful October Revolution, have historical-dialectical materialism escorted by a constitution into the first Soviet Republic of Russia (1918)? What made Hitler twice renew the Enabling Act that suspended the Weimar Constitution? Which motives drove Syrian despot Bashar al-Assad to stage a constitutional referendum in the midst of civil war

¹⁰¹ Adorno "Freudian Theory and the Pattern of Fascist Propaganda" 127.

and bloodshed in 2012? Why did Myanmar's military summon a National Convention to draft a new constitution and finally reconstitute their regime in 2008 against the backdrop of nationwide protest?

One can never know for sure. However, one wonders why any authoritarian ruler, party, or clique bothers with drafting a constitution or amending and submitting it to referendum. That they mindlessly follow a global routine cannot be ruled out but is likely to overlook their usually strategic mindset. Windowdressing appears to be a rather unspecific answer, unless one at least designates which window and which viewers autocrats may have in mind.

Decoding the various scripts of authoritarianism and putting forward the presumptive motives for authoritarian rulers to serious study is rendered difficult by history, political constellations, socioeconomic imperatives, human nature, and the counterpull between AC as text and AC as practice. All these circumstances bestow diversity, indeterminacy, and ambivalence on AC. On the whole, AC reverses the government of laws into the more than equally ideological regime of one person or group that may be hostile to law or may operate under the patina of legality, or even with the frame of a moderately effective legal system. Disregarding this ambiguity, constitutions, even if not domination-blind, hide their political subtext and any incentives rulers may harbor behind their standardized design and vocabulary, or silence. On the other hand, AC presupposes a connection, however tenuous, between regimes and constitutions.¹⁰² So it is only appropriate to read AC charters as texts with purposes addressed to an audience. Consequently, it seems worthwhile to (try to) make them talk, albeit monosyllabically, by looking at their design and their "nature" as performative acts, even if that means imputing a strategic, purposive rationality to authoritarian rulers.

4.1 Authoritarian Constitutions as Archetypes

Four distinct archetypes of design (and innumerable hybrids and crossovers) have left their mark on constitutional history.¹⁰³ Each of them characterizes a specific style and register informed by grammar and vocabulary, while depending on the political constellation and other context specifics. An archetype is distinguished by a peculiar normative speech act: political manifesto,

¹⁰² An authoritarian regime (president) may very well coexist with a fairly democratic parliamentary culture of constitutionalism, as is illustrated by the Fifth Republic of France. Authoritarianism may also develop within a fairly democratic institutional setting, as is demonstrated by Hajime Yamamoto's audit of the Abe government in Japan, in this book.

¹⁰³ For a more elaborate discussion of archetypes see Frankenberg *Comparative Constitutional Studies* ch 2.

contract, program, and code (law), resulting for the most part from a qualified legislative decision-making process. From afar, there seems to be no difference in semantics, structure, and rhetoric between authoritarian and nonauthoritarian documents. Conformism prevails on the level of semantics. Therefore the formal appearance has to be deconstructed, and the text decoded.¹⁰⁴

Constitutions naming enemies or straightforwardly excluding,¹⁰⁵ or significantly restricting,¹⁰⁶ constitutional protection for groups, ideas, and organizations deconstruct the formal appearance of the state and give away an authoritarian agenda, which is underscored by the authoritarian partiality to one-way communication, and turns into practice a lack of tolerance for surprise and risk, dissent and opposition.

Largely, political manifestoes are *unilateral, top-down declarations*, commonly issued by a (self-proclaimed) elite or ruler, like the Assembly of Experts (Iran 1979), the Communist Party of China (1982), or the “State Peace and Development Council” convening the National Convention in Myanmar (1993). The authors turn the performative act of worldmaking into a statement of fact by explicitly or implicitly claiming that the document merely confirms what the addressees must already know and hold to be beyond doubt, often as a result of collective struggles: “After experiencing the anti-despotic constitutional movement and the anti-colonialist movement centered on the nationalization of the oil industry, the Muslim people of Iran *learned*” (Iran 1979); “this Constitution *affirms* the achievements of the struggles of the Chinese people of all nationalities” (China 1982).¹⁰⁷

¹⁰⁴ For example, nationwide protest against the regime was played down as “the general situation [that] occurred in 1988” in the preamble of the 2008 Constitution of Myanmar.

¹⁰⁵ For example, “[N]o protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility its State and territory, historical and moral values of Turkishness” (Turkey 1982/1995); “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” (Russia 1918, Article II no 23). The Russian Constitution also denied political power to higher classes of Russian society or to those who supported the White armies in the Civil War. Also “Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing, especially the Saddamist Ba’ath in Iraq and its symbols . . . shall be prohibited” (Iraq 2005, Article 7 (1)).

¹⁰⁶ The 2008 Constitution of Bhutan lays down a string of “reasonable restrictions” for rights (Article 7) and adds a list of duties citizens have (Article 8); the concept of naturalization is quite restrictive (Article 6 (3)).

¹⁰⁷ Emphasis added. Also: “Invoking the memory of our ancestors and calling upon the wisdom of the *lessons* of our *shared history*” (Angola 2010). See Algeria 1989; Cameroon 1972 Article 1 para. 2; Congo 2005 (Article 42 ff.).

Furthermore, the manifesto also appeals to AC insofar as it takes recourse to the normative register of *necessity*: “[A]ll these considerations insistently *demand* the union of the Soviet Republics into one federated state” (Soviet Constitution 1924). The 2003 Rwanda Constitution accentuates “the *necessity* to strengthen and promote national unity and reconciliation which were seriously shaken by the genocide against the Tutsi and its consequences.” The Constitution of the Islamic Republic of Iran (1979) invokes “the awakened conscience of the nation under the leadership of Imam Khomeini that came to perceive the *necessity* of pursuing a genuinely Islamic and ideological line in its struggles.”

4.2 Authoritarian Constitutions as Texts with Purposes and Audiences

If a constitution is not expected to yield any (political) profit, AC is reduced to simple authoritarianism. Otherwise, the role of constitutions in authoritarian regimes can be studied in two dimensions that are internally related: (a) internal or external audience, and (b) instrumental versus symbolic purposes—dimensions that form the basic quadrants of a heuristic grid (see Figure 1.1): the accent shifts horizontally between instrumentalism and symbolism, vertically between internal and external audiences.

Regarding *audiences*, I distinguish the internal/domestic horizon (people, general public, followers, ruling elites, members of a coalition or junta) from the external, regional, global domain (other states, neighboring countries, ideological allies, economic actors, or international legal experts). As to the latter, governments, experts, and economic actors are likely to be perceived as primary interested parties. The ordinary population of other countries is likely to be ill informed about (and hardly interested in) constitutional matters in foreign countries, while corporations and comparable global actors can be assumed to be informed at least as far as their interests are concerned (trade, investment, protection of private property).¹⁰⁸

4.2.1 AC as governance script

The horizontal axis of the grid locates the focus of the constitutional purpose at the instrumental or symbolic pole of the horizontal axis, which is not meant

¹⁰⁸ Concerning the modality of social integration, order/control aim to ascertain a minimal degree of coordination—if need be, with coercion—whereas legitimacy is normatively more demanding when geared toward seeking cooperation to reach certain common ends. A more elaborate discussion is provided in Frankenberg *Comparative Constitutional Studies* ch 6. For a different tableau of categories see Ginsburg & Simpser “Introduction: Constitutions in Authoritarian Regimes.”

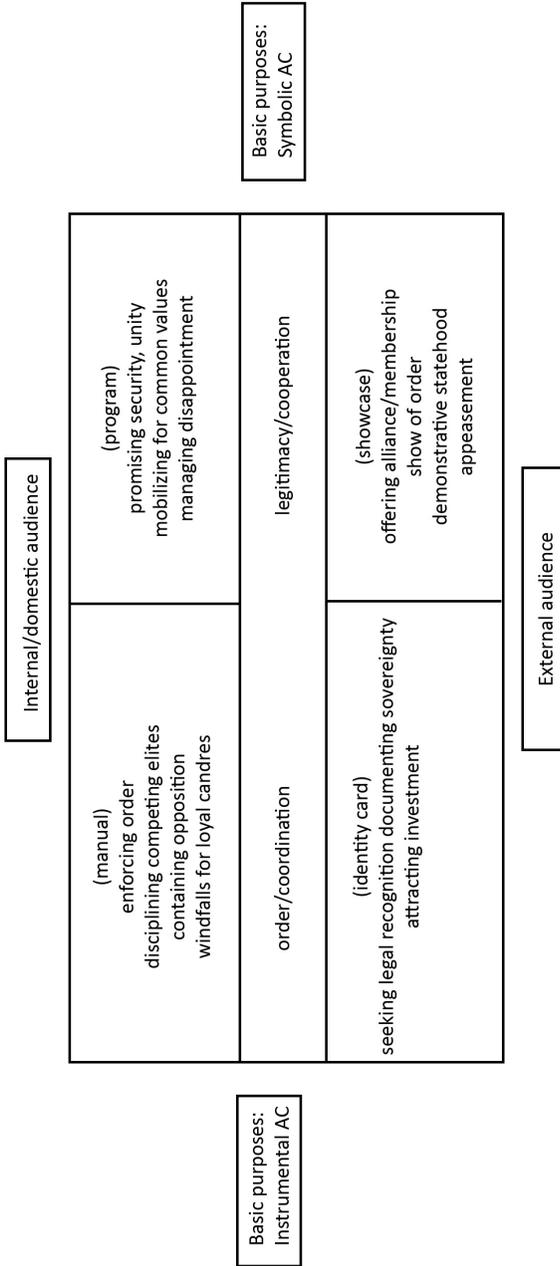


Figure 1.1 Audiences/Purposes of AC

to imply that AC does not mix instrumentalism and symbolism. While not all possible agendas and objectives can possibly be covered here, one may assume that AC documents invariably focus on order and control to coordinate society, and some are intended to rein in competing elites.

In the domestic terrain of constitutional instrumentalism, AC is presumed to lean toward order, discipline, and control, bringing forth a gamut of the “dual state”: the structural combination of normativity and lawlessness endorses the “lawless” prerogative state (emergency laws) whose governors execute “unlimited arbitrariness and violence unchecked by any legal guarantees.”¹⁰⁹ As illicit coercion is likely to erode legitimacy, AC authorizes coercive measures under martial law or the state of exception,¹¹⁰ thus condoning legal, that is, good-faith repression.

As far as partisans and cadres of the regime are concerned, constitutional action may be instrumental to stabilize the ruler’s or ruling cadres’ political authority by conveying the message that there *is* order, not chaos (Soviet Union/Stalin 1936; Syria 2012; Turkey 2016/17). In this way, AC charters function as governance scripts or manuals that help control and discipline the tentacles of the monster and coopt or pacify rival political groups. The quest for discipline and loyalty arguably explains, at least in part, why Hitler did not completely cut the umbilical cord to the Weimar Constitution, why Stalin sat down with his constitutional commission in 1936, or why Bashar al-Assad had the Syrian Constitution revised and staged a referendum in the midst of massacres and bombings of the civil population.¹¹¹

For the general public, AC charters offer a very vague matrix that distinguishes legitimate from illegitimate expectations and demarcates zones of permissible dissent and opposition, thus managing disappointment (generally by fear and intimidation) and generating loyalty and acclamation. For example, Soviet constitutionalism reduced the dangers of lofty rights-based expectations by making them nonjusticiable and submitting their normative purchase to the laws of socialism.¹¹² Post-Soviet Russia has appeared to act on a related maxim since Putin set up his crony network, which guarantees order with little regard for rights. Most constitutions of authoritarian regimes follow a pattern that

¹⁰⁹ Ernst Fraenkel (2017) *The Dual State: A Contribution to the Theory of Dictatorship*, Oxford: Oxford University Press.

¹¹⁰ For example, Article 44 Nr 16 and 17 and Article 45 Constitution of Kazakhstan.

¹¹¹ Joseph Holliday (2013) “The Assad Regime: From Counterinsurgency to Civil War” 8 *Middle East Security Report* 7; Robin Yassin-Kassab & Leila Al-Shami (2016) *Burning Country: Syrians in Revolution and War*, London: Pluto Press. See also Omar El Manfalouty’s textual analysis in this book.

¹¹² For a thorough study see Newton *The Constitutional Systems of the Independent Central Asian States*, and his exploration of “Network Constitutionalism” in this book.

enmeshes (a) rights catalogued with duties which individuals and groups owe society (or rather the government); (b) restrictions for the sake of the religious or secular order; (c) precautions against abuse; and (d) provisions for the suspension of rights in emergency situations.¹¹³ From the various documents available, one may infer the same as was said about Erdoğan's Turkey: that AC may "take the form of meticulous adherence to a constitution whose terms directly and unequivocally subordinate the liberties of citizens to an oppressive conception of the public order and security,"¹¹⁴ to public (or religious) morality and economic interests.

Often authoritarian constitutions, especially in their rights section, misinform addressees about the metamorphosis the polity has gone through, as for instance in Russia's "Putinstate"¹¹⁵ and Hungary's "Frankenstate,"¹¹⁶ in the Central Asian "stans," and, albeit with less dramatic consequences so far, in Poland.¹¹⁷ It is common for AC to compensate for citizens' loss of agency and the weakness of rights with (illusory) constitutional mandates of the state promising security, social cohesion, or ethnic or sexual purity—and community.

4.2.2 AC as program

The accent shifts from coordination to cooperation, from instrumental to symbolic purposes, where the AC project is designed to foster a regime's legitimacy and reputation and mobilize people for the pursuit of common goals. Constitutional symbolism is likely to be prevalent in situations of radical political transition (postrevolution, postcolony) and after catastrophe.¹¹⁸ AC's penchant for the manifesto style lends itself to the propagation of common values addressed to the wider domestic audience. The result is a differently

¹¹³ See the Constitution of Turkey 1982/2017, Part 2 Ch. 1.

¹¹⁴ Turkuler Isiksel (2013) "Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism" 11 *International Journal of Constitutional Law* 702; Li-Ann Thio (2012) "Constitutionalism in Illiberal Polities" in Rosenfeld & Sajó eds *Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 134.

¹¹⁵ Where the 1993 Constitution still proclaims that "no one may arrogate himself power" (Article 3 (4)), ideological plurality and "inalienable rights" that have "direct effect." See Newton *The Constitutional Systems of the Independent Central Asian States*.

¹¹⁶ Kim Lane Scheppele (2013) "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work" 2 *International Journal of Policy Administration Institutions* 559.

¹¹⁷ Lally Weymouth (2016) "Is Poland Taking an Authoritarian Turn? Its New President Explains" *The Washington Post* March 24.

¹¹⁸ To complicate matters, symbolism can also be used instrumentally, and vice versa.

accentuated mix of liberty, unity, progress, prosperity, and security (for example, Brazil 1988; Egypt 1956; Algeria 1989; Azerbaijan 1995; Hungary 2016). Other documents stress “combativity” (Cuba 1976), the “adherence to values common to all mankind” (Belarus 1994; similarly Bahrain 2012), “preventing and punishing the crime of genocide” (Rwanda 2003), or, as a rather exceptional goal, tranquility (Bhutan 2008). Many documents lay down duties to harness community or foster reconciliation.¹¹⁹

Values and duties come at a cheaper rate than rights, because they “can do” almost everything and oblige the state to do almost nothing. Moreover, they come “naturally” in AC contexts because they have to be enforced top down by the regime, the state, and its agencies—not by civil society—and hence have an authoritarian “drive.” Not infrequently, values and duties are amalgamated with programmatic messages to rally support and loyalty, or at least ascertain acquiescence.¹²⁰

To legitimate a regime in the eyes of “interested parties,” such as rival movements or elites, AC may provide tradeoffs for loyalists, such as constitutional protection for followers, or government positions as a form of windfall profit for acquiescence. Similarly, though under rather dissimilar conditions, Russia’s 1918 Constitution sealed the victory of the Bolsheviks, formally recognizing the proletariat (and here implied: its party cadres) as the new ruling class. The constitution intervened in the ongoing political struggles and sent out a message to the parties engaged in the civil war: It claimed legitimacy for the new regime and declared that revolutionary order had been established, that is, the “dictatorship of the urban and rural proletariat and the poorest peasantry in the form of a powerful All-Russian soviet authority.” By the same token, the constitution sought popular support for the common goals defined

¹¹⁹ “It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland. In building socialism it is imperative to rely on the workers, peasants and intellectuals and unite with all the forces that can be united” (China 1982). Similarly, Ethiopia 1994 (political community—Preamble); Rwanda 2003. Germany’s 1949 Basic Law offers “inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world” (Article 1 sec. 2).

¹²⁰ The first Russian Soviet Constitution promised to pursue “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” (Article II no 9 Russia 1918). The framers of the 2010 Constitution of Angola declared themselves “[f]aithful to the deepest wishes of the Angolan people for stability, dignity, liberty, development and the building of a modern, prosperous, inclusive, democratic and socially just country”. Likewise, the authors of Myanmar’s 2008 Constitution pledged to “stalwartly strive for further burgeoning the eternal principles namely justice, liberty, equality and perpetuation of peace and prosperity of the National people; uphold racial equality, living eternally in unity fostering the firm Union Spirit of true patriotism.”

top-down in the name of “the interests of the working class as a whole.” The explicit rules of exclusion from franchise, while displaying the novel idea of Marxist-Leninist legitimacy, gave sharp contours to the new order based on an almost Schmittian friend/enemy distinction.¹²¹

While the authors of the first Soviet Constitution may have tried to persuade people to view the way things were (or the way they should be seen) through the prism of the explicit official interpretive frame (ideology), other governors, especially those not guided by a compact ideological agenda, find different uses for constitutions to buffer their legitimacy. As mentioned above, there is always the option to mobilize for a common goal (nationalism in Egypt in 1956 and in Poland today), against an (imaginary) enemy (“the American conspiracy” in Iran in 1979 and the “Islamization” of Hungary today) or, as was mentioned above, to offer a set of common values to make a repressive regime look better,¹²² and to provide the hope of a more democratic future in order to garner public support and pacify rival elites (the Soviet Union in 1977).

Above all, especially where power is allocated on the basis of “prestructured”, manipulated elections (Russia, Turkey, the states of Central Asia, and so on) or within schemes of exclusion (the Apartheid Constitutions of 1961 and 1983),¹²³ autocratic governments tend to buttress their authority and garner popular support with security programs, with social justice agendas, or, by and large, with an output orientation, regardless of whether these are realistic or simply fantasy, thus trying to rally people to complicity.

¹²¹ “The following persons enjoy neither the right to vote nor the right to be voted for . . . (a) Persons who employ hired labor in order to obtain from it an increase in profits; (b) Persons who have an income without doing any work, such as interest from capital, receipts from property, etc.; (c) Private merchants, trade and commercial brokers; (d) Monks and clergy of all denominations; (e) Employees and agents of the former police, the gendarme corps, and the Okhrana [Czar’s secret service], also members of the former reigning dynasty; . . . (g) Persons who have been deprived by a soviet of their rights of citizenship because of selfish or dishonorable offenses, for the period fixed by the sentence” (Russia 1918, Article 4, no 65).

¹²² For example, Myanmar 2008: “stalwartly striv[ing] for further burgeoning the eternal principles namely justice, liberty, equality and perpetuation of peace and prosperity of the National people; uphold[ing] racial equality, living eternally in unity fostering the firm Union Spirit of true patriotism; constantly endeavor[ing] to uphold the principles of peaceful co-existence among nations with a view to having world peace and friendly relations among nations.”

¹²³ The referendum on the republican structure of the government (1961) was restricted to white South Africans; therefore, predictably, a solid majority voted for a “Republic of the Union.” See Dennis Davis’ audit of apartheid in this book.

4.2.3 AC as identity card

On the international plane, AC instrumentalism turns order and discipline into an identity card in the concert of nations to document statehood as order, that is, the status of sovereignty under international law.¹²⁴ Constitutions as identification are specifically addressed to other governments and international organizations. They are designed to convince (foreign) legal experts and politicians to recognize a state or union of states (such as the Malaysian Federation) as a sovereign entity and issue an entrance ticket to the United Nations or other international or supranational organizations or alliances (such as ASEAN or the European Council). Especially after radical transformations, effective order and sovereign power need to be “proved” constitutionally so as to be recognized as sovereign (Russia 1918; Mexico 1917; Algeria 1963/1976)¹²⁵ and to avoid the label “failed state.” Constitutional conformism may also serve as an entry ticket to political alliances with other states (Soviet Union 1924; Turkey 1982) as well as to disciplinary mechanisms to keep in line the members of a supranational organization.

The state ID is also likely to be useful to stimulate economic cooperation and (notably) attract investment, provided AC offers legal protection for potential investors and restrains the state’s eminent domain. While such a program failed in Sadat’s Egypt in 1971 because his rule of law agenda could not be trusted, Vietnam pursued this course with considerable success, flanking the open door policy with constitutional guarantees (access to courts) and a choice of arbitration settlements.¹²⁶

¹²⁴ Statehood is emphatically affirmed by the constitutions of Kazakhstan (1995), Kyrgyzstan (2010), Mongolia (1992), and Moldova (1994), to name only a few. By contrast, the Islamic Republic of Iran refers to “affairs of the country” or government.

¹²⁵ The revision of the German Basic Law in 1968, granting the government emergency powers, was also intended to confer and demonstrate sovereignty. In the same year the East German Democratic Republic sought to underscore its campaign for international recognition as a state (rather than as a Soviet occupation zone or satellite) with a new constitution.

¹²⁶ President Sadat’s 1971 Constitution of Egypt repealed the government’s power to seize property and provided tax incentives for investors, but to no avail. The attempt to attract investment was subverted, however, by a rigged referendum (99.98 percent): see Tamir Moustafa “Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt” in Ginsburg & Moustafa *Rule by Law* 132, 135–9. Vietnam’s strategy to constitutionalize a mixed economy (Constitution of 1992) was more successful, particularly because the party was determined to pursue the constitutional reform trajectory.

4.2.4 AC as showcase

Statehood and order come with a symbolic dimension, where the signifier and the signified collapse. They convey trustworthiness and promise dependable partnership and predictable cooperation. In this way, AC charters sustain and spread the reputation that a regime can be trusted as a political ally or partner in military or economic matters. An authoritarian regime's formal use of a constitution is likely to provide a higher score on the scales of legitimacy and reliability, even if that constitution is simply an aspect of the regime's public relations efforts.¹²⁷

Hence, demonstrative constitutional symbolism directed toward external audiences qualifies as window dressing, and the constitution as a showcase of a country's—or, rather, its regime's—(demonstrated good) intentions and respectability, if they are at least minimally plausible. While monarchies may offer (controlled) democratic concessions, as did the Moroccan king in 2011, military regimes may find a new constitution opportune to camouflage their authoritarianism with a “human face,” as for instance with Myanmar's 2008 Constitution that enabled Aung San Suu Kyi to finally become deputy and then in 2015 a leading figure in the government, albeit under the umbrella of the military. Symbolic constitutional politics may also be intended to appease not only the populace, elites, and opposition groups, but also neighbors or global actors. However, the same caveats apply.

5. CONCLUSION

Collective singulars resist definition. Therefore authoritarian constitutionalism—its features and facets, purposes and audiences, models and hybrids—cannot be pinned down in a relatively short introductory chapter such as this. Figure 1.1 is meant to work as a heuristic device that suggests comprehensiveness but is hopelessly deficient empirically.

To capture the varieties and ambiguity of the authoritarian disposition, and in particular the ambivalence of AC, the following chapters will advance critical insights and a plurality of perspectives concerning the formal and substantive, ideological and strategic “ingredients” of constitutionalism in the “global” north and south; the intimate internal relationship between authoritarian and republican rhetoric as well as between economic neoliberalism and constitutional authoritarianism in the capitalist centers and peripheries; the intricacies of network constitutionalism in Central Asian states; incremental authoritarianism in a consolidated democracy (Japan) and in the context of

¹²⁷ A diversity of constitutions qualify as examples; see only the constitutions of the Soviet Union 1924; Algeria 1963; Morocco 2011; Syria 2012.

transformative constitutionalism (South Africa); the evolution and transition of AC (China); the challenges behind constitutionalism in Latin America; the iconographic practices and dimension of AC (Venezuela); the temptation of authoritarianism exemplified by Bonapartism in France and Orbanism in Hungary; and finally the contradictory appeal to submit to fundamental law and to enjoy emancipation everywhere. While AC's link to repression lends itself to easy and compelling criticism, the features discussed above—especially the informality of authoritarian techniques of governing, constitutional opportunism, participation as complicity, the return of a concept of power as private property, the cult of immediacy, and the creation of phony community—should not be dismissed as theatrics. They may very well account for the dangerous appeal of authoritarianism and explain why autocratic regimes and rhetoric still seem to be attractive in the twenty-first century, and why they use constitutions as popular signs of decorum that offer another imaginative alternative to the one inhabited in the everyday.