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GLOBAL SOUTH IN COMPARATIVE CONSTITUTIONAL LAW SYMPOSIUM

Auctoritas non veritas facit Legem

A Response to Professor Roberto Niembro's
Conceptualisation of Authoritarian Constitutionalism

ANTONI ABAT I NINET — 18 October, 2017



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This blog post is a response to Roberto Niembro's [post](#) on authoritarian constitutionalism for the Global South in Comparative Constitutional Law. This post will be cross-posted on the [Blog of the International Association of Constitutional Law](#) as part of a collaboration between [Voelkerrechtsblog](#) and the IACL blog .

At the beginning of the new century there are more constitutional democracies than ever, and authoritarian regimes seems to be weaker, isolated and more pointed and under pressure. Even so, the analysis of the relation between constitutionalism and authoritarianism continues to fascinate academics worldwide. This interest has different reasons, some of them related to the current majoritarian epistemological doctrine that links constitutionalism with democracy, freedom and equality. Today, we conceive of a constitution as a charter of rights and freedoms, as a synonym of legal and political guarantees — a device to protect minorities and limit public power and arbitrariness. We also tend to relate a constitution to the best values and virtues of the rule of law that links, in a symbiotic fashion, democracy and law.

Constitutionalism is then a device that keeps this relationship alive.

The fact is that just about every state in the world has a written constitution. The great majority of these declare the constitution to be the law controlling the organs of the state. This development is generally thought to be a tribute to an especially American idea. Although there is considerable variation in the substantive contents and structural machinery of constitutionalism in various countries, the central idea, forged in the founding of America, of public power controlled by enforcement of a superior law is present everywhere constitutional government is proclaimed.

This romantic idea of constitutionalism contradicts a literal interpretation of the Declaration of the Rights of the Man of 1789 that in its article 16 remarked that observance of the law and separation of powers are the conditions of a constitution. It can be argued that there is no separation of power (horizontal or vertical) in authoritarian regimes and therefore, only representative democracies in a liberal sense have constitutions. This presumption can be contested, and this is exactly Niembro's argument. I agree with his position – as Schmitt pointed out, the foundation of the validity of a constitution does not lie in the justness of the norm.

I think, though, that Niembro is mistaken to define authoritarian constitutionalism as a new category. Authoritarian constitutions and constitutionalism were found in both the ancient constitutions and also those of the communist regimes or theocracies. The reasons for which authoritarian regimes adopt constitutions are multiple; some of them are well defined by Niembro but others should also be highlighted. Constitutions and constitutionalism are tools to implement legal and political rationality. Constitution is reason; legal reason, from the top of the legal-political pyramid. Constitutions have several dimensions, and authoritarian regimes need constitutions to dominate and to garner apparent sources of legitimacy other than brute force.

I agree with Niembro when he considers that authoritarian constitutionalism is not absurd or nonsensical but I do not consider the concept perplexing, despite the inconsistencies that Roberto finds

in comparison with the functions that constitutional provisions and principles realise in liberal democracies. The question is whether we will define as authoritarian some of the most qualified liberal democracies when they also breach some of the principles that Niembro mentions in his piece.

The post goes further with a very interesting point, the illusory character of constitutionalism. In my understanding, what the author defines as 'illusion' is part of a major feature of legal and political systems – political theology and the true undemocratic element of all constitutions. Illusions are not only created but needed by constitutionalism to consecrate a supra-legitimacy which requests compliance instead of citizen participation.

The drafters of constitutions consciously play the role of a civil God; the Constitutional or Supreme Court inhabits the role of secular prophets; the Constitution is as a sacred tablet with holistic dimensions; and the people are the chosen people. As the law was received by Moses on the tablets, so too did the Constitution adopt a legal, moral and religious character. Niembro's definition of illusion is adopted to keep this phenomenon alive. From the perspective of the social class distinction and struggle, as the author mentions, constitutionalism if it does not protect minorities (the people) does not hide effective constitutional aspirations but oppresses and excludes the powerless and minorities. It becomes what Marxist authors (from Marx to Pashukanis or Collins) opposed, a tool of class or minority oppression.

It is not surprising that authoritarian constitutionalism also plays the role of an illusion to keep the 'people' oppressed and encourage their obedience. However, the same degree of delusion that Niembro correctly points out in his post occurs in liberal constitutionalism: justice and equality for the poor and excluded, 'illegal' immigrants treated as slaves in prosperous countries, or states that are suffering political and economic corruption as a systemic and endemic disease. Constitutionalism in these liberal societies is also an illusion. We can then ask if there is any difference between the kind of illusion.

I agree again with Niembro when he states that authoritarian

constitutionalism is indeed a category that helps us to understand and analyse the way that power is exercised in all kind of regimes. But how dare we do this? We would ruin the main goal (at least the goal for some) of the epistemological construction of authoritarian constitutionalism, the distinction, the differentiation – we need the concept to differentiate us, we need to define something as authoritarian to remark that we are not. Hegel is crystal clear in defining this sort of epistemological constructions. To sum up, if constitutionalism does not provide the tools to project illusions, Hobbes will be rights and ‘auctoritas non veritas facit legem’.

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