

**AUTHORITARIANISM BETWEEN
CONSTITUTIONALISM AND
INTERNATIONAL LAW:
A CORNER CASE IN LIBERAL
DEMOCRATIC PARAMETER SPACE**

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Authoritarianism today does not float in an extralegal space; its rise, spread, and consolidation are deeply embedded in a multilateral institutional architecture, within which legitimacy cannot be merely reserved to a sovereign people or its state apparatus. This new authoritarianism re-institutes the society by slow but steady self-alterations to the hegemonic liberal script, which leads to a new, hybrid constitutional-political project that proposes prescriptive and descriptive knowledge of social organization. This Article concentrates on how some autocracies solidify themselves more successfully than others by readjusting the borders and orders in a liberal democratic society to redefine the goals and rules for legitimation and consolidation of authoritarianism. To explore the conceptual and practical boundaries of this new authoritarian script, the Article comparatively examines the strategic hybridization of constitutional democratic systems and originally liberal institutions, primarily but not only through the cases of Hungary (Fiatalk Demokraták Szövetsége, or FIDESZ) and Turkey (Adalet ve Kalkınma Partisi, or AKP).

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TABLE OF CONTENTS

INTRODUCTION.....	86
I. POLITICS OF RESENTMENT (“US V. THEM”)	92
II. POPULISM (“US WITHOUT THEM”).....	105
III. CONSTITUTION AS AN OBJECT OF FETISH	115
IV. AUTHORITARIANISM AND INTERNATIONAL LIBERAL ORDER: A BIPOLAR LOVE AFFAIR.....	126
CONCLUSION.....	135

INTRODUCTION

A specter is haunting constitutional democracies, the specter of authoritarianism. Although liberal democracy declared its hegemonic victory at the end of history as “the only game in town,”¹ especially in the past decade, a new authoritarian phenomenon has come to dominate the political landscape as a transformative force. This *authoritarianism does not float in an extralegal space*; it is well-anchored to the liberal democratic power configuration, which has procedurally painted the world-political scenery into a picture of constitutional democratic systems with hopeful prospects of global constitutionalism.² Today, as the authoritarian upheaval continues to intensify worldwide, this condensed world folds in on itself, crying for a novel theory of authoritarianism.

What is particularly challenging and novel in the rise and operation of authoritarianism today? Although the history of liberal democracy and global constitutionalism has never been fully smooth and peaceful,³ the number and intensity of

¹ JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* (1996).

² Mathias Kumm, *The End of “the West” and the Future of Global Constitutionalism*, 6 *GLOB. CONSTITUTIONALISM* 1 (2017); Alexander Somek, *Cosmopolitan Constitutionalism: The Case of the European Convention*, 9 *GLOB. CONSTITUTIONALISM* 467 (2020); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *VA. L. REV.* 771 (1997).

³ One can find examples of a large variety of authoritarian regimes coexisting/cooperating with liberal democracies throughout the twentieth century, during the paradigmatic construction (post-World War II) and reinforcement (post-1989) of the hegemonic liberal order. For more see NATO and Portugal, Greece, Turkey; military dictatorships across Latin America; Baas regimes in Iraq and Syria, and so on. One major difference is, those regimes (military juntas, dictatorships, whatever form they adopted) were overtly authoritarian, not operating behind a façade of

autocratic, illiberal strikes have skyrocketed in the past decade,⁴ not only in what we have come to call *hybrid* regimes (Hungary, Poland, Turkey, Brazil, Egypt, Indonesia, India), but also in consolidated, *advanced* democracies (UK, USA, France, the Netherlands, Germany). How, then, and under what circumstances does this new authoritarianism manage to pass as an acceptable political form in the modern power configuration, that is, a relevant and worthy actor for the hegemonic liberal script?⁵ In this article, I contend that there are four main domains of polemic and polarization, the simultaneous escalation of which remarkably contributes to the maintenance of some autocracies longer than others. Recent global democratic backslide needs a more nuanced analysis to distinguish populist movements with authoritarian aspirations that come and go in a representative democratic system from resilient autocracies which have longer life spans and higher chances of survival without isolating themselves from the hegemonic liberal order.

Constitutional democracy has faced many challenges from multiple directions since the twenty-first century began. Especially after the 2008 financial crisis and the unraveling of the Arab Spring, which resulted in a historical refugee influx from the Global South to the Global North, liberal democratic, constitutional transformations globally regressed.⁶ Thereby

illiberal democracy, multi-party elections, strategic restriction of individual and civic rights and liberties. See LINZ & STEPAN, *supra* note 1.

⁴ Noticeably after the 2008 financial crisis and then the multiple refugee influxes from Global South to North.

⁵ The script as an analytical concept signifies a “descriptive and prescriptive knowledge about the organization of society.” See Tanja A. Börzel & Michael Zürn, *Contestations of the Liberal Script. A Research Program* 1-26 (SCRIPTS, Working Paper No. 1, 2020), https://www.scripts-berlin.eu/publications/Publications-PDF/SCRIPTS-WP1_final.pdf.

⁶ See HAUKE HARTMANN & PETER THIERY, *DEMOCRACY REPORT: BTI TRANSFORMATION INDEX 2022* (2022).

appeared the authoritarian alternative to steal the spotlight and fill the power vacuum, that once again manifested the shortcomings of the liberal democratic constitutional design and its institutional edifice. It constructs itself by abusing the structural shortcomings and loopholes of the liberal hegemonic order; however, it goes one more step forward to draft its own (sub)script to contest –if not straightforwardly replace– liberal, constitutional democracy on domestic/national layer. This layer is constitutionally entrenched and embedded into the international liberal order, which aims to assure stable and legitimate operation of liberal democratic premises in affiliated states. In the layer of territorially grounded constitutional state, this new authoritarianism actualizes its legitimacy claims by redrawing the borders and rewriting the orders of the operating system (the liberal script), especially its domestic layer (constitutional state based on the will of a sovereign people).

By diabolically using the interaction of national and international spheres of constitutionally entrenched action, the new, resilient authoritarian phenomenon opens itself some space in the taxonomy of political regimes. This authoritarianism is neither isolated nor uniformed and equipped with weapons; rather it looks civilian, invested in identity politics, willing to compromise and negotiate with the liberal international order (bargain power for legitimacy). The combination of these features, specifically its recurring legitimation and validation by the liberal international order makes the contemporary authoritarian phenomenon much more dangerous than its predecessors (interwar fascism, military dictatorships, Soviet totalitarianism). Its international legitimacy, even at the bare minimum, has attached it into the hegemonic liberal order as a domestic alternative to liberal democracy, hence notably increased its life expectancy, which

makes a comparative analysis of Turkey and Hungary particularly significant.

By looking into the cases of Hungary (FIDESZ) and Turkey (AKP), I would like to argue that this new authoritarian phenomenon that seems to have infected constitutional democracies is a corner⁷ case in the parameter space of the hegemonic liberal order.⁸ A corner case occurs when multiple parameters simultaneously reach extreme levels, and the user—in this case, the constitutional subject, i.e. the citizen—is put at a corner of the parameter space, i.e., constitutionally entrenched democratic political space. As a corner case, the new authoritarianism is only possible within the constitutionally entrenched parameter space of the liberal script. Its distinct resilience is based on its adaptability into and conjunctural relevance for the hegemonic liberal order; thence its novelty comes from not its substance, but its combination and simultaneous escalation and intensification of multiple variables, each one of which are inherent in, and by itself normal to the habitat of, the hegemonic liberal order. A multilayered comparative analysis of Turkey and Hungary is particularly momentous, as the two perfectly epitomize this

⁷ The analogy originates from dynamic systems theory. A corner case is a pathological case which occurs only outside normal operating parameters, particularly when multiple variables or conditions simultaneously reach extreme levels, even though each variable is normal/acceptable for the system within the specified range of parameter space. For more about corner and edge cases in dynamic systems theory, see MARIO BERNARDO ET AL., *PIECEWISE-SMOOTH DYNAMICAL SYSTEMS: THEORY AND APPLICATIONS* (2008).

⁸ For the purposes of this article, script is “a descriptive and prescriptive knowledge about the organization of society.” Drawing from Tanja Börzel and Michael Zürn’s work, liberal scripts here refer to the predominant mode of being in modernity, the fundamentals of which have reached a globally hegemonic scale of influence since 1989. From the liberal scholarship point of view, liberal script includes but not limited to liberal democracy as the so-called “only game in town.” Börzel & Zürn, *supra* note 5.

strategic decoupling and recoupling with different layers of the modern matrix of power. The authoritarian upheaval in Turkey and Hungary precedes similar movements in constitutional settings (hybrid or developed / consolidated, no distinction at this point). In both cases, authoritarian upheaval and its institutional manifestations contesting the liberal script have been exponentially increasing for at least a decade,⁹ and their adventures on the road to authoritarian consolidation and constitutional change have most certainly been educational and encouraging for the like-minded political movements in other countries.¹⁰ Moreover, the successful instrumentalization and repurposing of the international law and institutions both by FIDESZ and the AKP has set a precedent for others with similar authoritarian ambitions, both within and outside the European Union.¹¹

These new autocracies' relation to this multilayered legal-institutional power configuration is not only formal and emblematic, but it also gives them a platform to socialize with political actors on the same wavelength in different countries, which leads to the emergence of authoritarian clusters (regionally concentrated) within the international institutional layer of hegemonic liberal order. One can find examples of this authoritarian clustering in Central and Eastern Europe, broadly

⁹ Since 2007-08 in Turkey, since 2010-11 in Hungary.

¹⁰ For more about the new patterns of knowledge production and transmission among aspired autocracies and illiberal democracies, see Péter Krekó, *The Birth of an Illiberal Information Autocracy in Europe: A Case Study on Hungary*, 2 J. ILLIBERALISM STUD. 55 (2022); for a fresh and astute analysis of democratic decline across and around the European Union, see STEFAN AUER, EUROPEAN DISUNION (2022).

¹¹ MARLENE WIND, TRIBALIZATION OF EUROPE: A DEFENSE OF OUR LIBERAL VALUES (2020); Julian Borger, *Republicans Closely Resemble Autocratic Parties in Hungary and Turkey*, THE GUARDIAN (Oct. 26, 2020), <https://www.theguardian.com/us-news/2020/oct/26/republican-party-autocratic-hungary-turkey-study-trump>.

speaking, the eastern borders of several flagship liberal international institutions, such as the European Union and the Council of Europe.¹² The question here becomes: how do these aspired autocracies not only survive, but also coexist and develop some interdependence with liberal democracy? In response, I would like to elaborate on the institutional construction of this new authoritarian phenomenon that alters constitutional democratic systems. To explore the conceptual and practical boundaries of this new authoritarian space and to see whether it is a contestant or a complementary of the liberal script and its multilayered institutional configuration, I will comparatively examine the strategic hybridization of constitutional democratic systems and the authoritarian appeal to a principle of uncertainty that relativizes the legitimacy of an autocracy depending on a particular spatio-temporality it has been observed from, primarily but not only through the cases of Hungary (FIDESZ – Orbán) and Turkey (AKP – Erdoğan). The novelty of this hybridization is in its multilayered nature: the resilient autocracies strategically hybridize and instrumentalize their relationship to not only the domestic audience, but also the liberal international law and institutions.

In what follows, I will pinpoint four distinctive domains of conflict and contestation, the combination of which is peculiar to constitutional democracies. Those are 1) politics of

¹² Council of Europe is the leading human rights and rule of law body across Europe, including but not limited to the European Union member countries. Founded in the aftermath of the World War II, the Council aims at overseeing the member states' actions and legal-institutional decisions to guarantee the maintenance of democratic rule of law practices. The Council of Europe works in close partnership with the European Union and cooperates with the United Nations and with partner countries in its neighborhood. For more, see COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/structure> (last visited May 8, 2023).

resentment, 2) populism, 3) constitution as an object of fetish, and 4) a bipolar love affair with the liberal international law and institutions. The simultaneous escalation of the four serves for the consolidation and legitimation of autocracies by tweaking the source codes of the modern state, that is, the principle of popular sovereignty and constitutionally entrenched representative democracy. By focusing on these four variables in identifying the authoritarian phenomenon as a corner case, my intention is not to neglect or underestimate the role and influence of other common factors, such as authoritarian personality.¹³ However, weaving a narrative through the institutional layers of authoritarianism rather than subjective, psychological, or discursive ones is an empirically informed theoretical choice on the way to propose a theoretical framework of contemporary authoritarianism as an institutional phenomenon that not only coexists with, but also reinforces its legitimacy claims through the liberal script by altering the boundaries, content, and accountability of the general will, and the sovereign people attached to it. Now, let me begin with the politics of resentment and its reflections on the institutional change for authoritarian purposes.

I. POLITICS OF RESENTMENT (“US V. THEM”)

The acceleration and explosion of resentment in politics is not new. Democracy has always been a terrain of contestation

¹³ THEODOR ADORNO ET AL., *AUTHORITARIAN PERSONALITY* VERSO (2019); Peter E. Gordon, *The Authoritarian Personality Revisited: Reading Adorno in the Age of Trump*, 44 *BOUNDARY 2*, 31 (2017); PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* (2017).

and conflict;¹⁴ what is novel here is the way it is framed in public discourse, which allows resentment to be “put to troubling uses in democratic politics”¹⁵ not only as a rhetorical tool but also through institutional reconfiguration. As an emotion of rejection and distrust, creating divisions between an imaginary *Us* and *Them*, resentment could be harmful for target groups in a society; however, once it is formalized and institutionalized around a critique of the liberal status quo,¹⁶ it becomes a large-scale existential threat for the future of liberal democratic societies, if not the entire liberal script. Here, I will examine two main strains that feed the authoritarian politics of resentment and contribute to its institutional architecture: first, identity and status resentments; second, legal and constitutional resentments. While the new authoritarianism refines and orchestrates the former for the alteration of the constitutional democratic social organization as the instituted society, the latter helps re-institute the society as a concrete, existential political unity. The anthropological, social-cultural definition of identity vis-à-vis the politics of subjectivity is not a matter of concern here; I rather focus on national identity to examine the institutional codification and recognition claims

¹⁴ From Ancient Greek to modern representative forms of democratic politics, contestation and agonism –sometimes even antagonism and open conflict– have been inherent components. For more, see Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745 (1999); CARL SCHMITT, *CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., 1923); JACQUES RANCIÈRE, *ON THE SHORES OF POLITICS* (Liz Heron trans., 1995); JACQUES RANCIÈRE, *HATRED OF DEMOCRACY* (Steve Corcoran trans., 2005).

¹⁵ JEREMY ENGELS, *THE POLITICS OF RESENTMENT: A GENEALOGY* 5 (2015).

¹⁶ Tomasz Tadeusz Konciewicz, *Understanding the Politics of Resentment: of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of Heart*, 26 IND. J. GLOB. LEGAL STUD. 501 (2019).

that have been central to the historical evolution of the modern state and society.

The new authoritarianism extensively addresses religious, ethnic, cultural diversions and surrounding recognition and inclusion claims to redesign a sovereign people and carry out its general will.¹⁷ Democratic or autocratic, any national identity originates from a shared belief in the legitimacy of a state and its *telos*, which could be embodied through formal laws and institutions.¹⁸ The constitutionally entrenched definitions of the nation, the recognition and management of religious affairs, legislative or constitutional regulations and definitions concerning gender categories and surrounding social and legal constructions are prominent examples of institutionalized identities to set up the boundaries between friends and enemies. Legal and institutional engraving of these identities also determine the venue and tone of recognition claims of those who are supposedly represented by them.

When it was founded in 1988, FIDESZ appeared to be a democratic alternative to the communist youth movement KISZ and joined the first free elections in 1990 as a *liberal* party, while swiftly incorporating the popular anti-communist rhetoric.¹⁹ In the 2000s, it started to reformulate its political messages by demonizing the winners of the election, declaring the Hungarian democratic left an enemy of the people, and

¹⁷ Public use of religious symbols (headscarf ban, Kurdish speaking ban, Roma etc. minority communities' recognition struggles), institutional recognition of native language and Indigenous / ethnic / religious / sectarian differences.

¹⁸ FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* 110-12 (2018).

¹⁹ Anna Szilágyi & András Bozóki, *Playing It Again in Post-Communism: The Revolutionary Rhetoric of Viktor Orbán in Hungary*, 18 *ADVANCES HIST. RHETORIC* 1 (2015).

making the party's slogan "the homeland cannot be in opposition."²⁰ In the past decade, nativism and anti-internationalism have become central to FIDESZ's efforts of cultivating resentment into a shortcut political identity. The new Hungarian Fundamental Law (2011) also put a particular emphasis on institutionalizing the genuine Hungarian identity by readjusting citizenship requirements and the definition of Hungarian nation.²¹ For FIDESZ, renovating the existential-political boundaries and strengthening the moral grounds of the national Hungarian identity came along with a particular emphasis on traditional family values, reconstructing the legal framework that is not only reinforcing heteronormativity, but also socially stigmatizing homosexuality and any other challenge to the heteronormative, patriarchal, Christian, and ethnic²² Hungarian identity.²³

²⁰ Gábor Halmai, *Populism, authoritarianism and constitutionalism*, 20 GERMAN L.J. 296 (2019).

²¹ The constitutional politics of FIDESZ put a particular emphasis on the institutionalization of the Hungarian identity by readjusting citizenship requirements (on grounds of *jus sanguini* principle). Constitutional definition of Hungarian citizenship, fundamental values attached to it, also calling for ethnic Hungarians abroad to claim Hungarian citizenship. For details, see the Hungarian Fundamental Law's description of citizenship, MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY.

²² In order to reap domestic electoral benefits FIDESZ appealed to an ethno-nationalist populism. For a detailed account of what this ethno-nationalist politics of FIDESZ are entitled to and more, see Gábor Halmai, *Fidesz and Faith: Ethno-Nationalism in Hungary*, EURO. UNIV. INST. (June 29, 2018), <https://blogs.eui.eu/constitutionalism-politics-working-group/fidesz-faith-ethno-nationalism-hungary/>; see also Istvan Szekeres, *Hungarian Two-Step: FIDESZ Courts ethnic Hungarians abroad to reap electoral benefits domestically*, THE BEACON PROJECT (June 6, 2022), <https://www.iribeaconproject.org/our-work-analysis-and-insights/2022-06-06/hungarian-two-step-fidesz-courts-ethnic-hungarians-abroad>.

²³ Although FIDESZ's legislative strategy and political discourse wage war against the LGBTQ community, Hungarian Fundamental Law (2011)

The national identity in the AKP's design blueprint has been edited and cropped several times. In the party's reluctant democrat early years, the national identity they proudly incarnated was an open-ended periphery of the secular, republican, hegemonic center, including but not limited to the conservative, majority Muslim rural populations, and ethnic minorities, who resented the 1980 coup and the military tutelage overshadowing democratic politics.²⁴ This national identity cut across ethnic divisions and generated a remarkable voter support for the AKP for a while; however, following the international and domestic developments challenging the legitimacy of the AKP government, the party has recalibrated its description of the nation, adding a religious component. Rather than weighing on the *jus sanguini* principle as in the case of Hungary, the AKP has moved on to address a nation, whose *telos* is theologically (Sunni Islam) informed and does not acknowledge the modern nation-state boundaries.²⁵

clearly states that "Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, color, gender, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever." See MAGYARORSZÁG ALAPTÖRVÉNYE, *supra* note 21.

²⁴ Aysegul Kars-Kaynar, *Making of military tutelage in Turkey: the National Security Council in the 1961 and 1982 Constitutions*, 19 *TURKISH STUD.* 451 (2017); Ümit Cizre, *Disentangling the Threads of Civil-Military Relations in Turkey: Promises and Perils*, 22 *MEDITERRANEAN Q.* 57 (2011).

²⁵ In the past decade, especially after the Syrian Civil War, the AKP has adopted a neo-Ottoman, theologically informed political discourse that puts more emphasis on the Sunni Muslim identity. For a detailed account of the AKP's neo-imperial, extraterritorial reconstruction of the People and the AKP's role as its embodiment, see Banu Bargu, *Neo-Ottomanism: An Alt-Right Formation from the South?*, 88 *SOC. RSCH.: AN INT'L Q.* 299 (2021); Marwa Maziad & Jake Sotiriadis, *Turkey's Dangerous New Exports: Pan-Islamist, Neo-Ottoman Visions and Regional Instability*, *MIDDLE EAST INST.* (Apr. 21, 2020), <https://www.mei.edu/publications/turkeys-dangerous-new-exports-pan-islamist-neo-ottoman-visions-and-regional>.

Although the *telos* of their nation drastically differs, both the AKP and FIDESZ have started adding on rather than merely extracting unwanted groups, which are labeled under the loosely defined category of *Them*.

Status resentments deal mostly with the problem of trust, belonging, and proximity to the social capital and its hegemonic center. The new authoritarianism abuses this component of trust to redesign the social capital,²⁶ while the polarization between in-group and out-group members of the society comes to a boiling point to justify an authoritarian act of redesigning the social capital, representation of reality, and overall society, for hegemonic consolidation. Instead of honing resentments of the masses that target the state apparatus and its institutional architecture, here, authoritarianism facilitates the people's feelings of discomfort, mistrust, disappointment, anger, and resentment, against their peers, which well serves for reframing the general will. Such inter-subject status resentments and polarizations open for the authoritarian regime a new domain to refresh and reconstruct its sociological legitimacy and, subsequently, to justify the assertion of a new in-group (*Us*), by expelling the subjects of resentment (former in-group members, i.e., *Them*). In the past decade, many voters across the world made it clear that they prefer the political-economic messages delivered in a way that links "cultural resentments to economic grievances, scapegoating cultural

²⁶ Pierre Bourdieu's definition is helpful here to flesh out the meaning and significance of social capital in understanding status resentments: "Social capital is the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition—or in other words, to membership in a group—which provides each of its members with the backing of the collectively owned capital, a "credential" which entitles them to credit, in the various senses of the word." 3 PIERRE BOURDIEU, FORMS OF CAPITAL: GENERAL SOCIOLOGY 21 (2021).

outsiders rather than blaming the business class.”²⁷ In addition to—if not always instead of—criticizing and resenting the political and economic elite (the ruling minority of *Them*), here those with authoritarian ambitions associate the matters of economic inequality and social injustice that are primarily structural with deeply rooted cultural and social-political resentments.

For FIDESZ, status resentments first targeted the corrupted political elite, then non-European immigrants and post-war refugees, specifically from majority Muslim Middle East and North African countries.²⁸ Soon before it came to power (2010), FIDESZ’s political discourse was primarily targeting socialist corruption and clientelism for bringing the country to the edge of financial collapse.²⁹ In this narrative, “socialist politicians were seen as mainly advancing the interests of major multinational corporations—and working hand in hand with neoliberal Brussels bureaucrats. Entry to the European Union in 2004 under Socialist auspices was widely perceived as having destroyed many local businesses.”³⁰ FIDESZ, on the other hand, was representing the homeland and its locally embedded, national interests, rather than that of the European Union and liberal international order.

The status resentments of political Islam against the secular upper-middle class in Turkey are twofold. On the one hand, it is a class resentment based on structural socio-economic differences, while on the other, it is a status resentment in a moral sense, intertwined with a discourse of victimhood and a

²⁷ RORY McVEIGH & KEVIN ESTEP, *THE POLITICS OF LOSING: TRUMP, THE KLAN, AND THE MAINSTREAMING OF RESENTMENT* 92 (2019).

²⁸ William Spindler, *2015: The Year of Europe’s Refugee Crisis*, UNHCR (Dec. 8, 2015), <https://www.unhcr.org/news/stories/2015-year-europes-refugee-crisis>.

²⁹ Jan Werner Müller, *The Hungarian Tragedy*, 58 *DISSENT* 5 (2011).

³⁰ *Id.* at 2.

historical rupture that compromised their traditional values as a nation and their status in that instituted society as individual subjects. Apparently, the republican modernization in Turkey has not fully accomplished its social transformation goals;³¹ instead it opened new domains to distill resentments by “marginalizing and victimizing all ethnic, religious and political minority groups that did not fit the prototype”³² of the desired, valid subject. According to President Erdoğan, the AKP was representing “Black Turks” of the periphery that “suffered at the hands of the Kemalist state elites, who were collaborating with Western forces to oppress ‘innocent,’ ‘devout,’ and ‘authentically’ Anatolian children of the country.”³³ This discursive framing successfully reinvigorated the status resentments of the lower-middle class, conservative segments of society toward the secular, urban, upper-middle class. Under the AKP rule in Turkey, status resentments took shape around and through the ideological state apparatuses, most frequently appealed ones of which are education and religion.³⁴ Moreover, identity and status resentments have given the AKP the opportunity to restructure the primary and higher education, stigmatize dissenting voices and set up loyalty to the government as an appointment/promotion criterion. In the AKP’s narration of the victim, the republican

³¹ NIYAZI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* (1964); SERIF MARDIN, *RELIGION AND SOCIAL CHANGE IN TURKEY* (1989).

³² Ihsan Yilmaz, *Erdogan’s Political Journey: From Victimized Muslim Democrat to Authoritarian, Islamist Populist*, EUR. CTR. FOR POPULISM STUDS. (Feb. 14, 2021), <https://www.populismstudies.org/erdogans-political-journey-from-victimized-muslim-democrat-to-authoritarian-islamist-populist/>.

³³ Zafer Yilmaz, *The AKP and the spirit of the ‘new’ Turkey: imagined victim, reactionary mood, and resentful sovereign*, 18 *TURKISH STUDS.* 482 (2017).

³⁴ LOUIS ALTHUSSER, *ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES* 243-50 (2014).

education has been heavily criticized, stigmatized, and held responsible for the weakening of traditional values of nation, religion, and family.³⁵ While reconstructing the public education curriculum³⁶ and opening multiple understaffed universities in rural areas without creating employment opportunities for the graduates, the AKP has recurrently addressed the secular republican indoctrination through education institutions and the cultural degeneration attached to it.³⁷ The countermove of the AKP, however, was no more than reappropriating this crucial ideological state apparatus for conservative, authoritarian indoctrination.

There is a second, even more enthralling domain of conflict and resentment at the disposal of aspired autocracies today. Besides economic inequality, social status, or institutionalized identity claims, and political and social polarizations they encapsulate, authoritarian populists also successfully instrumentalize constitutionalism and the rule of law, by generating what Paul Blokker calls *legal resentment*,³⁸ which

³⁵ The AKP leader Erdogan recurrently emphasized his party's belief that the secular, republican founding elite adopted not the science and technology but moral degeneration of the West in the name of modernization. *Erdogan: Bati'nin ahlaksizligini aldik*, BIRGUN (Jan. 25, 2008), <https://www.birgun.net/haber/erdogan-bati-nin-ahlaksizligini-aldik-38486>; for a detailed discussion on the AKP's politicization of traditional family values, see Hikmet Kocamaner, *The Politics of Family Values in Erdogan's New Turkey*, 288 MIDDLE EAST RSCH. & INFO. PROJECT (2018).

³⁶ Adding Arabic as an elective language course, changing the civic education/social sciences textbook content in a way that reinforces gender stereotypes and patriarchal traditional family order and social relations based on this binary-gender conception. For more, see Ayhan Kaya, *Islamisation of Turkey under the AKP Rule: Empowering Family, Faith and Charity*, 20 S. EUR. SOC'Y & POL. 47 (2015).

³⁷ Funda Karapehliyan, *Constructing a "New Turkey" through Education*, HEINRICH BÖLL STIFTUNG (Oct. 1, 2019), <https://tr.boell.org/en/2019/10/01/constructing-new-turkey-through-education>.

³⁸ PAUL BLOKKER, *NEW DEMOCRACIES IN CRISIS?* 136-64 (2013).

is “a domestic form of reaction against EU integration and legal-constitutionalist understandings of democracy.”³⁹ While the status-identity resentments set up the conditions for domestic political scenery of authoritarianism, legal-constitutional resentments address both constitutional law and international legal order and drift constitutional systems away from both legal and democratic constitutionalisms, by dissolving the emphasis they respectively put on judicial supremacy, civic engagement, and public deliberation.⁴⁰ As it proposes a limited, exclusionary, different understanding of constitutionalism tailored for the given state apparatus, legal resentment includes curtailing the powers of the apex courts, and the open defiance of international law and institutions.⁴¹

Now, I would like to introduce a distinction to Blokker’s definition. What he has encapsulated under the title of legal resentment is indeed twofold: The new authoritarianism orchestrates the resentment towards legal and constitutional transformations separately, refining and honing them by concentrating the voters on different actors in different time periods. The role of the politics of resentment in the dissolution of legal constitutionalism and democratic constitutionalism then works through 1) *legal* resentments that target the international liberal order and post-sovereign political bodies that propose transformative prescriptions for the country’s future (European Union, Council of Europe, International Monetary Fund, World Bank, international courts and conventions, etc.), against whom the authentic *Us* comes together, and 2) *constitutional* resentments, which focus on the constitutional *past* of the country in question, or a part of its

³⁹ *Id.* at 139.

⁴⁰ *Id.* at 140.

⁴¹ *Id.* at 150.

history, that comes to signify the pathologies of the present-day constitutional system and its perpetrators as the absolute representation of *Them*.

Legal and constitutional resentments reflect on the attached institutional strains; they not only shape the image of the authoritarian regime but also help grounding its legitimation claims before the international public. Among the most prominent examples of legal resentment comes Poland, Italy, Hungary, Romania, Czech Republic, and Turkey.⁴² The escalation and political instrumentalization of legal resentments coincide with an increasing appeal to the concept of constituent power in international political and legal theory. At the end of the Cold War, liberal democratic project of global constitutionalism⁴³ was exported worldwide as a remedy to the highly resilient and contagious germ of the modern sovereign state, which has repeatedly proven its role as an incubator of authoritarianism, if not outright totalitarianism. Post-1989 discussions and institutional reconfiguration of liberal democracy thus took a direction towards federative, post-

⁴² Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT'L L. 971 (2019); Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 9 (Adam Czarnota et al. eds., 2005); Gábor Halmai, *Populism and Constitutionalism in East-Central Europe*, COMPAR. JURIST BLOG (Nov. 22, 2017), <https://comparativejurist.org/2017/11/22/populism-and-constitutionalism-in-east-central-europe/>; Andrew Arato, *A Ticket for the Rome Express*, PUB. SEMINAR (Sept. 27, 2019), <https://publicseminar.org/essays/a-ticket-for-the-rome-express/>.

⁴³ Mathias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004); Tully et al., *Introducing Global Integral Constitutionalism*, 5 GLOB. CONSTITUTIONALISM 1 (2016); Ran Hirschl, *The New Constitution and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721 (2006); GÁBOR HALMAI, PERSPECTIVES ON GLOBAL CONSTITUTIONALISM: THE USE OF FOREIGN AND INTERNATIONAL LAW (2014).

sovereign solutions to restore and secure the future of democratic politics.⁴⁴

The European Union seems to be a common denominator here. The process of constitutional reconstruction and state building “followed the lead of the European Union in what is called the ‘new constitutionalism’ where democracy had become increasingly combined with the national and supranational involvement of judicial power in politics.”⁴⁵ However, the idea of global constitutionalism and deep-seated federative goals of the European Union has not sufficed to prevent authoritarian revival in its eastern frontiers, which explains why the Central and Eastern European countries lie at the heart of legal resentment literature, as Blokker’s and other case studies indicate.⁴⁶ The proposal of such an existential change in the mode of being of a society, which was instituted in the image and size of a nation, received a massive reaction from the post-1989 transitional societies. In other words, the proposal of a fundamentally different power configuration for the future, along with disappointments in the present situation (failed / semi-cooked constitutional changes and overall liberal democratic transition),⁴⁷ rekindled legal resentments on the way to authoritarian upheaval. By successfully orchestrating constitutional resentments, both the AKP and FIDESZ have

⁴⁴ ANDREW ARATO, *POST-SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY* (2016).

⁴⁵ SAID AMIR ARJOMAND, *CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION* 4 (2007).

⁴⁶ Bojan Bugarič, *Central Europe’s descent into autocracy: A constitutional analysis of authoritarian populism*, 17 *INT’L J. CONST. L.* 597 (2019); WOJCIECH SADURSKI, *A PANDEMIC OF POPULISTS* (2022).

⁴⁷ R. Daniel Kelemen, *The European Union’s authoritarian equilibrium*, 27 *J. EUR. PUB. POL’Y* 481 (2020); *see also* R. Daniel Kelemen, *Europe’s Other Democratic Deficit: National authoritarianism in Europe’s Democratic Union*, 52 *GOV’T & OPPOSITION* 211 (2017).

crafted themselves an identity as the actual, authentic representative of the People.

Constitutional resentments concentrate more on the descriptive knowledge of the past, whereas legal resentments are more oriented towards the prescriptive knowledge for the future. While legal resentments represent a resistance to prospective change, constitutional resentments at the service of the new authoritarianism demonstrate the opposite tendency of demanding change away from an old constitutional template of power. This has led to the creation and spread of hybridized⁴⁸ constitutional systems that are neither democratic nor totalitarian and committed to defuncting the democratic political space for *Them*, by invoking the constitutional and legal resentments of a society. In short, while legal resentments hold on to and preserve the instituted society, constitutional resentments route for the re-institution and self-alteration of the instituted society. As for the AKP, while the secular republican foundation in and of itself has been a problem, at the center of the AKP's politics of constitutional resentments lie the 1982 constitution.⁴⁹ Especially in Central and Eastern Europe, the imposed constitutional transitions for European Union membership were received as practices resembling totalitarian constitutional habits and strengthened the hand of those with

⁴⁸ For more, see Philippe Schmitter, *Dangers and Dilemmas of Democracy*, 5 J. DEMOCRACY 57 (1994); Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFFS. 22 (1997); Pippa Norris, *Is Western Democracy Backsliding? Diagnosing the Risks* 1-26 (HKS Fac. Rsch. Working Paper Series, Working Paper No. RWP17-012, 2017).

⁴⁹ Oya Yegen, *Constitutional Changes under the AKP Government of Turkey*, BIJ DE BU REN 70 (2017); ISLAM, AND SECULARISM IN TURKEY (Ahmet T. Kuru & Alfred Stepan eds., 2012); Ozan Varol, *Turkey's constitutional negotiations unravel before they even begin*, CONSTITUTIONNET (Mar. 15, 2015), <https://constitutionnet.org/news/turkeys-constitutional-negotiations-unravel-they-even-begin>.

authoritarian aspirations.⁵⁰ For FIDESZ, the obvious target was the 1989 Hungarian constitution,⁵¹ which was a constant reminder of the socialist past of the country and, according to FIDESZ, the primary obstacle before democratization.

Although resentment is not a new political instrument, the new autocracies diligently hone the existing streams of resentment and collective angst for authoritarian consolidation and legitimation purposes. It helps taming the masses by feeding them a story of a fragmented People, the minority of which (political elite) rules over the silenced and forgotten majority. The political elite in the picture and its ideology might change from one case to another, be they secular modernization or state socialism. This brings us to the second parameter that reached its extremes in the hands of the new autocracies, that is, a populist restoration of a vivid imagery of friend and enemy. In the moment of this populist enclavement of the democratic empty space, autocracies move forward from a simple counterposing of *Us* to *Them*; rather, at this populist instance, autocracies subtract *Them* from the sovereign People for indisputable legitimation of its claim to identify with an absolute sovereign *Us*.

II. POPULISM (“US WITHOUT THEM”)

The second pillar, associated with the first, is populism, where the *Us* claims to occupy the democratic empty space as

⁵⁰ BLOKKER, *supra* note 38.

⁵¹ The 1989 amendments fundamentally changed the 1949 communist constitution; however, for FIDESZ, the amendments were not sufficient to eradicate the bitter legacy of the communist rule. For more, see Janos Kis, *Introduction: From the 1989 Constitution to the 2011 Fundamental Law, in CONSTITUTION FOR A DISUNITED NATION* (Gábor Attila ed., 2012).

the mere authentic representative of the People.⁵² The escalation of populism with authoritarian ambitions today puts the beforementioned streams of resentment to its center. The politics of resentment and populism complement each other to set up a durable authoritarian plot that “consists of ideas and key objectives regarding justice, development, notions of good and evil, and the mechanisms needed to realize them, by linking meaning and action.”⁵³

What is populism? Before moving forward, let me set up the conceptual boundaries for this critical concept, which has been used widely and largely in the past decade with an open-ended, almost all-inclusive definition. The term has a long and overwhelming history. Along with the concept of the People, it “oscillate[s] between poles: whole and part, active and passive, threat, and promise.”⁵⁴ Over the course of these oscillations, it is difficult to pinpoint one absolute meaning of the term, which is not the purpose of this article anyway. As Isaiah Berlin captured decades ago, there is no “single formula to cover all populisms... The more embracing the formula, the less descriptive. The more richly descriptive the formula, the more it will exclude. The greater the intension, the smaller the extension. The greater the connotation, the smaller the

⁵² Ertuğ Tombuş, *The People and its Embodiment: Authoritarian Foundations of Constitutions*, in *THE FAILURE OF POPULAR CONSTITUTION MAKING IN TURKEY: REGRESSING TOWARDS CONSTITUTIONAL AUTOCRACY* (Felix Petersen & Zeynep Yanasmayan eds., 2020); JAN WERNER-MÜELLER, *WHAT IS POPULISM?* (2016); Andrew Arato, *Populism, Constitutional Courts, and Civil Society*, in *JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS* (Christine Landfried ed., 2019).

⁵³ Börzel & Zürn, *supra* note 5, at 10.

⁵⁴ Carlos de la Torre, *The People, Populism, and The Leader's Semi-Embodied Power*, 2 *RUBRICA CONTEMP.* 1, 6 (2013).

denotation.”⁵⁵ This article strictly observes populism as a means rather than an end in and of itself; thus, beyond the polemical and ideational uses of the term, I propose to rethink the concept as an instrument, a toolkit that is devised *for* and *from within* representative democracy.

Depending on what side of the populist pendulum one stands, various definitions with moral, ideological, or cultural appropriations come to the scene. Here, we will observe the populist pendulum from an authoritarian angle. As a permanent shadow of representative politics,⁵⁶ by identifying popular sovereignty with a part of the people and treating it as a monolithic entity and constructing a rhetorical chain of equivalences⁵⁷ to expand its zone of influence and consolidate its representative claim, populism fashions itself a Schmittian suit of democracy.⁵⁸ This normally sharpens the imaginary friend-enemy relations, targeting not only a foreign enemy but also the domestic *Them*, who is extracted from the authentic, actual people, hence from the populist leadership incarnating the will of these extricated genuine people.⁵⁹

⁵⁵ Hugh Seton-Watson, Chairman of the Session, Address at the 1967 Conference on Populism (May 20-21, 1967).

⁵⁶ WERNER-MÜLLER, *supra* note 52, at 80.

⁵⁷ ERNESTO LACLAU, ON POPULIST REASON 74 (2005); Arato, *supra* note 52, at 318.

⁵⁸ As Ellen Kennedy captures in her Introduction to the English translation of *Crisis of Parliamentary Democracy*, for Schmitt, “as the subject of democracy, the people are identical with the state: “The essence of the democratic principle . . . is the assertion that the law and the will of the people are identical.” Furthermore, the logic of democratic argument rests on a series of identities—the identity of rulers and ruled, governed, and governing, subject and object of state authority, the people and their representatives in parliament, the state and the voters, the state and the law. Finally, Schmitt argued that a democracy implied the identity of the quantitative (the numerical majority or plurality) with the qualitative (justice).” See SCHMITT, *supra* note 14; CARL SCHMITT, CONSTITUTIONAL THEORY (Jeffrey Seitzer trans., 1928).

⁵⁹ Arato, *supra* note 52, at 330.

Constructing a rhetorical chain of equivalences, authoritarian populist identity expands its zone of influence by alienating and stigmatizing *Them*, which no longer complies with the readjusted identity of the people, hence is the target of resentment. Moreover, this act of alienation and exclusion is also engraved into the constitutional and legal mechanisms to consolidate populist identification with the *genuine* people and enclaving of the democratic empty space. Here, I am not concerned whether populism is inherently authoritarian or not; rather it is understood as one of multiple variables that is present in the constitutional democratic parameter space. What makes it one of the four pillars of authoritarian institutional script today is then not anything about its substance, but the timing of its escalation that overlaps with the revealing of accumulated resentments. Also, it is important to note that resentment is not necessarily an underlying factor of populism; however, in the past decade, the two seem to have caught momentum together and mostly appeared as a pair.

While the politics of resentment serves for authoritarian revision of *Us-Them* boundaries in an instituted society, populism translates the dynamic energy generated by refined and tailored resentments to the phase of the instituting society. This act of instituting happens through self-alteration of the instituted society, which includes alteration of the definition, scope, and content of a sovereign people for the authoritarian re-institution of society.⁶⁰ The resentful *Us* is *part* of the People, whereas the populist *Us* claims to *be* the People. In this populist phase, authoritarianism tailors a so-called genuine image of the People as a newly emerging actor. In other words, it “gives power to a substantial reality, to bring the principles of Law and Knowledge within its orbit, to deny social division

⁶⁰ CASTORIADIS, *supra* note 54, at 359-74.

in all its forms, and to give society a *body* once more.”⁶¹ This is an act of transgression, given the situation of the instituted People, within which the resentful *Us* had been deduced from. This transgressive act of populism asserts the People as an omnipresent political actor, as the authoritarian regime does not claim to represent but rather *be* it. Here, as Laclau observed:

What is crucial for the emergence of the ‘people’ as a new historical actor is that the unification of a plurality of demands in a new configuration is constitutive and not derivative...The emergence of the ‘people’ as a historical actor is thus always transgressive vis-a-vis the situation preceding it. This transgression is the emergence of a new order.⁶²

Despite the notable differences in the socio-cultural background and historical development of populism in each case, from Eastern to Southern Europe (Hungary, Poland, Romania, Czech Republic, Italy), from Turkey to USA, relying on the same institutional design blueprint (the liberal script), populists with authoritarian ambitions harness “resentments against the international legal order: international legal rules are seen as a creation of an intellectual technocratic elite which is out of touch with the real world.”⁶³ Although the constitutional entrenchments and their implementation along with civil society in advanced democracies have relatively curbed the enthusiasm of populists and the potentially authoritarian binary logic (*Us-Them*), in hybrid contexts such antidemocratic disruptions have escalated more easily. For

⁶¹ LEFORT, *supra* note 55.

⁶² LACLAU, *supra* note 59, at 228.

⁶³ Krieger, *supra* note 42, at 975.

example, in Europe, in response to the post-Arab Spring refugee crisis, this authoritarian binary logic has been channeled into a nativist identity politics, in some cases (Hungary, Romania, Germany, etc.) stigmatizing not only the refugees but also the European Union, which was accused of attempting to absorb and eradicate the national, native culture and traditions, to be replaced by a supranational European identity. The populist identification has also reflected on the constitutional politics of these autocracies and, combined with legal resentments, has been incorporated nativist, conservative, religious, sexist values into the constitutional definition of sovereign people.

The nativism discourse of Orbán, Kaczyński, Trump, Le Pen, or AfD in Germany and Freedom Party in Austria, and Erdoğan's claims to unite and represent the *ummah*⁶⁴ show the broad spectrum of authoritarian identity-building. While a nativist populist rhetoric identifies with a territorially limited group of people (Americans, Poles, Hungarians, the Dutch, French), the AKP's (Turkey) or Likud's (Israel) populism proposes an identification with an extraterritorial people, that is, the religious nation. In both cases, the populist identification of the ruler with the people enclaves and closes the democratic empty space which lies at the heart of the liberal democratic power configuration; what distinguishes authoritarian appeal to

⁶⁴ Ummah (Ar.): community. In the Islamic theology, it signifies the whole community of Muslims bound together by ties of religion. One major division in ummah is the Sunni-Shia divide; Erdogan claims to represent primarily the Sunni fraction (majority) in the Muslim ummah. See *ummah*, OXFORD REFERENCE (2003), <https://www.oxfordreference.com/display/10.1093/acref/9780195125580.001.0001/acref-9780195125580-e-2427?jsessionid=DD8385FE22F6C50DB0B4DDEC893B8CC8>.

populism from democratic populism⁶⁵ is the rigidity of holding on to this claim of being the sole authentic representation of the people, after they win the elections and come to power. In other words, populism aligns with authoritarianism when it insists on its exclusionary claim of identification hence incorporates this *Us-Them* binary into its government, instead of breaking the center-periphery/us-them vicious cycle.

As it came into existence with the claim of embodying and representing the periphery through the global spread of neoliberalism, the AKP government managed to draw a transformative, democratizing role model image for itself which, in the eyes of political leaders and international media, had a promising potential to transform and integrate to the global system not only Turkey but also the majority Muslim Middle East and North African countries.⁶⁶ The AKP has established its political identity by counterposing itself with the Turkish style secularism and the military tutelage,⁶⁷ and the political elite attached to these two tenets of the modern Turkish constitutionalism. However, since 2007, the AKP has revised its discourse, and gradually redrawn the constitutional and political boundaries of social and political dissensus, while

⁶⁵ Podemos, Syriza, and Bernie Sanders are among the most popular examples of democratic, liberal, socially inclusive forms of populism. See also MARK TUSHNET & BOJAN BUGARIC, *POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM* (2021).

⁶⁶ See Deborah Sontag, *The Erdogan Experiment*, N.Y. TIMES MAG. (May 11, 2003), <https://www.nytimes.com/2003/05/11/magazine/the-erdogan-experiment.html>; Ergun Özbudun, *From Political Islam to Conservative Democracy: The Case of the Justice and Development Party in Turkey*, 11 S. EUR. SOC'Y & POL. 543, 547 (2006); Ahmet Insel, *The AKP and Normalizing Democracy in Turkey*, 102 S. ATL. Q. 293, 300 (2003).

⁶⁷ Military tutelage is a term coined to describe the legally entrenched constitutional guardian role of the Turkish military, which shut down civilian, parliamentary politics several times (1960, 1971, 1980, 1997) and initiated constitution-making processes. See Andrew Mango, *Turkey: Democracy under Military Tutelage*, 39 WORLD TODAY 429 (1983).

altering the already fragile balance of power among separate branches of government through a populist closure.⁶⁸ This closure becomes particularly noticeable first during the 2010 constitutional amendment referendum,⁶⁹ within the context of which the AKP presented itself “as the sole democratizing agent with an exclusive claim to represent the people.”⁷⁰ Those who were against the proposed amendments and the AKP’s plebiscitarian method to ratify them were stigmatized as military-lovers, traitors, anti-democratic status quo supporters; this antagonistic discourse has brought up the deeply rooted cultural and social resentments and grievances.

The AKP’s *genuine* people has been readjusted several times over the course of the past twenty years. First it was a collection of conservative rural masses, anti-Kemalist, anti-military tutelage liberals, and religious and ethnic minorities.⁷¹ The common quality of these groups was their desire to settle accounts with the army and the secular republican status quo. In a decade (by 2013-2014),⁷² the people have shrunk down to a collection of Turkish nationalists (Milliyetçi Hareket

⁶⁸ Tombuş, *supra* note 52, at 77.

⁶⁹ The referendum passed twenty-six amendments with 57.88% of Yes votes. For more on the highly controversial 2010 constitutional amendments, see Ergun Özbudun, *Turkey’s Constitutional Reform and the 2010 Constitutional Referendum*, EUR. INST. OF THE MEDITERRANEAN Y.B. (2011), <https://www.iemed.org/publication/turkeys-constitutional-reform-and-the-2010-constitutional-referendum/>.

⁷⁰ Tombuş, *supra* note 52, at 78.

⁷¹ Ragan Updegraff, *Turkey Under the AKP: The Kurdish Question*, 23 J. DEMOCRACY 119 (2012); Kerem Karaosmanlı, *Reimagining Minorities in Turkey: Before and After the AKP*, 12 INSIGHT TURK. 193 (2010); Bilge Yabancı, *Religion, Nationalism, and Populism in Turkey under the AKP*, MIDDLE EAST INST. (Oct. 6, 2022), <https://www.mei.edu/publications/religion-nationalism-and-populism-turkey-under-akp>.

⁷² The Gezi Park protests in 2013 and the government corruption scandal that same year mark a breaking point in the AKP’s populist identification.

Partisi, or MHP) and religious/conservative masses (AKP's core voter base).⁷³ In this phase, the AKP adopted the slogan "one nation, one flag, one motherland and one religion,"⁷⁴ consecrating those who contest this fixation of political identities. Then, along with the post-Arab Spring refugee influx, the AKP's discourse and policies have expanded its boundaries to include Muslim refugees (the people of *ummah*) in the populist readjustment of the nation.

While the AKP was shaping its populist discourse in favor of an extraterritorial Muslim (Sunni) nation, FIDESZ championed a more locally grounded and territorially fixated populist identification and acknowledged the importance of Christianity without letting it absorb the Hungarian culture into a supranational European identity. FIDESZ's localization of identity included creating a pro-government national capitalist class, which has well-served for the authoritarian consolidation of FIDESZ in the past decade. Moreover, while the AKP was responding to the popular discontent with the neoliberal order by relying on importing immigrant (particularly Muslim) labor, FIDESZ was encouraging "natalist policies that would create new Hungarians... The plan offered a lifetime exemption from personal income tax for women who bear and raise four or more children."⁷⁵

How, then, do these autocrats sustain a façade of legitimacy in constitutionally entrenched political settings? No matter what the substance of their validation claims is, by identifying the fate of the genuine people with that of the leader,

⁷³ Ihsan Dagı, *Islamist Parties and Democracy: Turkey's AKP in Power*, 19 J. DEMOCRACY 25 (2008).

⁷⁴ Krisztian Simon, *The Success of the Illiberal Vision - Orbán's Rise to Power*, D|PART (May 20, 2016), <https://dpart.org/the-success-of-the-illiberal-vision-2/>.

⁷⁵ TUSHNET & BUGARIC, *supra* note 67, at 83.

authoritarian regimes forge obedience and mass support that translates into social legitimacy.⁷⁶ Here, legitimacy is marked “as the property projected onto an action, rule, actor or system by an actor’s belief that that action, rule, actor or system is morally or legally legitimate.”⁷⁷ The authoritarian leader as the actor here grounds the legitimacy claims upon a subjective, temporal motive instead of an objective “ought;” in other words, it lacks a normative commitment or coherency that requires the recognition and pursuit of legally, morally, or socially oriented goals. The AKP’s and FIDESZ’s populist identity politics, which blurs the boundaries between the legal and cultural definitions of the nation/people, demonstrate a pressing urge to rewrite the social contract by redistribution of resources in favor of an imaginary people, that can be only seen and represented by the autocrat.⁷⁸ In both cases, becoming the sole embodiment of the people signifies a transition from generating and accumulating resentment as the long-oppressed underdog to enclaving and recalibrating the democratic political space, while at the same time pushing those who do not comply with this populist *Us*, out of not only the democratic political space, but also the popular sovereign, constituent body. Thus, as an authoritarian tool, populist pendulum vacillates away from open, globally networked statehood to a clustered—if not fully closed—one, which manifests through the autocracies’ conception of the constitution and constitutionalism and brings us to the third major variable, that is, the constitution as an object of fetish.

⁷⁶ Thomas Pepinsky, *The Institutional Turn in Comparative Authoritarianism*, 44 BRIT. J. POL. SCI. 631, 653 (2014).

⁷⁷ *Id.*

⁷⁸ The People here are a bit like the imaginary clothes in the Danish folktale “The Emperor’s New Clothes;” however, in the case of populist identification, if you cannot see it, you are not simply stupid as in the tale, but a traitor that denies the reality, hence is not part of it.

III. CONSTITUTION AS AN OBJECT OF FETISH

The mysterious character of the commodity-form consists therefore simply in the fact that the commodity reflects the social characteristics of men's own labor as objective characteristics of the products of labor themselves, as the socio-natural properties of these things.⁷⁹

Authoritarianism today has a peculiar obsession with constitutional politics and constitution making. Why does an authoritarian regime need to have a constitution, which can be suspended, violated, or nullified whenever it needs be? The new autocracies do not simply defy the realm of constitutional politics and attached normative strings. Although the level of engagement and commitment to constitutional and international limitations vary from one case to another, their interest in constitution making and constitutional change is beyond rhetorical and symbolic calculations. Although it appears to be one of the most frequently used keywords in scholarly debates on the contemporary democratic regress, constitutionalism indeed is part of a greater project of legitimacy of the liberal script.⁸⁰ That being said, beyond the normative framework attached to the hegemonically victorious liberal script,⁸¹ the authoritarian appeal to constitutionalism and constitutional politics should be understood on that axis, wherein the constitutional entitlement reinforces different forms and degrees of legitimacy in each temporality. In that context, the constitution becomes a commodity that reflects the

⁷⁹ KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 164-65 (Ben Fowkes trans., 1976).

⁸⁰ Börzel & Zürn, *supra* note 5, at 13-16.

⁸¹ *Id.* at 13.

authoritarian imaginary institution of society, politics, identity, and power.

In that imaginary re-institution of society, new autocracies with a populist toolkit and well-orchestrated resentments approach the constitution as a whole,⁸² fetishizing the State (form of forms) as an almost supernatural, divine entity, whose self-preservation precedes all else. Authoritarian fetish of constitutions has a double meaning. First, as an anthropological concept, it is the “worship of an inanimate object for its supposed magical powers or because it is considered to be inhabited by a spirit.”⁸³ Second, in the Marxist political thought, fetishism means an attachment “to the products of labor as soon as they are produced as commodities, and which is therefore inseparable from the production of commodities.”⁸⁴ The constitution here becomes a product of authoritarian labor on behalf of an imaginary *genuine* people; thus the constitution-maker becomes inseparable from not only the process of production (constitution-making) but also the end product (constitution and state apparatus). In the end, the constitution both as the norm of norms and the form of forms becomes a commodity, disjointed from the liberal script.

The self-preservation of the state apparatus and its fundamental law, however, does not rely on preserving normative commitments to the liberal script; rather its fetishization as the norm of norms and the form of forms serve for the maintenance of authoritarianism as a somehow legitimate stakeholder in the international liberal order. The

⁸² SCHMITT, *supra* note 14, at 57-62.

⁸³ *Fetishism (Anthropology)*, OXFORD DICTIONARY, <https://www.oxfordlearnersdictionaries.com/us/definition/english/fetishism?q=fetishism> (last visited May 8, 2023).

⁸⁴ ROSALIND C. MORRIS & DANIEL H. LEONARD, RETURNS OF FETISHISM 188 (2017).

self-preservation here is the reconstruction/rewiring of the state apparatus (constitution as the form of forms) for authoritarian consolidation. The unilateral constitution-making of FIDESZ in 2011 exemplifies this sacralization of the constitution in its absolute sense.⁸⁵ Especially in the past decade, the discourse and the policies of the AKP, which put the survival and perpetuity of the State⁸⁶ before all else, epitomize the same process of fetishization. In both cases, as Marx brilliantly captured, the constitution as a commodity reflects the social and political orientation and ambitions of aspired autocracies as “objective characteristics of the products of labor themselves, as the socio-natural properties of these things.”⁸⁷ Authoritarian appeal to constitutionalism and constitutional politics is then an illustration of the fetish-worshippers’⁸⁸ performance to refresh and legitimate the imaginary significations derived from the fetish object and the surrounding myth.

The new authoritarianism also fetishizes the constitution as the norm of norms, as the basic law and the formal text, a material property at their disposal, which can be tuned and readjusted for domestic or international legitimation, self-preservation, and consolidation purposes. Authoritarian fetishization of the constitution primes unrestricted executive power and subsequently targets the judiciary, as they tend to

⁸⁵ CARL SCHMITT, *CONSTITUTIONAL THEORY* 53-57 (2008).

⁸⁶ Devletin Bekasi (Tr.): perpetuity and survival of the state. The phrase has been gradually incorporated into the AKP’s discourse and policy-making logic in the past decade; see CAGLAR KEYDER, *STATE AND CLASS IN TURKEY* (2020); see also AHMET INSEL, *TURKIYE TOPLUMUNUN BUNALIMI* (2014).

⁸⁷ MARX, *supra* note 81, at 164-65.

⁸⁸ KARL MARX & FREDRICK ENGELS, *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 AND THE COMMUNIST MANIFESTO* 107 (Martin Milligan trans., 1932).

interpret any intervention of courts or high-rank bureaucracy in the elected government's operation as "the secret work of an oligarchical enemy or the deep state or an external power."⁸⁹ The autocrats present themselves not only as the representative but also the embodiment of the state and its constitution; thus, anything that challenges the executive power of a populist autocrat is national treason or external intervention. They "do not flagrantly violate legal obligations but tend to use constitutional amendments, declarations of emergencies, or the enactment of new constitutions to change the existing constitutional frame."⁹⁰

Naturally, judicial independence could not endure the authoritarian fetishization of constitutional state: it has distorted the balance of power among the branches of government, tending to recollect the state power under the executive branch. On that axis, court packing⁹¹ has emerged as another widespread practice for authoritarian consolidation through constitutional mechanisms/politics; Erdoğan in

⁸⁹ ARATO, *supra* note 44, at 12.

⁹⁰ Krieger, *supra* note 42, at 9.

⁹¹ 2010 Turkey, 2015 Hungary, 2016 Poland, and 2015 Venezuela are few examples of the recent court-packing acts of authoritarian leaders. For a compelling discussion on authoritarianism and courts, see Arato, *supra* note 52, at 18-19; see also TUSHNET & BUGARIC, *supra* note 67; see also Gábor A. Tóth, *Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive*, 28 WASH. INT'L L.J. 317 (2019). It's also frequently discussed in American politics whether the number of Supreme Court seats should be increased, which was a proposal by both Democrats and Republicans in different temporalities, and that the late Justice Ruth Bader Ginsburg strongly resisted.

Turkey⁹² (2010), Kaczyński in Poland⁹³ (2015), and Orbán in Hungary⁹⁴ (2018), Maduro in Venezuela⁹⁵ (2018) have adopted this strategy to paralyze an imaginary enemy (some prominent examples are the issues of same-sex marriage, religious freedom, freedom of speech and association). President Trump's Supreme Court and high bureaucracy appointments and surrounding debates of court packing reflect the same mindset.

Instead of completely dismissing the courts, authoritarianism today prefers to keep the judiciary on a short leash. In Turkey, the notorious 2010 constitutional amendments altered the membership, jurisdiction, and voting rules of the Constitutional Court among many other clauses, in an attempt to dismantle the parliamentary system first *de facto*, then, in 2017, with another set of constitutional amendments, *de jure*, to be replaced by hyper-presidentialism.⁹⁶ Here, it is

⁹² Andrew Arato, *The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition*, 17 CONSTELLATIONS 345 (2010); Oya Yegen, *Turkey Rolling Back the 2010 Reforms?*, INT'L J. CONST. L. BLOG (Oct. 24, 2014), <https://perma.cc/R565-PGAS>.

⁹³ Tomasz Tadeusz Koncewicz, "Court-packing" in Warsaw: The Plot Thickens, VERFASSUNGSBLOG (Dec. 18, 2015), <https://verfassungsblog.de/court-packing-in-warsaw-the-plot-thickens/>; TUSHNET & BUGARIC, *supra* note 67.

⁹⁴ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); Halmai, *supra* note 20, at 307-08; ARATO, *supra* note 44, at 15.

⁹⁵ Raul Sánchez-Urribarri & Carlos García-Soto, *A Primer to Venezuela's Constitutional Crisis*, IACL-AIDC BLOG (Apr. 29, 2019), <https://blog-iacl-aidc.org/crisis-in-venezuela/2019/4/29/a-primer-to-venezuelas-constitutional-crisis>; José Ignacio Hernández G., *Towards a Concept of Constitutional Authoritarianism: The Venezuelan Experience*, INT'L J. CONST. L. BLOG (Dec. 14, 2018), <http://www.icconnectblog.com/2018/12/towards-a-concept-of-constitutional-authoritarianism-the-venezuelan-experience/>.

⁹⁶ Susan Rose-Ackerman et al., *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines*, 29 BERKLEY J. INT'L L. 246 (2011); Andrew Arato & Ertuğ Tomuş, *Learning*

important to note that “a majority of independent liberal democrats and major European institutions such as the European Union, the Council of Europe and the Venice Commission”⁹⁷ did not consider the 2010 amendments as a sign of democratic decline or court-packing; rather the amendments were welcomed as milestones of democratic consolidation and the resolution of the tension between the center and periphery (*Us-Them*). In Hungary, the Constitutional Court’s attempt to revoke its guardian role during the constitutional roundtable discussions was responded with immediate executive action.⁹⁸ Once the apex courts are successfully packed, the next step is usually forming a constituent assembly for a new constitution, one that would embody the genuine people, who could be represented—if not created from scratch—only by the authoritarian regime.

Overall, the constitution is a critically important fetish object for the new authoritarianism both as process and product. The constitution making as a process sacralizes the constitution as a product first; then the sacralized concrete incarnation of the constitution (the State as product, not the

from Success, Learning from Failure: South Africa, Hungary, Turkey, and Egypt, 39 PHIL. & SOC. CRITICISM 1 (2013); Tombus, *supra* note 52, at 24–56.

⁹⁷ Ergun Özbudun, *Turkey’s Judiciary and the Drift Toward Competitive Authoritarianism*, 50 INT’L SPECTATOR 42, 45 (2015).

⁹⁸ FIDESZ used the amendment structure of the old constitution and its supermajority manufactured by the electoral rule to pre-emptively discipline the Court through devices of court packing, jurisdiction limitation and a majoritarian transformation of the structure of appointment. The amended structure was then lifted into the Basic Law of 2011, the new constitution. For a detailed, multidimensional account of the constitutional change in Hungary, see Kriszta Kovács & Gábor Attila Tóth, *Hungary’s Constitutional Transformation*, 7 EUR. CONST. L. REV. 183 (2011); PAUL BLOKKER, CONSTITUTIONAL ACCELERATION WITHIN THE EUROPEAN UNION AND BEYOND (Paul Blokker ed., 1st ed. 2018); TUSHNET & BUGARIC, *supra* note 67, at 105–24.

constitution as basic law, collection of individual constitutional laws) returns the favor by redefining the process as a prerogative to perpetuate the sacred product and its transcending value. In different temporalities, one of these two fetishizations may dominate the other, taking the prime spot in political discourse and decision making of the authoritarian regime; but they are complementary to one another. Moreover, they rarely show up as isolated acts in reality; they are somehow ideal types that draw from and feed upon each other to fulfill the sole purpose of this fetishistic practice: the control over the means of governance and distribution of political power, behind the false pretenses of self-preservation of the nation and its State. In short, the constitution as form (sacralized entity) informs the fetishization of the constitution as the norm (commodity with extraordinary value) and vice versa. As a fetish object, it helps authoritarian regimes to self-institute the social-historical however they find suitable.

The new authoritarianism instrumentalizes the constitution and constitution-making through a principle of dynamic emergence, a process of “constantly renewed formation and emergence of this unity from a fundamental or ultimately effective power and energy.”⁹⁹ In that instance, the constitution describes a dynamic process of effective energies, rather than a regulated procedure of commands. It then serves to reproduce and sustain the populist hype, upon which the domestic legitimation claims of new autocracies are relied. Here, it is also important to note that once considered in this twofold absolute sense, the constitution becomes both means and ends for authoritarian consolidation. The fetishization of the constitution as a commodity with codifying and commanding powers comes to be informed by the constitution as an

⁹⁹ SCHMITT, *supra* note 14, at 61.

anthropological object of fetish, that is, the State, i.e., concrete political unity, which were once reclaimed in the name of alienated people (*Us*), becomes the codification and command of a new State designed for the alienated majority of the People, who now claims to be the People without the resented minority of *Them*. In other words, the fetish of the sacred and of the commodity are inevitably complementary to one another; as Marx captured, the commodity is “a very queer thing, abounding in metaphysical subtleties and theological niceties,”¹⁰⁰ whose mystical character does not originate from their use-value.¹⁰¹

While in Hungary, FIDESZ immediately pushed for a unilateral constitution-making process, in Turkey, the AKP’s constitutional change appeared to adopt a method of “gradual amendment-making that was initially motivated by Turkey’s accession process to the European Union (EU),”¹⁰² and later by the perpetuity of the transcendental Turkish state and its true *telos*. Although the European Union has been one of the primary forces leading and encouraging constitutional transitions in both countries, the constitutional continuity is stronger in Turkey than Hungary. Turkey’s constitutional developmental narrative has less historical-ideological ruptures and the ruptures that shaped the republican (post-World War I) constitutional tradition are somehow normatively coherent and complementary to one another, drawing from the same hegemonic-totalitarian logic. Even the military coups and following *junta* regimes are remarkably different from its Greek, Latin American, Portuguese, or

¹⁰⁰ MARX & ENGELS, *supra* note 90, at 319.

¹⁰¹ *Id.* at 320.

¹⁰² Yegen, *supra* note 49, at 71.

Spanish counterparts.¹⁰³ In all three military interventions (1960, 1971, and 1980), the military suspended the basic law at most for three years,¹⁰⁴ amended or rewrote the constitution with certain irrevocable clauses that preserve the *soul/telos* of the Turkish state. On that account, the type of ruptures also drastically differs from Hungarian history, which in the past century had experienced the Nazi invasion, communist regime during the Cold War, collapse of the Soviet Union and transition to parliamentary constitutional democracy in 1989, and so on. In short, we can see how FIDESZ and the AKP reified the constitution for authoritarian consolidation and institutional configuration in slightly different ways, depending on the historical, conceptual, and socio-economic instruments at their disposal; however, the fetishization of the constitution as codification and command, as well as the continuous appeal to awake the constitution-making will, remain essentially the same.

The AKP's constitutional fetishism has drawn upon the already present image of transcendental state, which should belong to the genuine people and their representative, a populist ruler. Through bureaucratic appointments, changing the public education curriculum, reinforcing a series of conservative social norms as defaults for the society, encouraging religious education and increasing the number of

¹⁰³ GUILLERMO O'DONNELL ET AL., *TRANSITIONS FROM AUTHORITARIAN RULE* (1986); *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA* (Larry Diamond et al. eds., 1999).

¹⁰⁴ The 1960 coup's junta regime ended in one year, with the referendum to enact the 1961 constitution. In 1971, the military-backed technocratic regime suspended the law for two years, during which the 1961 constitution was heavily amended to restrain individual and civic liberties codified by the 1960 junta regime. In the 1980 coup, the junta rule ended in three years with the enactment of the 1982 constitution; however, the leader of the coup and the following junta regime, Kenan Evren, remained at the office of presidency until 1989.

religious establishments along with boosting the budget of the Ministry of Religious Affairs, the AKP has first packed the constitution as the State, concrete existence of the political unity was not only redefined, but also reconstructed in the light of an authoritarian blueprint. Then came the fetishization of the constitution as a commodity; the AKP has successfully rebranded and reappraised the constitution as normative command, through which the basics of social organization would be codified. As a result, this cyclical process was completed by the 2017 constitutional amendments, which simultaneously fetishized and reappraised the process (post-coup state of emergency rule, existential pressing threat to be avoided, the State personnel (mostly appointed or promoted by the AKP in the first phase of fetishization) and product (new political system, end of parliamentary democracy, overpowered unchecked-balanced hyper presidentialism, authoritarianism victoriously marching) of the constitution. Here, it is significant to remember again that after two decades of single-party rule, the AKP still has not managed to strike down the 1982 constitution, or the pale replica of it, after countless amendments.

In Hungary, on the other hand, the constitutional fetishism of FIDESZ unfolded in the opposite order. FIDESZ first changed the norm of norms (2011, the Fundamental Law), then implemented/enforced it upon the form of forms¹⁰⁵ (the Hungarian state and its concrete existence, scope, and attachments readjusted through constitutional amendments and omnibus bills). The constitution as the form of forms is confined by the European Union, which obviously has not sufficed to reverse the authoritarian trend in Hungary or

¹⁰⁵ For a detailed articulation of the constitution as the norm of norms and the form of forms, see SCHMITT, *supra* note 60, at 57-63.

elsewhere, whereas the constitution as the form of forms is associated with the glorious past of the Hungarian state.¹⁰⁶ At that instance, FIDESZ successfully deploys both victim (of communism, of Trianon, of refugees) and victor identities. Their peculiar coupling helps FIDESZ justify its controversial decisions and actions on grounds of popular sovereignty and the undisputable sacredness of the Hungarian state.

Therefore, as authoritarian fetish objects, constitutions “function as governance scripts and help control and discipline the tentacles of the [authoritarian] monster.”¹⁰⁷ That is, the new authoritarianism operates through mutations *inside* the constitutionally entrenched matrix of power. These mutations nevertheless do not aim at dissolving the State, rather reconstructing and preserving it in the image of the authoritarian regime. The self-preservation of the state apparatus and its fundamental law, however, does not rely on preserving normative commitments to the liberal script. Instead, its double fetishization serves for the maintenance of authoritarianism as a somehow legitimate script integrated to the international liberal order. The self-preservation here is the refurbishing of the state apparatus (constitution as the form of forms) for authoritarian consolidation. This finally brings us to the authoritarian instrumentalization of the international liberal order, which is a distinct quality of the new authoritarian phenomenon in constitutional settings, not only because of

¹⁰⁶ Marina Bán & Jennifer Pullicino Orlando, *Understanding Identity and the Legacy of Empire in European Constitutionalism: The Case of Hungary*, INT’L J. CONST. L. BLOG (Sept. 5, 2021), <http://www.icconnectblog.com/2021/09/understanding-identity-and-the-legacy-of-empire-in-european-constitutionalism-the-case-of-hungary/>.

¹⁰⁷ Günter Frankenberg, *Authoritarian Constitutionalism – Coming to Terms with Modernity’s Dreams and Demons* 27 (Goethe Universität Research Paper, Paper No. 3, 2018), <https://d-nb.info/1156326621/34>.

authoritarianism's choice of battleground, but also because of how gently and ignorantly the opponent responds to it.

IV. AUTHORITARIANISM AND INTERNATIONAL LIBERAL ORDER: A BIPOLAR LOVE AFFAIR

The external world of constitutional democracies was designed after World War II and the normative and institutional hegemonic construction of the liberal script was accomplished in the post-1989 context. Key objectives of the liberal script, a collection of individual and economic freedoms, property rights, and markets, “create an elective affinity of the liberal plot with capitalism.”¹⁰⁸ Along with the neoliberal capitalist institutional infrastructure—the World Trade Organization, the International Monetary Fund, and the World Bank—NATO, the Council of Europe, international courts, and later the European Union, occupy the core of this power configuration.¹⁰⁹ Throughout this liberal hegemonic consolidation, these bodies have been through a “process of reconfiguring constitutional practice *within* as well as *beyond* the state by mandating, second-guessing, and rearranging domestic policy structures and priorities,”¹¹⁰ and have started to adopt features of domestic constitutional systems, including but not limited to legislative mechanisms that produce binding norms. This multilayered institutional anchoring laid out a new set of limitations before anti-democratic challenges, but it also opened an untapped additional territory wherein autocracies can find alternative supplements to democratic legitimacy.

¹⁰⁸ Börzel & Zürn, *supra* note 5, at 12.

¹⁰⁹ Kumm, *supra* note 2, at 6.

¹¹⁰ TURKULER İSIKSEL, EUROPE'S FUNCTIONAL CONSTITUTION 3 (2016).

Populist, authoritarian governments today have a twofold relationship with international law and institutions, primarily motivated by legitimation concerns and claims. As for the practical operation and claims of legitimacy, autocracies in seemingly different worlds¹¹¹ adopt frighteningly similar attitudes and easily liquidate their international legal commitments and institutional alliances.¹¹² Their appeal to the international law and institutions oscillates between symbolic and instrumental reasons.¹¹³ On the one hand, autocracies maneuver in the grey areas of legality and conduct their operations under the cover of law. In doing so, they frequently refer to more traditional elements of international law: “Their understanding promotes those international norms which protect state sovereignty and the *domaine réservé*— ‘*the us*.’”¹¹⁴ This appeal to the principles of self-determination and national sovereignty in their constitutional contestations helps autocracies sustain their legitimacy in the eyes of the international community.

As Kim Lane-Scheppele captures, the new autocrats come to power and stay there with a phalanx of lawyers, instead of tanks or soldiers: they “look like democrats playing hardball, not like dictators playing softball.”¹¹⁵ This stylistic difference partially explains why the new autocracies are deeply committed to amend or rewrite a constitution, which can be

¹¹¹ In the past decade, cases that seemingly have nothing or too little in common in terms of their historical, ideological, and economic developmental patterns, such as Turkey, United States (Trump), Brazil, Venezuela, Poland, or Hungary, have surprisingly similar approaches to the international law and institutions, when it comes to authoritarian survival and legitimation.

¹¹² Krieger, *supra* note 42, at 14-17.

¹¹³ Frankenberg, *supra* note 109, at 26-27; Krieger, *supra* note 42, at 14.

¹¹⁴ Krieger, *supra* note 42, at 15 (emphasis added).

¹¹⁵ Scheppele, *supra* note 96, at 581.

suspended or violated whenever need be.¹¹⁶ Also, the very same commitment to national sovereignty leads them to reproduce the populist identification of the ruler and the ruled, where they appear to be the true representative of the people, whose culture, history, and very existence as a nation, have been under the threat of globalization and foreign interlopers, as much as the corrupted political elite.

As two of the largest beneficiaries of the European Union budget, in the past decade, the Polish¹¹⁷ and Hungarian¹¹⁸ governments have radically drifted away from the fundamental values and operational principles of the Union, which has been harshly and rightfully criticized for funding member states that challenge and alter—sometimes overtly reject—the Union’s values. They successfully stigmatized the European Union intervention, contending that it violates the principle of national sovereignty, and they did not sign up for that kind of alliance.¹¹⁹ Here the symbolic aspect becomes clear in the language of autocrats: *Violation* in question here was Brussels’s request for the reinstatement of basic European Union values in these countries on a wide catalog of issues including, but not limited to the media freedom, judicial independence, and non-discrimination based on sexual orientation, race, or religion. In this symbolic appeal, they appear in the shape of illiberal democracies or autocratic legalisms, which comply with the principles of national

¹¹⁶ Hungary (2011, 2018), Turkey (2010, 2017), Brazil (2022), Venezuela (2015), Poland (2016), and so on.

¹¹⁷ The Law and Justice Party.

¹¹⁸ FIDESZ.

¹¹⁹ Jan Strupczewski, *Poland Threatens to Veto EU 2021-2027 Budget Over Rule of Law Condition*, REUTERS (Nov. 12, 2020), <https://www.reuters.com/article/us-eu-budget-poland/poland-threatens-to-veto-eu-2021-2027-budget-over-rule-of-law-condition-idUSKBN27S2SM>.

sovereignty and meet the procedural bare minimum for *sui generis* democracy. Moreover, although it criticizes the goals and orientation of the liberal international order, authoritarianism today does not break ties with the international organizations; rather disputes the boundaries of this relation in reference to the principle of national sovereignty.

On the other hand, as to open a domain of opportunity for national interests, the new autocracies instrumentalize the international law and institutions merely as a tool of coordination and cooperation with political regimes on the same wavelength, which contributes to the advent of authoritarian clusters within the broader web of international liberal order. As Heike Krieger has observed, “populist governments occasionally ally in order to circumvent existing structures, to promote their agenda within international organizations or to change predominant interpretations of international law.”¹²⁰ Central and Eastern Europe in the past decade perfectly epitomizes the emergence and expansion of such authoritarian clusters. One contemporary example is Poland and Hungary’s coordinated effort against the application of the Article 7 of the Treaty of European Union that outlines the conditions and procedures through which a member country’s rights would be suspended on the grounds of violating European Union law.¹²¹ However, as the article requires unanimity among all European Union member states except the violating country, it has not been acted upon since

¹²⁰ Krieger, *supra* note 42, at 26.

¹²¹ For details on the European Union legislation and the role and importance of the Article 7, see *Promoting and Safeguarding the Eu’s Values*, EUR-LEX (last updated July 13, 2023), <https://eur-lex.europa.eu/EN/legal-content/summary/promoting-and-safeguarding-the-eu-s-values.html>.

the members from the authoritarian cluster agreed to veto any sanctions in each other's cases.¹²²

One key ingredient in the making of these authoritarian clusters is shared legal resentment: here, specifically in the form of Euroskeptical, nativist, isolationist discourses and policies. In the past decade, autocratizing hybrid regimes in Central and Eastern Europe have started referring to international law and institutions as a product of an intellectual technocratic elite,¹²³ that writes and enforces these laws from their ivory tower. This anti-international spirit has strengthened the authoritarian, populist clustering and even gone beyond that. Autocratic clusters in Central and Eastern Europe have found themselves populist right-wing allies in Western Europe¹²⁴ (Italy, France, the Netherlands), who share their Euroskeptical sentiments and closed statehood dreams. Those are not idiosyncratic European Union aspirations; similar populist engagements with authoritarian aspirations can be seen in the post-Brexit UK (Theresa May) and the Trump presidency in the US.¹²⁵ Indeed, Donald Trump's remarks at the UN General Assembly in 2017 well exemplify the outspoken opposition of autocrats to the idea of an international community based on shared values and interests,

¹²² For more, see Matthias Matthijs, *Hearing on Democracy and the NATO Alliance: Upholding Our Shared Democratic Values*, JOHNS HOPKINS COUNCIL ON FOREIGN RELS. (Nov. 13, 2019), https://cdn.cfr.org/sites/default/files/report_pdf/Democracy%20and%20the%20NATO%20Alliance.%20Upholding%20Our%20Shared%20Democratic%20Values.pdf?_gl=1*n8epnh*_ga*MjA0NDU2MTM0Ny4xNjgzNTczMzMx*_ga_24W5E70YKH*MTY4MzU3MzMzMzMC4xLjAuMTY4MzU3MzMzMzMC4wLjAuMA.

¹²³ Krieger, *supra* note 42, at 9-12.

¹²⁴ Matteo Salvini of Italy's Northern League, Harald Vilimsky of Austria's Freedom Party, Marine Le Pen of France's National Front, and Geert Wilders of the Dutch Party for Freedom.

¹²⁵ NORRIS & INGLEHART, *supra* note 13.

on substantially meaningful cooperation:

For too long, the American people were told that *mammoth multinational trade deals, unaccountable international tribunals, and powerful global bureaucracies* were the best way to promote their success. But as those promises flowed, millions of jobs vanished, and thousands of factories disappeared. Others gamed the system and broke the rules. And our great middle class, once the bedrock of American prosperity, was forgotten and left behind, but they are forgotten no more, and they will never be forgotten again.¹²⁶

From Trump to Orbán, from Kaczyński to Bolsonaro or Erdoğan, the past decade has seen a series of similar statements incorporated into the policy and discourse of the aspired autocrats. This instance of instrumentalizing international law and institutions serves domestic legitimacy. By rejecting to merely comply with the international organizations without a fight, all these autocracies reproduce their worthiness and necessity for the public good, the wealth and prosperity of the real people. This identification and the emotional satisfaction of challenging the external layer of the hegemonic liberal script suffices to refresh the legitimacy of an authoritarian regime in the eyes of a resentment-driven people.

In the case of authoritarian consolidation in Turkey, the European Union has a more indirect role. In response to democratic backsliding, the European Union first slowed down and then completely froze the membership accession

¹²⁶ *Remarks by President Trump to the 74th Session of the United Nations General Assembly*, TRUMP WHITE HOUSE (Sept. 25, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/>.

negotiations.¹²⁷ However, Turkey has kept her candidate status as “a key strategic partner of the EU on issues such as migration, security, counterterrorism, and the economy.”¹²⁸ This strategic alliance has been crucial to prevent the refugee influx to Europe from war-torn, majority Muslim countries. As a result, the “cash-for-refugees”¹²⁹ deal between Erdoğan’s authoritarian regime and the European Union has been forged.¹³⁰ Since 2016, €6 billion have been fully contracted in support to refugees and host communities in Turkey;¹³¹ synchronously, democratic backslide geared up and increased the pressure on civil society, academia, and the media.¹³² Apparently, the authoritarian equilibrium of the European Union holds multiple variables on a delicate balance, which sheds light on the dark spots of the multilayered constitutional

¹²⁷ *EU-Turkey Relations: We Are Entering a New Phase*, EUR. PARLIAMENT NEWS (Nov. 29, 2016), <https://www.europarl.europa.eu/news/en/headlines/world/20161128STO53408/eu-turkey-relations-we-are-entering-a-new-phase>; *EU Lawmakers Call for Freeze in Turkey Accession Talks*, REUTERS (July 5, 2016), <https://www.reuters.com/article/uk-eu-turkey-idUKKBN19Q2DN>.

¹²⁸ *Türkiye*, EUR. COMM’N (July 5, 2016), https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/turkiye_en.

¹²⁹ Patrick Wintour & Helena Smith, *Erdogan in Talks with European Leaders Over Refugee Cash for Turkey*, THE GUARDIAN (Mar. 17, 2020), <https://www.theguardian.com/world/2020/mar/17/erdogan-in-talks-with-european-leaders-over-refugee-cash-for-turkey>; *The EU-Turkey Refugee Agreement*, DW (Mar. 18, 2018), <https://www.dw.com/en/the-eu-turkey-refugee-agreement-a-review/a-43028295>; *Democracy and NATO Alliance: Upholding Our Shared Democratic Values*, COUNCIL ON FOREIGN RELS. (Nov. 13, 2019), <https://www.cfr.org/report/democracy-and-nato-alliance-upholding-our-shared-democratic-values>.

¹³⁰ Ignazio Corrao, *EU-Turkey Statement & Action Plan*, EUR. PARLIAMENT (Mar. 18, 2016), <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>.

¹³¹ Matthijs, *supra* note 124.

¹³² Berk Esen & Sebnem Gumuscu, *Rising Competitive Authoritarianism in Turkey*, 37 THIRD WORLD Q. 1581 (2016); ARATO, *supra* note 44; Toepfer Stefan et al., *The Changing Space for NGOs: Civil Society in Authoritarian and Hybrid Regime*, 31 VOLUNTAS 649 (2020).

configuration of power in the past decades. It also demonstrates the sharp edges of the Union as a constitutional polity and shortcomings of its institutional structure despite all good intentions, beyond both the sovereign state and the overarching normative boundaries attached to its institutional design.¹³³

Although a constant and systematic reproduction of an imaginary enemy endangers the pursuit of democratic politics, there is something higher at stake hidden in this logic of isolation and stigmatization. The authoritarian regimes' strategic temporalization of the relations between national and international layers of modern politics signifies the reduction of international law to a law of coordination and vanishing of the component of meaningful cooperation,¹³⁴ which is deadly necessary to secure the legitimacy of both international institutions and member states. This pragmatic attitude toward international law and institutions is accompanied by a loud and irrational denial of the global community; in this new formulation "the world is not a 'global community' but an arena where nations, nongovernmental actors and businesses engage and compete for advantage."¹³⁵ Moreover, while taking a sharp turn away from open, globalized, networked statehood, the new autocracies want to keep certain benefits of the international order, be they financial aid, unrestrained mobility for citizens, military support/protection or else. Their desire of closed statehood is a customized one, which brings us to the instrumentalization of international law and institutions in a second, stronger sense: the new autocracies use their

¹³³ ISIKSEL, *supra* note 112, at 55.

¹³⁴ Krieger, *supra* note 42, at 16.

¹³⁵ H. R. McMaster & Gary D. Cohn, *America First Doesn't Mean America Alone*, WALL STREET J. (May 30, 2017), <https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426>.

worthiness/usefulness for the hegemonic liberal order as bargaining chips.

A constitution that is commodified in an absolute sense is then an ace in the hands of autocracies. Here the worthiness is construed with reference to 1) timeless argument of national security and accompanying politics of emergency;¹³⁶ 2) in the past decade, refugee crises from the Global South to the Global North following various wars and natural disasters;¹³⁷ 3) geopolitical relevance of a country/region in each temporality. In the past decade, we have witnessed the unfolding of each in different contexts: President Trump and the border wall accompanied by economic concerns of the masses (“Stop the immigrants from coming and stealing our jobs!”); Brexit vote in the UK; European concerns about radical Islamists and new social-cultural components coming along with the refugees and posing a threat to the European identity in addition to security; and, the AKP government in Turkey playing the refugee card¹³⁸ to get economic benefits in exchange for keeping its Western borders closed, in addition to a silent international approval of autocratization in the country.¹³⁹

This double instrumentalization of international law and

¹³⁶ ISIS, Al-Qaida, extreme right-wing violence/conflict, plus refugee crisis posing a demographical and security threat for Global North.

¹³⁷ Sonja Fransen & Hein de Haas, *Trends and Patterns of Global Refugee Migration*, 48 *POPULATION & DEV. REV.* 97 (2022); For more about the various dimensions of the refugee crisis, see UNHCR, <https://www.unhcr.org/us/about-unhcr/who-we-are/figures-glance> (last visited May 8, 2023).

¹³⁸ For details about the European Union-Turkey refugee cash deal, see Corrao, *supra* note 132; see also *What is the EU-Turkey Deal?*, *INT’L RESCUE COMM.* (Mar. 18, 2022), <https://www.rescue.org/eu/article/what-eu-turkey-deal>.

¹³⁹ Karabekir Akkoyunlu & Kerem Öktem, *Existential Insecurity and the Making of a Weak Authoritarian Regime in Turkey*, 16 *SE. EUR. & BLACK SEA STUDS.* 505, 527 (2016).

institutions somehow corresponds to the dual nature of legitimacy claims today, which appears to “presume that participatory processes can be guided toward outcomes compatible with international standards, creating a marriage of internal and external legitimacy.”¹⁴⁰ The authoritarian instrumentalization of international law and institutions has made visible the structural shortcomings of the liberal script, which, in the past decade—if not earlier—has arrived at a democratic eclipse, wherein liberal constitutional democracies somehow coexist with autocracies within the international order.

CONCLUSION

Max Weber’s concept of legitimate authority directs our attention to the connection between belief in the legitimacy of orders [Ordnungen] and their potential for justification, on the one hand, and to their factual validity on the other.¹⁴¹

Institutional design matters.¹⁴² Social, cultural, legal normative orders manifest and actualize themselves through institutions, which serve for dispersing knowledge, enforcing rules, introducing new values and practices, hence for actualizing the underlying abstract values and principles, in addition to consolidating power and wielding it into authority. What are the main domains of contestation and appropriation for institutional consolidation of authoritarianism?

¹⁴⁰ Rhodri C. Williams, *Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of Key Trends and Actors*, in FOLKE BERNADOTTE ACADEMY 34 (2013).

¹⁴¹ JÜRGEN HABERMAS, LEGITIMATION CRISIS 95 (Thomas McCarthy trans., 1973).

¹⁴² See Maximilian Steinbeis, *Esperance*, VERFASSUNGSBLOG ON MATTERS CONSTITUTIONAL (Aug. 19, 2022), <https://verfassungsblog.de/esperance/>.

Concentrating on the contemporary challenges that alter the source codes of liberal democracy by tempering with institutions and reinterpreting legal frameworks for authoritarian consolidation, this Article has explored the authoritarian politics of resentment, engagement with populism, constitutional fetishism, and international liberal order as four key domains of contestation, through which an authoritarian institutional script seems to be in the making. Drawing from Börzel and Zürn, the script here refers to a set of “descriptive and prescriptive knowledge about the organization of society.”¹⁴³ A script unfolds in a twofold manner: 1) performative and 2) normative. The performative dimension of a script contains a plot, scenery, actorhood, and a degree of decoupling that is strongly entangled with the second dimension, which contains the normative underpinnings of any script tailored for a particular society and its collective understanding.¹⁴⁴ Those are critically important for the institutional design of a given script, as it serves for its continuous legitimation and social functioning.¹⁴⁵ Here, four key issues occupy the center:

(1) *Borders* determine who belongs to a group or society and who can be legitimately excluded. (2) *Orders* refer to core ideas about the institutionalized rules of the game, which allow for political and social coordination within a given society. (3) For the (re-)allocation of goods and life chances in the face of social and material scarcities, scripts involve *rules and goals*. (4) Certain *understandings about temporality and progress* provide information on

¹⁴³ Börzel & Zürn, *supra* note 5, at 10.

¹⁴⁴ *Id.* at 11-13.

¹⁴⁵ *Id.* at 10.

time scales, imaginations of transience and eternity, and the reproduction of social structure.¹⁴⁶

What makes a script a serious candidate to enforce its own plot and scenery is its capacity to implement this descriptive and prescriptive set of knowledge on the institutional architecture of power. The four domains of contestation and compromise that are examined in this Article illustrate the authoritarian readjustments of the plot, scenery, and actorhood of the liberal power configuration by strategic decouplings from the legal-institutional frameworks on both domestic and international levels. It refines status-identity and legal-constitutional resentments and populist identifications to tame and control its domestic audience/voter base. The new authoritarianism takes the populist identification beyond the image of the leader; it rather codifies this identification by recreating the people and revoking their resentments to empower this imaginary people. This appeal to the politics of resentment and populism helps redrawing the descriptive boundaries of the society in question, readjusting the definition of sovereign people. FIDESZ's ethnic Hungarian nation and its constitutional codification, the AKP's theologically informed *millet* definition that takes an extraterritorial turn to redesign the people in the image of a Sunni Muslim identity and reflects on the citizenship and naturalization laws of the country, are among the prominent examples of the institutional unfolding of authoritarian descriptive knowledge. The politics of resentment and populism reach to their extremes within the constitutional democratic parameter space to reassure/reproduce primarily domestic consent/sociological

¹⁴⁶ *Id.*

legitimacy of this authoritarian script and thus contribute to edit the scenery and the plot of modern politics.

Moreover, it fetishizes the constitution as an object, over which one could claim ownership (ethnic Hungarians, Sunni Muslims, ethnic Poles). The commodification and fetishization of the constitution throughout this association is an existential, rather than a rhetorical or symbolic matter: constitution as the form of forms leads to reconstructing/readjusting the state apparatus, by recodifying its underlying principles into the constitution as the norm of norms. The fetishization of the constitution and accompanying institutional reconfigurations reverberate back on the society, translating the descriptive knowledge to prescriptive knowledge (who the people is, what are the normative and practical boundaries between the recently redefined *Us and Them*, how to treat *Them*, how to obey/adapt into the prescribed version of the people, society, and their affairs), which also helps orchestrate and, in some cases legitimate, the new authoritarianism's bipolar love affair with the liberal international order. Constitutional fetishism and this bipolar relationship with the liberal international order contribute to keeping domestic/sociological and international/legal-institutional legitimacy on a fragile balance for consolidating an authoritarian script.

The four domains of legitimacy contestation serve for developing and excelling an authoritarian script learning from the mistakes of previous variants of the authoritarian germ (interwar fascism, totalitarianism, junta regimes across the world during the Cold War, etc.).¹⁴⁷ In other words, authoritarianism today in constitutional settings have been gradually formulating itself into a sustainable, somehow legitimate constitutional design blueprint that defines the

¹⁴⁷ See LINZ & STEPAN, *supra* note 1.

source and realm of sovereign power, as well as the normative framework undergirding this definition. In doing so, a constitutional design also proposes its own institutional configuration to apply and protect the authoritarian descriptive knowledge, while operating the state power throughout these institutional mechanisms. Therefore, the constellation and simultaneous escalation of these four domains of contestation contribute to the solidification and legitimation of authoritarian institutional design by:

- 1) Readjusting the boundaries and content of the sovereign people (*constituent power*) in favor of the authoritarian agenda (rewriting the plot by readjusting the borders)
- 2) Creating a monolithic, absolute representative claim based on an imaginary identification with the freshly readjusted People (reformatting the scenery by reallocating goods and life chances)
- 3) Codifying itself for legitimation purposes by tweaking the fundamentals of liberal constitutionalism and the rule of law (reinforcing the new plot by readjusting the orders)
- 4) Navigating its way through multiple layers of the modern legal-institutional power configuration that had acknowledged the hegemonic superiority of liberal democracy a while ago, by instrumentalizing and stealthily and silently altering the international law and

institutions, which were designed to prevent democratic regress and offer a second layer of legitimation beyond the domestic consent/approval of a people. This one is a particularly distinctive quality of this new variant of the old authoritarian germ. (Readjusting the scenery and actorhood at once by strategic decoupling and recoupling)

Here it must also be noted that this new authoritarianism is not a landmark of this or that culture or society, hence it is neither Western nor Eastern. It is a peculiar collection of values and methods from cross-cultural practices that make it as global as the liberal script¹⁴⁸ in terms of collective authorship and partially explains its resilience and flexibility to adapt to different institutional, social-cultural, or economic circumstances. This institutional reconfiguration is neither territorially nor culturally bound; rather it is a specific political form that readjusts and reinterprets a collection of variables from the liberal script. On that account, it might be argued that it appears as a sub-script, which proposes itself as a domestic alternative to liberal democracy with enough descriptive and prescriptive knowledge to organize and rule a modern society. However, it remains embedded in the international layer of the hegemonic power configuration without fundamentally challenging but instead strategically abusing its loopholes and shortcomings. Thus, authoritarianism today in constitutional settings is not merely an exceptional pathological occurrence, nor is it simply an adjectivized (illiberal, procedural, declining) democracy. Rather, as a corner case, it proposes itself as a domestic alternative to liberal democracy and a relevant—if

¹⁴⁸ Börzel & Zürn, *supra* note 5.

not outright worthy—actor for the international layer of this power configuration.

It is crucial to distinguish populists with anti-democratic aspirations that might come and go in a democratic system from resilient autocracies that redeem themselves useful and relevant for the hegemonic liberal script, in exchange of means of sustenance and legitimation. This slight but significant distinction would help overcome the conceptual inflation¹⁴⁹ that blurs the boundaries between democracy and populism, populism and authoritarianism, and functionality/usefulness and legitimacy. On a domestic level, then, the new authoritarianism has been more successful to consolidate itself for long-term survival than its predecessors. It plays all sides of this multilateral order to maximize its benefit and increase its life expectancy. Turkey and Hungary perfectly epitomize this strategic decoupling and recoupling with different layers of the modern matrix of power. In doing so, the new authoritarianism manages to pass as an acceptable alternative in the domestic layer of modern politics. That is, Hungary can continue enjoying its European Union membership as long as they continue to tweak and repurpose legal-institutional boundaries of the liberal democratic plot and scenery; or the Turkish government can continue receiving financial aid from the European Union at the expense of the country's citizens suffering under the oppressive regime, as long as the AKP government keeps the European Union-Turkey borders (via Bulgaria and Greece) closed to the post-Arab Spring, majority Muslim and non-white refugees.

¹⁴⁹ In the past decade, many terms have been coined or resurrected to address the contemporary anti-democratic trends, including but not limited to illiberal democracy, authoritarian constitutionalism, competitive authoritarianism, abusive constitutionalism, and authoritarian populism.

As the cases of Hungary and Turkey have made crystal clear, the new authoritarianism bears all signs indicating the construction of an alternative, patchwork institutional blueprint in the face of the multilayered impasse of the hegemonic liberal power matrix, no matter how crooked the ground it has been erected upon. This corner case proposes itself as a primarily domestic script yet remains embedded in the liberal democratic parameter space. This leaves us with a grave question: to what extent can the liberal international order afford to coexist and cooperate with this new, ambitious, resilient authoritarianism?