

## The “Method and Madness” of Authoritarian Constitution Making in Democratic Regimes

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### *Abstract*

Globally, more than half the attempts at making a democratic constitution have failed to produce one. Another large number of constitutions have suffered the ignominy of having a draft made and implemented, but ultimately being rejected by the populace or political elites for failing to perform its intended functions. A curious case emerges in instances when would-be-autocrats draft authoritarian constitutions in democratic regimes. They do it rather successfully. Moreover, they do so without using force, with the consent of large sections of the society, and in ostensibly democratic ways. The question that then arises is how would-be-autocrats are more successful than their democratic counterparts in such ventures. Using three varied examples of authoritarian constitution-making from Hungary, Venezuela, and Turkey, this article will examine the ‘method and madness’ behind the success of would-be autocrat’s constitution-making endeavors and these authoritarian constitutions’ acceptance by the populace.

*Keywords:* Constitution-Making – Democratic Backsliding – Turkey – Hungary – Venezuela – Democracy.

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\*Fellow, Faculty of Law, University of Hamburg. The author would like to thank Aditya Phalnikar, Karthik Rai, Sumit Chatterjee, and Vasu Aggarwal for their excellent assistance on this article and the larger project. The author would also like to thank the participants at the ICON:S Mundo Conference’s Panel on ‘Democratic Backsliding, Making, and Changing The Constitution’ for their valuable comments. Furthermore, the author would like to thank the two anonymous reviewers for their pertinent feedback and observations. The essay was submitted to double blind peer review. Member of the Editorial Team who oversaw the essay: Simone Gianello.

## 1. Prologue

After the break-up of the Soviet Union in 1991, the number of democracies worldwide increased yearly<sup>1</sup>. Democracy was perhaps “the only game in town”, and it seemed like there was no turning back. For a couple of years, this seemed accurate before things took an ugly turn. Since the mid-2000s, the trend of global democratization has reversed<sup>2</sup>. The number of democracies has started diminishing at an alarming rate<sup>3</sup>. Even in established democracies, the quality of democracy has seen constant deterioration<sup>4</sup>. Countries like the United States of America and France, which were models to replicate for centuries, started to show chinks in their armor. In recent years, the Economist Intelligence Unit’s Democracy Index has demoted both these countries from full democracies to flawed democracies<sup>5</sup>.

This time around, the demise of democracies is happening in ways never seen before. Rather than coups accompanied by an instant democratic breakdown, democracy is being subverted in multiple stages using the veneer of law and legality in a practice termed by Javier Corrales as “autocratic legalism”<sup>6</sup>. One of the chief tactics of “autocratic legalism” is substituting democratic constitutions with authoritarian<sup>7</sup> ones<sup>8</sup>. Several countries that were well on the path to democratic consolidation now have authoritarian constitutions<sup>9</sup>. These include European Union and OECD members such as Hungary. Likewise, Poland has been mooted plans to follow suit. Currently, Sri Lanka is in the process of drafting one.

Though scholars have started identifying this trend, there is a scant understanding of the mechanisms and processes by which would-be-autocrats draft authoritarian constitutions in democratic regimes and the reasons behind the success of their drafting endeavors. There is a lesser understanding of what can be done to prevent this from happening. This article will investigate the former with minor initial directions for addressing the latter.

The rest of this article proceeds as follows: Part 2 examines how to draft a constitution successfully, irrespective of whether it is a democratic or an authoritarian constitution.

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<sup>1</sup>*Freedom in the World 2018*, Freedom House, Washington DC, 2018, 8.

<sup>2</sup>M. Loughlin, *The Contemporary Crisis of Constitutional Democracy*, in *Oxford Journal of Legal Studies*, Vol. 35, No. 2, 2019, 436-437.

<sup>3</sup>*Freedom in the World 2019*, Freedom House, Washington DC, 2019, 1.

<sup>4</sup>*Freedom in the World 2018*, cit., 1-3.

<sup>5</sup>*Democracy Index 2020*, Economic Intelligence Unit, London, 2020, 9.

<sup>6</sup>J. Corrales, *Autocratic Legalism in Venezuela*, in *Journal of Democracy*, Vol. 26, No. 2, 2015, 38-45.

<sup>7</sup>By “authoritarian” I refer to a system of government that is characterized generally by elements such as (1) centralized power (2) rejection of political plurality (3) erosion of the rule of law, separation of powers, and democratic voting procedures. These characteristics of an authoritarian government have been identified by Furio Cerutti in F. Cerutti, *Conceptualizing Politics: An Introduction to Political Philosophy*, Routledge, London, 2017, 17. Additionally, while democracy has far too many connotations and no single acceptable definition (on this point see C. Tilly, *Democracy*, Cambridge University Press, Cambridge, 2007, 1-25), for the purposes of this article, democracy or democratic is used as the antonym of autocracy or authoritarian.

<sup>8</sup>K. L. Scheppelle, *Autocratic Legalism*, in *University of Chicago Law Review*, Vol. 86, No. 2, 2018, 545-555.

<sup>9</sup>*Idem*, 550-554.

This discussion is imperative before we proceed to understand how authoritarian constitutions have been drafted in democratic regimes. Part 3 briefly describes the story of three successful examples of authoritarian constitution-making in democratic regimes: Venezuela, Hungary, and Turkey. This part will also detail the reasons for choosing these examples. Part 4 tries to unpack why modern would-be-autocrats have had success in drafting authoritarian constitutions. Part 5 provides concluding remarks.

## ***2. How To Successfully Draft A Constitution***

Constitution-making often accompanies the process of decolonizing. States transiting to a democratic regime promulgate new constitutions. Would-be-autocrats draft new constitutions to consolidate power and forward their authoritarian projects. Constitutions are made as essential components of peacebuilding in countries recuperating from a violent conflict. Existing democratic regimes write new constitutions for motivations such as modernization or additional democratization.

In most modern instances, constitutions are intended to serve two core functions. Firstly, to lay down the mechanisms and institutions for exercising and sharing public power<sup>10</sup>. Secondly, for symbolic and moral purposes, such as expressions of a country's statehood, shared commitments, and highest values<sup>11</sup>.

Unfortunately, the majority of constitution-making attempts are not successful<sup>12</sup>. More than fifty percent of attempts at making constitutions do not end up producing a final draft<sup>13</sup>. This generally happens when negotiations between major groups involved in the constitution-making breakdown, and they cannot reach adequate compromises<sup>14</sup>. In some cases, though a constitution is drafted, it does not come into force<sup>15</sup>. This has occurred even in established democracies like Iceland, where core groups of elites held out and prevented a new constitution from coming into force when it was not to their liking<sup>16</sup>.

At times constitution-making attempts are not successful, although a constitution is drafted and enforced. This happens when constitutions fail at performing one of their core functions. As will be discussed later, this can occur when the constitution-making processes result in constitutions that are unacceptable to the bulk of the populace and core elites or provide inept means of power-sharing.

Cases of constitution-making gone wrong can result in “back to square one” scenarios. For example, when it comes to democratic constitution-making, about 60 percent of

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<sup>10</sup>M. Tushnet, *Constitution-Making: An Introduction*, in *Texas Law Review*, Vol. 91, 2013, 1983-1984.

<sup>11</sup>*Ibidem*.

<sup>12</sup>Successful here refers to a constitution-making attempt that has to a fair degree the following four characteristics (1) results in producing a constitution; (2) produces a constitution with workable power-sharing arrangements; (3) produces a constitution that is accepted by a significant section of the populace and/or core elites; (4) produces a constitution that does not face calls by a significant section of the populace and/or core elites to be replaced shortly after its drafting.

<sup>13</sup>M. Brandt, J. Cottrell, Y. Ghai, A. Regan, *Constitution-Making and Reform Options for The Process*, Interpeace, Switzerland, 2011, 75.

<sup>14</sup>*Ibidem*.

<sup>15</sup>*Ibidem*.

<sup>16</sup>A. Hudson, *When Does Public Participation Make a Difference? Evidence From Iceland's Crowdsourced Constitution*, in *Policy and Internet*, Vol. 10, No. 2, 2017, 205-207.

societies are unable to sustain democracy<sup>17</sup>. At times, within a short period from the promulgation of a new constitution, there are calls for another constitution, as the recently drafted constitution is rejected by a majority of core elites and the populace. In more extreme cases, unsuccessful constitution-making attempts can lead to an outbreak of violence. Forty percent of post-conflict countries revert to violence within a decade of their attempts at constitution-making<sup>18</sup>. Though exogenous factors relating to the social, economic, and political environment in which a constitution operates do have a significant role (and often the primary role) in the latter outcomes<sup>19</sup>, sub-optimal constitution-making processes and/or constitutional design choices can considerably amplify them<sup>20</sup>. Even when circumstances exist for a constitution to be successful, sub-optimal constitution-making processes or constitutional design choices can lead to a constitution failing to perform its core functions<sup>21</sup>.

While this is an almost impossible task (and one that does not have an acceptable or a “one size fits all” answer), I will discuss some of the minimum factors scholarly literature recognizes as vital for making a constitution successfully<sup>22</sup>. These general claims help set the scene for the discussion that follows. For organizational efficiency, I will discuss them under two heads (1) the process of constitution-making and (2) the design of the constitution. One qualification for this part is that it will only briefly address potential ways to avoid constitution-making going wrong since that is not the focus of this article. Moreover, this part will generally discuss how to successfully draft a constitution irrespective of its nature, whether democratic or authoritarian.

## 2.1 *The Process of Constitution-Making*

To start with, constitutions need to be drafted and adopted in ways conducive to their eventual success. Elites and citizens will push for a constitution and subsequently abide by and fight for its enforcement if they are attached to it<sup>23</sup>. Attachment to a constitution usually flows from a constitution-making process that is inclusive of all core groups in a society<sup>24</sup>. One way of guaranteeing inclusiveness is by ensuring democratic elections to constituent assemblies (or similar drafting bodies)<sup>25</sup>. Jennifer Widner’s quantitative

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<sup>17</sup>S. Levitsky, L. Way, *The New Competitive Authoritarianism*, in *Journal of Democracy*, Vol. 31, No. 1, 2020, 51-52.

<sup>18</sup>P. Collier, *Wars, Guns, And Votes*, Harper Collins, New York, 2010, 75.

<sup>19</sup>The argument here is that optimally making a constitution can counteract to some degree non conducive exogeneous factors and likewise can result in far better outcomes in those situations where exogeneous factors are conducive to making a constitution.

<sup>20</sup>Z. Elkins, T Ginsburg, J. Milton, *The Endurance of National Constitutions*, Cambridge University Press, Cambridge, 2009, 2-5.

<sup>21</sup>C. Saunders, *International Involvement In Constitution Making*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, Edward Elgar Publishing, Cheltenham: UK, 2019, 84-88.

<sup>22</sup>There are obviously other factors that the ones described here that impact the success of the constitution. Nonetheless, if these factors are not present, most other factors do not even come into play. For example, one such factor could be that different core groups get a fair chance to bargain at the constitution-making table. However, if they are not present at the table, the question of them getting a fair chance becomes moot.

<sup>23</sup>Z. Elkins, T Ginsburg, J. Milton, *The Endurance of National Constitutions*, cit., 78.

<sup>24</sup>*Ibidem*.

<sup>25</sup>J. Elster, *Ways Of Constitution-Making in Democracy’s Victory and Crisis*, in A. Hadenius (Ed.), *Democracy’s Victory and Crisis*, Cambridge University Press, Cambridge, 1997, 123–42.

research on post-conflict constitution-making demonstrates how outbreaks of violence decreased or did not increase in over 78 percent of cases where members of drafting bodies were democratically elected<sup>26</sup>. If core groups are excluded from the drafting process, it could impact elite and citizen attachment to a constitution and its eventual success. The recent constitution-making processes in Iraq, Libya, and Egypt led to worst-case scenarios because core groups were excluded from the constitution-making process or were made to accept certain choices by threats of force<sup>27</sup>. David Landau and Andrew Arato have gone so far as arguing that in cases of democratic constitution-making, even negotiating with undemocratic actors who hold substantial sway in a society will result in favorable outcomes and that a failure to do so may result in a return to authoritarianism or the outbreak of violence<sup>28</sup>.

To further facilitate attachment to a constitution, the constitution-making process could involve the public directly by seeking participation through elections to constituent assemblies, referendums to trigger a constituent assembly or ratify a constitution, public discussions through primary assemblies, community workshops, the internet, etc. In all cases of constitution-making since 1789, where the process was participatory, the resulting constitution was five times more likely to endure<sup>29</sup>. Yet, despite the importance of popular participation, in the 194 cases of constitution-making since 1975 (a plurality of them being democratic), only one-third involved some form of popular participation<sup>30</sup>.

Nevertheless, there is a small caveat. Scholars have asserted that direct popular participation during constitution-making can be detrimental to a constitution's creation and, among other things, lead to increased transaction costs, polarization, and deadlocks<sup>31</sup>. At times secrecy is necessary to strike the hard bargains needed in constitution-making<sup>32</sup>. Nevertheless, even when public participation can be detrimental to outcomes, constitutions need to be drafted in ways that ensure that the core groups of elites are adequately represented in their drafting and adoption. Scholars argue that this is a far more indispensable element to the success of constitution-making than popular participation<sup>33</sup>. Ana María Bejarano and Renata Segura state how the composition of the drafting body is important in determining whether the public perceives the constitution-

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<sup>26</sup>J. Widner, *Constitution Writing and Conflict Resolution*, in *The Round Table*, Vol. 94, No. 381, 2005, 511.

<sup>27</sup>N. Brown, *The Unsurprising but Distinctive Nature of Constitution Writing in The Arab World*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 457-458.

<sup>28</sup>D. Landau, *Constituent Power and Constitution Making in Latin America*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 558.

<sup>29</sup>Z. Elkins, T. Ginsburg, J. Milton, *The Endurance of National Constitutions*, cit., 147-214.

<sup>30</sup>J. Widner, *Constitution Writing and Conflict Resolution*, cit.

<sup>31</sup>C. Sunstein, *Designing Democracy: What Constitutions Do*, Oxford University Press, Oxford, 2003, 13-48; D. Landau, *Constitution-Making Gone Wrong*, in *Alabama Law Review*, Vol. 64, No. 5, 2013, 923-980; W. Partlett, *The Dangers of Popular Constitution-Making*, in *Brooklyn Journal of International Law*, Vol. 38, No. 1, 2012, 193-238.

<sup>32</sup>J. Elster, *Forces and Mechanisms in the Constitution-Making Process*, in *Duke Law Journal*, Vol. 45, No. 2, 1995, 395.

<sup>33</sup>G. Negretto, *Replacing Constitutions in Democratic Regimes: Elite Cooperation and Citizen Participation*, in G. Negretto (Ed.), *Redrafting Constitutions in Democratic Regimes*, Cambridge University Press, Cambridge, 2020, 109-110.

making process as legitimate<sup>34</sup>. Therefore, all attempts must be made in a given constitution-making process to ensure that the drafting and adopting process does not exclude core groups.

## 2.2 *The Design of the Constitutions*

As vital is the process of constitution-making, so is the actual design of the constitution produced. Design choices need to result in a workable constitution and a constitution acceptable to the bulk of the populace and/or core elites. More often than not, the incorrect design choices flow from a dominant faction of elites wanting to consolidate power or their views during constitution-making<sup>35</sup>. However, in countries with minimal or no experience in constitution-making, where foreign actors heavily drive crafting processes, and the outcomes can be uncertain, other reasons can be behind the wrong design choices. For example, based on his experience as a constitutional advisor in several countries, Brandon O’Leary mentions how drafters and constitutional advisors import provisions from other systems that might not be appropriate for a particular society<sup>36</sup>. On the other hand, William Partlett, in his study of constitution-making in post-Soviet Europe, describes how, at times, drafters, elites, and the populace genuinely believe a particular choice might be the right one when it might not be<sup>37</sup>.

Wrong design choices can be regarding intrinsic issues pertaining to a country’s core values, such as religion or national identity. Two particular instances stand out: Afghanistan and Turkey. In both these countries, secular liberal values were pushed upon by reformists in societies with large conservative and religious populations, which caused problems from the start. In Afghanistan, international actors involved in the 2004 constitution-making process insisted on such constitutional qualities without considering whether domestic actors desired the same. In Afghanistan, the Taliban, who has reemerged more potent than ever, has called the liberal Afghanistan Constitution a Western import and the biggest obstacle to peace<sup>38</sup>. Drafting a new Islamic constitution is on the top of their agenda for Afghanistan’s future<sup>39</sup>.

Similarly, in Turkey, secularism was enshrined as a core value in its 1982 Constitution despite arguably over 99 percent of its population being Muslim at that point. Later on, disputes arose over the judiciary restricting Islam’s social expressions (such as banning wearing hijabs in educational institutions or parties expressing Islamic views) on the grounds of secularism protected by the constitution<sup>40</sup>. These contentions eventually

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<sup>34</sup>A. M. Bejarano, R. Segura, *The Difference Power Diffusion Makes*, in G. Negretto (Ed.), *Redrafting Constitutions in Democratic Regimes*, cit., 133.

<sup>35</sup>T. Ginsburg, Z. Elkins, J. Blount, *Does the Process of Constitution-Making Matter*, in *Annual Review of Law and Social Sciences*, Vol. 5, No 1, 2009, 214.

<sup>36</sup>See B. O’Leary, *Making Constitutions in Deeply Divided Places*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 186-211.

<sup>37</sup>W. Partlett, *Post-Soviet Constitution Making*, in D. Landau, H. Lerner (eds), *Comparative Constitution Making*, cit., 539-566.

<sup>38</sup>*Taliban Demands New Constitution for Afghanistan at Moscow Talks*, in *TRT World*, 5 February 2020, available at [trtworld.com/asia/taliban-demands-new-constitution-for-afghanistan-at-moscow-talks-23896/](http://trtworld.com/asia/taliban-demands-new-constitution-for-afghanistan-at-moscow-talks-23896/).

<sup>39</sup>*Ibidem*.

<sup>40</sup>A Bali, *Courts and Constitutional Transition: Lessons from the Turkish Case*, in *International Journal of Constitutional Law*, Vol. 11, No. 3, 2013, 679-691.

served as the underlying basis for a series of amendments passed in 2010 by Recep Erdoğan's Dalet Ve Kalkınma Partisi (AKP) that altered the judiciary's appointment procedures<sup>41</sup>. This compromised the judiciary's neutrality and independence and seated more judges aligned with AKP's values on the benches<sup>42</sup>.

In cases such as Turkey and Afghanistan, when an amicable resolution over decisive issues such as religion or national identity is not possible or realistic, scholars opine how, instead of forcibly imposing a view, a better strategy could be to not explicitly decide contentious issues but leave them for the future to concretize<sup>43</sup>. While this does not guarantee future resolution, it can prevent constitutional negotiations from breaking down or a constitution from being rejected.

Wrong design choices could also include improper mechanisms for exercising and sharing public power in light of a given polity's socio-political realities and the constitution's purposes. Several democratic constitutions provide for a presidential form of government or centralize power because their creators feel it will facilitate better governance. Though such systems have their merits, they offer limited power-sharing opportunities and reduce the number of veto points in a system<sup>44</sup>. In countries that lack a constitutional culture, such a setup can give rise to dictatorial regimes<sup>45</sup>, as it has done in many post-Soviet states<sup>46</sup>. Additionally, in deeply divided countries where different groups are ready to resort to violence, setups that provide winner-takes-all political outcomes can be a recipe for disaster<sup>47</sup>.

Another problem that arises specifically in unitary systems in conflict-ridden regimes is that the bulk of the country is under the de facto control of regional militias and warlords. This makes centralized systems almost unworkable as the central government does not exercise authority over the entire territory. All the above problems have recently been observed in South Sudan<sup>48</sup>. Therefore, in specific scenarios, options that allow for power-sharing, such as parliamentary systems or decentralization, might be more suited even if the state-building process is slower or governance is less than ideal. Furthermore, in instances where a large portion of the country is under the command of armed groups, governance structures might need to involve regional militias and warlords and provide

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<sup>41</sup>A. Bali, H. Lerner, *Religion and Constitution-Making in Comparative Perspective*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 266-267.

<sup>42</sup>A Bali, *Courts and Constitutional Transition: Lessons from the Turkish Case*, cit.

<sup>43</sup>H. Lerner, *Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach*, in *Nations and Nationalism*, Vol. 16, No. 1, 2010, 66-88 (describing how this can be done by using four tactics (1) ambiguity (2) deferral; (3) conflicting principles/provisions; and (4) non-justiciability).

<sup>44</sup>Juan Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in J. Linz, A. Valenzuela (Eds.), *The Failure of Presidential Democracy*, John Hopkins University Press, Baltimore, 1994, 18.

<sup>45</sup>*Ibidem*.

<sup>46</sup>Z. Csaky, *Nations in Transit: Dropping the Democratic Façade*, Freedom House, Washington DC, 2020, 1-25.

<sup>47</sup>A. Lijphart, *Constitutional Design for Deeply Divided Societies*, in *Journal of Democracy*, Vol. 15, No. 2, 2004, 101.

<sup>48</sup>A. Sethi, *A Stitch in Times Saves Nine – Why South Sudan Needs a New Constitution ASAP*, in Global Affairs Blog, available at [law.upenn.edu/live/news/6911-a-stitch-in-time-saves-nine-why-south-sudan/news/international-blog](http://law.upenn.edu/live/news/6911-a-stitch-in-time-saves-nine-why-south-sudan/news/international-blog).

them with an incentive to cooperate with the central government<sup>49</sup>. Alienating actors that exercise on-ground control does not help the cause of peace or state-building and can worsen matters. At times, retaining some aspects of non-democratic regimes as building blocks for the new order might be necessary<sup>50</sup>.

### **3. Authoritarian Constitution-Making in Democratic Regimes**

There are some salient examples of successful democratic constitution-making, and much has been written about them. In a departure from that trend, this part will briefly discuss the journey of three successful examples of authoritarian constitution-making in Venezuela, Hungary, and Turkey. These three examples a) represent three different variants of authoritarian constitution-making; b) have all been drafted legally in the age of autocratic legalism and without the use of any military force; c) have comparable levels of constitutional cultures (or lack thereof); d) represent different geographic regions with very different social, cultural, and economic contexts; and (e) fulfill to some degree all criteria's of a successful attempt at making a constitution mentioned in footnote 12. Hence studying these examples provides a varied (yet comparable) insight into authoritarian constitution-making in democratic regimes. Though this part does not provide a detailed or empirical account of chosen examples, the broad strokes presented help provide context for the reasons why would-be-autocrats are successful in their constitution-making attempts, dealt in Part 4<sup>51</sup>. Additionally, a lot of the moves of would-be-autocrats discussed in this part (such as expanding rights in their authoritarian constitutions) would not make sense *prima facie*, but their utility in the larger scheme of things will be discussed in Part 4.

#### **3.1 Venezuela (Authoritarian Constitution-Making by Bypassing the Existing Legal System)**

In Venezuela in the 1990s, a grave economic crisis was underway, and the existing political regime was in disarray due to corruption scandals<sup>52</sup>. There was a commonly held belief that the current politicians could not tackle the country's major economic ailments<sup>53</sup>. In this climate, Hugo Chávez, a left-wing populist who claimed to represent the common man, ran for president in 1998 as an adversary of the two dominant political parties (i.e., Democratic Action and Social Christian Party) and political elites<sup>54</sup>. His

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<sup>49</sup>L. Goodson, *Afghanistan's Long Road to Reconstruction*, in *Journal of Democracy*, Vol. 14 No. 1, 2003, 91.

<sup>50</sup>D. Landau, *Constitution-Making Gone Wrong*, cit., 980.

<sup>51</sup>Moreover, this part to paint broad strokes relies on more detailed individual works (and particularly empirical works) on the respective jurisdictions (and their issues) which help in ascertaining adequately the broader picture of the respective constitution-making experiences.

<sup>52</sup>M. Coppedge, *Venezuela Popular Sovereignty Versus Liberal Democracy*, in J. I. Domínguez, M. Shifter (Eds.), *Constructing Democratic Governance in Latin America*, John Hopkins University Press, Baltimore, 2003, 161-175.

<sup>53</sup>*Ibidem*.

<sup>54</sup>K. M. Roberts, *Populism and Democracy in Venezuela under Hugo Chavez*, in C. Mudde, C.R. Kaltwasser (Eds.), *Populism in Europe and the Americas*, Cambridge University Press, Cambridge, 2012, 144-145.



central promise was to hold a constitutional assembly to draft a new constitution.<sup>55</sup> He claimed that such a constitution would put Venezuela on the right socio-economic track<sup>56</sup>. Chávez won the presidency convincingly with a 16 percent lead over his closest competitor.

The existing constitution provided an amendment procedure that allowed for ‘total reform’, which could be undertaken by majority approval in the legislature. At that point, the legislature was controlled by the two aforesaid political opposition parties whose candidates Chávez had defeated in the presidential election<sup>57</sup>. Rather than negotiating with the discredited opposition members, Chávez issued a unilateral decree by going outside the legal system and calling for a referendum on convening a constituent assembly «aimed at transforming the state and creating a new legal order that allows the effective functioning of a social and participative democracy»<sup>58</sup>. This decree was appealed to the Supreme Court by some democracy-supporting groups, but the Supreme Court upheld it on the grounds that people have the right to remake their constitutions<sup>59</sup>.

The referendum passed decisively with over 82 percent of the vote. The electoral rules written by Chávez for selecting members of the Constituent Assembly were designed to tilt the scales in favor of his loyalists – commonly known as the Chavistas<sup>60</sup>. Consequently, the Chavistas, who were internally diverse and represented various segments of the society, won about 93 percent of seats in the Constituent Assembly<sup>61</sup>. This resulted in the Chavistas having no need to negotiate with the handful of discredited opposition members who made it into the Constituent Assembly. Simultaneously, the Constituent Assembly exercised its constituent power to close down state institutions such as the legislature in which the opposition still had a say and transferred their powers to itself<sup>62</sup>. Again, the Supreme Court acquiesced to these moves. It held that the Constituent Assembly, as the direct manifestation of the people’s “constituent power”, was a supra institution capable of wielding such authority<sup>63</sup>. Ironically, finding the Supreme Court a potential roadblock, the Constituent Assembly even shut down the Supreme Court soon after<sup>64</sup>.

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<sup>55</sup>S. Ellner, *Rethinking Venezuelan Politics: Class, Conflict, and the Chávez Phenomenon*, Lynne Rienner Publishers, Boulder, 2008, 95-98.

<sup>56</sup>*Ibidem*.

<sup>57</sup>J. Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, in *International Journal of Constitutional Law*, Vol. 14, No. 3, 2016, 565-578.

<sup>58</sup>A. Brewer-Carías, *The 1999 Venezuelan Constitution making Process as an Instrument for Framing the Development of an Authoritarian Political Regime*, in L.E. Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making* (Ed.), United States Institute of Peace Press, Washington DC, 506.

<sup>59</sup>J. Braver, *Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution*, cit., 567-578.

<sup>60</sup>M. Bejarano, R. Segura, *The Difference Power Diffusion Makes*, cit., 143-144.

<sup>61</sup>*Ibidem*.

<sup>62</sup>D. Landau, *Constituent Power and Constitution Making in Latin America*, cit., 578.

<sup>63</sup>*Ibidem*.

<sup>64</sup>D. Landau, *Constitution-Making Gone Wrong*, cit., 948.

The new constitution was drafted in consultation with trade unions, civil society organizations, professional associations, and neighborhood organizations<sup>65</sup>. One study mentions how organizations submitted 624 proposals and had more than 50 percent of their recommendations accepted for inclusion in the constitution<sup>66</sup>.

This constitution gave Chávez substantial power to push through his authoritarian program. At first glance, containing all the emblematic elements of a democratic constitution such as a bill of rights (including social-welfare guarantees), courts with the power of judicial review, fourth branch institutions, etc. it (1) created an ultra-strong presidency which allowed Chávez to run for three terms in contrast to the one-term previously allowed (2) weakened the federal nature of Venezuela's constitutional system (3) converted the bicameral legislature into a unicameral one (4) increased the powers of the state and (5) loosened civilian control over the military<sup>67</sup>.

This constitution was then put to the vote in a referendum wherein it was passed with a 71.3 majority.

### 3.2 Hungary (*Authoritarian Constitution-Making Within the Existing Legal System*)

Venezuela illustrates Chávez going outside the existing legal order to draft a new constitution. Nonetheless, this is not always what happens. Hungary is a case in point here. The Hungarian story began with citizens growing tired of political scandals and the divided left-wing government's ineptitude in tackling the economy<sup>68</sup>. Viktor Orbán, a nationalist right-wing politician, took advantage of this situation and ran for prime minister in 2010<sup>69</sup>. Orbán had made his vision for Hungary extremely clear before the election. In 2009 he promised how «politics in Hungary will no longer be defined by a dualist power space [...] instead, a large governing party will emerge in the centre of the political stage that will be able to formulate national policy, not through constant debates but through a natural representation of interests»<sup>70</sup>. Orbán fiercely rejected the liberal values of the European Union and vowed to build an “illiberal” democracy<sup>71</sup>.

Hungarians from different walks of life showed their support for Orbán's Fidesz Party and its populist message<sup>72</sup>, giving its coalition control of 68 percent of parliamentary

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<sup>65</sup>M.P. García-Guadilla, M. Pilar, *Polarization, Participatory Democracy, and Democratic Erosion In Venezuela's Twenty-First Century Socialism*, in *The Annals of The American Academy of Political and Social Science*, Vol. 681, No. 1, 2019, 65–67.

<sup>66</sup>D. Landau, *Constitution-Making Gone Wrong*, cit., 942.

<sup>67</sup>O. G. Encarnación, *Venezuela's "Civil Society Coup"*, in *World Policy Journal*, Vol. 19, No. 2, 2002, 41.

<sup>68</sup>G. Negretto, S. Wandan, *Democratic Constitutional Replacements and Majoritarian Politics*, in G. Negretto (Ed.), *Redrafting Constitutions in Democratic Regimes*, cit., 158.

<sup>69</sup>E. Palonen, *Performing the Nation: The Janus-Faced Populist Foundations of Illiberalism in Hungary*, in *Journal of Contemporary European Studies*, Vol. 26, No. 3, 2018, 308-321.

<sup>70</sup>G. Halmai, *A Coup Against Constitutional Democracy*, in M.A. Graber, S. Levinson, M. Tushnet, *Constitutional Democracy in Crisis?*, Oxford University Press, Oxford, 2018, 245.

<sup>71</sup>E. Palonen, *Performing the Nation: The Janus-Faced Populist Foundations of Illiberalism in Hungary*, cit., 308.

<sup>72</sup>According to the Pew Research Study from 2010, 7/10 Hungarians felt they were worse off than under communism, and expressed skepticism with democracy – the highest of any of the countries in the region.

seats<sup>73</sup>. This electoral outcome crossed the two-thirds majority required by the existing constitution to pass constitutional amendments. Once in office, the Orbán government wasted no time in protecting and consolidating their coalition's victory<sup>74</sup>. The first target was the constitutional court, where the government changed the system for nominating constitutional judges, expanded the constitutional court, and limited its power of judicial review<sup>75</sup>. As soon as the court was not a major concern, the Orbán government passed hundreds of new laws and amendments. Including those impacting the right to seek information from the government, nationality rules, protections for the family, churches' role in society, etc<sup>76</sup>. The most important of these changes abolished the constitutional provision that required a four-fifths majority in the parliament to adopt the procedural rules for drafting a new constitution<sup>77</sup>.

In mid-2010, the Orbán government announced plans for drafting a new constitution, defending it by citing the failure of previous efforts to adopt a new constitution as Hungary was still operating under its communist-era constitution (albeit a heavily amended one that had transformed the communist-era political system)<sup>78</sup>. Subsequently, the Orbán government instituted the first round of constitution-making by establishing an ad hoc committee that included members of the opposition<sup>79</sup>. This committee was tasked with preparing fundamental principles for the new constitution in consultation with the public and civil society<sup>80</sup>. The committee submitted the constitutional principles to the parliament on 20 December 2010<sup>81</sup>.

With crucial institutional checks weakened, the Orbán government proceeded expeditiously with the second round of constitutional drafting. The procedural rules adopted by the Fidesz-controlled parliament ensured that the outcome of the first round of drafting was not binding in any way (though the Fidesz government took principles from that round of drafting that benefited their goals)<sup>82</sup>. The final version of the new constitution was introduced in parliament as an ordinary piece of legislation and was approved quickly by the Fidesz coalition's votes on 15 March 2011. This new constitution eroded the secular character of Hungary by giving strong emphasis to Christianity

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<sup>73</sup>A. Bozóki, András, *Mainstreaming The Far Right: Cultural Politics In Hungary*, in *Revue D'études Comparatives Est-Ouest*, Vol. 47, No. 4, 2016, 91-99.

<sup>74</sup>G. Halmai, *The Making Of "Illiberal Constitutionalism" With or Without a New Constitution*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 305.

<sup>75</sup>M. Bánkuti, G. Halmai, K. L. Scheppele, *Disabling the Constitution*, in *Journal of Democracy*, Vol. 23, No. 3, 2012, 138-146.

<sup>76</sup>G. Halmai, *The Making Of "Illiberal Constitutionalism" With or Without a New Constitution*, cit., 305.

<sup>77</sup>*Ibidem*.

<sup>78</sup>I. Szikinger, *Hungary's Pliable Constitution*, in J. Zielonka (Ed.), *Democratic Consolidation in Eastern Europe: Volume I: Institutional Engineering*, Oxford University Press, Oxford, 406-430.

<sup>79</sup>G. Negretto, S. Wandan, *Democratic Constitutional Replacements and Majoritarian Politics*, cit., 158.

<sup>80</sup>*Idem*, 161.

<sup>81</sup>*Ibidem*.

<sup>82</sup>*Ibidem*.

(Hungary's predominant religion), created a government with very few checks, and weakened human rights protections<sup>83</sup>.

### 3.3 Turkey (*Authoritarian Constitution-Making Through Ordinary Constitutional Amendments*)

Besides these two instances of constitution-remaking, there is a subtler way constitutions are remade, i.e., using ordinary constitutional amendments to rewrite constitutions wholly and incrementally in ways that result in a complete revision of the constitution<sup>84</sup>. For methodological ease, most works on constitution-making consider constitution-making as only those events when drafters themselves claim that they are creating a new constitution. Nonetheless, rewriting constitutions over time using ordinary amendment procedures and as part of a singular project is too important an issue to omit in the study of constitution-making – whether authoritarian or otherwise. In fact, this appears to be the trend that would-be autocrats seem inclined to follow going forward<sup>85</sup>.

Turkey is a paradigm of this form of authoritarian constitution-remaking. Over the years, weak coalition governments have struggled to maintain stability, creating frequent power vacuums<sup>86</sup>. These power vacuums have occasioned military coups<sup>87</sup>. The weakness of the governments also adversely affected the Turkish economy, resulting in a financial crisis in 2001<sup>88</sup>. Another characteristic of the Turkish political elites was their espousal of secularism, which formed a vital tenet of the 1982 Turkish Constitution. Despite Islam being the dominant religion, several parties over the years were banned by the Turkish Constitutional Court for promoting Islamic values<sup>89</sup>.

In this background, Recep Erdoğan's AKP came to power in 2002. AKP sold itself as a majoritarian Islamic right-wing party that opposed the existing political order<sup>90</sup>. The party stood for religious freedom, a liberal market economy, and membership in the European Union<sup>91</sup>. During its first term, it pursued economic reforms while building its religious base without alienating the secular opposition<sup>92</sup>. By AKP's second term, Erdoğan realized that the secular opposition was a severe obstacle to the AKP's agendas

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<sup>83</sup>M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, in G.A. Toth (Ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, CEU Press, Budapest, 2012, 237-268.

<sup>84</sup>This generally happens for one of these three reasons (1) lack of sufficient representation in governmental bodies that carry out formal constitutional change (2) constraints due to constitutional norms or procedures (3) easier and subtler way to go about things.

<sup>85</sup>Two high-risk countries - Poland and India - have started to make use of this model.

<sup>86</sup>O. Varol, *Stealth Authoritarianism in Turkey*, in M.A. Graber, S. Levinson, M. Tushnet, *Constitutional Democracy in Crisis?*, cit., 342.

<sup>87</sup>*Ibidem*.

<sup>88</sup>*Ibidem*.

<sup>89</sup>A Bali, *Courts and Constitutional Transition: Lessons from the Turkish Case*, cit.

<sup>90</sup>M. Çınar, *From Moderation to De-moderation: Democratic Backsliding of the AKP in Turkey*, in J. L. Esposito, L. Z. Rahim, N. Ghobadzadeh, *The Politics of Islamism*, Palgrave Macmillan, London, 2018, 129.

<sup>91</sup>Y. Arat, *Beyond the Democratic Paradox: The Decline of Democracy in Turkey*, in *University of Gothenburg Working Paper Series*, No. 21, 2019, 2-4.

<sup>92</sup>*Ibidem*

and possibly its existence<sup>93</sup>. Thus, began Erdoğan's project of dismantling secularism and consolidating power which some believe had always been the ultimate plan<sup>94</sup>.

Initially, this project started with curbing free speech, closing the space for civil society to operate, and selective prosecution of political opponents for crimes such as tax evasion, fraud, and money laundering<sup>95</sup>. The primary constitutional remaking took the form of three successful public referendums in 2007, 2010, and 2017. In Turkey, the constitution can be amended by either a public referendum or a 2/3<sup>rd</sup> vote of the legislature. Some of the amendments resulted in adding liberal values. For example, these amendments increased protection for minorities in Turkey, expanded the right to privacy, and barred military courts from trying civilians<sup>96</sup>. Nevertheless, the significant changes due to these amendments resulted in abolishing the prime minister's office, diminishing the legislature's role, and transforming the country from a parliamentary system to a presidential system wherein the president was accorded unfettered powers<sup>97</sup>. As previously described, these amendments also curtailed the judiciary's independence and packed it with loyalists.

Early on, Erdoğan had claimed that the reforms were necessary to limit the military that had staged four coups in recent history and because of Turkey's accession to the European Union<sup>98</sup>. Erdoğan later shifted to more aggressive Islamic-cum-Turkish nationalism rhetoric and justified reforms as the only way Turkey could achieve stability and security<sup>99</sup>. During the 2017 referendum, Erdoğan had implied that opposing these reforms would be akin to siding with terrorists or the supporters of Fethullah Gulen, the secular scholar whom Erdoğan had accused of plotting the failed coup of 2016<sup>100</sup>.

After the first two rounds of amendments, 117 out of the 177 articles no longer stood in their original forms<sup>101</sup>. The recent 2017 amendment package further revised or repealed 76 articles of the already revised Constitution<sup>102</sup>. These amendments' cumulative effect completely changed how Turkey's government operated and overhauled the Constitution to the extent that it bore no resemblance to the 1982 Constitution. Debatably the changes made to the Turkish Constitution go beyond mere revision and could be classified as what Richard Albert terms "dismemberment"<sup>103</sup>.

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<sup>93</sup>*Idem*, 5.

<sup>94</sup>M. Çınar, *From Moderation to De-moderation: Democratic Backsliding of the AKP in Turkey*, cit., 132

<sup>95</sup>O. Varol, *Stealth Authoritarianism in Turkey*, cit., 348-354.

<sup>96</sup>*Idem*, pp. 348.

<sup>97</sup>Z. Yılmaz, *Erdoğan's Presidential Regime and Strategic Legalism: Turkish Democracy in The Twilight Zone*, in *Southeast European and Black Sea Studies*, Vol. 20, No. 2, 2020, 265-287.

<sup>98</sup>O. Varol, *Stealth Authoritarianism in Turkey*, cit., 342.

<sup>99</sup>*Idem*, 266.

<sup>100</sup>D. Cupolo, *The Decline and Fall of Turkish Democracy*, in *The Atlantic*, 13 April 2017, available at [theatlantic.com/international/archive/2017/04/turkey-referendum-erdogan-kurds/522894/](http://theatlantic.com/international/archive/2017/04/turkey-referendum-erdogan-kurds/522894/).

<sup>101</sup>A. Makovsky, *Erdoğan's Proposal for an Empowered Presidency*, Center for American Progress, Washington DC, 2017, 8.

<sup>102</sup>*Ibidem*.

<sup>103</sup>A. Richard, *Constitutional Amendment and Dismemberment*, in *Yale Journal of International Law*, Vol. 43, No. 1, 2018, 29-80.

#### **4. Conducting An Autopsy - Why Are Would-Be-Autocrats Successful In Making Authoritarian Constitutions?**

Part 2 stated how most instances of constitution-making, particularly democratic ones, are not successful. A curious case emerges in Part 3 where would-be-autocrats draft authoritarian constitutions in democratic regimes and do it quite successfully. Moreover, they do not use force, as was the case with the attempts at democratic constitution-making post the Arab Spring. The question then arises: How do they manage it, and how are authoritarian constitutions accepted in established democratic regimes? This part will attempt to conduct an autopsy using the three previously discussed examples. This part will largely limit its analysis to the cases discussed in Part 3 and only make limited references to instances beyond Venezuela, Hungary, and Turkey. However, similar considerations apply to other instances of authoritarian constitution-making in democratic regimes, both that have happened in the past and ones currently underway.

##### **4.1 Several Elements of An Optimal Constitution-Making Process**

While exclusionary and deficient in their own ways<sup>104</sup>, all the three constitution-making instances mentioned above had some aspects of an optimal constitution-making process, which helps develop attachment for the respective constitutions. In Venezuela, there was a referendum for calling a constituent assembly and approving the constitution. Similarly, in Turkey, all three amendment packages were passed by referendums though they could have been passed legislatively as well. Erdoğan had explicitly stated that he would not get the constitutional changes passed legislatively if the referendums failed<sup>105</sup>. It is worth noting that such referendums seldom fail because would-be-authoritarians control the referendum questions, and citizens are unlikely to develop critical views of large constitutional texts or amendment packages<sup>106</sup>. This is especially the case when referendum questions are window-dressed perfectly with democratic innovations, as was witnessed in the referendums fielded in Turkey.

In both Venezuela and Hungary, the drafting bodies of the constitutions were democratically elected. Further, as mentioned earlier, though these drafting bodies were comprised mainly of allies of the would-be-autocrat, they still reflected or represented broad sections of the society. Those missing were the weak, divided, and discredited oppositions or minorities, which were not “core” enough anymore to create problems for the constitution’s working. Moreover, the respective drafting bodies considered civil society and public input, which did find its way into the constitution. In most cases, such participation was only done to create an illusion and did not affect the structural systems that would-be-autocrats intended to establish. Yet, these are precisely the kind of

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<sup>104</sup>This sub section’s claim is not that the drafting processes in the three countries were perfect. All of these examples have been criticized by both academics and international organizations as being exclusionary or otherwise not completely optimal. Nonetheless, they do display several elements of an optimal constitution-making process – atleast to the extent that they lead to building popular support for the constitution.

<sup>105</sup>AKP, *367'den Vazgeçemedi*, in Cumhuriyet, 9<sup>th</sup> December 2016, available at [cumhuriyet.com.tr/haber/akp-367den-vazgecemedi-642636](http://cumhuriyet.com.tr/haber/akp-367den-vazgecemedi-642636).

<sup>106</sup>Z. Elkins, A. Hudson, *The Constitutional Referendum in Historical Perspective*, in D. Landau, H. Lerner (Eds.), *Comparative Constitution Making*, cit., 142-164.

measures that help build a sense of attachment towards a constitution. Curiously many instances of democratic constitution-making do not even come close to their authoritarian counterparts on this front<sup>107</sup>. Clearly, would-be-autocrats know perfectly well how to work the system.

#### **4.2 Absence of Any Nonconformity Issues**

In the cases of Afghanistan and Turkey, the constitutions, did not fit into claims of domestic ownership because they were considered contrary and in conflict with the bulk of the populace's core values and identity. Similarly, Hungary's last constitution was seen as a relic of its communist past, which people wanted to move away from<sup>108</sup>.

The constitutions drafted by would-be-autocrats do not face nonconformity issues as they either promote majoritarian values or do not champion any controversial counter-majoritarian values. The preamble of Hungary's 2011 Constitution makes explicit references to the majority Christian religion by pronouncements such as «We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago» and «We recognize the role of Christianity in preserving nationhood». Likewise, while the Turkish constitutional amendments did not expressly introduce Islam into the Constitution or alter the secular nature of the Constitution (another *prima facie* democratic innovation), it was apparent that the 2010 amendments which changed the judicial appointment mechanisms facilitated a judiciary that comprised more judges aligned with AKP's majoritarian ideology. This was intended to prevent the judiciary from suppressing expressions of Islam like it had done in the past.

On the other hand, though not advocating any particular majoritarian value or ideology (which was almost a non-issue in Venezuela), the Venezuelan Constitution did not promote any counter-majoritarian one either. Nevertheless, it was laden with social promises and provisions for organizations such as trade unions, farmers, neighborhood associations, etc., which appeased diverse sections of the society. A survey fielded in Venezuela showed how different groups were generally satisfied with the eventual constitution<sup>109</sup>. Such tactics also serve an added function. They allow would-be-autocrats to add legitimacy to their authoritarian constitutions and confuse domestic and international critics<sup>110</sup>.

#### **4.3 Workable Constitutions**

Unlike with new regimes, in established democracies, the worries of a constitution's unworkability are fewer, as state machinery and enforcing institutions are present and in working conditions. The risk of severe violence that can turn into a civil war is also lower in established democracies. As far as isolated incidents of protests or violence are

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<sup>107</sup>Z. Elkins, T Ginsburg, J. Milton, *The Endurance of National Constitutions*, cit., 147-214.

<sup>108</sup>I. Szikinger, *Hungary's Pliable Constitution*, cit.

<sup>109</sup>M. P. García-Guadilla, *Civil Society Institutionalization, Fragmentation, Autonomy*, in S. Ellner, D. Hellinger (Eds.), *Venezuelan Politics in The Chávez Era: Class, Polarization, & Conflict*, Lynne Rienner Publishers, Boulder, 2003, 179-186.

<sup>110</sup>K. L. Scheppele, *Autocratic Legalism*, cit.

concerned, would-be autocrats have the state machinery and popular backing to suppress them without many roadblocks<sup>111</sup>. Turkey witnessed a coup attempt in 2016, but because AKP was stable and established by that time, the party easily quelled it. Quite the reverse, Erdoğan used the failed coup as an excuse to centralize more power. None of the three countries had the problem of de facto ground control lying with armed or military groups that would make a centralized system problematic. In fact, even during its democratic heyday, Hungary was operating as a unitary system. The major losers in authoritarian constitution-making processes are weak opposition political parties and/or minorities who lack the political power to become a problem for the constitutions' working. Since the purpose of authoritarian constitutions is precisely to create an authoritarian state, authoritarian constitutions work precisely as intended. It is doubtful that a carefully drafted authoritarian constitution would result in a democratic state instead of an authoritarian one.

#### **4.4 Failure of Constitutional Safeguards and Institutional Checks**

Constitutions often contain safeguards like judicial institutions or a combination of revision clauses, total reform clauses, unconstitutional constitutional amendments, amendment procedure clauses, etc., to prevent authoritarian constitution-making. However, these options in all the cases described above failed to work for different reasons. When it came to constitutional law provisions that prevent legal change in unilateral or abusive ways, they failed because embedding a particular rule in a constitution does not automatically make governments play by the rules<sup>112</sup>. Governments abide by constitutional provisions not aligned with their interests when the costs of not doing so would be extremely high<sup>113</sup>. This generally happens when flouting constitutional provisions can usher in massive protests or cause the citizenry to vote against incumbents<sup>114</sup>. The popularity of would-be-autocrats coupled with the weak state of the opposition parties made constitutional provisions inadequate checks. This is precisely why the total reform clause in Venezuela's Constitution did not prevent Chávez from drafting an authoritarian constitution.

The option of judicial institutions also rears its head in such situations. As bodies without the "power of the purse or sword", such institutions are dependent on the elected branches for their functioning and the enforcement of their decisions. The same dynamics as witnessed with constitutional law provisions exist when it comes to the government enforcing judgments of judicial institutions. Consequently, judicial institutions are wary of having their decisions ignored by the elected branches, which can affect these institutions' legitimacy and credibility<sup>115</sup>. In worst-case scenarios, judicial institutions not only risk having their decisions ignored but are also in danger of facing retaliation from

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<sup>111</sup>E. Chenoweth, M. Stephan, *Why Civil Resistance Works*, in *International Security*, Vol. 33, No. 1, 2011, 39-42.

<sup>112</sup>A. Chilton, M. Versteeg, *How Constitutional Rights Matter*, Oxford University Press, New York, 2020, 7.

<sup>113</sup>*Ibidem*.

<sup>114</sup>*Ibidem*.

<sup>115</sup>G. Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, in *Annual Review of Political Science*, Vol. 18, 2015, 179-182.



elected branches in the form of court curbing measures<sup>116</sup>. In turn, judicial institutions either end up siding with would-be-autocrats or utilizing avoidance cannons and letting autocrats proceed with their projects. This explains why the Venezuelan Supreme Court allowed Chávez to move ahead unilaterally. Contrariwise, in Turkey and Hungary, the respective would-be-autocrats started their projects by first attacking the judiciary and compromising its independence. Hence, by the time questions regarding constitutional replacements came up, the judiciary was no longer independent<sup>117</sup>. Rather than playing a positive role, they ended up themselves being facilitators of democratic backsliding<sup>118</sup>.

#### **4.5 Lack of United Opposition Forces**

Perhaps the most important reason would-be-autocrats succeeded in drafting authoritarian constitutions is the lack of united opposition forces to confront them. To compound matters, opposition forces in all the cases discussed above were weak, divided, discredited, and often embroiled in their own scandals and internal discords<sup>119</sup>. As such, they did not put up any meaningful resistance to would-be-autocrats attempts to redraft constitutions. In fact, in Venezuela, the opposition did have both electoral leverage and support across society, media, military, and courts but could not unite and put up a resistance against Chávez<sup>120</sup>. Hence, would-be-autocrats could draft authoritarian constitutions unilaterally and without negotiating with the opposition or without them holding out.

For the most part, would-be autocrats have only been stopped in their attempts to make authoritarian constitutions when they were confronted by united opposition forces acting strategically. This is why Poland has been unable to draft one despite plans to do so since 2017<sup>121</sup>. Situations with united oppositions acting strategically are also responsible for creating the circumstances for constitutional safeguards and judicial institutions to function adequately<sup>122</sup>. In 2008, when Evo Morales remade the Bolivian Constitution, he was forced to abide by the revision clause and could not draft the constitution he intended to as he was faced with a powerful opposition with considerable sway, support, and electoral presence across state institutions<sup>123</sup>. Similarly, when different judicial institutions precluded Honduras President Zelaya in 2009 from calling for a referendum on whether or not a constituent assembly should be constituted, both the opposition party

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<sup>116</sup>*Idem*, 169-179.

<sup>117</sup>K. L. Scheppele, *Autocratic Legalism*, cit., 550-554.

<sup>118</sup>D. Landau, R. Dixon, c, in *University of California Davis Law Review*, Vol. 53, 2020, 1315-1387.

<sup>119</sup>A. Sethi, *Populism, Liberal Democracy, And Constitutionalism: An Unholy Trinity*, 2021, 8, 18-20, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3838122](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3838122).

<sup>120</sup>L. Gambao, *Opposition at The Margins: Strategies Against the Erosion of Democracy in Colombia and Venezuela*, in *Comparative Politics*, Vol. 49, No. 4, 2017, 464-468.

<sup>121</sup>G. Halmai, *The Making Of "Illiberal Constitutionalism" With or Without a New Constitution*, cit., 320-321.

<sup>122</sup>A. Sethi, *Populism, Liberal Democracy, And Constitutionalism: An Unholy Trinity*, cit.

<sup>123</sup>M. Cameron, K. Sharpe, *Andean Left Turns Constituent Power and Constitution Making*, in M. Cameron, E. Hershberg (Eds.), *Latin America's Left Turns, Latin America's Left Turns: Politics, Policies & Trajectories of Change*, Cambridge University Press, Cambridge, 2010, 60-71.

and Zelaya's own party fiercely and publicly opposed the referendum<sup>124</sup>. Such a political environment provided different judicial institutions with the conditions to pass judgments against a populist (and popular) president. However, these examples have been exceptions and not the norm. Worldwide, existing political establishments are in complete shambles with a high level of discontent among the population, laying the foundation for would-be-autocrats to emerge<sup>125</sup>.

## 5. Epilogue

This article surveyed three types of authoritarian constitution-making in democratic regimes and examined why would-be-autocrats find more success than their democratic counterparts. It listed five reasons to explain the latter, namely 1) several elements of an optimal constitution-making process; 2) absence of any nonconformity issues; 3) workable constitutions; 4) failure of constitutional safeguards and institutional checks; 5) lack of united opposition forces.

Considering the general populace's support for would-be-autocrats constitutions, their efficiency in drafting one, and the weak state of opposition parties in most democracies, the grim reality is that it is unlikely that attempts to draft authoritarian constitutions can be foiled in most cases.

There are two essential points worth making in conclusion. First, in countries where political parties are in disarray and the public is disillusioned with the political climate, political parties need to start realizing the consequences if they do not get their houses in order and address public demands. The cases discussed here (and several others) are enough evidence to show how the story usually unfolds. Scholars have suggested that beyond just putting their house in order and uniting, democratic political forces might require a rethinking of democracy's goals and aspirations for it to be sustainable in the long term<sup>126</sup>.

Second, authoritarian projects take years to complete. Turkey passed its constitutional amendments over a decade and, in early 2021, declared plans to draft a new Islamic constitution from scratch. Orbán's authoritarian project has been in action for a similar period, despite promulgating an authoritarian constitution in 2011. Three years after the 2011 Constitution, Orbán denounced European Union internationalism and declared his intentions to transform Hungary into an illiberal democracy. In Venezuela, Chávez drafted his Constitution in 1999, but he and his successor Nicolás Maduro have continued expanding the authoritarian project well into the present.

Thus, opposition forces have a role to play, even if they are not in a position to stop a would-be autocrat's initial constitution-making attempt because their authoritarian project still has a long way before it reaches its apogee. This becomes particularly relevant when would-be autocrats use the Turkish route to remake constitutions. Hence, there are many windows of opportunity available to prevent more democratic backsliding. The

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<sup>124</sup>D. Landau, *Courts and Constitution Making in Democratic Regimes*, in G. Negretto, *Redrafting Constitutions in Democratic Regimes*, cit., 944-9.

<sup>125</sup>B. Moffit, *The Global Rise of Populism*, in *The Global Rise of Populism*, Stanford University Press, 2016, 1-10.

<sup>126</sup>W. A. Galston, *The Populist Challenge to Liberal Democracy*, in *Journal of Democracy*, Vol. 29, No. 2, 2018, 15-17.

onus is on opposition forces in countries facing authoritarian threats to keep aside their differences, sort out internal problems, rally around a common enemy, and use their institutional leverage optimally. The longer the autocrat stays in power, the harder it becomes to dislodge them because they start increasing their hold over accountability institutions and keep removing checks on their powers.