



Himachal Pradesh National Law University, Shimla (India)



Journal Articles

ISSN:2582-1903

*Shimla Law Review*

Volume-IV (2021)

**RECHTSTAAT OF POPULIST AUTHORITARIANISM: Paradoxes of the  
Constitution in Authoritarian Regimes**

*Niraj Kumar*

DOI: <https://doi.org/10.70556/hpnlul-slr-v4-l1-2021-02>

This article can be downloaded from: <http://www.hpnlul.ac.in/journal-level-3.aspx?ref-id=18>.

---

Recommended Citation:

Niraj Kumar, *RECHTSTAAT OF POPULIST AUTHORITARIANISM: Paradoxes of the  
Constitution in Authoritarian Regimes* IV SML. L. REV. 41 (2021).

DOI: <https://doi.org/10.70556/hpnlul-slr-v4-l1-2021-02>

This Article is published and brought to you for free and open access by Himachal Pradesh National Law University, Shimla. For more information, please contact [editorslr@hpnlul.ac.in](mailto:editorslr@hpnlul.ac.in)

## Contents

---

Volume IV	ISSN: 2582-1903	April 2020 - March 2021
-----------	-----------------	-------------------------

---

*Special Article* *Page*

1. GENEALOGICAL AND ANALYTICAL CRITIQUE OF THE NATIONAL EDUCATION POLICY, 2020: The Rich Heritage of Indian Knowledge, Social Traditions, and the Problem of Social Order  
*Chanchal Kumar Singh & Mritunjay Kumar* 1

*Articles*

2. RECHTSTAAT OF POPULIST AUTHORITARIANISM: Paradoxes of the Constitution in Authoritarian Regimes  
*Niraj Kumar* 41
3. THE IMPERATIVE OF EMPIRICAL RESEARCH METHODOLOGY IN LEGISLATIVE DRAFTING AND CONDUCT OF RESEARCH IN LAW  
*Tonye Clinton Jaja & Chukwuka Onyeaku* 59
4. EXORCISING THE COLONIAL GHOST IN CLASSROOMS: Contextualising Teaching of International Law in the Geographical South  
*Manwendra K. Tiwari & Swati Singh Parmar* 77
5. DIGITAL MARKET, DATA ANALYSIS AND THE SUBSEQUENT: Competition Law Challenges in Cyberspace in India  
*Anand Pawar* 97
6. CONSTITUTIONAL MORALITY IN INDIA: A Brief Analysis & Contextualising its (De)Limitations  
*Vibhuti Jaswal & Aayush Raj* 113
7. EMERGING NORMS OF INTERNATIONAL LAW AND CYBER-WARFARE: A Critical Analysis  
*Veer Mayank & Nidhi Saxena* 130

8. A STUDY OF THE LEGAL PROTECTION OF TRADITIONAL INDIGENOUS KNOWLEDGE OF NORTHEAST INDIA: A Legal Approach  
*Partha Sarothi Rakshit, Karobi Dihingia & Soumyadeep Chakraborti* 152
9. THEORISING THE EFFECT OF STIGMATISATION ON THE CRIMINAL JUSTICE SYSTEM: Normalizing Prison Sentences  
*Mehreen Manzoor* 170
10. COMBATING SEXUAL VIOLENCE AGAINST WOMEN WITH DISABILITIES IN INDIA: A Brief Conspectus of the Legal Framework  
*Monica Chaudhary* 189
11. POLITICAL TERRORISM & POLITICAL CRIME VIS-À-VIS CRIMINALIZATION OF POLITICS: A Critical Analysis of the Efforts of Indian Judiciary in Preserving the Democratic Values  
*M.R. Sreenivasa Murthy & K. Syamala* 217

*Notes and Comments*

12. TEXT, CONTEXT, AND HUMAN RIGHTS-BASED INTERPRETATIONS BY DOMESTIC COURTS  
*Deepa Kansra & Rabindra Kr Pathak* 241
13. SURROGATE MOTHERHOOD IN INDIA: An Analysis of Surrogacy (Regulation) Act, 2021  
*Paramjit S. Jaswal & Jasdeep Kaur* 257
14. THE CONTROVERSY SURROUNDING THE PLACES OF WORSHIP ACT, 1991: Challenges against Democracy, Secularism, and the Cherished Principles of Constitution  
*Shreshth Srivastava & Vaishali Gaurha* 269

# RECHTSSTAAT OF POPULIST AUTHORITARIANISM: Paradoxes of the Constitution in Authoritarian Regimes

Niraj Kumar\*

*[Abstract: This review article is inspired by Gunter Frankenberg's work, *Authoritarianism: Constitutional Perspectives* (2020). The attempt is to understand the populist authoritarianism forays into constitutions. Specifically, what are the signals? In doing so, the article also tries to investigate the constitutional interface. The article is interested in exploring the paradox of constitution in an authoritarian regime. To meet its end, the first part of the article culls out the basic idea of Frankenberg's work. The second part of the article culls out the basic ideas. In the third part, the author explores the markers of a liberal-democratic state. The fourth part investigates the possibilities of re-establishment of Rechtsstaat. Finally, the last part talks about conclusions and suggestions].*

**Keywords:** *Authoritarianism, Rule of Law, Rechtsstaat, Autocrat, and Constitutionalization.*

## I

### Introduction: Autocrats & Constitutions

#### *The Background*

Populist, authoritarian, dictator, etc., aren't the concepts of recent imagination. They have been in vogue in one form or other since the idea of State came into being. However, one may acknowledge that discourse around them has its own moments of crests and troughs. Even if one does not go far back in time, there has been a recent spurt of literature on the issue.<sup>1</sup> Moreover, these concepts have not been cast in stone. They have some fluidity in their meaning. For example, the idea of Roman *Diktator*, from which the contemporary concept of dictator is derived, was an entity

---

\* Dr. Niraj Kumar is associate professor of law at National Law University, Delhi, India. He is co-author of the book, 'The Indian Legal System', published by the Oxford University Press (2019). Email: niraj.kumar@nludelhi.ac.in

<sup>1</sup> See generally, David Runciman, *HOW DEMOCRACY ENDS* (2018); Jan-Werner Muller, *WHAT IS POPULISM* (2017); Steven Levitsky and Daniel Ziblatt, *HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE* (2019).

which was to ensure smooth restoration of *status quo ante*, unlike its current usage. Populism also had a shifting connotation over a period of time. According to Jan-Werner Muller:

‘Back in the late 1960s, populism appeared in debates about decolonization, speculations concerning the future of peasantism, and perhaps most surprising from our vantage point at the beginning of the twenty-first century, discussions about the origins and likely developments of Communism in general and Maoism in particular. Today, especially in Europe, all kinds of anxieties and, much less often, hopes also crystallize around the word populism’.<sup>2</sup>

Our regimes are democratic, but we are not governed democratically.<sup>3</sup> This apparent paradox is at the root of the disenchantment and dismay that are so widely felt today.<sup>4</sup> Dutch social scientist Cas Mudde has called populism as an ‘illiberal democratic response to undemocratic liberalism’.<sup>5</sup> It also constructs a royal path for authoritarian regimes to find legitimacy. It allows them to invoke people.

Nationalism is an often-deployed tool by populists. Nationalism, being an ideology, has to have not merely an identifiable content but also a theoretical frame, however coarse and repetitious.<sup>6</sup> That frame includes a set of ends and means; a series of propositions on national culture and national community, their origins and differentia, and an idea of national interest that supersedes the interests of aggregate larger and smaller than the nation.<sup>7</sup> Nationalism has at its core, at best discomfort or ambivalence, at worst contempt for its targeted beneficiaries.<sup>8</sup> The frequent witch-hunts that the ultra-nationalists mount are a direct outcome of this ambivalence.<sup>9</sup>

### ***Authoritarianism: Constitutional Perspectives***

Frankenberg commences the work-at-hand by recording the presence of authoritarian regimes as rising global phenomena. The global survey throws some interesting facts. Authoritarian regimes no longer remain phenomena of some remote African country or Middle East. They are very much prospering in backyard of erstwhile bastions of liberal democratic state.

Frankenberg explores the enigma of relevance of constitutions for autocrats. In the process, it challenges the intuitive argument of constitution and autocrat as antithesis to each-other. Frankenberg begins by suggesting that ‘more often, rights are adapted to autocratic purposes by doctrinal schemes, concretized by laws or

---

<sup>2</sup> Jan-Werner Muller, *WHAT IS POPULISM* 7-8 (2017).

<sup>3</sup> Pierre Rosanvallon, *GOOD GOVERNMENT: DEMOCRACY BEYOND ELECTIONS* (2018).

<sup>4</sup> *Id.*

<sup>5</sup> Jan-Muller, *Supra* note 2 at 8.

<sup>6</sup> Ashish Nandy, *REGIMES OF NARCISSISM, REGIMES OF DESPAIR* 14-15 (2013).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, at 16.

merely set aside in state practice'.<sup>10</sup> He argues that autocracies are not opposed to the ideas of values and duties 'because, by definition, values and duties must be enforced from above'.<sup>11</sup> Besides, he infers 'constitution of politics' as another facet of constitutional polity 'of [being] special interest to autocracies, as long as it meets their increased demand for order'.<sup>12</sup> In short, the utilitarian argument in favor of autocrats requiring constitutions has to be different from the utilitarian argument in favor of liberal requirements is one of the fascinating themes of the book.

Certainly, the theme which Frankenberg has chosen to explore in this work: Why Constitutions Matter? is a common one and has been dealt with by several other legal minds. Nonetheless, his frame of reference to explore the question is different, which makes the work different from other such works exploring the same theme. As opposed to the liberal dispensation which views constitution as providing a framework to achieve political goals of the society at its foundational moments, Frankenberg argues that constitutions are viewed as instruments of legitimizing private aspirations by autocrats. In this context, the question then arises; is constitutional defiance also an oft-used *modus operandi* of revolutionaries, seeking to transform *status-quo*? Whether all revolutionaries should be considered as autocrats? For instance, one can very well argue, factually, that Lincoln violated many of the tenets of the US Constitution during the Civil War. Rather, Noah Feldman argues that Lincoln violated the US Constitution in at least three ways: Firstly, by waging war against confederacy. Secondly, by suspending *habeas corpus* unilaterally, and thirdly, by believing that he also possessed the power to proclaim an end to slavery in the Southern states.<sup>13</sup> In that context, whether Lincoln should be clubbed with autocrats? Responding to it, Feldman argues that defiance of US Constitution of 1787 by Lincoln helped in making it a *moral constitution*. In contradistinction to above, the defiance of the constitutions which aid infusion of morality in the documents, autocrats are motivated by personal benefits. In essence, therefore, they generally make *immoral constitutions*. One of such example was rampant tinkering with the text of constitution by Indira Gandhi in India during the infamous emergency of 1975-77. During this period significant and wide-ranging constitutional amendments were introduced, when almost whole of the opposition

---

<sup>10</sup> Gunter Frankenberg, AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES 25 (2020).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Noah Feldman, This is the Story of How Lincoln Broke the U.S. Constitution (NEW YORK TIMES, 02 Nov., 2021), available at: <https://www.nytimes.com/2021/11/02/opinion/constitution-slavery-lincoln.html> (last visited on 02 May, 2022).

legislators were already in jail or were trying to escape imminent arrests or detentions.<sup>14</sup>

The immoral constitution, neither in its origin nor in its objective, intends to trace any *Genealogy of Morals* (The phrase here is not intended to signify the same meaning as expounded by Nietzsche in his work of same title). The immoral constitutions are reflective of tendencies of autocrats to use constitutions as instrumentalities of personal aggrandizement. This in opinion of Frankenberg requires deployment of various *political technologies*. Frankenberg defines political technology as 'encompassing the totality of practices, norms and principles, forms of knowledge and skills, calculations, strategies and tactics that state (or international) actors and institutions bring to bear in their operations of social control, threat aversion, risk management and so on'.<sup>15</sup> He argues that these defiance and different readings of the constitutions by autocrats are akin to treatment of public power as private property.

He goes on to enumerate the techniques which are required to convert constitutions into some sort of special purpose vehicle to achieve private aims. To do so, he engages with the vexed problem of popular democracy and authoritarian regimes. The choice of a dictator to appeal to people or public is always a tricky issue. They defy the common logic of why, when, where, what and how. But Frankenberg is almost successful in finding method in madness. The qualifier 'almost' accounts for instances like Pinochet's failure in getting desired support. Frankenberg very convincingly enunciates such forays with the help of thesis of 'the cult of immediacy'. It serves the twin purposes, if not more, of need of legitimacy and dismantling the institutional check and balances. Frankenberg identifies the relevancy of it by asserting:

'Immediacy prepares the stage for leaders to seduce their audiences to succumb to the authoritarian temptation and renounce their right to determine their own political existence. This script works if the totality of direct communications can disperse and condense into the cult of immediacy, which spreads-in word, writing and image-like a toxic fog over organizations, institutions, and procedures of representative democracy.<sup>16</sup>

Thereafter, Frankenberg unravels this complex web by suggesting that all these provide tools to an autocrat to create a miasma of constitution in their own image. Lastly, he situates all the above in the contemporary Covid crisis. He contrasts the approaches of autocrats and liberals. He argues, 'Co-determination and

---

<sup>14</sup> See, generally Christophe Jefferlot and Pratinav Anil, INDIA'S FIRST DICTATORSHIP: THE EMERGENCY, 1975-77 (2021); Coomi Kapoor, THE EMERGENCY: A PERSONAL HISTORY (2016); Gyan Prakash, EMERGENCY CHRONICLES: INDIRA GANDHI AND DEMOCRACY'S TURNING POINT (2022).

<sup>15</sup> See, Gunter Frankenberg, POLITICAL ECONOMY AND THE EROSION OF THE RULE OF LAW: NORMALIZING THE STATE OF EXCEPTION (2014).

<sup>16</sup> Frankenberg, *Supra* note 6 at 200.

voluntariness must be introduced as (new) principles, without which even the prohibition-supported and compulsively enforced imperatives against infection ultimately cannot work'.<sup>17</sup>

## II

### **Autocrats' Outlook of Some Tenets of a Liberal Democracy**

#### ***Liberalism***

Jacques Derrida suggested that meaning is often defined in terms of binary oppositions.<sup>18</sup> A deconstruction of autocracy will require an engagement with liberalism since autocracy is often posited as antithesis of liberalism (although it may not be always true). Therefore, it is quite pertinent to understand the foundational values of liberalism. Only then can one run a litmus test on autocratic regimes for its failures. John Gray describes liberalism in the following way:

'It is individualistic, in that it asserts the moral primacy of the person against the claims of any social collectivity; egalitarian, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; universalist, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and meliorist in its affirmation of the corrigibility and improvability of all social institutions and political arrangements'.<sup>19</sup> (Emphasis added)

Frankenberg's autocrat is individualistic in a perverse sense of the personhood of the dictator. Whereas, when it comes to the according of individual status to their citizens, they always find ways and means for creation of the 'others'. Whether it is *Fidesz* party in Hungary or *Junta* of Myanmar, the 'political technology' remains the same. Egalitarianism in the sense of moral worth for an autocrat is chillingly analogous to *Homo Sacer* of Agamben, where a segment of populace deserves a lesser legal status. Universalism has never been of any appeal to the dictator. They always claim to confer privileges on their own people who have been denied their rightful place under the Sun or in these cases in their motherland and fatherland. *Meliorism* is none of their concern. They always make an appeal to the past-glory. Therefore, they naturalize past a better time in comparison of future. They keep endeavouring to regress towards restoration rather than any improvement. It appears that John Gray's evaluation of an autocrat would be a polar opposite of a

---

<sup>17</sup> Frankenberg, *Supra* note 6 at 279.

<sup>18</sup> Jacques Derrida, *POSITIONS* 41 (1992).

<sup>19</sup> John Gray, *LIBERALISM X* (1986).



liberal. The idea of liberalism has various connotations in legal sense. Fukuyama argues:

‘Liberal societies embed rights in formal law, and as a result tend to be highly procedural. Law is simply a system of explicit rules that define how conflicts are to be resolved and collective decisions made, embodied in a set of legal institutions that function semi-autonomously from the rest of the of the political system so that it cannot be abused by politicians for short-term advantage’.<sup>20</sup>

One may have qualms about a very simplistic role assigned to Law. But given the context of engagement with classical liberalism, it may not be of immediate concern for us. An autocrat sees law as conduit. He may not brook any parchment barrier either. In the same vein, autonomy of any kind is a matter of convenience. It can never be a matter of convenience. Till the time legislature is not conducive, Hitler’s game plan of third *Reich*, i.e., rule by executive fiats, serves the purpose. Frankenberg has established through many examples like Trump’s infamous travel embargos etc., that the executive fiat takes place of the legislative laws. Autocrats are not even wary of unfavourable court’s verdicts either. It is part of their theatrics. In any case, independent institutions are to be seen as untrustworthy. Therefore, either way executive fiat in its operation and demise serves the purpose. However, in contemporary age, there is also a tendency to justify illiberal shifts in state-policies on the basis of liberalism.<sup>21</sup> It must also be appreciated that it is not an easy task to identify virtue at the level of nation, given the multiplicity of factors and actors in the nation’s history. Nietzsche in this context wrote, ‘every nation has its own *Tartuffery* and calls that its virtue’.<sup>22</sup>

### ***Constitutions***

Bruce Ackerman wrote in 1997, ‘Turn back the clock sixty years, and glimpse into the future: What were the prospects for constitutionalism as they might have appeared in the late 1930’s? Grim’!<sup>23</sup> He further writes, ‘Sixty years later, and how the world has turned. Even the British are debating the need for a new-fangled written constitution’.<sup>24</sup> The idea of Constitution, and largely written, has become a widely accepted idea across the world. Just as democracy comes in different sizes, so too, the democratic constitutions come in a variety of styles and forms.<sup>25</sup> Frankenberg has identified a few Weberian archetypes of the constitutions as contract, manifesto, programme, and law<sup>26</sup>. Although Dworkin argued,

---

<sup>20</sup> Francis Fukuyama, LIBERALISM AND ITS DISCONTENTS 2 (2022).

<sup>21</sup> See, Desmond King, *Liberalism and Illiberal Social Policy*, OXFORD ACADEMIC 7-27 (1999).

<sup>22</sup> Friedrich Wilhelm Nietzsche, BEYOND GOOD AND EVIL 184 (2019).

<sup>23</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 (4) VIRGINIA LAW REVIEW 771 (1997).

<sup>24</sup> Bruce Ackerman, *Id.* at 772.

<sup>25</sup> Robert A. Dahl, ON DEMOCRACY 119 (2020).

<sup>26</sup> Frankenberg, *Supra* note 6 at 21.

Constitutional political events-whether these are formal like the *Magna Carta* and the Glorious Revolution or informal like the New Deal in America-define a nation's character in symbolism that cannot be fully appreciated at the time'.<sup>27</sup> David Singh Grewal and Jedediah Purdy, in review of Richard Tuck's book, *The Sleeping Sovereign: The Invention of Modern Democracy*, write:

'To understand the original theory of modern constitutionalism, it is necessary to understand the original problem that constitutionalism was meant to solve: not whether but how the people were understood to participate in government, and specifically whether they could ever make their own laws-that is, rule themselves'.<sup>28</sup>

Robert Tollison wrote in foreword to classic work of James M. Buchanan, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, 'Constitutional choice differs from ordinary political decision making in that it is devoid of self-interest'.<sup>29</sup> This basic premise of Tollison is conspicuous by its absence in constitutional choices to be made by an autocrat. All the decisions of an autocrat are moved by an interest, which may not be a classic self-interest, but perpetuates the self of the autocrat. To use Freudian metaphors, the *self* of the autocrat is governed by *id*, not *ego*, and never by *superego*. All these create an enigma about the relationship between an autocrat and the constitution. In words of Frankenberg:

'The dispositive of authoritarian constitutionalism, regardless of its variations, encompasses an ensemble of discourses, forms of knowledge and institutions, regulatory decisions, political strategies and normative positions. This dispositive informs a technique of governing that combines constitutional opportunism with a special security agenda and imperative, and often informal action that consistently privilege the executive'.<sup>30</sup>

It is quite obvious that in case of an autocrat executive signifies the physical personhood of the autocrat and not the legal personality. Tushnet's and Khosla's following observation made in context of South-Asian experience can be *mutatis-mutandis* applied to almost all the societies facing crisis of Constitutionalism:

'The theoretical commitments thought to define constitutionalism share an uneasy relationship with the on-the-ground pressures that the politics of these regions generate. The term unstable constitutionalism aims to capture the difficulties that the law faces in mediating between legal norms and socio-political facts....'<sup>31</sup>

<sup>27</sup> Ronald Dworkin, A BILL OF RIGHTS FOR BRITAIN (1990).

<sup>28</sup> Grewal and Purdy, *The Original Theory of Constitutionalism*, 127 THE YALE LAW JOURNAL 669 (2018).

<sup>29</sup> James M. Buchanan, THE COLLECTED WORKS OF JAMES M. BUCHANAN, Vol. 3, ix (1999).

<sup>30</sup> Gunter Frankenberg, AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES 103 (2020).

<sup>31</sup> Mark Tushnet and Madhav Khosla, *Introduction*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 5 (Mark Tushnet & Madhav Khosla eds. 2015).

Law as empirical fact and as norm appears to be in irreconcilable conflict in an authoritarian milieu.

*a. Paradox*

Frankenberg raises the question, 'what use are constitutions in advancing the cause of political authoritarianism'?<sup>32</sup> Then he answers it in a much anticipated manner, 'Zero, the ideal-generalized liberal will answer, without being able to explain plausibly why authoritarian regimes nonetheless *constitutionalize* themselves all the same'.<sup>33</sup> It is quite obvious that more measured response is needed to make sense of the paradox. There has been a classic paradox always present in the idea of constitution. This classic paradox is aptly captured by D. J. Galligan in his observations on Walker and Loughlin's edited work<sup>34</sup> in following words:

'Modern constitutionalism, the editors of the collection of essays under review claim, has at its centre a paradox between the people as sovereign or constituent power and the constitution; constitutions are the creation of the people yet, once created, impose restraints on them'.<sup>35</sup>

Tushnet identifies a few characteristic of authoritarian constitutionalism as follows:<sup>36</sup>

1. 'The regime makes all relevant public policy decisions, and there is no basis in law for challenging whatever choices the regime makes;
2. The regime does not arrest political opponents arbitrarily, although it may impose a variety of sanctions on them;
3. Even as it employs such sanctions, the regime allows reasonably open discussion and criticism of its policies;
4. The regime operates reasonably free and fair elections, with close attention to such matters as the drawing of election districts and the creation of party lists to ensure as best it can that it will prevail-and by a substantial margin-in such elections;
5. The dominant party is sensitive to public opinion and alters its policies at least on occasion in response to what it perceives to be public views;
6. It may develop mechanisms to ensure that the amount of dissent does not exceed the level it regards as desirable;
7. Courts are reasonably independent and enforce basic rule-of-law requirements reasonably well. Although judges are likely to be sensitive to

<sup>32</sup> Gunter Frankenberg, *AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES* 239 (2020).

<sup>33</sup> Gunter Frankenberg, *Id.*

<sup>34</sup> M Loughlin and N Walker (eds.), *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL REFORM* (2006).

<sup>35</sup> D. J. Galligan, *The Paradox of Constitutionalism or the Potential of Constitutional Theory*, 28 OXFORD J. LEGAL STUD. 343 (2008).

<sup>36</sup> See, Mark Tushnet, *Authoritarian Constitutionalism*, 100 (2) CORNELL LAW REVIEW 391-461 (2015).

the regime's interests, they rarely take direct instructions from the regime. Sometimes, indeed, they might reject important regime initiatives on rule of law or constitutional grounds'.

Tushnet's postulates capture the paradox. Authoritarianism in most of the circumstances, claims to maintain constitutional governance, has to be covert not overt. It has the trappings of constitutionalism in the letter but will not have the spirit of constitutionalism. Frankenberg sees the project of authoritarian constitutionalism through two lenses; one lens is audience centric and the other is purpose centric.<sup>37</sup> Audiences can be further subdivided into internal and external. Purposes can be either instrumental or symbolic. The constitutions in the scheme of Frankenberg's authoritarian will be suitably moulded to achieve the desired effects on desired audience. Such project in many circumstances does not work in binaries rather is in a continuum.<sup>38</sup> Frankenberg lays audience on X-axis and purposes on Y-axis. In each quadrant of such plotting, some of the characteristics of the authoritarian regime will appear to be prominent.<sup>39</sup>

#### *b. Democracy*

What is democracy? There cannot be a very definitive answer to it. But for the limited purposes of our discourse, we can go with the tenets regarding opportunities provided by democracy as enumerated by Robert A. Dahl:<sup>40</sup>

- 'Democracy provides opportunities for;
- i. Effective participation,
  - ii. Equality in voting,
  - iii. Gaining enlightened understanding,
  - iv. Exercising final control over the agenda,
  - v. Inclusion of adults'.

In most of the contemporary authoritarian regimes, which no longer are the by-products of *coup d'etat* instilled by rolling tanks on the streets,<sup>41</sup> one can find the presence of (although at superficial levels only) many of the above mentioned tenets. No longer can one run a litmus test for democracy very easily. It will require removal of veneer to reveal an authoritarian regime. Nancy Bermeo has identified six types of coup:

- i. 'Executive Coups, when democratic institutions are suspended by the people in power;

---

<sup>37</sup> See, Frankenberg, *Supra* note 6.

<sup>38</sup> See, *Id.* at 254; Fig. 8.2.

<sup>39</sup> See, *Id.*

<sup>40</sup> Robert A. Dahl, ON DEMOCRACY 38 (2020).

<sup>41</sup> See, Steven Levitsky and Daniel Ziblatt, HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE (2019).

- ii. Election-day vote fraud, when tampering with electoral process is done to elicit the desired result;
- iii. Promissory coups, when power is first taken over by people who thereafter hold elections to gain legitimacy for their rule;
- iv. Executive aggrandisement, when sanctity of democratic institutions are slowly compromised without completely doing away with them;
- v. Strategic election manipulation, when elections are not completely stolen but are compromised'.<sup>42</sup>

Carl Schmitt brings into sharp relief the idea that parliamentary elections may not be the definite reflection of democracy in following words, 'The stronger the power of democratic feeling, the more certain is the awareness that democracy is something other than a registration system for secret ballots'.<sup>43</sup> Democracies work best and survive longer where constitutions are reinforced by unwritten democratic norms.<sup>44</sup> Levitsky and Ziblatt further argue (although in historical context of the United States of America, but it can be extended to most of other liberal democracies too) that two basic norms preserve democracy, viz. mutual tolerance and forbearance. They will not find even a mention in rule-book of an autocrat. The whole edifice of an autocrat is based on demagoguery. It strives to delegitimize the opposing political parties. Observing on similar lines, Runciman writes:

'Our political imaginations are stuck with out-dated images of what democratic failure looks like. We are trapped in the landscape of the twentieth century. We reach back to the 1930s and 1970s for pictures of what happens when democracy falls apart: tanks in the streets; tin-pot dictators barking out messages of national unity, violence and repression in tow'.<sup>45</sup>

He rightly points out that new autocrats are not, at least in their appearances and *modus operandi*, like their predecessors. Frankenberg's engagements also establish the same proposition. Therefore, it would be quite a tricky affair to sift through a regime for the purposes of lifting the veil. Most of them come through an electoral process. However, it does not stop them from questioning the process, if they fail to secure the electoral majority.<sup>46</sup> Electoral processes may not be sufficient safeguard to keep these autocrats at bay. More is required of independent democratic institutions to act as check and balances. Therefore, it is not surprising that after getting elected the immediate target of these strongmen is credibility of these institutions. Tweets like, 'What is our country if a judge can stop a Homeland

---

<sup>42</sup> Nancy Bermeo, *On democratic backsliding*, 27 JOURNAL OF DEMOCRACY 5-19 (2016).

<sup>43</sup> Carl Schmitt, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 16-17 {Ellen Kennedy (*trans.*), 1988}.

<sup>44</sup> Steven Levitsky and Daniel Ziblatt, *HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE* 8 (2019).

<sup>45</sup> David Runciman, *HOW DEMOCRACY ENDS* 2 (2018).

<sup>46</sup> One does not have to go far beyond January 6-event on the Capitol Hill to appreciate it.

Security travel ban’?<sup>47</sup> Such statement questions the credibility of the institutions. By relying on works of Forsythe and Henriksen, Frankenberg also argues, ‘Word has long since got around that even elections as a proof of democracy are not very reliable’.<sup>48</sup>

*c. Authoritarianism*

Frankenberg argues the following in context of identifiable markers of an authoritarian power:

‘First, authoritarian constitutionalism (although the term constitutionalism is a debatable construct here) is characterized by an intimate dualism of power and property. Second, as far as circumstances permit, autocrats derive from this notion of power their right to decide high-handedly on the duration of their term of office and to determine who will be their successor. Third, not content with the psychological revenue they derive from commanding or oppressing others, or with mere perks, some autocrats seek to appropriate all form of state capital-all public good available within their grasp-for their own private benefit’.<sup>49</sup>

Francis Fukuyama in book tracing *The Origins of Political Order* asserted that ‘accountable government means that the rulers believe that they are responsible to the people they govern and put the people’s interests above their own’.<sup>50</sup> He further argues:

‘Formal accountability is procedural: the government agrees to submit itself to certain mechanisms that limit its power to do as it pleases. Ultimately, these procedures (which are usually spelled out in constitutions) allow the citizens of the society to replace the government entirely for malfeasance, incompetence, or abuse of power’.<sup>51</sup>

Frankenberg’s authoritarian regime alters the Fukuyama’s Political order. The ruler does not see the people as plural as expounded by Jürgen Habermas. They refuse the identity to those who are not on the same page. Therefore, in authoritarian regime, accountability appears to be of the people to the regime rather than other way around. Logical corollary to above would be the ouster of inconvenient people from public life rather than ruler getting replaced. Further, since the public power and private property distinction is removed, therefore the possibilities of abuse of power are not recognized. The distortions to classic liberal democratic models are generally traced to the idea of populism.

---

<sup>47</sup> Frankenberg, *Supra* note 6 at 129.

<sup>48</sup> *Id.* at 172.

<sup>49</sup> *Id.* at 134-35.

<sup>50</sup> Francis Fukuyama, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* 321 (2011).

<sup>51</sup> Frankenberg, *Supra* note 6 at 321-22.

*d. Populism*

It has to be said at the onset that as is the case with most of other similar concepts like democracy, secularism etc., the concept of populism cannot be either confined to any specific signified. But a few representative definitions may be useful for clarifying its meaning. In words of Frankenberg, 'Populism designates a style that movements or parties use to mobilize potential followers (e.g., the population at large; the underclass; farmers) and to put issues on the political agenda that are widely negated'.<sup>52</sup> Jan-Werner Muller provides some of the characteristics of populist government in these words:

'Populist governance exhibits three features: attempts to hijack the state apparatus, corruption, and mass clientelism (trading material benefits or bureaucratic favours for political support by citizens who become populist' clients), and efforts systematically to suppress civil society'.<sup>53</sup>

There is a possibility of presence of populism in all shades of political belief-systems.<sup>54</sup> It appears that populism is the new 'empirical mainstream.' The possibilities of an alienated life in a world dominated by information-warfare, although in classical sense the term is reserved for international relations, are ever looming large. It creates a very fertile ground for demagoguery. Runciman catches the spirit of the age of populism very aptly in following words:

'In an age of populism, while some anxious defenders of democracy are invoking the banality of evil, others are busy railing against the evil of banality. For many populists, mindless bureaucracy is not at risk of being invaded by a truly terrible idea it is powerless to resist. Instead, mindless bureaucracy is the truly terrible idea and the correct democratic response is to resist it. Both sides in populist politics-the populists and the anti-populists- believe they are fighting the good fight to save the democracy from itself. The central division of our time is not democracy v. conspiracy theory. It is conspiracy theory v. conspiracy theory in the name of democracy. It is not 1930s all over again. It is 1890s, without the prospect of resolution'.<sup>55</sup>

Further, there is nothing to choose from left or right-wing populism. Muller clearly establishes that historically, it was a matter of which side of Pacific is talking about it. Otherwise both sides deploy by and large same kind of toolbox for challenging the *status quo*. Schupmann's following observations regarding events during Weimar republic is an indication in that direction, 'Weimar's anti-positivists were alarmed by the potential for the newly enfranchised German masses to become

---

<sup>52</sup> *Id.* at 53.

<sup>53</sup> Jan-Werner Muller, WHAT IS POPULISM? 5(2017).

<sup>54</sup> *See*, Muller, *Supra* note 2.

<sup>55</sup> *See*, Runciman, *Supra* note 1 at 98-99.

tyrannical-especially in the wake of right-and left-wing populists uprisings following the end of World War I'.<sup>56</sup>

*e. Nationalism*

The trope of nationalism as political technology has not been sufficiently engaged with by Frankenberg in the referred work. But it remains perhaps one of the most important centripetal forces for creation of legitimacy. As Sudipta Kaviraj postulates the process of narrative-making in the history in these words, 'Nationalist narratives are not disinterested, positivist accounts of past events: what is crucial to them is a particular way of including the present-the history of themselves, of those writing the history-into this history'.<sup>57</sup> Therefore it becomes a very potent tool for the creation of narratives of victimhood and othering. Contemporary authoritarian regimes do not survive on military support only, rather they get most of their work done by private militia constituting of citizens who believe in the stories told by populists. All these have become possible because of shift in the idea of social unity. States try to develop solidarity by appealing to ideals of nationhood.<sup>58</sup> Kymlicka argues that '...in modern democracies, the boundary of nation-states do more than this. They also define a body of citizens-a political community-which is seen as the bearer of sovereignty, and whose will and interests form the standard of political legitimacy'.<sup>59</sup> The populist-authoritarian manipulates the idea to ensure that legitimacy is not argued on the basis of some liberal justification for the shared idea of good life. It rather thrives on illiberalism.

### III

## Reclaiming the *Rechtsstaat*

### *Rechtsstaat*

The term *Rechtsstaat* is a German expression made up of the words *Recht* (law) and *Staat* (state). This term translates easily into some languages, for instance *regstaat* (Afrikaans) or *rechtsstaat* (Dutch); a similar combination of law and state is more difficult to achieve in others. However, the concept itself is expressed to a certain extent by the phrases rule of law in English, *regne de la loi* or *limitation des gouvernants*

---

<sup>56</sup> See generally, Benjamin Schupmann, *CARL SCHMITT'S STATE AND CONSTITUTIONAL THEORY* (2017).

<sup>57</sup> Sudipta Kaviraj, *Nationalism*, in Nirja Gopal Jayal and Pratap Bhanu Mehta (eds.), *THE OXFORD COMPANION TO POLITICS IN INDIA* 320 (2010).

<sup>58</sup> Will Kymlicka, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 261 (2002).

<sup>59</sup> *Id.* at 262.



in French and *stato di diritto* in Italian.<sup>60</sup> The concepts of *Rechtsstaat* and of Rule of Law both express certain closely related values that have been advanced in respect of legal order. Some of the proponents of these values in the past and the present may have thought it possible to derive them from pure analysis of the concept of law and have thus been ... in error.<sup>61</sup> Like many other important moral, political, and legal ideals, among them democracy, justice, and liberty, its meaning, scope, conditions, and significance are all highly, perhaps essentially, contested.<sup>62</sup> In all versions, the rule of law has to do with the relationship between law and the exercise of power, particularly public power.<sup>63</sup>

There is an obvious semantic difference between *rule of law*, the term used in English, and those found in many European languages to cover some, but not all, of the same terrain. Each of these has a context and a history that cannot be ignored or simply elided, but in a host of European languages, there is one thing commonly built into the concept, which is missing from the English phrase: the State. Whether it is *Rechtsstaat* (German: state of law; law-governed state), *état de droit* (French), *stato diritto* (Italian), *estado de derecho* (Spanish), *panstwo prawa* (Polish), or *pravovoe gosudarstvo* (Russian), law is inextricably connected to the state.<sup>64</sup>

The close connection between Law and State has not been a result of linear development. But it has allowed a space for the autocrats to claim a conflation between Law and State and as a necessary corollary between themselves and the Law. Because for an autocrat, State is an entity in their own image not much distinct from their own personhood. Frankenberg's dictatorial centralism appears to come quite close to such a confluence. In the model of dictatorial centralism, the investiture—whether by dynastic succession, election or acclamation—leads to the joined ownership of supreme authority, whose holder is henceforth distinguished from the circle of constituted powers and act as the constituent power.<sup>65</sup>

*Rechtsstaat* or rule of law is dependent on the idea of a clear distinction between constituent power and constituted power. All subsequent exercise of power from the foundation moment has to be answerable to the constituent power. Of course, we are here assuming that the constituent power, in the first place, was a product of liberal democratic ideas. Frankenberg discusses various archetypes of the

---

<sup>60</sup> Loammi C Blauu, *The Rechtsstaat idea compared with the Rule of Law as a paradigm for protecting rights*, 107 S AFRICAN LJ i (1990).

<sup>61</sup> See generally, Neil MacCormick, *QUESTIONING SOVEREIGNTY* (1999).

<sup>62</sup> Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept?* 21 (2) LAW AND PHILOSOPHY (2002).

<sup>63</sup> M. Krygier, *Rule of Law (and Rechtsstaat)*, in James D. Wright (ed.), *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES*, Vol. 20, 780–787 (2015).

<sup>64</sup> *Id.*

<sup>65</sup> Frankenberg, *Supra* note 6 at 143.

constitution.<sup>66</sup> All archetypes may not be amenable to a liberal outcome. Therefore, the idea of constitutionalism which is required to reclaim *rechtsstaat* must be weaned away from nation states. Martin Loughlin calls it as a process of constitutionalisation.<sup>67</sup> Loughlin says that it is born of the reconfiguration of the values of constitutionalism, an extension of their reach, and a loosening of connection between constitutionalism and nation-state.<sup>68</sup>

### ***Constitutionalisation***

Brazilian autocrat Getulio Dornelles Vargas is stated to have proclaimed, 'for my friend, everything; for my enemies, the law'.<sup>69</sup> In most of the cases, it is not absence of laws matters, but it is about selective application of laws. Ideally, for an autocrat, laws per se are to be drafted with selective appreciation and perception to achieve a few of the goals. But till that is not achieved, the existing state-instrumentalities can be conveniently deployed for the purposes of signalling. In most of the circumstances, they are subtle like dog whistling. It is a type of virtue signalling, where the proponent needs not engage in moral reasoning. The virtue signaller is unduly concerned with herself rather than the issues she purports to discuss.<sup>70</sup> Levy suggests, '...at least one of her primary motivations is recognition. She signals her supposed moral insight and her superior values, thereby turning moral discourse into a vanity project'.<sup>71</sup> They essentially rely on the 'halo-effect'<sup>72</sup> phenomena rather than some argumentative justification. Autocrats indulge into virtue signalling in a manner which demolishes the idea of rule of law. The discourse is framed to elicit only a certain type of responses. In relation to political regimes, the authoritative/authoritarian distinction also presupposes that the rule can be characterized as legitimate-or not.<sup>73</sup>

The problem faced in addressing the new archetypes of autocrats is somewhat captured by following observation, albeit not exactly identical across the countries and continents, of Ginsburg and Huq, 'Being old, and lacking an easy amendment mechanism, the US Constitution does not necessarily reflect the learning of

---

<sup>66</sup> *Id.* at 21-24.

<sup>67</sup> Martin Loughlin, *What is Constitutionalisation?* in Petra Dobner and Martin Loughlin (eds.), *THE TWILIGHT OF CONSTITUTIONALISM* (2010).

<sup>68</sup> Martin Loughlin, *Id.* at 68.

<sup>69</sup> Guillermo A. O'Donnell, *Why the Rule of Law Matters?* 15 (4) *JOURNAL OF DEMOCRACY* 32-46 (2004).

<sup>70</sup> Neil Levy, *Virtue Signalling is Virtuous*, 198 *SYNTHESE* 9545-9562 (2021).

<sup>71</sup> *Id.*

<sup>72</sup> E. Thorndike, *A Constant Error in Psychological Ratings*, 4 *JOURNAL OF APPLIED PSYCHOLOGY* 25-29 (1920).

<sup>73</sup> Frankenberg, *Supra* note 6 at 39.

subsequent years and decades. It instead calcifies the mistaken assumptions and prejudices of long-dead generation'.<sup>74</sup>

Whether reformation in constitutional systems can be an answer? Robert Dahl rightly observes:

'Questions about the relative performance of different constitutional systems are easy to pose but extraordinarily difficult to answer responsibly. True, we can find today, as only a generation ago or more we could not, many good indicators of how different countries' systems perform in a variety of important ways: from literacy, education, health, and life expectancy to political and civil rights, incomes, income distribution, and others. It is, however, not easy to determine the extent to which a country's constitutional arrangements influence that country's performance on such matters'.<sup>75</sup>

Therefore, it appears, placing too much reliance on Constitutions is not going to be very effective. More so, if the spirit of commitments to constitutional values are lacking. Further, every society has its own organic trajectory as emphasized by Luhmann. In his words, '...meaning, self-reference, autopoietic reproduction, and operational closure with monopolization of a specific type of operation-communication-cause a system of society to develop its own structural complexity and hence to organize its own autopoiesis'.<sup>76</sup> The means of knowledge-generation and its sustenance will depend upon so much of entwined variables that it would be very difficult, if not impossible, to identify it with one or even a few factors.

#### *a. Constitutional Guardianship*

One of the most important means, developed by modern discourse on constitutionalism, for creation of bulwark against authoritarian tendencies is power of judicial review. Although on the issue of who should be having guardianship over the constitution has never been a debate without its fair share of differences.<sup>77</sup> In the contemporary times, the scale has clearly tilted in favour of the role of guardianship being ascribed to the judiciary. Ran Hirschl in his comparative analysis found, 'Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries'.<sup>78</sup> Therefore, for the successful conduct of authoritarian governance structure-tinkering with judicial institutions has become one of the recurring phenomena.

<sup>74</sup> Ginsburg and HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 5 (2019).

<sup>75</sup> Robert A. Dahl, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 91-92 (2003).

<sup>76</sup> Niklas Luhmann, THEORY OF SOCIETY, Vol. 1, 77 {Rhodes Barrett (*trans.*), 2012}.

<sup>77</sup> Lars Vinx, THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW (2015).

<sup>78</sup> Ran Hirschl, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007).

Frankenberg identifies this phenomenon when he writes, ‘Co-opting and neutralizing the judiciary as one of the significant political technology of authoritarianism’.<sup>79</sup> He postulates by citing a few exemplars in these words:

‘The neutralization of the judiciary usually starts with the intimidation of judges or mobilization of public opinion against the courts, which Trump’s tweets were intended to achieve. The formal and institutional strategy is usually geared towards dictating or changing the composition of courts by hand-picking judges who are loyal to the system and getting rid of those who are unruly or unreliable. While authoritarian leaders in general focus on the higher courts, especially constitutional or supreme courts, Viktor Orban’s Fidesz party also targeted the lower courts’.<sup>80</sup>

## IV

### Conclusion

Hayek lamented that liberty will not be preserved if the basic belief in the existence of abstract rules of law which binds all authority in action is shaken.<sup>81</sup> The stuntmen of the state intend to shake those belief-systems. The conflation of state, government and ruler can happen only if abstract rules of law are diluted, if not demolished. Any attempt to establish *rechtsstaat* has to begin with emphasizing the differences between state, government and ruler. Loughlin proposed that the process of constitutionalisation draws on some of the achievements of modern constitutions and constitutionalism in regulating government, but it jettisons those aspects of these modern processes which have rested on the particularities of history and culture.<sup>82</sup> Constitutions encapsulate idiosyncrasies of a particular society. But it must also uniformly uphold the universal human values to establish constitutionalism.

Rosanvallon has possible suggestions for limiting illiberalism, ‘three possibilities suggest themselves: improved supervision of elections; reparliamentarization; a return to impersonal forms of authority’.<sup>83</sup>

Frankenberg sounds hopeful, when he avers that ‘Authoritarianism has no expiry date; but nor is its longevity guaranteed. There is no reason to view autocracies as inevitable and their constitutions as necessarily enduring’.<sup>84</sup> But it is also important

---

<sup>79</sup> See, Frankenberg, *Supra* note 6 at 129-33.

<sup>80</sup> *Id.* at 130.

<sup>81</sup> F. A. Hayek, *THE CONSTITUTION OF LIBERTY* 191 (2012).

<sup>82</sup> Loughlin, *Supra* note 34 at 68.

<sup>83</sup> Rosanvallon, *Supra* note 3 at 114.

<sup>84</sup> Frankenberg, *Supra* note 6 at 284.

to realise that it cannot be just wished away. It will require an establishment of the following proposition of Immanuel Kant:

‘For since morality is a law for us only as rational beings, it must be equally valid for all rational beings; and since it must be derived solely from the property of freedom, we have got to prove that freedom too is a property of the will of all rational beings. It is not enough to demonstrate freedom from certain alleged experiences of human nature (though to do this is in any case absolutely impossible and freedom can be demonstrated only a priori): we must prove that it belongs universally to the activity of rational beings endowed with a will’.<sup>85</sup>

Ginsburg and Huq provide for a way to make Constitutions a bulwark against authoritarian propensities in following words, ‘The world of constitutional design...is richer and more strange than anyone bounded within the walls of their own national tradition might perceive. That institutional diversity can be exploited to general gain’.<sup>86</sup> Maybe sometimes one has to reinvent the wheels!

---

<sup>85</sup> Emanuel Kant, *THE MORAL LAW: GROUNDWORK OF THE METAPHYSICS OF MORALS* 129 (2012).

<sup>86</sup> Tom Ginsburg and Aziz Z. Huq, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 204 (2019).