

ABHANDLUNGEN / ARTICLES

Conceptualizing authoritarian constitutionalism

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Abstract: Authoritarian constitutionalism is a new category used by constitutional law scholars to refer to a distinct type of regime wherein there are faulty practices and a constitution with an authoritarian content. With these characteristics in mind it seems contradictory to talk about “constitutionalism”. In this article I propose a different understanding of authoritarian constitutionalism. I conceptualize it as a way in which ruling elites of not fully democratic states exercise power, such that the liberal democratic constitution, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian ideological functions. Authoritarian constitutionalism is normatively attractive as a critical tool to understand and critique this sophisticated way in which power is exercised in not fully democratic states. Moreover, I argue for a critical constitutional theory for those countries where it exists.

The conclusion that I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

The Federalist, No. 48

1. Introduction

In this article I want to conceptualize authoritarian constitutionalism and argue for a critical constitutional theory for those countries where it takes place. For Mark Tushnet, authoritarian constitutionalism is an intermediate normative model between liberal constitutionalism and authoritarianism that has moderately strong normative commitments to constitutional-

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I want to thank Stephen Holmes, Mark Tushnet, Roberto Gargarella, Luis Pomed, Lewis Kornhauser, Micaela Alterio and my colleagues at the legal theory seminar 2013-14 at NYU School of Law for their comments and critics.

ism.¹ According to the author, this is a conceptual possibility that has some connection to empirical reality, but not a precise claim about any system.²

I want to clarify at the outset that this is not an empirical work about hybrid regimes. My approach is conceptual and it applies to one category: authoritarian constitutionalism. In my opinion, authoritarian constitutionalism should not be used to refer to a distinctive regime, rather it is a concept that refers to a very sophisticated way in which ruling elites with an authoritarian mentality exercise power in not fully democratic states.³ In this case, the regime's liberal democratic constitution, instead of limiting the power of the state and empowering those who would otherwise be powerless⁴, is used for practical and authoritarian ideological functions.

At first glance, authoritarian constitutionalism appears absurd and nonsensical. Authoritarianism refers to regimes in which some or all of the following characteristics are present: (a) there is limited pluralism in contrast to unlimited pluralism, (b) there is no extensive nor intensive political mobilization, (c) political power is not legally and/or de facto accountable to citizens even though it can be quite responsive to them, (d) power is exercised within formally ill-defined limits but actually predictable ones, (e) the positions of officials depend in part on the support of a leader or a ruling group instead of the support of citizens, (f) there is an official or a single or privileged party, and (g) ruling elites lack an elaborate or guiding ideology.⁵ But constitutionalism means, among other things, limiting the power of the state and empowering those who would otherwise be powerless.

1 *Mark Tushnet*, *Authoritarian Constitutionalism*, 4, 5, 7, 9 (Harvard Public Law Working Paper, Paper No. 13-47, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2369518&download=yes (last accessed on 25 December 2016).

2 *Ibid.*, p. 7.

3 Elkins, Ginsburg and Melton have used the Unified Democracy Scores to identify authoritarian regimes. Country-years with a Unified Democracy Scores (UDS) score greater than or equal to 0.16 are coded as democratic, and country-years with a UDS score less than 0.16 are coded as authoritarian *Zachary Elkins, Tom Ginsburg and James Melton*, *The Content of Authoritarian Constitutions*, in: Tom Ginsburg / Alberto Simpser (eds.), *Constitutions in authoritarian regimes*, Cambridge 2014, 141, 144, 145.

I want to emphasize that authoritarian constitutionalism takes place in countries that score greater than or equal to 0.16, and in that sense they are democratic according to Elkins et. al. However, they are countries with low or intermediate level of democratic development. Maybe there should be a different threshold to distinguish between authoritarian constitutionalism and democracies.

4 *Jeremy Waldron*, *Constitutionalism: A Skeptical View*, NYU School of Law, Public Law Research Paper, Paper No. 10-87, 2012), 12-16, 25, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771 (last accessed on 25 December 2016); *Keith E. Whittington*, *Constitutionalism*, in: Keith E. Whittington / R. Daniel Kelemen / Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, Oxford 2008, 281. I recognize that this understanding of constitutionalism could be very limited and there are dramatically different forms of constitutionalism. *Cass R. Sunstein*, *Constitutions and democracies: an epilogue*, in: Jon Elster / Rune Slagstad (eds.), *Constitutionalism and democracy*, Cambridge 1988, p. 327, 328.

5 *Juan Linz*, *Totalitarian and authoritarian regimes*, Boulder 2000, p. 159-165.

Authoritarian constitutionalism emphasizes the tension between the exercise of power within ill-defined limits, lack of accountability, and how the ruling elite executes and masks its violence under the forms of the constitution,⁶ and the idea of constitutionalism. This tension makes authoritarian constitutionalism a perplexing category, but not absurd; perplexing because of the inconsistencies it points out and helps us both understand and critique. These inconsistencies exist between the functions that some constitutional provisions fulfill in a liberal democracy (limiting the power of the state and empowering those who would otherwise be powerless) and the liberal democratic ideology behind constitutionalism, on the one hand, and the functions that those same provisions and a constitutionalist discourse fulfill in authoritarian constitutionalism. It is worth noting that I do not hope to hide or justify these authoritarian functions. On the contrary, this concept is a tool that helps us understand, uncover, and critique those functions. In this sense, authoritarian constitutionalism is normatively attractive as a critical tool.⁷

There are very useful studies in the literature on authoritarian constitutionalism, the most helpful for our purposes being studies about constitutions in authoritarian regimes. They show us, for example, that the constitutions of democratic and authoritarian regimes do not differ much. Differences extend to marginally fewer rights, specificity, and the lack of judicial independence in authoritarian regimes.⁸ Very relevant Loewenstein's distinction among normative, nominal and semantic constitutions, the latter being a formalization of *status quo*⁹. Other studies identify the theorists who could be considered the founding fathers of authoritarian constitutionalism, among them, G.W.F. Hegel and Carl Schmitt.¹⁰ Some works discuss the inherent authoritarianism in democratic regimes that point to the tendency of the partisan forces that gain temporary democratic control to pass anti-competitive electoral laws.¹¹ Other studies focus on how constitutional amendments improve stand-

6 Clinton Rossiter (ed.) *The Federalist Papers*, No. 10, New York 1961, p. 75.

7 Cf. *Tushnet*, note 1, p. 98 "Singapore is not a bad place to live...Yet, of course, it is not a liberal democracy...From a normative point of view the central question, probable unanswerable now, is whether a Singapore without authoritarian constitutionalism would be a liberal democracy or fully authoritarian state. If the latter, authoritarian constitutionalism may be normatively attractive for Singapore."

8 *Elkins / Ginsburg / Melton*, note 3, p. 141, 143.

9 *Karl Loewenstein*, *Teoría de la Constitución*, translation Alfredo Gallero Anabitarte, Barcelona, 1964.

10 *Renato Crist*, G.W.F. Hegel: precursor del Constitucionalismo autoritario, Carl Schmitt: jurista del Constitucionalismo Autoritario, in: Renato Cristi / Pablo Ruiz-Tagle, *La república en Chile teoría y práctica del constitucionalismo republicano*, Santiago 2006, p. 45, 46-78. *Rune Slagstad*, *Liberal constitutionalism and its critics*, in: Jon Elster / Rune Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge 1988, p. 103.

11 *Richard H. Pildes*, *The Inherent Authoritarianism in Democratic Regimes*, in: Andrés Sajó (ed.), *Out of and into authoritarian law*, New York 2003, p. 125-126.

ing of authoritarian political elites¹². Last are authors that explain the authoritarian way in which some communities and individuals are governed in liberal regimes.¹³

But a literature review is not the purpose of this essay. In my opinion, authoritarian constitutionalism is a category that helps us understand and critique a way in which power is exercised in countries that cannot be considered strictly authoritarian but neither can they be considered fully liberal democracies. Moreover, once we understand authoritarian constitutionalism we can do something to counteract it. Indeed, the final purpose of understanding authoritarian constitutionalism is to open the eyes of those who live in countries where it takes place and to call for their critical contribution.

As we will see in the next section, constitutionalism can be used to refer to an ideology, a theory, a narrative, and specific institutions. It is also possible to use the concept to refer simultaneously to some or all of them. Furthermore, there is a plurality of ideologies, theories, narratives, and institutions that embody “constitutionalism”¹⁴. This plurality is the reason why there are so many adjectives that qualify the word constitutionalism. Second, I explore the very few essays in which the category authoritarian constitutionalism has been used to refer to some countries. In those essays it is possible to find some common features, even though there are differences. Then I challenge one of these features—the existence of a constitution with an authoritarian content—and argue that ruling elites hold a distinctive authoritarian mentality. To support this thesis, I will focus on what functions a constitution accomplishes, according to authoritarian constitutionalism, and explain how ruling elites use the discourse of constitutionalism for authoritarian purposes. Finally, I suggest what a constitutional theory should be to counteract authoritarian constitutionalism.

2. The different uses of the term “constitutionalism”

2.1. *Constitutionalism as an ideology*

Ideology has many different meanings.¹⁵ I understand by ideology a system of political ideas that contribute to shape the naturalize meaning of a political concept.¹⁶ For Jeremy Waldron, constitutionalism, the ideology, is part of a “liberalism of fear”.¹⁷ According to Shklar, “liberalism of fear” wishes to secure freedom from the abuse of power and intimi-

12 *Eun-Jeung Lee*, Verfassungsreformen als politisches Instrument: Die Einstellung der politischen Eliten Südkoreas zur Verfassung, *Verfassung und Recht in Übersee* 1 (2013) p. 18-45.

13 *Mitchell Dean*, Liberal government and authoritarianism, *Economy and Society* 37 (2002), p.31.

14 *Mark Tushnet*, Varieties of Constitutionalism, *International Journal of Constitutional Law* 14 (2016), p. 1-5.

15 *Terry Eagleton*, *Ideology. An Introduction*, 2007 London.

16 *Aletta J. Norval*, Review Article: The Things We Do with Words – Contemporary Approaches to the Analysis of Ideology, *British Journal of Political Science* 3 (2000), p. 313, 318-325.

17 *Waldron*, note 5, p. 14.

dation of the defenseless.¹⁸ Liberalism recognizes that government coercion is necessary, but it wants to control it and avoid arbitrariness. It wants to prevent arbitrary, unexpected, unnecessary, and unlicensed acts of force and pervasive acts of cruelty and torture performed by the military, paramilitary, and police agents in any regime.¹⁹ Liberalism of fear is against any extralegal, secret, and unauthorized act by public agents or their deputies,²⁰ and argues in favor of well-understood and accepted legal procedures.²¹ And it is very worried about systematic fear that can be aroused by the expectation of institutionalized cruelty.²²

The aim of liberalism is to secure the political conditions that are necessary for the exercise of personal freedom.²³ In this sense, it gives a lot of weight to the institutions that make personal freedom possible, such as limited government and the control of unequally divided political power.²⁴ The rule of law is considered the prime instrument to restrain governments.²⁵ It also defends equal rights and their legal protection, representative government, and independent judiciary.²⁶

Of course, not everyone agrees with this liberal ideology as distinct from constitutionalism. Competing ideologies struggle over the socially legitimated meaning of this political concept.²⁷ Ideological content is acquired as the concept is employed in specific discourses.²⁸ In fact, there are many liberalisms,²⁹ and liberalism is not the only ideal that guides constitutionalism. As Frank Michelman has pointed out, the political doctrine of constitutionalism may be compounded by liberal, constitutional, democratic and progressive

18 *Judith N. Shklar*, *Liberalism of fear*, in: Nancy L. Rosenblum (ed.), *Liberalism and the Moral Life*, Boston 1989, p.27.

19 *Ibid.*, p. 29.

20 *Ibid.*, p. 30.

21 *Ibid.*, p. 31.

22 *Ibid.*, p. 29.

23 *Ibid.*, p. 21.

24 *Ibid.*, p. 28.

25 *Ibid.*, p. 37.

26 *Ibid.*

27 *Norval*, note 14, p. 325.

28 *Alan Hunt*, *Explorations in Law and Society Toward a Constitutive Theory of Law*, Abingdon 1993, p. 117, 137.

29 *John Rawls*, *Political Liberalism*, Columbia 1993, p. 223.

ideas.³⁰ Moreover, some scholars think that we should consider the possibility of nonliberal³¹ or illiberal³² constitutionalism.

2.2. *Constitutionalism as a theory*

A constitutional theory may try to answer many different questions that vary according to the time, place, and interests of the people that make up the theory. They are contextually based. Conceptual constitutional theories focus on the content and meaning of concepts, positive constitutional theories on forces and institutions, and normative constitutional theories on the implications of concepts, forces, and institutions for political morality.³³ Ideal constitutional theories ask what constitution ought a society to adopt that assumes perfect compliance whereas non-ideal theories answer the same question but assume that the institutions of society will violate the constitution.³⁴ Furthermore, there are text-based theories that argue that better fit the constitution, practice-based theories that explain constitutional practice, substantive theories that seek to identify substantive values that adjudication ought to advance, and formal theories that prescribe methodologies.³⁵

In general terms, constitutional theories share a common purpose: to explain and justify institutions, practices, and solutions. They describe and prescribe what people have to do.³⁶ Moreover, they help us to understand the origin and the purpose of an argument, and to see the big picture.³⁷ Constitutional theories are usually based on other theories, what I called in the last section “ideologies.” What’s more, constitutional theories indirectly make ideologies uncontested by justifying institutions and practices imbued by those ideologies.

Some scholars are skeptical about theories underlying practices or constitutional law or constitutional practice resting upon theory. Instead, they advocate for theory as a tool to make sense of the practice, when that is necessary. A theory may help us uncover some-

- 30 *Frank Michelman*, What (if anything) is progressive-liberal democratic constitutionalism?, 4 (1999) *Widener L. Symp. J.*, p. 181.
- 31 *Graham Walker*, The idea of nonliberal constitutionalism, in: Ian Shapiro / Will Kymlicka (eds.), *Ethnicity and Group Rights*, New York 1997, p. 154.
- 32 *Li-Ann Thio*, Constitutionalism in Illiberal Politics, in: Michel Rosenfeld / András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 133.
- 33 *Lawrence B. Solum*, Constitutional Possibilities, *Indian Law Journal* 83 (2008), p. 307, 308. For a different description of normative, conceptual and empirical theories or forms of constitutionalism see *Keith E. Whittington*, note 5.
- 34 *Ibid.*, p. 309.
- 35 *Richard H. Fallon*, How to Choose a Constitutional Theory, *Californian Law Review* 87 (1999), p. 535, 538.
- 36 *Ibid.*, p. 540, 541, 549. *David A. Strauss*, What Is Constitutional Theory, *Californian Law Review*, 87 (1999), p. 581, 582.
- 37 *Thomas E. Baker*, Constitutional Theory in a Nutshell, *William & Mary Bill of Rights Journal* 13 (2004), p. 57, 58, 59.

thing that might be moving in the background of our practice.³⁸ In that sense, the theory is a critical tool.

2.3. *Constitutionalism as a narrative*

By narratives we understand stories that different people and communities tell about the constitution or its provisions that compete to be the one that defines the collective narrative.³⁹ Narratives are part of constitutional discourse. There is a diversity of narratives as there are diversity of experiences, visions, etc. that compete with each other. Each narrative strives to persuade and convince its audience to embrace the meaning they want to give to the constitution as an instrument of government or to any of its provisions.⁴⁰ This meaning is unsettled so there is continual interpretation and reinterpretation.⁴¹ Judges, officials, the people, and social movements participate in this ongoing conversation.⁴²

But it is not just about the contemporary understanding of the constitution that narratives compete, they also argue for the significance of the constitution and imagined alternatives or visions,⁴³ that is, possible and plausible states of affairs.⁴⁴ Moreover, narratives emphasize some things and neglect others. For example, if they stand up for a prevailing role of the people as constitutional interpreters, they tell us a story in which the people are the main actors and judges are not. To make their argument persuasive, narratives draw on the text of the constitution and make reference to its origins.⁴⁵ Moreover, they make explicitly or implicitly positive and normative claims that depend on theoretical assumptions.⁴⁶

One example of a narrative about constitutions and their provisions is strategic constitutionalism, which asks us to think about how constitutional checks serve elites. Elites impose on themselves limits that work to their advantage and make their behavior predictable. Democratic government exists when powerful actors discover that they can get a palpable advantage from it.⁴⁷ The clue to understand the sustainability of constitutional limits is to

38 *Lawrence Lessig*, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, *Georgetown Law Journal* 85 (1996-1997), p. 1837, 1837, 1838.

39 *Laurence H. Tribe*, *America's Constitutional Narrative*, *Daedalus* 141 (2012), p. 18, 28; *Robert M. Cover*, *The Supreme Court, 1982 Term - Foreword: Nomos and Narrative*, *Harvard Law Review* 97 (1983), p. 4, 25, 33.

40 *Tribe*, note 39, p. 19; *Peter Brooks*, *The Rhetoric of Constitutional Narratives: A Response to Elaine Scarry*, *Yale Journal of Law & Humanities* 2 (1990), p. 129, 131.

41 *Ibid.*

42 *Ibid.*, p. 22.

43 *Cover*, note 39, p. 9, 10.

44 *Ibid.*, p. 10.

45 *Tribe*, note 39, p. 20, 31, 34; *Brooks*, note 40, p. 130.

46 *Lawrence B. Solum*, *Narrative, Normativity, and Causation*, *Michigan State Law Review* 18 (2010), p. 597, 598.

47 *Stephen Holmes*, *Constitutions and Constitutionalism*, in: Michel Rosenfeld / András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, p. 189, 191, 192, 198.

look at the advantages that governing elites may get from them.⁴⁸ Constitutions help mobilize cooperation, something that even the most powerful rulers need, for example, by granting legal protections and rights to less powerful swaths of the population.⁴⁹ Constitutional provisions serve to gather information, for example by parliamentary immunity, and correct fatal errors of judgment.⁵⁰

2.4. *Constitutionalism as institutions*

According to Santiago Nino we can distinguish between minimum constitutionalism and full constitutionalism. In the first one, there is a constitution in the apex of the legal system. The constitution organizes political power and regulates the relation between the subjects and the state, imposing limitations on legislative power. The constitution does not have to be written and could have any content. On the other hand, in full constitutionalism there are not only set rules that organize power; they also regulate the procedure and the content of the law.

In a similar vein, Ronald Dworkin considers that constitutionalism is a “system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise.”⁵¹ When this system includes strong judicial review, as it usually does, it is called judicially enforceable constitutionalism.⁵²

A new commonwealth model of constitutionalism has, according to Stephen Gardbaum, been adopted by Canada, New Zealand, and the United Kingdom. These countries established an alternative to the American model of constitutionalism based on entrenched rights and judicial review of legislation. They pursue the legal protection of human rights by “decoupling judicial review from judicial supremacy by empowering legislatures to have the final word.”⁵³

48 Ibid., p. 192.

49 Ibid., p. 191, 215.

50 Ibid., p. 191, 194.

51 *Ronald Dworkin*, *Constitutionalism and Democracy*, *European Journal of Philosophy*, 3 (1995), p. 2.

52 *Michael J. Klarman*, *What’s so great about constitutionalism?*, *Northwestern University Law Review* 93 (1998-1999), p. 145, 146.

53 *Stephen Gardbaum*, *The New Commonwealth Model of Constitutionalism*, *American Journal of Comparative Law* 59 (2011), p. 707, 709.

2.5. *Constitutionalism as ideology, theory, and institutions*

Finally, we have cases in which the term “constitutionalism” is used to refer at the same time to an ideology, a theory, and institutions. According to Paolo Comanducci and Ricardo Guastini, this is the case of European postwar neo-constitutionalism.⁵⁴

The ideology of neo-constitutionalism puts in second place the limitation of the power of the state, since the state is considered a partner. It focuses on the protection of fundamental rights, and welcomes what it calls the constitutionalization of a legal system and propels its extension.⁵⁵ It considers that there is a moral duty to obey the constitution.⁵⁶ The constitutionalization process of a legal system means: (1) the adoption of a rigid constitution that incorporates fundamental rights, (2) the existence of judicial review, (3) the normative force of the constitution, (4) the overinterpretation of the constitution, which means there are multiple implicit norms that derive from the constitution. There is no legislative discretion; everything is pre-established by the constitution, (5) the regulation by the constitution of the relations among individuals, (6) the practice of interpreting laws according to the constitution, and (7) the influence of the constitution in political questions.⁵⁷

The theory of neo-constitutionalism describes the achievements of the constitutionalization of the legal system. And it focuses on the structure and the role of the constitution. Furthermore, it considers that the interpretation of the constitution is different from statute interpretation.⁵⁸ Finally, with constitutionalism neoconstitutionalists mean a rigid constitution that incorporates fundamental rights and judicial review.⁵⁹

3. What is authoritarian constitutionalism?

In this part of the essay I want to explore the very few authors that have used the category “authoritarian constitutionalism” to refer to some countries. This survey will help us to identify the features pointed out in the literature that characterize authoritarian constitutionalism. Once I identify these features I will reconsider two of them and distinguish authoritarian constitutionalism from *constitutional authoritarianism*.

54 Paolo Comanducci, *Formas de (Neo)constitucionalismo: Un análisis metateórico*, in: Miguel Carbonell (ed.), *Neoconstitucionalismo(s)*, Madrid 2005, p. 75; Ricardo Guastini, *La Constitucionalización del ordenamiento jurídico: El caso italiano*, in: Miguel Carbonell (ed.), *Neoconstitucionalismo(s)*, Madrid 2005, p. 49, 50-58. For a democratic critique of neoconstitutionalism see Micaela Alterio, *Una crítica democrática al neoconstitucionalismo y a sus implicancias políticas e institucionales*, Madrid, 2015.

55 Guastini, note 54, p. 50-58.

56 Comanducci, note 54, p. 85, 85.

57 Guastini, note 54, p. 50-58.

58 Comanducci, note 54, p. 83, 84.

59 Guastini, note 54, p. 50, 51.

We have to keep in mind that we are talking about authoritarian constitutionalism instead of, for example, electoral authoritarianism⁶⁰ or competitive authoritarianism.⁶¹ These categories differ in two main ways. Electoral authoritarianism or competitive authoritarianism refers to a distinctive regime; authoritarian constitutionalism, as I have said, does not. Authoritarian constitutionalism, as I understand it, emphasizes *a way in which ruling elites with an authoritarian mentality exercise power* in not fully democratic states, where the liberal democratic constitution in place, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian ideological functions. The second difference is the emphasis that authoritarian constitutionalism places on the constitutional facet instead of on multiparty elections or unfair electoral competition.

My understanding of authoritarian constitutionalism differs from other authors because they use the category to describe a distinctive regime.

3.1. *The existing literature.*

We may begin our review of the literature that refers to authoritarian constitutionalism with the case of Singapore described by Mark Tushnet. According to the constitutional scholar, in authoritarian constitutionalism liberal freedoms are protected at an intermediate level and elections are reasonably free and fair.⁶² In the case of Singapore “there are interstices tolerated by the regime in which standard liberal freedoms, including freedom to dissent from existing policy, can be found.”⁶³ For example, of the three notable occasions in which persons have been detained without trial because they pose a threat to national security, only one could be considered arbitrary.⁶⁴ Seditious law that authorizes criminal punishment for criticizing government policies has been largely unused, even though authorities use other methods of pursuing their critics.⁶⁵ For example, they have used libel law to recover substantial monetary damage awards.⁶⁶ The courts protect public officials of false public statements or false imputations of corruption.⁶⁷ There is indirect influence on newspapers’ board

60 *Andreas Schedler*, *The Logic of Electoral Authoritarianism*, in: Andreas Schedler (ed.), *Electoral Authoritarianism. The Dynamic of Unfree Competition*, Boulder 2006.

61 *Steven Levitsky / Lucan A. Way*, *Competitive authoritarianism: hybrid regimes after the Cold War* Cambridge 2010.

62 *Tushnet*, note 1, p. 8.

63 *Ibid.*, p. 9.

64 *Ibid.*, p. 13, 14.

65 *Ibid.*, p. 15.

66 *Ibid.*, p. 16.

67 *Ibid.*, p. 16, 17.

of directors⁶⁸ and the electoral rules have been amended to secure a control of the ruling political party while there is a minority representation.⁶⁹

After this description of Singapore's practices and laws, Mark Tushnet continues: The ideology of authoritarian constitutionalism can be understood near one end of a spectrum running from strong libertarianism through U.S.-style liberalism and the European tradition of social democracy to a constitutionalism that freely invokes standard justification for restrictions on individual freedom. Importantly, though, authoritarian constitutionalism is constitutionalist because it invokes standard justifications, not ones flowing from a distinctive authoritarian ideology (emphasis added).⁷⁰

Part of this ideology is explained by Lee Kuan Yew, who says that “in the East the main object is to have a *well-ordered* society so that everybody can have a maximum enjoyment of his freedoms” (emphasis added).⁷¹ On the other hand, Li-Ann Thio explains there is a communitarian bent of the nation before community and society above self. The people in the East seek a government by honorable men, rather than mechanisms of accountability, and do not give a heightened value to political speech, which is why they protect the reputation of public men in political libel cases.⁷² Likewise, they value consensus rather than contention,⁷³ and individualism is rejected in favor of a responsibilities and good, public-oriented discourse.⁷⁴

In Somek's description of authoritarian constitutionalism, based on the Austrian regime from 1933 to 1938, we find the following: “[the constitution] accepts structures of government that contain most of the features of constitutional law with the noteworthy exception of (parliamentary) democracy itself.”⁷⁵ That means that the government does not depend on approval by the electorate and is not accountable to a representative body.⁷⁶

So in the case of Austria, the content of the constitution is authoritarian. It is the constitution that rejects democracy, and it is not just a matter of authoritarian practices. There are other interesting features, such as (1) the government's wish to maintain the semblance of formal legality and continuity with the Constitution of 1920⁷⁷; (2) the role constitutional doctrine played to accommodate the new developments (this doctrine used descriptive po-

68 Ibid., p. 29.

69 Ibid., p. 29, 30.

70 Ibid., p. 95.

71 Quoted in: *Tushnet*, note 1, p. 82.

72 *Thio*, note 32, p. 144.

73 Ibid., p. 145.

74 Ibid., p. 147.

75 *Alexander Somek*, *Authoritarian constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its legacy*, in: Christian Joerges / Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law*, Oxford 2003, p. 361, 362.

76 Ibid., p. 379.

77 Ibid., p. 367.

litical language that has an underlying normative agenda⁷⁸); (3) the important role of the leader for the founding and preservation of the state⁷⁹; and (4) the program of national reconstruction was animated by Catholic social philosophy, the goal of social integration, the idea of a corporate society, and the self-image of the Austrians as the better Germans and national unity.⁸⁰

We may find a similar description of authoritarian constitutionalism in the work of Turkuler Isiksel, who focuses on the case of Turkey. Isiksel denounces how in this type of regime the constitution rather than constraining power is co-opted to sanction oppressive uses of it.⁸¹ The constitution is deployed as a device for political domination that denies the promises of constitutionalism and reflects an authoritarian ideology.⁸² The 1982 Turkish constitution, says Isiksel, is “permeated by the spirit of emergency rule and is designed primarily to circumscribe the liberties themselves rather than to govern their restriction.”⁸³ The constitution contains expansive provisions concerning emergency rule.⁸⁴ In that sense, Isiksel agrees with Somek that there is a constitution with an authoritarian content, but they disagree as to what the content is. For Isiksel “[Somek’s] emphasis on the lack of democratic assemblies as the defining feature of this kind of constitutional rule does not do justice to the profound challenge of authoritarian constitutionalism...precluding arbitrary, absolute, or unaccountable uses of public power by definition.”⁸⁵

Moreover, she emphasizes how the liberties of citizens are subordinate to an oppressive conception of public order and security in which the state is the center of political culture.⁸⁶ According to Isiksel, the powerful National Security Council, composed of the military high command and key government ministers, could *de facto* direct the operations of the three branches of government. In addition, military judges could try civilians, producing a stream of political prisoners, insulated the military itself from civilian monitoring, and established expansive provisions concerning emergency rule.⁸⁷ And the Constitutional Court has refused to make a progressive interpretation of the constitution.⁸⁸

The description of authoritarian constitutionalism in Chile from 1830 on is very similar. As Tschoren explains “the Constitution of 1830 and its complementary legislation would

78 Ibid., p. 370.

79 Ibid., p. 362, 377, 378.

80 Ibid., p. 362, 366, 369.

81 *Turkuler Isiksel*, Between text and context: Turkey’s tradition of authoritarian constitutionalism, *International Journal of Constitutional Law* 11 (2013), p. 702, 702, 709.

82 Ibid., p. 709, 726.

83 Ibid., p. 719.

84 Ibid., p. 718.

85 Ibid., p. 709, 710.

86 Ibid., p. 710, 726.

87 Ibid., p. 717, 718.

88 Ibid., p. 722, 723.

establish a true “constitutional dictatorship” in which the President, the great guarantor of national security and domestic public order, was not only made the primary magistrate of the autocratic republic, but also practically elevated to a point of unchecked power.”⁸⁹ And, once more, the most important values were peace and order.⁹⁰

3.2. *Some common features.*

What are the common features that we can deduce from these descriptions of authoritarian constitutionalism? We have come across conservative values—such as order, community bent, and value consensus rather than contention—however, it is not clear that there is a distinctive authoritarian ideology. We have also found that there is an intermediate level of protection of liberal freedoms, which is why I use the term “not full democracies.” More importantly, we have encountered constitutions with an authoritarian content, even though there is no agreement on what that content is.

Why are these countries considered examples of authoritarian *constitutionalism*? So far we haven’t seen any constitutionalist feature. For this reason, I think we should reconsider whether one of the features of authoritarian constitutionalism is a constitution with an authoritarian content – whatever that is. Moreover, we should decide if elites maintain a distinctive authoritarian ideology.

On the other hand, there is the question: are these characteristics sufficiently novel to warrant a new category? If we have in mind that conservative values also are present in liberal democracies and intermediate level of faulty constitutional practices are taken into account by other categories, such as competitive authoritarianism, the answer is no. However, this answer doesn’t do justice to the emphasis that authoritarian constitutionalism makes on the exercise of power within an ineffective liberal democratic constitution that sustains a constitutionalist discourse for authoritarian purposes. This emphasis calls our attention to a feature that categories such as competitive authoritarianism do not.

4. **Authoritarian constitutionalism reconsidered**

4.1. *Constitutions with an authoritarian or a liberal content?*

As has been said, one of the features of authoritarian constitutionalism described by the literature is a constitution with authoritarian content. In my opinion, the cases in which this has happened—such as Austria from 1933 to 1938, Turkey from 1982 to the present, Chile

89 *Samuel Tschorne V.*, *Authoritarian Constitutionalism and Political “Stability” in Chile: The Role of Law and Institutions in the History of Chile (1820-1925)*, (2014), p. 31, https://www.law.yale.edu/system/files/documents/pdf/sela/SELA11_Tschorne_CV_Eng_20110513.pdf (last accessed on 12 January 2017); *Pablo Ruiz-Tagle*, *El constitucionalismo chileno: entre el autoritarismo y la democracia*, in: Renato Cristi / Pablo Ruiz-Tagle, *La República en Chile Teoría y práctica del Constitucionalismo Republicano*, Santiago 2006, p. 79, 93-106.

90 *Tschorne*, note 89, p 29.

from 1830, and maybe Singapore⁹¹--are examples of *constitutional authoritarianism* rather than *authoritarian constitutionalism*. In the former, the practices follow a constitution with an authoritarian content. There is no constitutional commitment to constitutionalism to which practices can be confronted and criticized. On the latter, there has to be a liberal constitution in place, at least, if we want to call it *constitutionalism*.

Maybe this difference seems pedantic and for sure we should keep thinking of *constitutional authoritarianism* and *authoritarian constitutionalism* as categories that pose similar difficulties. In fact, *constitutional authoritarianism* and *authoritarian constitutionalism* are very similar. However, if we are looking for analytical clarity this may be a good place to start. Moreover, the difference between the two—the existence or non-existence of a liberal democratic constitution—is very relevant. Indeed, a liberal democratic constitution is part and basis of a constitutionalist discourse with authoritarian purposes. This discourse makes the exercise of power more sophisticated.

In brief, *authoritarian constitutionalism* refers to the exercise of power within the framework of a liberal democratic constitution. Of course, a constitution that does not fulfill the promises of constitutionalism⁹² makes authoritarian constitutionalism a *thin* constitutionalism.

4.2. Authoritarian ideologies?

One of the points in which there is ambiguity in Tushnet's work about Singapore is in his discussion about ideology. Let's recall what he says:

*The ideology of authoritarian constitutionalism can be understood near one end of a spectrum running from strong libertarianism through U.S.-style liberalism and the European tradition of social democracy to a constitutionalism that freely invokes standard justification for restrictions on individual freedom. Importantly, though, authoritarian constitutionalism is constitutionalist because it invokes standard justifications, not ones flowing from a distinctive authoritarian ideology" (emphasis added).*⁹³

This means that the authoritarian leaders invoke standard liberal justifications, so that there is only one ideology at work (whereas in authoritarianism, as such, there typically is an au-

91 Since we can find provisions like the following: Constitution of the Republic of Singapore Aug. 9, 1965 art. *5A.(1) Subject to Part III, the President may, acting in his discretion, in writing withhold his assent to any Bill seeking to amend this Constitution (other than a Bill referred to in Article 5 (2A)), if the Bill or any provision therein provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution.

92 *H.W.O. Okoth-Ogendo*, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in: Douglas Greenberg / S.N. Katz / B. Oliviero / S.C. Wheatley, *Constitutionalism and Democracy: Transitions in the Contemporary World*, Oxford 1993, p. 66.

93 *Tushnet*, note 1, p.84.

thoritarian ideology).⁹⁴ What is different in authoritarian constitutionalism is the conduct or practices of governance or what officials do.

Is it correct to say that ruling elites do not hold a distinctive authoritarian ideology? How do we know whether the ideology of the ruling elites is authoritarian? In order to determine the nature of the ideology of the ruling elites, we should look at their behavior. The ideologies should be compatible with all the observation evidence about their behavior, and make the evidence more comprehensible to us.⁹⁵ Moreover, we have to take into account the content and the functions of the evidence.⁹⁶ This evidence could be the constitution in place, if it is not too old, or the amendments passed by the ruling elite, and their constitutional practices. Let's focus first on the content.

We already know that in countries where authoritarian constitutionalism takes place there is an intermediate level of respect of rights and freedoms. The question is: do those practices allow us to affirm that the ruling elites held a distinctive authoritarian ideology? Tushnet thinks they do not, since ruling elites claim standard justifications.

In my opinion, faulty constitutional practices give us a clue to the rulers' authoritarian ideology. However, I also recognize that there are ambiguities. We may wonder, for example, whether passing several constitutional amendments in a few weeks without public deliberation, the permanent threat to journalists by the state and the lack of protection against narcotics gangs, the repression of protests, the control of the Internet, the raising of torture by the police tell us something about an authoritarian ideology.⁹⁷ Or if, besides the quality of the practices, there has to be a repetition and how often. In other words, it is a matter of degree and there are disagreements about it. It seems then that practices are not enough and we need to look at something else.

Now let's think about the content of the constitution. As has been argued, if we want to talk about authoritarian *constitutionalism* the content of the constitution needs to be of a liberal kind. In that sense, the existence of a liberal constitution runs counter to the thesis of a distinctive authoritarian ideology.

94 I want to thank Professor Tushnet for this clarification.

95 We may attribute some sort of ideologies to the elites because it is compatible with all the observation evidence about their behavior, and makes the evidence more comprehensible to us; *Raymond Geuss, The Idea of a Critical Theory Habermas and the Frankfurt School*, Cambridge 1981, p. 93.

96 For the difference between content and functions of ideology *ibid.* p. 8.

97 This happened in Mexico last term with the constitutional amendments related with the regulation of oil and hydrocarbons investment, telecommunications, electoral rules, and education. The threats to journalists are documented, among others, by Human Rights Watch <http://www.hrw.org/es/world-report-2011/mexico-0> (last accessed 12 on January 2017); We can remember the repression of the street protests in the first official day of President Enrique Peña Nieto. Control of the Internet is pursued by the telecommunications law presented by President Enrique Peña Nieto in March 2014, that it is nowadays discuss in the Congress, for an analysis *see* <http://www.sinembargo.mx/opinion/21-04-2014/23296> (last accessed on 12 January 2017) The raise of torture by the police has been denounce by several NGO's, <http://cmdpdh.org/2014/04/ong-exponen-la-situacion-de-los-derechos-humanos-en-mexico-ante-el-relator-especial-de-la-onu-sobre-la-tortura-juan-e-mendez/> (last accessed on 12 January 2017)

From this perspective, it looks like the ruling elites do not have a distinctive authoritarian ideology. That is, if there are authoritarian practices and there is disagreement about its nature, and there is a constitution with a liberal content, it seems odd to say that the ruling elites that put in place that constitution have a distinctive authoritarian ideology.

The problem with this conclusion is that it does not take into account a very important point about the ideology of the ruling elites, that is, what the practical and ideological functions of the constitutions and the functions of constitutionalist discourse tell us. Only if we take them into account, I think, we can see the distinctive authoritarian ideology of ruling elites.

4.3. *Practical and ideological functions of liberal democratic constitutions in authoritarian constitutionalism*

In a liberal democracy, where the power is widely and evenly distributed, the provisions that theoretically have the purpose of limiting power do have the *effect* of limiting power.⁹⁸ Conversely, authoritarian constitutionalism turned liberal democratic constitutions inside out.⁹⁹ Elites used constitutions to achieve goals, such as control of political opponents or to bolster a regime's claim to legal legitimacy in so far as it served the regime's interests.¹⁰⁰ Consequently, the application of the constitutional provisions varied according to the interests of the ruling elite.

This instrumental use of the constitution may tell us something about the ideologies of the ruling elites. According to Linz, authoritarian ruling elites have no elaborate or guiding ideology and prefer to call them mentalities. Linz, who follows Theodor Geiger, explains:

[I]deologies are systems of thought more or less intellectually elaborated and organized, often in written form. Mentalities are ways of thinking and feeling, more emotional than rational, that provide noncodified ways of reacting to different situations. Mentality is an intellectual attitude; ideology is intellectual content. Mentality is physic predisposition, ideology is reflection, self-interpretation; mentality is previous, ideology later; mentality is formless, fluctuating –ideology, however, is firmly formed. Ideologies have a strong utopian element, mentalities are closer to the present or past...It is more difficult to conceive of mentalities as binding, requiring a commitment of the rulers and the subjects irrespective of costs and of the need of coercion to implement them.¹⁰¹

The distinction between mentalities and ideologies emphasizes the weakness of the commitment to political ideas, the looseness of the ideas, the flexible approach they allow.

98 Holmes, note 47, p.207.

99 Ibid., p. 211; *Isiksel*, note 81, p.714.

100 *Tushnet*, note 1, p. 53, 62, 69.

101 *Linz*, note 5, p. 162,163.

These pragmatic mentalities of authoritarian elites allow them to adopt and implement limiting kinds of constitutional provisions according to the necessities they have across time and space. Their pragmatic mentalities adapt to the realities and situations in a noncodified way. So, to the extent these constitutional provisions give them some benefit, they will adopt or implement them. There is a more flexible approach to the constitution far away from the strict commitments of ideologies.¹⁰²

Besides this pragmatic approach, what distinguishes authoritarian constitutionalism is that those provisions that in a liberal democracy usually serve as a limitation to power and empower those who would otherwise be powerless here do not work. Moreover, these kinds of provisions are used for different practical purposes and to perform authoritarian ideological functions. Their functions serve the necessities of the ruling elite in a specific time.

Let's begin by identifying the different kinds of provisions of most liberal democratic constitutions. Using the Mexican Constitution as an example, first, there are rights and liberties. Second, there are rules that attribute and separate power in different branches of government. Third are rules that distribute power among federal and state governments. Fourth are rules that establish causes of officials' liability, procedures, and sanctions. Fifth are rules that regulate elections. Sixth are provisions that grant governmental powers over the economy, regulation of property, public goods, etc. Seventh are provisions that design representative institutions and procedures. Eighth are rules to amend the constitution.

In a liberal democracy, these provisions have several functions. They may empower institutions that allow people to cooperate and coordinate or they may serve as tools to gather information and expose it to the people. But they also have the purpose and the effect of limiting power by establishing what can and what cannot be done, or *how* things can be done.¹⁰³ Moreover, some of these provisions empower people that otherwise would be powerless.¹⁰⁴

What distinguishes authoritarian constitutionalism is that those limiting and empowering functions disappear. We can guide our inquiry about the functions that liberal democratic constitutions fulfill according to authoritarian constitutionalism by thinking of the functions that constitutions have in authoritarian regimes. That is because the content of constitutions in democratic and authoritarian regimes do not differ too much. So, what makes the constitutions fulfill different functions is not the content but the context in which they are applied.

According to Ginsburg and Simpser, constitutions in authoritarian regimes have the following functions: coordinate multiple actors, control subordinates, elicit cooperation from subjects, establish instructions, make advertisements, obfuscate actual practices, provide signals of ideological legitimacy to particular voices, enhance credibility, demoralize

102 *Ibid.*, p. 162-164.

103 *Waldron*, note 4, p.20, 21.

104 *Ibid.*, p. 24, 25.

would-be opponents, describe things as they might be, structure authoritative discourse and provide a political idiom.¹⁰⁵

Now let's imagine how the provisions of a liberal constitution can fulfill the same functions that the constitutions in authoritarian regimes do. For example,

- Provisions that regulate elections can help to coordinate political elites by establishing the way of peaceful succession among elites.
- Provisions that separate power among different branches, distribute power among the federal and states governments, establish representative procedures and the process to amend the constitution serve to coordinate elites by assigning different tasks to different groups, without serving as mutual checks and balances or pauses for reflection.
- Rules imposing officials liabilities help to control subordinates
- Rights and liberties help to elicit cooperation of the powerless and provide a political idiom.
- Regulation of the economy and public goods, such as oil and energy resources, make advertisements to national and foreign investors.
- Procedural democratic rules can obfuscate actual practices, provide signals of legitimacy, and describe things as they might be in order to generate an illusion.
- Elections are used by the ruling elite to gather information about the preferences of the people and engender the belief of legitimacy without being an effective mechanism of accountability.

We can classify these functions as practical and ideological. Among the practical functions are coordinate actors or control subordinates, make advertisements, elicit cooperation, etc. And among the ideological functions are obfuscate actual practices, provide signals of legitimacy, etc. As I said, in a liberal democracy cooperation and coordination are also fulfilled by the constitution, and the constitution serves to legitimate the regime. The difference is that under authoritarian constitutionalism constitutions do not effectively limit power nor empower those who would otherwise be powerless. However, as we will see, that doesn't impede ruling elites from trying to use the constitution as legitimate force. If that is not longer possible, they use the constitution to stabilize the regime generating continuous aspirations while making implausible any real change.

Thus, ruling elites are not strongly constrained by the liberal constitution in place. According to their pragmatist mentality, they do with the constitution whatever they need.¹⁰⁶ In that sense, the standard justifications freely invoked by the ruling elites do not do any

105 Tom Ginsburg / Alberto Simpser, Introduction, in: Tom Ginsburg & Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes*, Cambridge 2014, p. 1, 2-14.

106 In Nonet and Selznick classification this is a political repressive constitution because it is subordinated to politics. *Philippe Nonet / Philip Selznick, Law and Society in Transition*, Piscataway 2001, p. 16. I do not deny that. What I mean is that constitutions have to be responsive in some degree to social needs *in order* to be repressive.

good. Perhaps they make things even worse. That is because liberal democratic standards are used to cover authoritarian functions.¹⁰⁷

4.4. *Constitutionalist discourse in authoritarian constitutionalism*

I have pointed out the practical and ideological functions that a constitution fulfills for authoritarian constitutionalism. Now I will focus on the ideological functions of the constitution. To understand these ideological functions, it is helpful to switch our perspective. Instead of considering the constitution as an instrument of government we have to look at it as a discourse.

A constitution is a written ideological discourse upon which the ruling elites adopt a spoken discourse of constitutionalism. Commonly, they appeal to the constitution, the rule of law, respect for human rights or the life of democracy. In that sense, the text matters insofar as it gives the ruling elite the material basis—which make it more credible—to use to their benefit the spoken discourse of constitutionalism.¹⁰⁸ Of course, there is no normative architecture—that is, conventions and practices, principles and understandings¹⁰⁹—that makes constitutionalism a reality. In the mentality of the ruling elite, there is no commitment to the limitation of power.

This is a superficial constitutionalist discourse because it does not further the liberal democratic ideology that is needed for constitutionalism to work properly. I mean values such as individualism, plurality, neutrality, participation, and disagreement. As with the cases of authoritarian constitutionalism, its pillars are the conservative cultural values of order, community bent, value consensus rather than contention, etc., and, of course, in authoritarian constitutionalism ruling elites do not make any attempt to undermine them by spreading liberal democratic values.

The ruling elite uses this constitutionalist discourse—written and spoken—for ideological purposes. The goal of this discourse is to stabilize domination or engender the belief of being a legitimate domination.¹¹⁰ Stabilize domination might be easier than engendering the belief of its legitimacy, and it is possible that the younger the regime the greater possibilities for generating this belief. Conversely, as time goes by and people realize that the constitution is not respected and the discourse of constitutionalism is just a sham, its legitimating force would tend to reduce.

107 *Tushnet*, note 1, p. 53. We may attribute mentalities and not ideologies to the elites in authoritarian constitutionalism because it is compatible with all the observation evidence about their behavior, and makes the evidence more comprehensible to us. *Geuss*, note 95, p.93.

108 As Alan Hunt says law is important in that it exhibit symbolic or ideological dimensions. Law mobilizes important ideological symbols. *Hunt*, note 28, p.4.

109 *Walker*, note 31, p.165.

110 *Geuss*, note 95, p.15. Of course, constitutional discourse is not the only one used for stabilizing and legitimizing a regime. See *Hunt*, note 28, p.117, 134, 135.

To engender the belief of legitimacy and stabilize a regime ruling elites need to produce continuous aspirations to keep the people in the game of authoritarian constitutionalism, even though at the same time they make implausible any real change.

(a) Create constitutional aspirations

To achieve this purpose, they have to create an illusion of possible change. This can be achieved, for example, by granting rights that formulate the interests of the powerless without changing the conditions—social, economic and institutional power relations—to make them effective.

Commonly, this grant of human rights is accompanied by theories that further the idea that the dogmatic and organic parts of the constitutions are independent or interrelated in a peaceful way.¹¹¹ Accordingly it is possible to make some progress just focusing on human rights. However, as has been argued by Roberto Gargarella based on the Latin American experience, this thesis seems doubtful. Constitutions should be seen as composed of components that are related and interdependent, and recognize the special influence that the organization of powers has on the functioning of the entire constitution, and in consequence, the necessary attention that has to be paid to it.¹¹² Not recognizing this difficult relation among the components of the constitution may hide failures of the political branches to comply with the constitution, blind the presidential hindering of social rights implementation, or ignore the inactivity of Congress to implement the participatory clauses.¹¹³

This logic may explain why, for example, in Latin America in the last decades the constitutional amendments have focused on granting more human rights, even though there has not been any substantial change in the vertical organization of power.¹¹⁴ Moreover, in the cases that the organic part of the constitution has been amended to establish more democratic procedures or vehicles for popular participation, in the statutes or in practice, they are not respected.¹¹⁵

In those cases, rights reflect powerless interests but further elite interests.¹¹⁶ The logic is that the law has to be responsive to some degree to social needs in order to be repressive, that is, to secure control by ruling elites.¹¹⁷ In effect, the powerless make some minor gains and the elites maintain control over the state.¹¹⁸

111 *Roberto Gargarella*, *Latin American Constitutionalism 1810-2010*, Oxford 2013, p. 157, 158.

112 *Ibid.*, p. 157, 159, 161, 172, 184, 186, 187, 205, 206.

113 *Ibid.*, p. 158.

114 *Ibid.*, p. 148, 172, 185, 186.

115 According to Roberto Gargarella this has happened in Ecuador and Venezuela, *ibid.* p. 173-177.

116 For the distinction see *Geuss*, note 95, p. 38.

117 I use the categories of Nonet & Selznick in a slightly different way. For them, repressive law “gives short shrift to the interest of the governed, that is, when it is disposed to disregard those interests or deny its legitimacy”. *Nonet / Selznick*, note 117, p.29.

118 *Hugh Collins*, *Marxism and law*, Clarendon Press 1982, p. 47.

In fact, without any respect or inclusion of the powerless, it would be very difficult for any constitutionalist discourse to be persuasive.¹¹⁹ Creating constitutional aspirations depends on the identification of real but partial freedoms and equalities.¹²⁰ Delusion is plausible and effective because norms selectively articulate real needs, relations, and potentials of the powerless.¹²¹

This real, but feigned, achievement of constitutionalism creates an illusion of living in a constitutional state.¹²² It is an illusion because there is no overwhelming evidence that the belief is false. On the contrary, the inclusion of human rights, separation of powers, and some respectful practices make people believe that it is possible to achieve a constitutional state. The discourse satisfies the wish of the people to live in a place where power is limited. However, under the existing conditions it is implausible that this could happen.¹²³ In other words, there is no evidence that under the existing conditions the constitution will limit power and would be respected without relying on the varying considerations of the ruling elite.

(b) Make implausible any real change

For this purpose, they have to conceal and reproduce reality.¹²⁴ For example, conceal politics behind the scenes using democratic procedures as a façade,¹²⁵ present group interest as the interest of the whole,¹²⁶ hinder or obstruct the creation of opposition powers manipulating electoral rules, and co-opt them if they come to existence.¹²⁷

Likewise, ruling elites have to dissimulate the conditions under which normative potentials might be realized.¹²⁸ The dissimulation masks the conditions of realization of a desirable political situation. They highlight some kinds of social contingencies or power relations and suppress others.¹²⁹ For example, they may highlight the importance of human rights provisions while disregarding the organic provisions of the constitution or the uneven

119 *Eagleton*, note 15, p. 14, 15, 26.

120 *Mark Warren*, *Liberal Constitutionalism as Ideology: Marx and Habermas*, *Political Theory* 17 (1989), p. 511, 525.

121 *Ibid.*, p. 526.

122 As E.P. Thompson says the essential precondition for the effectiveness of law, in its functions as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. On occasion, by actually being just. *E.P. Thompson*, *Whigs and Hunters. The origin of the Black Act*, Phanton Books 1975, p. 263.

123 *Geuss*, note 95, p. 42.

124 *Schedler*, note 60, p. 1.

125 *Ibid.*, p. 9.

126 *Geuss*, note 95, p. 14.

127 *Ibid.*, p. 13.

128 *Warren*, note 120, p. 512.

129 *Ibid.*, p. 514.

power relations in society. Or they may point to frequent elections without considering any other auxiliary precautions.¹³⁰ Elites use the constitution to provide symbols and generate appearances in order to mask contrary practices.¹³¹

Moreover, elites may make sham constitutional attempts to counteract the conditions that allow them to implement the constitution according to their varying wishes. These conditions are wide corruption, weak civil society,¹³² rigid verticality in the political system, popular ignorance of the constitution,¹³³ material inequality,¹³⁴ etc. Among these conditions, one of great importance is the creation of an authoritarian coalition.¹³⁵ This coalition is made up of the provision of benefits to other officials, the opposition, political parties and social powers such as mass media. Therefore, the lack of virtue among men of self-government make it possible to create an authoritarian coalition between several members of government and private fortunes. This authoritarian coalition renders the constitutional means ineffective.¹³⁶ To use the words of the Federalist Papers, there are no longer any personal motives to resist encroachments or violations of rights and liberties, there is no ambition to counteract ambition, no opposite or rival interest or mutual checks.¹³⁷

Finally, ruling elites may want to misidentify and justify existing power relations.¹³⁸ By the misidentification of the causal origins of social phenomena they are removed from the realm of possible political action.¹³⁹ Examples include pointing to the constitution as the legal impediment of change, make a subsequent constitutional amendment and subverting the purpose in the laws or in practice. On the other hand, justification makes the prevailing distributions of power something right, proper, and good,¹⁴⁰ such as appealing to the exist-

130 Even though frequent and fix elections were very important for the framers of the American Constitution, they also knew that “A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives...”. *The Federalist*, No. 51, p.319 (James Madison) (Clinton Rossiter ed., Signet Classics 1961).

131 *Malcolm M. Feeley*, Review: Law, Legitimacy, and Symbols: An Expanded view of Law and Society in Transition, *Michigan Law Review* 77 (1979), p. 899, 905.

132 It is worth recalling that according to Madison restraints need constitutional laws and the vigilant spirit of the people. *Madison, James*, *The Federalist* 57 (1967), p. 350.

133 Mark Tushnet says that “if the participants in the system cannot unambiguously identify actions as violations [of the constitution], the breaches if the constitution cannot serve as a signal that people should now coordinate cooperative action against the leader”, *Tushnet*, note 1, p. 49.

134 *Gargarella*, note 111, p. 206.

135 *Tushnet*, 1, p. 51.

136 Remember that for republican governments to function properly private fortunes should not be sources of danger, improbability of mercenary and perfidious combination of the several members of government, accountability and sufficient virtue among men of self government. *Madison, James*, *The Federalist* 51 (1961), p. 343.

137 *Madison*, note 132, p. 319.

138 *Warren*, note 120, p. 514.

139 *Ibid.*

140 *Ibid.*, p. 513.

tence of more or less regular elections and formal representative procedures to justify decisions adopted behind the scenes and without public deliberation.

To sum up what has been said in these last two sections, authoritarian constitutionalism is a way of exercising power in not fully democratic states, where a liberal democratic constitution, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian functions. Among the latter, it sustains a constitutionalist discourse that helps ruling elites generate continuous constitutional aspirations that keep the people in the game of authoritarian constitutionalism, while making implausible any real change. These ideological effects are manifested, and sometimes extended, by those who are dominated.

In my opinion, these features give us sufficient grounds to claim that ruling elites hold a distinctive authoritarian mentality. Furthermore, they help us understand how ruling elites exercise power within ineffective constitutional provisions, masked by a liberal constitution and a constitutionalist discourse.

5. What should a constitutional theory be to counteract authoritarian constitutionalism?

Maybe the most obvious endeavor for a constitutional theory is to denounce defective constitutional practices, such as electoral manipulation, lack of substantive fulfillment of representative procedures, and violations of human rights. Whatever importance these criticisms may have, there are other more subliminal faults, but maybe more pernicious in the long run, at which a constitutional theory should aim. I'm thinking of the authoritarian purposes and effects of the constitutionalist discourse.

Where constitutionalist discourse is used to mask the exercise of power within ineffective constitutional limits, the critique of the latter should be the most important task of any theory. Constitutional theory has to be a critical constitutional theory that looks for emancipation and enlightenment.¹⁴¹ As James Madison wrote long ago, "the people ought to be enlightened, to be awakened, to be united, [and] that after establishing a government they should watch over it, as well as obey it."¹⁴² The question is: emancipate and enlighten about what? In my opinion, a critical constitutional theory has different purposes, depending on the context. So, what I am going to say is thought for a critical theory in authoritarian constitutionalism.

As we have seen ideologies are a set of political ideas that want to become uncontested. Constitutional theories are imbued by and used as instruments of ideologies. Theorists are inspired by and they appeal to different ideological values such as autonomy, democracy, pluralism, neutrality, etc., to make their arguments and recommendations more persuasive.

141 *Geuss*, note 95, p. 54, 58.

142 *James Madison*, Who are the best keepers of the people's liberties?, in: J.C.A. Stagg (ed.) *The Papers of James Madison*, Charlottesville 2010, p. 426.

Theorists make descriptive and normative arguments to persuade an audience of what they consider to be the best institutions and practices. Theories they construct also are instruments of ideologies. With the defense, explanation, or critique of some sort of institutions and practices, they indirectly try to make ideologies uncontestable.

In a liberal democracy, where constitutions work properly and limit power and empower those who would otherwise be powerless, a constitutional theory that explains how Congress works or how constitutional amendments are made, or what the requirements of the rule of law are, etc. reinforce the liberal democratic ideology behind constitutionalism. However, in authoritarian constitutionalism this is not the case.

In authoritarian constitutionalism if a constitutional theory restricts its efforts to explain and justify liberal democratic constitutions without uncovering and criticizing the authoritarian ideological purposes and effects of constitutionalist discourse, they become part of the problem and not of the solution. That is because restrict to explaining and justifying liberal democratic institutions that are in place help ruling elites to obfuscate the authoritarian functions of constitutionalist discourse.

I realize that uncovering and criticizing constitutionalist discourse, even in authoritarian constitutionalism, is not an easy task. That would require saving the utopian content of constitutionalism while criticizing its authoritarian functions.¹⁴³ This may be even harder when the population has naturalized that constitutionalist discourse *per se* is a “Good Thing”.¹⁴⁴ In this situation, criticizing constitutionalist discourse may be wrongfully, and sometimes intentionally, considered an authoritarian endeavor. However, criticizing constitutionalist discourse is the only path to allow agents to pursue their interests to live in a liberal and democratic society.¹⁴⁵ This possible misunderstanding makes it very important to distinguish between the content and the functions of a constitutionalist discourse in authoritarian constitutionalism.

In this endeavor, legal academia has an important responsibility. As is broadly known, education and schools are one of the main instruments to articulate and disseminate ideology,¹⁴⁶ so they have a unique opportunity to reproduce or criticize this instrumental use of the constitution and of constitutionalism. Theorists have the opportunity to unmask the perverted use of constitutionalism discourse by pointing out the authoritarian functions it serves for ruling elites. They have to take constitutionalism down off its pedestal and analyze it critically. Paraphrasing E. P. Thompson, they have to expose the sham and inequities which may be concealed beneath the discourse of constitutionalism.¹⁴⁷

143 *Geuss*, note 95, p. 88.

144 I’m paraphrasing Mark Tushnet “Rights, most people believe, are Good Things”. *Mark Tushnet, A Critique of Rights: An Essay on Rights*, Texas Law Review 62 (1984), p. 1363, 1363.

145 *Geuss*, note 95, p. 34, 35.

146 *Collins*, note 118, p. 50. Besides education there are churches and mass media.

147 *Thompson*, note 122, p. 266.

The first aim of a critical constitutional theory could be to identify how the system *generates continuous aspirations* without giving the tools to make them real, and how generating these aspirations furthers the interests of ruling elites. This could be the case of incorporating human rights provisions in the constitution without changing the organic part of the constitution. Or the case in which there are some constitutional amendments that give more power to the powerless but they are obstructed by laws or practices. Let me give you some examples. In Mexico, for a long time we have had a constitution that established civic, political, and social rights. Moreover, we had a specific judicial procedure called *amparo* for the protection of human rights. However, its implementation by the courts was unduly restricted. By a narrow interpretation of the requirement of real and in fact injury to file courts limited the access to it. Furthermore, they followed a practice that made it very difficult to admit *amparos* by loosely applying the causes of inadmissibility.¹⁴⁸ In this case, human rights provisions formulated the interests of the powerlessness but in practice they furthered the interests of the ruling elites. They did it by generating aspirations that could not be achieved while helping to stabilize or legitimize the regime.

Second, a critical constitutional theory should point to the *conditions that impede* liberal democracy from becoming a reality. If we follow the framework given by Solum, there may be historical, path dependence, or historic constraints; nomological or human nature or institutional capacities impediments; and beliefs, social norms, or political attitudes that depend on unlikely contingencies.¹⁴⁹

As I have said, one of the main impediments for checks and balances, separation of powers, bill of rights, etc. to limit power are authoritarian coalitions. So, to uncover the existence of authoritarian coalitions, would be one of the key aims of a critical constitutional theory. For example, in Mexico the mass media is one of the members of the authoritarian coalition. For almost all the 20th century just one company *Grupo Televisa* was the only mass media company in Mexico. In 1993 there emerged another mass media company—*TV Azteca*. Together both companies have more than 90% of audience and infrastructure in open TV.¹⁵⁰ *Televisa* has a well-documented history of alliance with the *Partido Revolucionario Institucional* (PRI) that governed Mexico for more than 72 years and after twelve years of alternation in 2012 was back in *Los Pinos*. In fact, in Mexico, it is broadly recognized that Enrique Peña Nieto is the new president thanks to the support of *Televisa*.

In 2013 with the amendment of articles 6, 7, 28 of the Constitution competition among media was established as a constitutional principle and an independent national agency was granted the power to limit the concentration of media and to order the sale of assets, rights, or any parts necessary to accomplish it. Of course, the ruling elite publicly said that the

148 In June 6, 2011 there was a constitutional amendment to *amparo* procedure that makes the real and in fact injury more broad. However, we have not yet enough time to observe the practices of the courts.

149 Solum, note 33, p. 317-320, 329.

150 Juan Enrique Huerta-Wong / Rodrigo Gómez García, *Concentración y diversidad de los medios de comunicación y televisión en México*, Nueva Época 19 (2013), p. 113.

amendment would promote mass media competition. However, according to members of the opposition parties, NGOs, and social movements, the legislation introduced in March 2014 by the president establishes joke limits to concentration, undermines the authority of the independent agency established to control mass media companies, makes it very difficult to consider *Televisa* as a firm that dominates the market of pay TV by making subterfuge legal distinctions, and establishes very broad limits for the authority to control the Internet, among other things.¹⁵¹ In short, the legal reform proposed by the president impedes any possible change promised by the constitutional amendment.¹⁵² In multiple cases like this in Mexico, a critical constitutional theory might denounce how the same ruling elite used the constitution to set up an “emancipatory” constitutionalist discourse, and then undermined the constitutional amendment to protect the members of the authoritarian coalition that was supposed to be controlled by the constitutional amendment.

Third, a critical theory should call our attention to *partial interest presented as interest of the whole*, or how the *formal procedures are used as a façade* of democracy. Let me give you another example. In 2013, after several failed attempts, there was an amendment to the Mexican Constitution regarding the oil and hydrocarbon investment regulation that allowed private investment. This amendment was negotiated by a little group of congressmen, government leaders, and party leaders outside congress in what has been called the Board of the Mexican Agreement (*Pacto por México*). The *Pacto por México* was a political agenda set by the three major political parties when Enrique Peña Nieto came to office. Moreover, they put in place a Board that negotiated and wrote up the law proposals. Of course, there was no transparency in their discussions; they just turned in the proposal to Congress to be approved.

In fact, according to article 135 of the Constitution, this amendment required the approval of a super majority in both houses and a majority of state legislatures. Even though this procedure is theoretically rigid, the constitutional amendment was approved by the House of Representatives the next day after receiving it from the Senate, and the state legislatures approved it in just few days.¹⁵³ Moreover, according to the members of the Left op-

151 See *Javier Corral*, La iniciativa Peña-Televisa, *El Universal*, <http://www.eluniversalmas.com.mx/editoriales/2014/04/69536.php> (last accessed on 28 December 2016) See also *Pablo Gómez*, Censura de Internet, *Milenio*, http://www.milenio.com/firmas/pablo_gomez/Censura-internet_18_287551277.html (last accessed on 28 December 2016), *Raymundo Riva Palacio*, Tentaciones autoritarias, *El Financiero*, <http://www.elfinanciero.com.mx/opinion/tentaciones-autoritarias.html> (last accessed on 28 December 2016). For the position of several NGOs see <http://revoluciontresputocero.com/propuesta-de-pena-nieto-criminaliza-uso-de-internet-organizaciones-civiles/> (last accessed on 28 December 2016) and for Article 19 see <http://www.articulo19.org/reforma-de-telecomunicaciones-nuevos-perdedores-mismos-ganadores/> (last accessed on 28 December 2016).

152 *Denisse Dresser*, Mesa puesta, *Proceso*, <http://foroparalelodemilenioelotroforo.blogspot.com.es/2014/04/denise-dresser-mesa-puesta.html?m=1> (last accessed on 28 December 2016).

153 *Reforma energética rompe record en tiempo de aprobación constitucional*, *animalpolitico.com*, <http://www.animalpolitico.com/2013/12/en-83-horasla-reforma-energetica-es-constitucional-17-congresos-la-avalan/#axzz2r5KR9aMK> (last accessed on 28 December 2016).

position, there were some irregularities in the committees of the House.¹⁵⁴ And some state legislatures approved the amendment within hours after receiving it without any further proceeding.¹⁵⁵

After it passed the state legislatures, Congress made a public declaration of its constitutionality. Some days later the President, congressman of PRI and the members of the right wing party defended this constitutional amendment in a big TV presentation arguing that it would further the development of the country and make electricity and combustibles cheaper. Moreover, the ruling elite argued that the amendment was inevitable under current conditions and emphasized that the amendment respected all the rules established on the constitution, so it was constitutional.

In this case, a critical theory might point out at least three critical ideological flaws. First, it could call our attention to how the ruling elite argued that a particular interest of some faction, the oil companies, is presented as the general interest of the population. Second, it could question how inevitable the amendment was. And finally, it would denounce how a representative and federal procedure works neither to refine nor to enlarge public views nor to discern public interest.¹⁵⁶ In other words, how democratic procedure was used as a façade of democracy.

Finally, a critical theory could reflect on *how the constitutionalist discourse can affect legal culture*, that is, the ideas, attitudes, values, and beliefs that people hold about the constitution and constitutionalism.¹⁵⁷ In some cases, constitutionalist discourse in authoritarian constitutionalism creates the illusion of possible change. For those people, the path taken by the ruling elites would be the right one, although existing conditions make it impossible, and the ones that could make it real are hidden or misidentified. We can say that these people are deluded because they don't even realize the source of their repression and the implausibility of change, and they are oppressed because they live under social institutions that repress them.

154 Violaciones a reglamento sustenta amparo reforma energética: PRD. radioformula.com.mx, <http://www.radioformula.com.mx/notas.asp?Idn=381947> (last accessed on 28 December 2016).

155 La reforma energética avanza en los Congresos Estatales, *mexico.cnn.com*, <http://mexico.cnn.com/nacional/2013/12/13/reforma-energetica-aprobacion-congresos-estatales> (last accessed on 28 December 2016). *Entre protestas, seis congresos estatales refrendaron la reforma energética*, *la-jornada.unam.mx*, <http://www.jornada.unam.mx/ultimas/2013/12/13/en-10-minutos-comision-del-congreso-de-queretaro-aprueba-reforma-energetica-7765.html> (last accessed on 28 December 2016). It is worth to note that this fast track processing of constitutional amendments has become a trait of the current government.

156 *Madison, James*, *The Federalist 10* (1961), p.76-79. It is interesting that for Isiksel one of the evidence that office-holders and citizens takes its constitution seriously is the diligent weighing of the wording of particular constitutional provisions by political actors, and widespread public debate about the merits of proposed amendment. *Isiksel*, note 91, p.704.

157 *Lawrence M. Friedman*, *The Legal System: A Social Science Perspective*, New York 1975, p. 194.

On the other hand, constitutionalist discourse can generate disenchantment with constitutionalism, and people may be disposed to accept an authoritarian regime.¹⁵⁸ In this case, people are enlightened about authoritarian constitutionalism, but they continue to be oppressed. Moreover, they have no interest or faith in any change. In both cases, ruling elites achieved something very valuable: people become inactive and throw away its vigilant spirit.

In the first case, critical theory has to begin by enlightening people about how authoritarian constitutionalism operates. In the second case, it has to convince them that despite their disenchantment with constitutionalism, constitutions may be a tool for emancipation in different conditions. In both cases, it has to point out which are the conditions that prevent the constitution from being a tool for emancipation, how to move forward, and that they have the power to change social institutions.¹⁵⁹ Only when people are enlightened is it possible to begin writing a new narrative. Unfortunately, all this would not be easy since the authoritarian coalition will do everything to maintain the *status quo* and would require long political action.¹⁶⁰

6. Conclusions

The term constitutionalism can be used to refer to an ideology, a theory, a narrative or some sort of institutions. Identifying the different *uses* of the concept helps us understand that when we are talking about constitutionalism, we may be discussing different things. In the case of authoritarian constitutionalism, we use it to criticize a way in which ruling elites with an authoritarian mentality exercise power in not fully democratic states, where the liberal democratic constitution in place, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian ideological functions.

After reviewing the very few articles written about authoritarian constitutionalism, we find some common features: (a) intermediate level of authoritarian practices, (b) conservative values, and (c) a constitution with an authoritarian content.

I have argued that if we want to talk about authoritarian *constitutionalism* there has to be a constitution with a liberal democratic content rather than with an authoritarian content.

158 This clearly is the case of Mexico. According to *Latinobarometro* in 2013 only 37% of Mexicans believe in democracy, 16% favors an authoritarian regime, and 37% thinks it is the same. While in 1995 there was 49% who believed in democracy, which means a loose of believers of 12% in almost 20 years, http://www.latinobarometro.org/documentos/LATBD_INFORME_LB_2013.pdf (last accessed on 28 December 2016). According to Arnaldo Córdova this disbelief is due to the authoritarian practices of the ruling elites. *Arnaldo Córdova*, *El desencanto con la democracia*, *La Jornada*, <http://www.jornada.unam.mx/2013/11/24/opinion/015a1pol> (last accessed on 28 December 2016).

159 *Geuss*, note 95, p. 72.

160 *Ibid.*, p. 75.

This distinction allowed me to distinguish between *authoritarian constitutionalism* and *constitutional authoritarianism*.

In both cases, there are constitutional practices and cultural values that, if assessed by a liberal democratic perspective, would fail. The difference is that in an *authoritarian constitutionalism* these practices fail to achieve the potentials expressed by the constitutional provisions, while in *constitutional authoritarianism* it is the constitution, among other variables, that allows and promotes those practices.

Moreover, I argued that ruling elites hold an authoritarian mentality. To demonstrate it, I focused on the functions that liberal democratic constitutions fulfill according to authoritarian constitutionalism as instruments of government, and the ideological functions they serve in written discourse. In my opinion, once we appreciate the whole picture we are able to support the thesis of a distinctive ruler's authoritarian mentality and understand how authoritarian constitutionalism operates.

As has been said, in authoritarian constitutionalism the provisions that theoretically have the purpose of limiting power or empowering those who would otherwise be powerless are ineffective. Constitutional provisions that theoretically create incentives for powerful actors to control each other and constrain them—separation of powers,¹⁶¹ checks and balances, federalism, rights and liberties—do not work to limit power or to empower those who would otherwise be powerless. Instead, in authoritarian constitutionalism the constitution is used for other practical functions, such as coordination, eliciting cooperation of the powerless, or gathering information.

Regarding the ideological functions of constitutions and of constitutionalist discourse, I focused on the power-interests it serves and the political effects it generates.¹⁶² This constitutionalist discourse creates an illusion. It is an illusion because even though the constitution is not merely an expression of the needs and will of the ruling class,¹⁶³ the interests of the powerless become law because they serve the interest of the ruling elite. Moreover, the conditions that could make constitutional aspirations effective, are hiding and are misidentified by the same constitutionalist discourse.

Finally, I argued for a theory that uncovers and critiques the ideological functions of the written and spoken constitutionalist discourse. I pointed out the great difficulties this critique would confront. First, the difficulty of distinguishing the utopian content of constitutionalism and the instrumental authoritarian use that ruling elites make of it. Second, that ruling elites would do everything they can to keep the *status quo*. How viable it is to achieve this endeavor, is difficult to know. However, staying in the same place and waiting for authoritarianism to come back does not seem like a progressive option.

161 *Holmes*, note 55, p. 210, 211.

162 *Eagleton*, note 15, p. 9.

163 *Hunt*, note 28, p. 7.