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Authoritarian Constitutionalism –
Coming to Terms with Modernity’s Dreams and
Demons*

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Abstract: The article is designed to introduce and analyze authoritarian constitutionalism as an important phenomenon in its own right, not merely a deficient or deviant version of liberal constitutionalism. Therefore it is not adequate to dismiss it as sham or window-dressing. Instead, its crucial features – participation as complicity, power as property and the cult of immediacy – are related to the basic assumption that authoritarian constitutions are texts with a purpose that warrant careful analysis of the domestic and transnational audience.

- 1 Were the twentieth century to be remembered as the century of human rights, then its successor might be marked by the breakthrough of liberal democracy.¹ Both eras of brightness come with very dark sides, though.² While organized violence, massacres and torture blemish the twentieth century, authoritarianism seems to be well on its way – or making a comeback – to become the stigma and nightmare of the twenty-first. No ultimate triumph of liberalism then, and certainly no end of history³ to that effect – but further struggle between the ‘gentle’ authority of democracy and sterner, patriarchal authoritarian forces as well as their uneasy global cohabitation.
- 2 ‘Authoritarian’ signifies more and less than ‘authority’⁴ from whose crisis it often arises. Authority implies the right to command obedience. As the exercise of power it is inevitably unjust and therefore requires that injustice be justified.⁵ Max Weber suggested tradition, charisma, and rational legality as candidates for legitimation commanding fealty (and thus generated the monopoly of legitimate violence). Seeking normative justification philosophers focus on the tropes of consent, democracy, trust, social contract, discourse, and so forth. Philosophical narratives need to explain away coercion, violence, and inequality in order to draw a thin line between (legitimate) authoritative and (illegitimate) authoritarian rule.⁶ As will be shown below, authoritarian regimes change the register of

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¹ Located by Amartya K. Sen in the twentieth century: (1999) ‘Democracy as a Universal Value’ 10 *Journal of Democracy* 3. Similar Jan-Werner Müller (2018) *Das demokratische Zeitalter*, Berlin: Suhrkamp. See Yusuf Bangura (1991) ‘Authoritarian Rule and Democracy in Africa: A Theoretical Discourse’ *UNRISD* - [http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/A81C86EE203A8B1780256B67005B6139](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/A81C86EE203A8B1780256B67005B6139) - accessed 28 March 2018.

² The metaphor is taken from Hannah Arendt (1951) *The Origins of Totalitarianism*, New York: Schocken Books; and David Kennedy (2004) *The Dark Sides of Virtue – Reassessing International Humanitarianism*, Princeton: Princeton University Press. Similarly: Bonny Ibhawoh (2006) *Imperialism and Human Rights*, Albany NY: SUNY Press.

³ Francis Fukuyama (1992) *The End of History and the Last Man*, New York: Free Press. For a non-eschatological analysis see David Kennedy (2016) *A World of Struggle*, Princeton: Princeton University Press.

⁴ Alexandre Kojève (2014) *The Notion of Authority. A Brief Presentation*, Verso (directed at post-revolutionary Russia).

⁵ Günter Frankenberg (2014) ‘Human rights and the “belief” in a just world’ 12 *I.CON* 34.

⁶ Hannah Arendt (1954) *Between Past and Future*, New York: Viking (What is Authority?).

justificatory narratives. They tend to invoke necessity, self-preservation, security (against enemies), and whatever else community may call for.

I. Varieties of Authoritarianism

- 3 Authoritarian ideologies, movements and regimes have been on the rise in national settings and the global arena, exploiting economic crises, cultural strife and democracy fatigue, and eroding the standing of democratic governance.⁷ They come with different symbolic representations⁸ and in diverse conceptual guises,⁹ covering bureaucratic or competitive authoritarianism, oriental despotism, personalistic or developmental dictatorship, autocracy, elitism, one-party-rule, military regimes, right-wing communitarianism, right- or left-wing populism, Bonapartism,¹⁰ police states, arbitrary government, technocracy, economic authoritarianism,¹¹ dual states and neopatrimonialism – and there are more.
- 4 Unless stereotyped as liberalism's other,¹² authoritarianism is hard to pin down. The phenomenon is *chatoyant*. Like a chameleon it changes its appearance. As far as possible, it withdraws the rules of its grammar from scrutiny. From the point of view of conceptual history,¹³ authoritarianism inscribes itself in the narratives of modernity as a *collective singular*, naming a plurality of diverse phenomena.

⁷ A global panorama is provided by Larry Diamond, Marc F. Plattner & Christopher Walker eds (2016) *Authoritarianism Goes Global: The Challenge to Democracy*, Baltimore MD: 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 IN: Indiana University Press; Jerzy W. Borejsza et al. eds (2006) *Totalitarian and Authoritarian Regimes in Europe*, Oxford/New York: Berghahn Books.

⁸ Concerning the iconography of authoritarian heads of state: Jorge Gonzalez' analysis of the Hugo Chavez in this book.

⁹ For an overview see Juan J. Linz (2000) *Totalitarian and Authoritarian Regimes*, Boulder CO: 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.

¹⁰ See below Eugénie Merieaux' historical reconstruction and critique of Bonapartism: [...]

¹¹ The connection between economy and authoritarian regimes are investigated here by Helena Alviar and Michael Wilkinson.

¹² For a critique such stereotypical analysis see, from a historical perspective: Norman Spaulding [...] and, with regard to China, Michael W. Dowdle [...]

¹³ Reinhard Koselleck (2004) *Futures Past. On the Semantics of Historical Time*, New York: Columbia University Press; and Jan-Werner Müller (2014) *On Conceptual History. Rethinking Modern European Intellectual History*, Oxford: Oxford University Press 74.

- 5 In clinical terms, it can be described as a *syndrome* – a pattern of governance resulting from the co-occurrence of diverse, distinctive symptoms. Common symptoms are rigged elections or votes with highly implausible outcomes;¹⁴ detention without trial; little if any protection for minorities and little if any tolerance of opposition; gender inequality that suggest an intimate connection with patriarchy;¹⁵ extensions of constitutional tenure of office thinly legitimating sclerotic regimes' clinging to power;¹⁶ recourse to a quasi-dynastic principle by leaders grooming family members or cronies for succession; top-down administration of public arenas, and manipulation of rules of accountability virtually excluding political authorities from significant popular or judicial control, which is frequently replaced by appeals to symbolic support; as well as promulgation of emergency law implemented by an exorbitant security apparatus of secret services, police, military.¹⁷
- 6 The varieties of authoritarian regimes are marked by differently assembled clusters of common symptoms interconnected by a profound distrust of rivalling elites and oppositional movements. These clusters (in)form the clinical pictures of political authority. 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. It was based on racism in Nazi Germany after 1933 and *apartheid* South Africa established in 1948, as well as the Jim Crow Laws across the Southern United States.¹⁸ Nationalism was grafted onto authoritarianism during Indira Gandhi's governance, and the regimes of Gamal Abdel Nasser, Anwar Sadat and Hosni Mubarak in Egypt. Numerous peoples suffered under the yoke of military dictatorships – Greece, Argentina, Chile, North Korea and many more. Authoritarianism demonstrates the varieties of populism – encompassing corporatism, anti-elitism, socialism, White

¹⁴ Outcomes become plausible when votes can only be cast for the candidates of one party or all candidates need approval of the government (Rwanda 2017).

¹⁵ See Brandt, Mark J. & Henry, P. J. (2012) 'Gender Inequality and Gender Differences in Authoritarianism' 38 *Personality and Social Psychology Bulletin* 1301.

¹⁶ 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).

¹⁷ Frequent economic symptoms, unrelated to constitutional provisions, would have to be added, like stagnant economic growth, rising food prices, erratic governmental interventions.

¹⁸ Juan J. Linz (2000) *Totalitarian and Authoritarian Regimes*, Boulder CO: Lynne Rienne Publishers; George M. Frederickson (1981) *White Supremacy: A Comparative Study in American and South African History*, Oxford: Oxford University Press.

supremacist ideology and so forth – in Peron’s Argentina and Chavez’s Venezuela, Orban’s Hungary and Donald Trump’s presidency.¹⁹

7 The disease patterns can be diagnosed *globally* ranges from Azerbaijan to Poland and Egypt to Zimbabwe, from North Korea to Singapore, and Japan²⁰ to the United States. It comprises Erdoğan’s Turkey, who is said to have set up a ‘competitive authoritarian regime,’²¹ as well as Vladimir Putin who created a mixture of ‘authoritarianism and managed democracy.’²² In Venezuela Hugo Chávez’ initial populism has mutated into cesarism, recently into despotism. Repressive kleptocracies are run by rulers motivated by greed rather than deranged idealism, like Ilham Alijev, Islam A. Karimov (1989-2016) in the ‘stans’ of Central Asia,²³ and formerly Robert Mugabe in Zimbabwe (1990-2017) and Jacob Zuma in South Africa.²⁴ By routinizing authoritarian practices many of them promoted neopatrimonialism, maintaining authority through personal patronage embedded in one or the other *nomenklatura* or crony network rather than through ideology or law.²⁵

II. Authoritarian Constitutionalism: Sham or Phenomenon in its Own Right?

8 In the orthodox liberal discourse, authoritarian constitutionalism (AC) operates not only as a contested concept, but as denial, sham and absurd misnomer, in

¹⁹ See below the contributions by Roberto Gargarella, Jorge Ganzalez, and Max Pichl. 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. See Ta-Nehisi Coates (2017) ‘The First White President’ *The Atlantic Monthly*, October; Duncan Kennedy (2017) ‘A Left of Liberal Interpretation of Trump’s “Big” Win, Part One’ 1 *Nevada Law Journal Forum* 98.

²⁰ See Hajime Yamamoto below.

²¹ He recently empowered himself per decree to decide on the deportation and exchange of persons detained awaiting trial - <http://www.tagesspiegel.de/politik/tuerkei-erdogan-baut-seine-macht-per-dekret-weiter-aus/20244188.html> - accessed 30 August 2017.

²² 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.

²³ Thoroughly analyzed in this book by Scott Newton; see also Scott Newton (2017) *The Constitutional Systems of the Independent Asian States*, London: Bloomsbury.

²⁴ See *The Atlantic* (2017) ‘How to Build an Autocracy’, <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/> - accessed 31 August 2017. For a critical assessment of apartheid and post-apartheid authoritarianism in South Africa see Dennis Davis [.....]

²⁵ 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.

short: liberal democracy's other. However, AC's proliferation and diversity advise to treat it as a phenomenon of its own right and one of the narratives of modern constitutional thought and practice that merits critical analysis.²⁶ Setting aside the discursive hegemony of liberal constitutionalism (LC) and its democratic sibling (DC), I argue, allows for a more nuanced treatment of AC as well as its liberal and democratic relatives in order to discuss the paradox hidden at the heart of darkness: In the face of the myriad of forms and shapes authoritarian constitutionalism takes on, one wonders why an authoritarian regime would need a constitution. Why submit to a foundation document, if in the end, when push comes to shove, constitutional constraints are going to be abolished, disregarded or manipulated? Which brings us back to the query scholars and laymen have agonized over, ever since the Old Testament, why an omnipotent God would submit him/herself to a binding covenant.

1. *Constitutionalism in 'the Proper Sense': Inherent Authoritarian Elements*

9 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 (higher) law.²⁷ Moreover, it gives 'obsessive attention to issues of rights',²⁸ 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)²⁹ – mostly a transient phenomenon of crisis and always liberalism's other.

²⁶ Similar: Roberto Niembro Ortega (2016) 'Conceptualizing authoritarian constitutionalism' 49 *Verfassung und Recht in Übersee* 339.

²⁷ E.g. 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. With reserve: Mark Tushnet (2015) 'Authoritarian Constitutionalism' 100 *Cornell Law Review* 391.

²⁸ Roberto Gargarella (2013) *Latin American Constitutionalism 1810-2010. The Engine Room of the Constitution*, Oxford: Oxford University Press vii; see also his analysis in this book.

²⁹ As distinct from its liberal specimen, democratic constitutionalism appears to be less focused on rights and the protection 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*

- 10 The 'proper sense' thesis rests on the assumption that (modern) constitutionalism brings forth an institutional configuration that forges a free political order sustained by a scaffolding of legality/constitutionality. Constitutionalism is usually taken to be coextensive with LC's canonic elements: enforceable rights, free and fair elections, separation of powers, and judicial review. Hence, the 'proper sense' updates John Locke's 'limited and lawful government,' Thomas Paine's 'power with [...] right,' and Immanuel Kant's 'constitutional state'.³⁰ Indeed, John Locke displayed in his *Second Treatise* what James Harrington had previously made known as the 'empire of laws'³¹ and what was later coined with more ideological momentum 'the government of laws and not of men' (Art. 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, majority or minority to a covenant, forcing a collective identity upon an internally fragmented society,³² offering constitutional protection to some interests, claims and actions, and, with the same *coup de main*, excluding others. Those who lost, by majority decision or elite *octroi*, are relegated to the side-lines 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.
- 11 Furthermore, John Locke, one of LC's most influential framers, in a traditional turn to public law and *realpolitik*, re-introduced the prerogative: 'the power to act according to discretion, for the public good, *without the support of the law and sometimes even against it*'.³³ Hence, from the very beginning, there had been a crack in the wall of the liberal citadel. And the legislative style of governing had

Traditions, Oxford: Hart Publishing, 361; Niembro Ortega 'Conceptualizing authoritarian constitutionalism'.

³⁰ John Locke (1988) *Second Treatise on Government* [1690], (1988), 2nd ed Cambridge: Cambridge University Press; Thomas Paine (1994) *The Rights of Man* [1791-1792], New York: Penguin; Immanuel Kant (1996) 'Doctrine of Right' in *Metaphysics of Morals* [1797], Cambridge: Cambridge University Press.

³¹ James Harrington (1992) *The Commonwealth of Oceana* [1656] and *A System of Politics* ed. J.G.A. Pocock, Cambridge: Cambridge University Press.

³² 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; Günter Frankenberg (2018) *Comparative Constitutional Studies: Between Magic and Deceit*, Cheltenham UK: E. Elgar Ch. VII; Hanna Lerner and Ash Bali (2016) 'Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies' 49 *Cornell International Law Journal* 227.

³³ Locke *Second Treatise*, 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.

always already been compromised by a premium for the very personal, arbitrary, executive style that was to undermine the constitution as well as disrupt, among others, Max Weber's formal-legal authority³⁴ and found its theoretical expression in concepts like the 'dual state', the Nazi-'Behemoth', the 'deep state', etc.,³⁵ generally registered as deviant or deficient forms of liberal governance.

- 12 Less spectacularly but quite efficiently, run-of-the-mill regimes of LC and DC break down the prerogative into a myriad of provisions bestowing *discretion* on administrative agencies. Although discretionary power must be used 'reasonably, impartially and avoiding oppression or unnecessary injury',³⁶ it remains broad and has the tendency to escape the close scrutiny of law's (and the courts') authority,³⁷ installing instead the bureaucratic dominion of expertise and routine. LC and DC host other institutions that are also structurally related to the prerogative: Models of *militant democracy*³⁸ grant the executive, in some countries also constitutional courts and parliaments, ample powers of surveillance and repression, the right to political opposition and competition.³⁹ 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 to obtain information.⁴⁰ In quite a few LCDC regimes, authoritarian techniques of

³⁴ Max Weber (2004) *The Vocation Lectures*, Illinois: 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: Elgar Publishing 1-25. See also Hermann Heller (2015) 'Authoritarian Liberalism?' 295 *European Law Journal* 295.

³⁵ Ernst Fraenkel (2017) *The Dual State* [1941], New York: Oxford University Press; Franz Neumann () *Behemoth: The Structure and Practice of National Socialism*, New York: Ivan R. Dee, Inc.; Mike Lofgren (2016) *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government*, London: Penguin. See also M.W. Dowdle's analysis in this book.

³⁶ E.g. *Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos.*, 498 U.S. 211 (U.S. 1991).

³⁷ See the studies of the competing political and judicial authorities in Siri Gloppen et al. (2010) *Courts and Power in Latin America and Africa*, Basingstoke UK: Palgrave Macmillan.

³⁸ The concept 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.

³⁹ Frankenberg *Political Technology* Ch. 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 Andrés Sajó ed. *Out of and Into Authoritarian Law*, New York: Kluwer Law International 125.

⁴⁰ 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

governance allow secret services to assert *privileges* concerning ‘*law enforcement records*’ and bar information from disclosure or protect executive and military officials from prosecution for violation of human rights.⁴¹ In short, the prerogative is anything but history. Its various manifestations are deeply grafted onto LCDC and sanction authoritarian interventions in social-political processes.

2. ‘*Constitutions without Constitutionalism*’

- 13 Corresponding to the ‘one proper sense’ argument, constitutions of authoritarian regimes are regarded, from the LCDC perspective, as façade⁴² or ‘constitutions without constitutionalism’.⁴³ Socialist charters, unless dignified with mild disdain as ‘aspirational texts’ have always served as one of the testing grounds for this contention. From the vantage point of LCDC they typify the authoritarian (constitutional) style bereft of a constitutional culture.⁴⁴ Jointly with their non-socialist authoritarian comrades they run under ratings like ‘mere parchment barrier for power,’ ‘paper constitution,’ ‘Potemkin village,’ ‘insincere promise,’ ‘*de jure* rather than *de facto*,’ and the likes.
- 14 The sham/façade allegation is beset by two major fallacies. First, it reduces constitutionalism to the guarantee of and compliance with *rights* and their judicial review – and scales down liberal orthodoxy one more notch, bypassing other liberal grammars, like movement, value or process constitutionalism. Second and

U.S. 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*, G.R. No. 133250, 9 July 2002 (Philippines).

⁴¹ Anthony W. Pereira (2005) *Political (In) Justice: Authoritarianism and the Rule of Law in Brazil, Chile and Argentina*, Pittsburg PA: University of Pittsburg Press 161.

⁴² 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 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.

⁴³ See Nimer Sultany [...] below. 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.

⁴⁴ A more nuanced view, by far, is presented by Newton *The Constitutional Systems of the Independent Asian States*, Newton and Dowdle below.

more importantly, shamming AC as window-dressing or deceit posits, by implication, the no-sham nature of liberal-democratic constitutions as *law*, not ideology, and as mapping power, not camouflaging it. While only naïve positivists will regard all constitutional elements as enforceable, everyone will agree that LC/DC constitutional maps are quite blind as to the location and influence of private power. Instead of celebrating the – downright illusory – immaculacy of LC/DC 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 ask whether they refer to state practices that elude constitutional schemes or require a constitutional theory tailored to their distinct features.⁴⁵

3. Narratives of Constitutionalism

- 15 Constitutional modernity has many narratives to offer. These accounts are ‘ways of imagining the real’ or ‘world-making’,⁴⁶ more so than ordinary laws. They 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.
- 16 Constitutionalism covers a spectrum of quite different regimes and practices. The early documents of the era of the democratic revolutions convey the struggles and designs of people who tried to get rid of *ancien régimes* and tyrants, feudal lords and colonial powers as well as abolish privilege and redistribute wealth (within limits). They also set up new axes of inequality: shifting the constitutional view from estate to social class, from subject to citizen. The French Constitutions⁴⁷ of 1791 and 1814 established constitutional monarchies; 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

⁴⁵ As actually outlined for Soviet constitutionalism by Newton *The Constitutional Systems of the Independent Central Asian States* 86-92. These questions will be asked throughout this book.

⁴⁶ 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.

⁴⁷ For a far more thorough analysis of French constitutional history and bonapartism see Merieau below.

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.⁴⁸

- 17 Throughout the nineteenth century and later, constitutionalism went through a series of experiments and metamorphoses in Europe, Latin America, Africa and Asia. They display a wide range of – liberal, illiberal and a-liberal – scaffolds buttressing the constitutional construction of political authority.⁴⁹ They testify to constitutionalism's astounding flexibility as a normative framework for political order, ideological cover narrative of political authority and scaffolding of legality for state action.

III. Power as Property, Participation as Complicity, and the Cult of Immediacy

- 18 Authoritarian Constitutionalism is introduced here as one of the diverse narratives of modernity – not as liberalism's 'other'.⁵⁰ The varieties of AC are located on a continuum with the gamut of LC/DC and are distinguished by four features discussed below: a specific mix of political technology that is, not altogether unlike

⁴⁸ In particular Art. 9 – 14. See Sibylle Fischer (2004) *Modernity Disavowed. Haiti and the Cultures of Slavery in the Age of Revolution*, Durham, Duke University Press; Günter Frankenberg (2018) *Comparative Constitutional Studies. Between Magic and Deceit*, Cheltenham UK: E. Elgar Publishing also with regard to the following.

⁴⁹ 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); or Chile 1833 (endorsed 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 (parliamentary 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), and 1996 (democratic republic, egalitarian constitutionalism). See 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: Social Rights and the "Engine room" of the Constitution*, Oxford: Oxford University Press.

⁵⁰ E.g. Rod Hague and Martin Harrop (2007) *Political Science: A Comparative Introduction*, 7th ed., Basingstoke UK: Palgrave MacMillan 259.

LC/DC, connected to a public safety *dispositive*;⁵¹ the reversal of LC's dualism of power and property; a preference for *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 and a national, ethnic, patriotic, tribal or other community.

1. Authoritarian Political Technology

19 Authoritarian power, whether obtained by institution, acquisition or usurpation,⁵² obeys the constitutional grammar of an executive political technology alloying Machiavellian and Hobbesian styles and agendas. 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, calculations, strategies and tactics that state actors and institutions use in their operations.⁵³ In his infamous manual⁵⁴ *The Prince* (1532) the author instructed governors how to run a state top-down, acquire and uphold their power, and follow 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, even if governors prefer constitutions to play a less authoritative role. Taken as a whole, rulers' constitutional compliance depends on their view of what it is expedient to sustain their status and dominion. It ranges from eliminating rivals via co-opting threats of opponents or tapping the public weal as a source of legitimacy to respecting constitutional provisions.⁵⁵

⁵¹ *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.

⁵² Hobbes (1651) *Leviathan* Ch. 17.

⁵³ See Frankenberg *Political Technology* Ch. 1 also for the following.

⁵⁴ See Foucault 'Sécurité, Territoire, Population'.

⁵⁵ Also analyzed by Tom Ginsburg & Alberto Simpser (2013) 'Introduction: Constitutions in Authoritarian Regimes' 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.

- 20 Strictly tailored to the Prince, Machiavellian technology rivets on the appropriation of territory and ruling over the resident population. Today's Machiavellians rely on the secondary regulation of behavior (intimidation) and strategies of biopolitics. They treat constitutions as an instruction manual that establishes the status of (mostly) uncrowned heads and stabilizes state structures of dominance based on opportunism, and is marked by *technicity* and *informality*, while operating in the shadow of hierarchy.⁵⁶ AC charters subvert the distinction between regular order and exception by endorsing a wide spectrum of techniques of governance roaming from constitutional democracy to constitutional dictatorship.⁵⁷
- 21 Concerning the *procedural* and *institutional* dimension of political authority, AC-type rulers are likely to set up and rely on informal networks and channels of patriarchal masculinity.⁵⁸ They are epitomized by the military and secret services, adding operations *in Arcanum* to technicity and informality, such as the Greek *Regime of Colonels* (1967-1974), the Argentine *Junta* (1974-1983), and the Chicago Boys, Pinochet's willing helpers in the laboratory of brutal market policies.
- 22 In so far as the Machiavellian style meets with constitutional constraints, shifts from law/constitution to an 'occasional virtue' or even dictates of raw power require a pseudo-democratic or pseudo-constitutional masquerade borrowed from the semantics of necessity or the arsenal of the state of exception. When Chinese leader Xi Jinping moved to rid himself of his term limit (Art. 79 1982 Constitution), he went through the constitutional amendment procedures. i.e. a decision of the National People's Congress (Art. 62). The regimes of Russia's Vladimir Putin and Alyaksandr Lukashenka, President of Belarus, are both blemished by a scheme of fairly crude power management bereft of what Machiavelli would have called 'occasional virtue.' In Russia and elsewhere, updated Machiavellian technologies, convert the reason of state from the Machiavellian interest of the ruler 'in himself' to the robust politico-economic

⁵⁶ The metaphor I borrow from Fritz Scharpf (1997) *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Boulder CO: Westview Press.

⁵⁷ See the analyses of Siri Gloppen, Scott Newton and Michael Dowdle below.

⁵⁸ 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.

benefits of rulers, elites or other hegemonic utility maximizers, glossed over by constitutionalism, such as the Putin-Medvedev-Tandemocracy.⁵⁹

- 23 By the same token, moves from LC/DC to AC call for a justification. After the Fukushima disaster in 2011, Germany witnessed a dramatically increasing opposition against nuclear energy. German Chancellor Angela Merkel single-handedly suspended the German Nuclear Power Act she had initiated shortly before. Her nuclear U-turn qualifies as a Machiavellian intervention since it was dictated by the logic to preserve her party's majority position and her power.⁶⁰ She had to dress the turn in the semantics of necessity and claimed there was no alternative. No masquerade is warranted if the acclaiming public relishes rather than objects to the chief executive officer's repeated abuses and breaches of constitutional law, albeit only to stay in power. Such acclaim allowed Italy's Silvio Berlusconi to enjoy and extend his populist sultanate, and encouraged the revenant to take another stab at it again.⁶¹
- 24 In contrast, *Hobbesian* AC binds the *Leviathan* as sovereign authority and the security maxim to a central political goal: the protection of life to ensure peaceful coexistence. Thus, political technology is geared toward essential aspects of public safety: Concentrated in the hands of the sovereign it tilts toward the executive and imperative style. While in general Machiavellianism banks on wily opportunism, Hobbesian techniques of authoritarian governing are marked by distrust. They 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*.⁶²
- 25 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, like order and loyalty, or the passe-partout

⁵⁹ *Nezavisimaya gazeta*, 2 September 2008 – accessed 31.12. 2008.

⁶⁰ <http://www.spiegel.de/international/germany/out-of-control-merkel-gambles-credibility-with-nuclear-u-turn-a-752163.html> – accessed 24 August 2017. That the U-turn was widely considered unconstitutional did not matter much.

⁶¹ See Giovanni Sartori (2009) *Il Sultanato*, Rome: Laterza.

⁶² Hobbes *Leviathan*, Ch. 30, and Hobbes (2008) *The Elements of Law, Natural and Political* [1640], Oxford: Oxford University Press. Hobbesianism thus outlines the contours of a bisected rule of law.

values of progress,⁶³ welfare, peace and security.⁶⁴ Quite often they also bank 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,⁶⁵ as it opens the depot of measures permitting the ruler to do 'whatever it takes'⁶⁶ to intervene in social processes and preferably come to the rescue of this or that purpose or goal, always defined from above and always claimed to benefit the community. For instance, 'rescue torture' and 'rescue downing' of a renegade aircraft dignified organized cruelty, respectively the killing of (innocent) passengers as constitutional tropes.⁶⁷ Likewise, Hungarian Prime Minister Orbán considered vindicating 'European Christian values' would justify the extremely repressive, dehumanizing treatment of migrants.⁶⁸ His xenophobic strategy also qualifies as a Machiavellian move to secure his power by mobilizing resentment against refugees.

26 In a Hobbesian milieu, constitutions are likely to function as registers of managerial regulations for managing disappointment that is. As an upshot, Hobbesian technology comprises a large arsenal of instruments serving power, in particular rule by decree within and without the framework of emergency law, manipulated national consultations and referenda.⁶⁹ These tools are quite conspicuously displayed and generalized. By contrast, updates of the prerogative, in LC/DC constellations, are adapted to more specific situations, and

⁶³ 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, technical progress with a strong executive power and influence of the military.

⁶⁴ To list a few randomly picked but typical examples: Franco's regime was regarded by supporters (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 continue until the country achieved 'welfare and peace.' - <https://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-to-hold-elections>. - Concerning Hungarian PM Viktor Orbán's justification of his migration policy - <https://www.theguardian.com/world/2017/may/26/hungary-lgbt-world-congress-families-viktor-orban>.

⁶⁵ See Alviari and Wilkinson below.

⁶⁶ '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 26 July 2012 - <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

⁶⁷ Frankenberg *Political Technology* Ch. 4 and 5.

⁶⁸ See Pichl below.

⁶⁹ For references and a discussion of the various models of emergency law see Frankenberg *Comparative Constitutional Studies* Ch 9.

their availability and application are camouflaged by techniques of normalization.⁷⁰

2. Power as Property

- 27 AC technology flips over the traditional ‘power follows property’⁷¹ maxim and establishes its own intimate dualism of power as property. In LCDC authoritarian force and clout arise from the governmental and bureaucratic apparatus, its knowledges, tactics and practices. In an AC frame, political power submits all property relations to state control mainly according to a security agenda that is, first and foremost, geared toward the protection of the territory (of the latter-day ‘Prince’) and the nation (the updated version of Hobbes’ ‘Commonwealth, Ecclesiastical and Civil’). Thus AC safeguards the primacy of politics.
- 28 Symbolically, authoritarianism relies on a property-based matrix. It plays out in state practice, *first*, by heads of government who take their position of power to be *quasi-private property* and treat it as possession. From monarchies AC transfers notions of sovereignty and the (self-) authorization of rulers as well as the concept of succession. Accordingly, they pass on their status and office pursuant to a pastiche of the dynastic principle to family members, cronies or personal physicians. This way the orderly rotation of elites is replaced by clan authoritarianism that allows for decades-long incumbency.⁷² The Kim dynasty in North Korea, in good Stalinist tradition, and the Assad family personify hard core versions that include the *dégagé* killing of potential rivals. Standard variants can be studied in Venezuela, where in 2013 Hugo Chavez anointed his loyal follower, Nicolás Maduro (flanked by his powerful wife) to succeed him as president, and in Turkmenistan, where the dictator’s dentist, Gurbanguly Berdymukhammedov, went to the helm after Saparmurat Niyazov’s death in 2006. (It seems that members of the medical profession, if situated close enough to an authoritarian

⁷⁰ E.g. the ill-famed Art. 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 I.

⁷¹ J.C. Wilsher (1983) “‘Power Follows Property’: Social and Economic Interpretations in British Historical Writing in the Eighteenth and Nineteenth Centuries’ 16 *Journal of Social History* 7.

⁷² See the incisive analyses of Central Asian super-presidentialism by Newton *The Constitutional Systems of the Independent Central Asian States* 125-152 and below.

ruler, stand a good chance of succeeding him, as for instance Sali Berisha in Albania, François Duvalier in Haiti, and Radovan Karadžić in Bosnia and Herzegovina.)

- 29 Likewise, the history of many countries attests a wide gamut of hybrids of dynasty and democracy. Several Gandhi generations went down this road in India. The heads of clans in Central Asian states passed on their position of power in the same vein, albeit more blatantly. In China, the Party functions as the receptacle of power. It tightens the reins of succession, and this way ascertains that the space of power is never symbolically empty in Claude Lefort's sense, and power is never contested without restraints.⁷³ In LCDC contexts, like the United States (see the Adams, Kennedy and Bush families), the property-like management of political succession is mediated by elections.
- 30 *Second*, as far as authoritarian power emulates the logic of private property, it also adopts property's structural bias towards the concentration of landowning and capital holdings as well as the unequal distribution of resources, which AC translates into the political domain. Comparable to capital's predisposition for 'privacy,' AC disengages power from public scrutiny and accountability. Structural and ideological affinity to property also facilitates 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 the British East India Company or United Fruit Company in Central America.⁷⁴
- 31 *Third*, the Machiavellian informal and arcane style of governance (see above) is internally related to power as property. Convinced that they *own* the authority they exercise and therefore *are* the law, rulers tend to see no need to answer for their politics pursuant to principles and procedures of accountability. Informalism elucidates AC's *mélange* of Weberian forms of political authority: By undermining formal legal rationality, it favors charismatic rule, if need be, buffered by tradition.

⁷³ Claude Lefort (1986) *Essais sur le politique*, Paris: Seuil. As regards China see Teemu Ruskola (2013) *Legal Orientalism*, Cambridge MA: Harvard University Press.

⁷⁴ Philipp J. Stern (2011) *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, Oxford UK: Oxford University Press; Peter Chapman (2007) *Bananas: How the United Fruit Company Shaped the World*, Edinburgh UK: [Canongate Books](#).

Informality also characterizes more recent authoritarian garbs that replace legal by neoliberal economic rationality.

3. *Participation as Complicity*

- 32 One might think that participation – or rather its shortcomings and absence – distinguishes AC from DC in particular.⁷⁵ Yet this assumption is contested.⁷⁶ One may argue that individual choice and elective action, albeit accompanied and manipulated by ideology, are crucial – with the usual reserve – also for the success of political authoritarianism.⁷⁷ Still, others see popular passivity and civil desertion⁷⁸ as distinctive features of AC and stress its fear-inducing quality. 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.⁷⁹ Whereas the outcome of this controversy clearly depends on the historical-social context and political constellations, I argue that participation in authoritarian regimes is more often than not interrelated to the project of creating an imaginary community and integrated in the cult of immediacy, and that both the project and the cult serve the purpose of curbing discontent and producing demonstrative loyalty.
- 33 Re-presentative democracy operates smugly in the mode of remote control. As a matter of routine the people are absent. Authoritarian regimes, if following a semi-representative path, let people go to the voting booth, present their complaints directly in *cahiers de doléances*⁸⁰ or as supplications in imperial or other AC

⁷⁵ Thomas H. Henriksen (2007) *American Power after the Berlin Wall*, Basingstoke UK: 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 UK: 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.'

⁷⁶ For a different argument see Spaulding (below).

⁷⁷ Gino Germani (1978) *Authoritarianism, Fascism, and Populism*, New Brunswick, NJ: Transaction Books.

⁷⁸ Marcel Gauchet (1990) 'Pacification démocratique, desertion civique' 60 *Le débat* 87-98.

⁷⁹ See Max Pichl below (Hungary). Also Michael Lind (2016) 'Donald Trump, the Perfect Populist' - <https://www.politico.com/magazine/story/2016/03/donald-trump-the-perfect-populist-213697> - accessed 8 March 2018.

⁸⁰ The practice in 1789 dating back from the 14th century; Philippe Grateau (2001) *Les Cahiers de doléances: une relecture culturelle*, Rennes: Presses Universitaires.

settings. National consultations, referenda or petition,⁸¹ whether customary or solicited by the regime, function as rapid alert mechanisms or instruments to defuse conflict and pacify society. Rather than settling controversy or creating community, petitions or referenda may misfire, though, as can be learned from 1789 or Pinochet's 1988 plebiscite ending unexpectedly, despite an onerous process and massive deception, his 16 years in power.⁸²

34 Aside from petitions, political participation is encouraged and orchestrated (from above) to stimulate the fantasy of community⁸³ and legitimize autocratic rule. On that account, elective action may be convenient, provided elections are 'supervised' and the outcomes rigged so that elective action or less formal participation comes across as complicity with the regime and ratifies and strengthens the bond between people and leader.

35 Authoritarian regimes are likely to shun the risk of open dissent and radical opposition. In socialist regimes, risk aversion accounts for bizarre election results (the predictable winner-takes-all percentage, always in the high 90ies) and the prevalence of 'unity parties' and single-party systems. In populist settings, minimizing political risk and building community suggest the shift from 'party' to 'movement' to avoid or contain competition.

36 Similarly, the always already precarious independence of the judiciary is one of the prime targets of authoritarian leaders who are out to break free from legal fetters that might disturb the community project. This does not mean though that courts are always pawns in the hands of authoritarian rulers.⁸⁴ However, the latter have globally demonstrated over and over again a preference for excluding surprise from state practice or containing it as far as possible. For this reason, judicial review of governmental decisions is generally discouraged, curtailed or

⁸¹ As for instance in imperial China or the former German Democratic Republic. With remarkable detail: Art. 41 Constitution of the People's Republic of China (1982). See the Decree Concerning Petition (1961) of the German Democratic Republic.

⁸² Instituto Nacional Democrata para Asuntos Internacionales (1989) *La Transición Chilena Hacia la Democrática*, Washington DC.

⁸³ From a social-psychological perspective: M. Kemmelmeier et al. (2003) 'Individualism, Collectivism, and Authoritarianism: in Seven Countries' 34 *Journal of Cross-Cultural Psychology* 304.

⁸⁴ See the contributions to Tom Ginsburg & Tamir Moustafa eds (2008) *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge: Cambridge University Press and 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; also Newton *The Constitutional Systems of the Independent Central Asian States*.

emasculated in AC contexts, unless the judiciary can be controlled. A recent case in point is Poland where nationalist party chief Jarosław Kaczyński had the review rules changed in 2016 and three judges of the Constitutional Tribunal, whose term had not yet expired, replaced with handpicked eunuchs who would not endanger the nationalist project. Likewise, in 2017 Venezuela's President Maduro staffed with loyal partisans the Constituent Assembly he charged to rewrite the constitution. Indira Gandhi attempted to control the composition of the **judiciary, notably the Supreme Court**, between 1971 and 1980 by undoing (or making) **judicial** appointments. When this strategy failed she finally resorted to emergency powers.⁸⁵ In this regard, also the 2014 disempowerment of the Hungarian Constitutional Court by Orbán's *Fidesz* party qualifies as an AC move to impose restraints on the judicial review. In the United States, F. D. Roosevelt's court packing threat and, albeit less conspicuous, the president's 'prerogative' to nominate Supreme Court justices smack of AC.

37 Still, the overall picture of participation in AC contexts is complex and comprises elections, plebiscites, mass rallies and presidential twitter practices, all of them geared toward complicity and community. Yet, there are notable exceptions, such as Singapore,⁸⁶ Vietnam, and other regimes that combine the logic of complicity/community with (mostly low-risk) periodical elections and (weak) checks and balances guarded by a moderately effective administration of justice.

4. *The Cult of Immediacy*

38 Governing has a theatrical dimension. Democracy's (and in particular law-rule's) sober form of governance and the symbolic deficit of their demure style are grafted onto LC/DC politics. On the stage of AC, a cult of immediacy flanked by its form of communication replace the temperate style of governance. Pervasive distrust, the quest for complicity, the informality of decision-making and the preference for acclamation disembody into a theatrical *dispositif*.

⁸⁵ On 12 June 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. The ruling party was given a time of 20 days to find a replacement. She finally resorted to emergency rule because of 'internal disturbance'.

⁸⁶ See Tushnet 'Authoritarian Constitutionalism' and Gordon Silverstein (2008) 'Singapore: The Exception that Proves Rules Matter' in Ginsburg & Moustafa *Rule by Law* 73.

- 39 Having sanded down all intermediate institutions and ousted oppositional organisations, authoritarian rulers routinely turn society into an amphitheater. On its stage the main actor appeals directly to the audience, treating the people as partisans and accomplices of his or – in fewer cases – her project. To use a Hobbesian metaphor, the people’s ears are chained to the Leviathan’s lips. They are transformed into the lead actor’s audience whose liberty depends on the silence of AC laws and the ruler’s script of power. By and large, citizens’ political agency is limited by pervasive ‘compliance demands’⁸⁷ to applaud their governors.
- 40 The varieties of authoritarianism, notably 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.⁸⁸ Parades, mass rallies, deployments of troops and partisans, national consultations and addresses to the people, carefully orchestrated from above, function as shows of force and power to produce calculated acclamation and complicity in an otherwise rigidly sequestered public space.
- 41 Presentism and immediacy also determine the one-way communication from rulers to subjects that suggests a personal relationship between ruler-ruled and thus incidentally re-feudalizes the concept of loyalty. To that effect Berlusconi communicates via tv and US President Trump twitters with his constituency. Both bypass the regular institutions of government and seek to create an instantaneous circuit of national communication. Hungarian Prime Minister Orbán repeatedly uses ‘national consultations’ with suggestive, manipulative questions⁸⁹ to propagate and have ‘confirmed’ his policy choices.
- 42 The cult of immediacy⁹⁰ conveys the (omni-)presence of the ruler, whose mythical, patriarchal, absolute and sovereign authority it authenticates ad hoc – neither mediated by parliamentary deliberation, party instructions and the media (as *mediators* they are natural enemies of the regime) nor constrained by court

⁸⁷ The term I borrow from Donald Winnicott (1965) *Theory of Emotional Development*, New York: International Universities Press. See Hobbes *Leviathan* Ch. XXI (‘On the Liberty of Subjects’).

⁸⁸ As is also demonstrated in Trump’s style of governing today and populist movements all over Europe

⁸⁹ Presently the Orbán Government tries to mobilize public opinion against a (presumptive) ‘Soras-Plan’ to transfer to Europe millions of migrants - *Frankfurter Allgemeine* 15 September 2017. The Hungarian Constitution only provides for formal referendums (The State Art. 8). See Max Pichl below.

⁹⁰ See Jeffrey Librett (2017) ‘Sovereignty and the Cult of Immediacy’ IX *Konturen* 1.

rulings. Instead, authoritarianism banks on cushioning repression with pseudo-private gestures and images of the patriarch – Putin’s bare torso on horseback, Mao swimming through the Yellow River, Hitler caressing his German Shepherd, Chavez and Maduro sporting a jogging outfit in the colors of the Venezuelan flag, and Aung Suu Kyi’s never wilting flower decorating Myanmar’s military regime. These personal icons and intimate gestures of authoritarianism, while incidentally visualizing the sovereign’s presence and private persona, spawn the fantasy of a personal bond that is sustained by the invisible border between the authoritative self and the subjected others. This bond constitutes the basic module of the (illusory) community AC is laid out to establish: Orban’s Hungarian Constitution proclaims a national community. The Law and Justice Party struggles for a nationalist-patriotic society in Poland. Trump’s election campaign and presidency were geared to white supremacy, a tribal community. The Alternative für Deutschland, like other populist movements, addresses the ‘authentic people’ purged of foreign elements.

IV. Audiences. Why Constitute Authoritarianism?

- 43 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 renew twice the Enabling Act that suspended the Weimar Constitution? What might have driven Syrian depot Bashar al-Assad to stage a constitutional referendum in the midst of civil war and bloodshed in 2012? Which motives may have driven Myanmar’s military to summon a National Convention to draft a new constitution and finally re-constitute their regime in 2008 against nation-wide protest? – We will never know for sure, however, may wonder why any authoritarian ruler, party or clique bothers with drafting a constitution and amending or submitting it to referendum. That they mindlessly follow a global routine, is very likely to miss their shrewd sense of tactics. Window-dressing appears to be rather unspecific an answer, too. One would at least have to pin down the window and the viewers that autocrats have in mind.
- 44 Decoding the various scripts of authoritarianism and submitting the motives of authoritarian rulers to serious analysis is rendered difficult by history, political constellations, socio-economic contexts, and human nature which bestow

diversity on AC. On the whole, AC reverses the government of laws into the more than equally ideological regime of (one) man or group that may be hostile to law or 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 vocabulary and design, or silence. On the other hand, AC presupposes a connection, however thin, between regimes and constitutions. So it seems appropriate to read constitutions as texts with purposes and try to make them talk, albeit monosyllabically, by looking at their design and their 'nature' as performative acts.

1. Authoritarian Constitutions as Archetypes

45 Four distinct archetypes of design (and innumerable hybrids and crossovers) have left their imprint on constitutional history,⁹¹ each of them characterizing a specific style informed by grammar and vocabulary, depending on the political constellation and other context specifics. Each archetype is distinguished by a peculiar normative speech act: political manifesto, contract, program and codified document resulting from a usually qualified legislative process. From afar there seems to be no difference in semantics and structure between authoritarian and non-authoritarian documents. Conformism prevails on the level of formal appearance, and so official texts have to be decoded.⁹² Clauses excluding⁹³ or significantly restricting⁹⁴ constitutional protection deconstruct that appearance and give away an imperious agenda. Furthermore, AC discloses a preference for the manifesto style, which corresponds to authoritarian rulers' preference for one-way communication as well as lack of tolerance for surprise, dissent and

⁹¹ For a more elaborate discussion of archetypes see Frankenberg *Comparative Constitutional Studies* Ch. 2.

⁹² 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.

⁹³ E.g. '[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, Art. 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](#).

⁹⁴ The 2008 Constitution of Bhutan lays down a string of 'reasonable restrictions' for rights (Art. 7) and adds a list of duties citizens have (Art. 8); quite restrictive is the concept of naturalization (Art. 6 (3)).

organized opposition. The proclaiming style is usually garnished with common values ('our adherence to values common to all mankind' Belarus 1994) and duties to harness community.⁹⁵ Values and duties come at a cheaper rate than rights and come 'naturally' as they have to be enforced top-down – by the state, the bureaucracy or courts – hence feature an authoritarian tendency. Not infrequently they are amalgamated with programmatic messages to mobilize support, loyalty or at least acquiescence.⁹⁶

46 At large, political manifestoes are *unilateral, top-down declarations*, commonly issued by a (self-proclaimed) elite or ruler, like the Representatives of the United States of America (Declaration of Independence 1776), 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 world-making 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 results 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). '[T]his Constitution *affirms* the achievements of the struggles of the Chinese people of all nationalities' (China 1982).⁹⁷

47 Furthermore, the manifesto also appeals to authoritarianism 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

⁹⁵ '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).

⁹⁶ 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' (Art. II no. 9 Russia 1918). - The framers of the 2010 Constitution of Angola promised to be '[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 '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'.

⁹⁷ 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 Art. 1 para. 2; Congo 2005 (Art. 42 ff.).

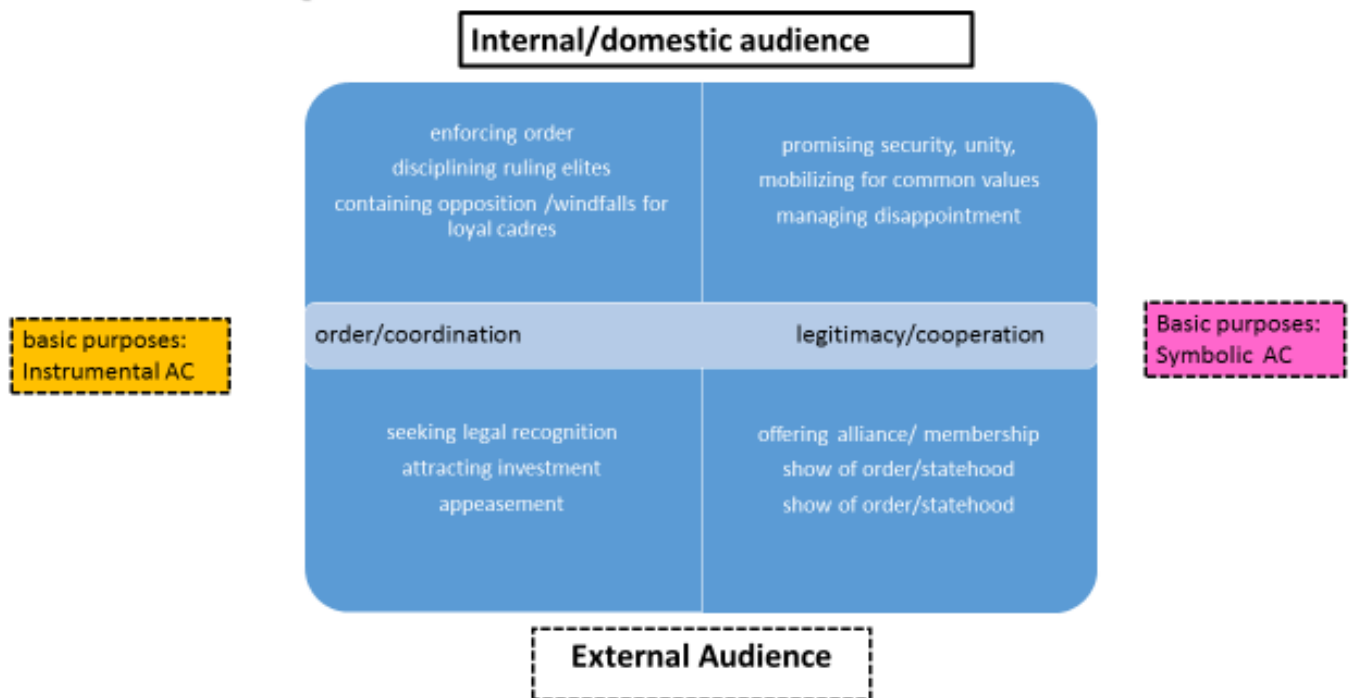
necessity to strengthen and promote national unity and reconciliation which were seriously shaken by the genocide against the Tutsi and its consequences'. The Constitution of the Islamic Republic of Iran (1979) invokes 'the awakened conscience of the nation under the leadership of Imam Khomeini,' that 'came to perceive the *necessity* of pursuing a genuinely Islamic and ideological line in its struggles'.

2. Authoritarian Constitutions as Texts with Purposes and Audiences

- 48 Unless no specific dividend is expected from constitutionalism (that would reduce AC to A), the potential role of constitutions in authoritarian regimes I study in two internally related dimensions relying on a heuristic grid (see fig. 1): First, regarding *the addressees* (audience) one needs distinguish the internal or domestic horizon (people, general public and 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). Regarding the latter, other governments, experts and economic actors are likely to be of primary interest, as one may assume that people in other countries are less attentive to foreign constitutional regimes, at least less than corporations interested in investment.⁹⁸
- 49 The second dimension captures the *focus* of the constitutional purpose (see the horizontal axis). While not all possible agendas and objectives can possibly be covered here, it seems fair to assume that most AC documents rivet on order and control to coordinate society and rein in ruling elites on the one hand, and to foster the regime's legitimacy and reputation by mobilizing its people for the common pursuit of common goals in cooperation.

⁹⁸ Concerning the modality of social integration, order/control are 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 by Frankenberg *Comparative Constitutional Studies* Ch. VI. For a different tableau of categories see Ginsburg & Simpser 'Introduction: Constitutions in Authoritarian Regimes'.

Audiences/Purposes of AC:



- 50 (1) On the instrumental side of the domestic terrain, order and control are likely to be prevalent within authoritarian monism and also varieties of a ‘dual state,’ that is the structural combination of normativity and lawlessness in LC/DC deconstructed above, such as the ‘normative’ rule of law (*Rechtsstaat*) with the ‘lawless’ prerogative state commanded by a head of state, ruling elite, party or movement, exercising ‘unlimited arbitrariness and violence unchecked by any legal guarantees’.⁹⁹ Coercion undermines legitimacy, therefore rulers take recourse to constitutions – their normative side – in case they believe such a move might augment their political authority and stabilize their regime. However, they will activate their prerogative, notably the lawless state of exception, wherever and whenever court proceedings and rule of law encumber the effective discharge of authoritarian rule.¹⁰⁰
- 51 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

⁹⁹ Ernst Fraenkel (2017) *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford: Oxford University Press.

¹⁰⁰ Illustrated by the state-sponsored terrorism of the Argentine Military Junta against the opposition – see Comisión Nacional sobre la Desaparición de Personas (1984) *Nunca Más – Informe Conadep*.

conveying the message that there *is* order, not chaos (Soviet Union/Stalin1936; Syria 2012; Turkey 2016/17). This way, AC charters may be expected to function as governance scripts and help control and discipline the tentacles of the monster and co-opt pacify rivaling political groups. Discipline and loyalty appear to be key explanations for Hitler's not cutting the umbilical cord to the Weimar Constitution, or China's 1982 Constitution, and also Bashar al-Assad's project to revise the Syrian Constitution and stage a referendum in the midst of massacres and bombings of the civil population.¹⁰¹

- 52 For the general public, AC constitutions offer a matrix, however vague, that distinguishes legitimate from illegitimate expectations and demarcates zones of permissible dissent and opposition. Thus constitutions contribute to the management of disappointment and generate loyalty and acclamation. For example, Soviet constitutionalism reduced the dangers of lofty rights-based expectations by making them non-justiciable and submitting their normative purchase to the laws of socialism.¹⁰² Post-soviet Russia appears to act on a related maxim, since Putin had set up his crony network and seemed to guarantee order, albeit with little regard for rights. Today's Constitution of Turkey follows the pattern of other AC documents that enmesh (a) the rights catalog with duties individuals and groups owe society, (b) restrictions for the sake of the democratic and secular order, (c) precautions against abuse and (d) provisions for the suspension of rights in emergency situations.¹⁰³ From these documents one may infer 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',¹⁰⁴ to public morality and economic interests.
- 53 More often constitutions, especially their rights section, misinform addressees about the metamorphosis the polity has gone through as for instance in Russia's

¹⁰¹ 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.

¹⁰² For a thoughtful analysis see Newton *The Constitutional Systems of the Independent Central Asian States*.

¹⁰³ See the Constitution of Turkey 1982/2017, Part Two Chapter One.

¹⁰⁴ 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* 134

“Putinstate”¹⁰⁵ and Hungary’s ‘Frankenstate’,¹⁰⁶ in the Central Asian ‘stans’ as well as, albeit with less dramatic consequences so far, in Poland.¹⁰⁷ It is common for AC to compensate citizens’ loss of agency and the weakness of rights by (illusory) promises of security, social cohesion and ethnic or sexual purity – and community.

54 (2) As regards legitimation, constitutions may promise trade-offs for loyalists, like constitutional spoils or government positions as windfall profit for acquiescence. Similarly, though under rather dissimilar conditions, Russia’s 1918 Constitution sealed the victory of the Bolsheviks, formally recognizing the working class (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 – 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 top-down in the name of ‘the interests of the working class as a whole’. The explicit rules of exclusion from franchise displayed both the idea of Marxist-Leninist legitimacy and an almost Schmittian concept of political enemies.¹⁰⁸

55 While the authors of the first Soviet Constitution tried to persuade people to view the way things were or should be through the prism of the explicit official ideology, other governors, especially those not guided by a compact ideological framework, find different uses for constitutions to buffer their legitimacy. As was mentioned above, there is always the option to mobilize for a common goal (nationalism in

¹⁰⁵ Where the 1993 Constitution still proclaims that ‘no one may arrogate himself power’ (Art. 3 (4)), ideological plurality and ‘inalienable rights’ that have ‘direct effect.’ See Newton *The Constitutional Systems of the Independent Central Asian States*.

¹⁰⁶ 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.

¹⁰⁷ Lally Weymouth (2016) ‘Is Poland taking an authoritarian turn? Its new president explains’ *The Washington Post* 24 March.

¹⁰⁸ ‘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, Art. Four, no. 65).

Egypt 1956 and Poland today), against an (imaginary) enemy (islamisation in Hungary today) or offer a set of common values (China 1982, Myanmar 2008)¹⁰⁹ to make a repressive regime look better and hold out hope for a more democratic future. Above all, where power is allocated on the basis of 'pre-structured', manipulated elections, autocratic governments tend to buttress their authority and garner popular support with security programs, social justice agendas or, by and large, an output orientation that rallies people, regardless whether it is realistic or fantasy.

- 56 (3) On the international plane, as was mentioned before AC window-dressing would be wasted on the world population at large. Recognition of order and statehood are specifically addressed to other governments and also to international organisations. AC charters need to convince their legal experts that recognition is justified.
- 57 Demonstrative constitutionalism and rule of law may also serve to keep in line the members of a supranational organization (Soviet Union 1924, 1977). Displaying a modicum of constitutional conformism also helps encourage political alliances with other states (Soviet Union 1924).
- 58 It may also be designed to stimulate economic cooperation, that is investments, provided the property of potential investors is protected and the state's eminent domain restrained. While this program failed in Sadat's Egypt 1971 because his rule of law agenda could not be trusted, Vietnam pursued this course quite successfully, flanking the open door policy with constitutional guarantees, for instance to have access to (reliable) courts, and the choice of arbitration settlements (Vietnam 1992).¹¹⁰

¹⁰⁹ E.g. 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.

¹¹⁰ President Sadat's 1971 Constitution of Egypt repealed the government's power to seize property and provided tax incentives for investors, however to no avail. The attempt to attract investment was subverted, however, by a rigged referendum (99.98%); see Tamir Moustafa 'Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt' in Ginsburg & Moustafa *Rule by Law* 132, 135-139. Vietnam's strategy to constitutionalize a mixed economy (Constitution of 1992) was much more successful, particularly because of a more permissive party-state willing to pursue the constitutional reform trajectory, see Mark Sidel (2009) *The Constitution of Vietnam: A Contextual Analysis*, Oxford and Portland: Hart Publishing.

59 (4) Cooperation, legitimacy and reputation have to be transposed in the AC context.

60 Show of order and of being in charge is a crucial prerequisite for recognition as a sovereign, and not failed state – especially after radical transformations (Russia 1918, Algeria 1963/1976).

Conclusion

61 It is the nature of a collective singular that its features and facets are hard to pin down. The grid above suggests to render a comprehensive picture of the purposes and audiences constitutions may have in authoritarian settings. However, even as a heuristic device it is hopelessly deficient empirically to capture the traits, symptoms and strategic orientations of the diverse authoritarianisms. While most rulers have a profound *distrust* in the people and intermediate institutions (parliaments, courts, political parties, coalitions), others use them – and the institutions of LCDC strategically and stage elections, referenda and consultations. While AC demonstrates a preference for constitutionalized schemes of governing that ascertain the routinization of the management of power, some protagonists have experienced that AC sanctions, in one way or the other, the administration of public fora and places to implement the preference for organized *acclamation* and *informal* procedures of decision-making. While one may very well criticize AC's main features – power as (private) property, participation as complicity, and the *cult of immediacy* – they should not be dismissed as theatrics because they may very well account for the appeal of the authoritarian temptation.