Authoritarian Constitutionalism

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Abstract

What is "authoritarian constitutionalism"? How can we know it when we see it? In this paper, we provide a conceptual and analytical framework that addresses both ingredients of this intriguing concept: (1) a regime type commonly known for its tendency to abuse power, with (2) a centuries-old lineage of theories and practices seeking precisely to place limits on how it be used. After discussing different conceptualizations of "authoritarian constitutionalism", we argue that it properly is a phenomenon that takes place under an authoritarian regime that exhibits institutional constraints on power. We thus distinguish authoritarian constitutionalism from "abusive constitutionalism" (that takes place under democracy) and from "constitutional authoritarianism" (authoritarian regimes where there are no *institutional limits* on power). We illustrate each one of these categories with examples from Latin American constitutional history.

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Prima facie the meaning of "authoritarian constitutionalism" is by no means transparent. Accepting that this concept is not an oxymoron implies at least a willingness, as Mark Tushnet puts it, "to pluralize the idea of constitutionalism," (2015, 420) taking it out of a purely liberal-democratic framework (e.g. Waldron 2011). A reductionist view, one that is limited to a liberal democratic framework, *a priori* cancels out the possibility of non-liberal constitutionalism, minimizing not only its normative and scholarly interest but also the relevance of an important part of many countries' long and rich constitutional histories. Take for instance the Latin American region, that we use our empirical arena in this text. The region's mosaic of political configurations has produced a large number of diverse constitutions (Gargarella 2013), many of which have been written under autocratic regimes (see Negretto 2014). Of course, not all authoritarian constitutions are the same, nor do all play the same role in their country's polities: Trujillo's Dominican Republic had little to do with Pinochet's Chile. How can we make sense of these differences? Are both, and others, part of the same phenomenon, i.e. *authoritarian constitutionalism*?

In a nutshell, authoritarian constitutionalism is a distinct phenomenon that involves an intriguing mixture of a regime type commonly known for its tendency to abuse power (e.g. Linz 2000) with a centuries-old lineage of theories and practices seeking precisely to place limits on how power be used (e.g. Holmes 1995; Vile 1967). We provide a conceptual and analytical framework that addresses both dimensions of authoritarian constitutionalism, and in so doing we discuss the theoretical and empirical advantages and disadvantages of distinct conceptualizations of this term. We then illustrate the different categories in our conceptual map with examples drawn from Latin American countries. We conclude with what we see as promising avenues for research in this interesting and vibrant area.

I. Authoritarian Constitutionalism: A Conceptual Map

I.1 "Constitutionalism" in "Authoritarian Constitutionalism"

We start by analytically distinguishing two conceptualizations of "authoritarian constitutionalism" using as criterion the normative weight that the authors who have dealt with this concept assign to the term "constitutionalism". Specifically, is it the case that "authoritarian constitutionalism" implies a positive or desirable qualification over mere "authoritarianism"? We consider that the conceptualizations that do have such a positive normative implication (e.g. Barros 2002; Tushnet 2015) have an advantage over the ones that do not (e.g. Isiksel 2013; Niembro 2016; Somek 2003). The former group links "authoritarian constitutionalism" with a very long well-known genealogy where "constitutionalism" is understood as a desirable set of political (and social) principles, practices, and institutions for the organization of governmental power. In contrast, for the latter group, "constitutionalism" when accompanied by "authoritarian" refers merely to a specific relation with, or way of using, constitutional law without any normative appeal.[1] This latter group thus faces the theoretical disadvantage of conceptual ambiguity (Schedler 2010) since the meaning of "constitutionalism" when accompanying "authoritarian" has little to do with the meaning of the term itself.

For instance, in her stimulating account of Turkey, Isiksel defines *authoritarian constitutionalism* as a political system that practices robust constitutional discipline (i.e. that "takes its constitution seriously") without meeting basic expectations of democracy (Isiksel 2013, 702).[2]

[1] Note that this use of "constitutionalism" is also present in related constitutional discussions. For instance, in Landau's "abusive constitutionalism" "constitutionalism" merely means "the use of mechanisms of constitutional change" (Landau 2013, 195).

[2] Similarly, Somek defines authoritarian constitutionalism as the accommodation of judicial and doctrinal discourse to a government that is undoubtedly authoritarian (Somek 2003, 362). For Niembro authoritarian constitutionalism is a "sophisticated way of exercising power by elites with an authoritarian mentality in states with an incipient democratic development […] to foster authoritarian aims" (Niembro 2016, 224).

Notice that a regime that takes its authoritarian constitution seriously is not necessarily normatively better than one that does not (i.e. where the authoritarian constitution is systematically ignored). Thus it is not surprising to read in her account that "[t]he [Turkish] system functions on a shared assumption that the constitution matters [i.e. the fact that the regime is not only "authoritarian" but also an instance of "authoritarian constitutionalism"]…which is not obviously for the better" (Isiksel 2013, 705). This leads to conceptual ambiguity and to paradoxes in which the presence of "authoritarian constitutionalism" makes it easier for an authoritarian government to infringe upon "precisely those principles we expect constitutionalism to uphold" (Isiksel 2013, 711).

On the other hand, studies on "authoritarian constitutionalism" where "constitutionalism" takes a positive normative connotation avoid such ambiguity. This does not mean that there is a unique understanding of "constitutionalism" within this scholarship, but rather that authors use the term in a way that is consistent with its rich normative and theoretical lineage. For instance, in his analysis on Pinochet's Chile Robert Barros understands constitutionalism as the presence of efficacious institutional limits on central government actors (e.g. the executive). As Barros puts it "institutional limits imply a legal standard, a mechanism of enforcement, a division among the authorities subject to the standard and those who uphold it, with the result that the actors are constrained by prior decisions in the form of rules" (Barros 2002, 20). Similarly, Mark Tushnet considers "authoritarian constitutionalism to be a variety of constitutionalism characterized by intermediate levels of rights protection and a low (or intermediate) level of use of force and fraud in elections" (cf. Tushnet 2015, 396). Tushnet, however, doubts the efficacy of *institutional* constraints in enforcing such features in authoritarian regimes.[3] Rather they would be put in practice due to a normative commitment with certain

[3] See below a discussion on Tushnet's conception of authoritarianism.

liberal freedoms by the political elite (Tushnet 2015, 416 fn. 135). In other words, for Tushnet the "normative commitment to constraints on public power […] might be a truly distinguishing characteristic of authoritarian constitutionalism" (2015, 438).

In sum, we have two distinct ways of understanding constitutionalism in "authoritarian constitutionalism." The first refers to a subset of practices, principles, or institutions that constrain power in authoritarian contexts, and for which therefore "constitutionalism" has semantic equivalence when used to qualify either authoritarian or democratic settings. The second way refers merely to the use of constitutional means for authoritarian ends; thus in this case "constitutionalism" means something different in "authoritarian constitutionalism" than in "democratic constitutionalism."

I.2 "Authoritarian" in "Authoritarian Constitutionalism"

"Authoritarian" also has been used to refer to different phenomena in the literature on authoritarian constitutionalism. Some authors refer to authoritarian practices or behaviors related to the constitution, such as the practices captured by David Landau's *abusive constitutionalism* that is defined as the "use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before" (2013, 195). Other authors refer to the abuse of constitutional emergency powers, such as an undue or unbound concentration of power on the executive branch to face a threat to the republic, as a case of authoritarian undermining of democracy through constitutional means (e.g. Loveman 1993). Notice that in the previous examples "authoritarian" refers to practices or behaviors, not to a type of regime. In fact, *strictu sensu* abusive constitutionalism and abuses of emergency powers take place under democracy, which is threatened by those authoritarian practices.

We take a different approach. Specifically, we understand "authoritarian constitutionalism" to be a distinct phenomenon that takes place under a non-democratic regime;

thus this is the way in which we use the term "authoritarian." Emphasizing regime-type as the relevant feature for understanding "authoritarian" implies that its specific definition depends on the definition of "democracy."[4] In this connection, conceptualizations of "authoritarian constitutionalism" can then be classified into those that adopt a minimalist conception of democracy (e.g. Przeworski 1990) or those with a more substantive approach to it (e.g. Freedom House 2005). We consider that a minimalist conception has important advantages for the development of empirical research on authoritarian constitutionalism, especially when (as is often the case) some of the substantive elements ascribed to democracy coincide with features linked to constitutionalism. Hence, we understand democracy as a regime "in which rulers are selected by competitive elections, and in which ruling parties lose elections" (Przeworski et al. 2000, 15). Such a concept of democracy produces objective and observable criteria for a binary classification of regime types, autocracy and democracy, and allows also for making further distinctions within either set (e.g. Cheibub, Gandhi, and Vreeland 2009).

To see the analytical advantages of our approach, consider the challenges posed by the conceptualization of "authoritarianism" in Mark Tushnet's otherwise appealing understanding of "authoritarian constitutionalism." "I take as a rough definition of authoritarianism that all decisions can potentially be made by a single decision maker [and that] those decisions are [...] unregulated by law" (Tushnet 2015, 448). In other words, according to this definition, "if the regime is authoritarian, it faces no constraints on abandoning laws, courts, and constitutionalism, when doing so would serve the regime's interests…" (Tushnet 2015, 432). Therefore, Tushnet excludes *a priori* the possibility of effective *institutional* constraints on authoritarian governments since in his formulation they always have the capacity to transform the rules of the game, the

[4] The dependency of these two concepts is the focus of an extensive and familiar discussion (e.g. Dahl 1971; Przeworski 1990; Schumpeter 1962).

constitutional provisions, at will (Tushnet 2015, 425). However, Latin American constitutional history provides examples of the inaccuracy of this claim. For instance, as we discuss in detail in the following section, Mexico's powerful presidents under the authoritarian hegemonic-party rule could not (neither *de jure* nor *de facto*) alter Article 83 of the Constitution that establishes a six-year presidential term without re-election, despite the fact that the president was the head of the party that controlled all the organs necessary to amend the constitution: supermajorities in both houses of the federal congress as well as states' executives and majorities in the state's legislative branches (see Pozas-Loyo, 2017).[5] If we are correct, then there might be interesting cases of effective institutional limits on power in some authoritarian regimes, and the fact that Tushnet's (and other substantive) conceptual approach(es) *a priori* exclude them is a disadvantage for empirical and theoretical research.

In sum, we define "authoritarian constitutionalism" as the presence of effective institutional constraints-on-power in countries with an authoritarian regime. Now, it is important to note that while some institutional constraints may be effective, others may not. Within the same country some institutions may be instances of authoritarian constitutionalism while others may only be parchment barriers, as we exemplify later. We believe that a more precise use of the concept, targeting specific institutions, or constitutional articles at particular times, rather than whole countries for long periods of time provides enhanced analytical leverage to ultimately explain the sources of constitutional enforcement and efficacy.

Our conceptual map, based on the two dimensions we have discussed is summarized in Table 1, in which we include the examples for each category that we elaborate on in the second part of this paper (see Table 1). We posit that "authoritarian constitutionalism" proper is to be

[5]It is noteworthy that Tushnet identifies Mexico in this period as an example of "authoritarian constitutionalism" (2015, 393).

found in autocracies where there are some effective institutional constraints on governmental power (upper left cell) and provide three instances of this: the role of the Constitutional Tribunal in Chile under Pinochet, the performance of courts in the Brazilian dictatorship of 1964-1985, and the non-reelection rule in Mexico under hegemonic-party rule. In the upper-right cell we include autocracies with weaker or none institutional constraints on power, where constitutional mechanisms are manipulated by the government. We label these cases instances of "constitutional authoritarianism" to emphasize that while having constitutions they do not have "constitutionalism": these are instances of constitutional institutions being used for authoritarian ends. The examples we discuss in this category are the performance of the Supreme Courts in Argentina and Mexico, as well as the Dominican Republic under Trujillo. In the lower-righthand cell we find democracies in which some "authoritarian behaviors" take place, such as *abusive constitutionalism* in Venezuela under Chávez or the abuse of emergency powers in Colombia from 1958 to 1991, which are sometimes mistakenly presented as instances of authoritarian constitutionalism.[6] Finally, the lower-lefthand cell is the place for democratic regimes with strong institutional limits on power, i.e. constitutional democracies.[7]

[6] Note that in this framework cases that other authors have discussed as instances of "authoritarian constitutionalism" (e.g. Turkey or Venezuela) would start out as democracies with instances of abusive constitutionalism. As these cases become autocracies they can transit to constitutional authoritarianism (if there are no effective constraints on power), or authoritarian constitutionalism if some institutional limits remain effective.

[7] We do not include illustrations of this category.

Table 1.

		Institutional Limits on Power	
		More	**Less/None**
Regime Type	**Autocracy**	Authoritarian Constitutionalism Chile, 1973-88 (Constitutional Tribunal) Brazil, 1964-85 (Military Courts) Mexico, 1934-1994 (Non-reelection clause)	Constitutional Authoritarianism Dominican Republic, 1930-61 México, 1934-1994 (Supreme Court) Argentina, 1930-32 and 1943-6 (Supreme Court)
	Democracy	Democratic Constitutionalism	Abusive Constitutionalism Venezuela, 1999 (Abusive constitutionalism) Colombia, 1958-91 (Emergency powers)

Certainly the attentive reader has noticed a couple of thorny issues raised by our examples. Whereas the empirical operationalization of the regime-type dimension is well developed and allows in most cases for unambiguously identifying an autocracy, it is less clear how to capture the "constitutionalism", or institutional constraints-on-power, dimension. For starters, it is important to acknowledge that the extent to which institutions constrain under authoritarian regimes varies greatly between countries, within countries across time, and within

the same country and period across different institutions and issue-areas.[8] Moreover, fine-grained and reliable data is hard to obtain under authoritarian regimes, which make it hard to make systematic comparisons and to generalize knowledge. We will discuss some of the issues in the next section and in the conclusion, albeit briefly due to constraints of space.

II. Examples from Latin America

II.1 Authoritarian Constitutionalism

Perhaps the clearest example of authoritarian constitutionalism is that of the Chilean military dictatorship (1973-1990), no less so because its own demise was partly caused by institutional constraints that they themselves had created. As Robert Barros puts it, "shortly after the coup, the military junta demanded rules to regulate power among the armed forces and later introduced and sustained a constitution which set into operation institutions that limited the dictatorship's power and prevented it from unilaterally determining the outcome of the October 5, 1988 plebiscite which trigger the transition to democracy in 1990" (Barros 2002, 1). The reason behind this demand for rules was that none of the four branches of the armed forces, which together formed the *Junta de Gobierno*, wanted another to dominate the government. Because the decisions of the *Junta* had to be taken by unanimity each branch, which had both corporatist autonomy and real power behind it, checked the others. The result was, as Przeworski eloquently puts it in the Foreword to Barros' book, "that even though the *Junta* as a whole had the capacity to act at will, internal differences led it to conform to the constitutional document it originated and even to decisions of the Constitutional Tribunal it created" (Barros 2002, xi).

[8] A relatively recent scholarship on so called "hybrid regimes" and autocratic institutions has made progress in this regard but the debate is not yet settled (e.g. Ginsburg and Moustafa 2008; Lagacé and Gandhi 2015; Levitsky and Way 2010; Rios-Figueroa and Aguilar 2018; Schedler 2013; Svolik 2012)

The military regime in Chile changed many things when compared to the democratic regime it toppled, including banning political parties and shutting down Congress. Interestingly, whereas the regime did not touch the courts and pledged its commitment to judicial independence, Chilean ordinary judges did not challenge the abuses made by the regime, for instance in the persecution and prosecution of political opponents (Hilbink 2007). However, the 1980 Constitution created by the military regime did constrain the use of power: for one, it restricted the Military Junta's prior capacity to unilaterally modify the constitution. More importantly, the constitution included a Constitutional Tribunal that soon assumed autonomy even though its members were appointed by the military. All the organic constitutional laws passed by the Junta had to be reviewed by the Tribunal and on these and other decisions the Tribunal on various occasions ruled against the Junta (Barros 2002, ch. 7). Of course, the Tribunal's most consequential decision was to force the Junta to hold a plebiscite on the continuation of the regime in 1988 as the Constitution stipulated, with the known results.

Another example of authoritarian constitutionalism proper comes from Mexico. The PRI (*Partido Revolucionario Institucional*) was the hegemonic party in Mexico from 1929 to 2000 when it lost the presidential election. During the PRI era, this political party had control over the Administration, the Federal Congress, the states' Governments and the Judiciary. The President was the head of a very well-disciplined political system: he was the head of the government and the head of the PRI. He had the political capacity to violate some provisions of the 1917 Constitution without political opposition. Moreover, the PRI's supermajoritarian control also gave him the legal capacity to alter the Constitution. Every incoming President amended the Constitution to make it fit his political agenda: as many as 66 constitutional provisions were altered during the presidential term of Miguel de la Madrid Hurtado, 1982-1988 (Valdés Ugalde 2012). Nevertheless, this does not imply that in this period the President could

transform arbitrarily any article or, as Tushnet puts it, that "the authoritarian leader has lawful power to alter [all] constitutional provisions at will…" (Tushnet, 2015:425). In particular, during this president-centered era Article 83 of the constitution that establishes a six-year presidential term without re-election was neither altered nor violated, and without doubt it constituted a strong and ever effective institutional constraint on power.

Why did presidents with extraordinary power accept to hand over political power and to retire from public life once their term was over?[9] Given the purposes of this text the first thing to point at is that the strict enforcement of Article 83 cannot be fully accounted for as a "normative commitment" to limits on power by Mexican presidents as Tushnet's account would imply: President Alemán attempted, and failed, to push for his reelection, and arguably this instance sent the clear message to his successors that Article 83 was untouchable. While a detailed account of the enforcement mechanisms of Article 83 is not possible here, it is important to note that the PRI was politically and socially very heterogeneous and that the hegemonic equilibrium was arguably sustained by the following of intraparty informal rule: as long as the rotation of presidential power among the different ideological sub-groups was possible (i.e. as long as no president sought re-election) no sub-group would break with the party and all would respect the selection of the candidate and cooperate with the winners (Pozas-Loyo 2017). Hence Article 83 was "constitutional" not only in a formal sense, but also in the deeper sense of constituting the "rules of the political game".

Our last example within this category comes from Brazil. The Brazilian dictatorship (that started with a military coup in 1964 and ended with a pacted transition in 1985) created seven Institutional Acts and the Constitution of 1967. Some Acts were issued after the Constitution,

[9] See Pozas-Loyo (2017) for a discussion of the enforcement of this article and an account of President Alemán's attempt of reelection .

including the infamous AI-5 "that eliminated habeas corpus in cases of national security crimes, thus institutionalizing the use of confessions extracted under torture as a basis for the repression and prosecution of opponents and dissidents" (Pereira 2005, 72). However, the constitutional rules created by the dictatorship were consequential and did impose limits on the authoritarian rulers. As Pereira notes: "When rulers of a state are concerned about legal procedures –even when they manipulate those procedures in their own interest– defense lawyers then may have opportunities to monitor the safety of their clients, and this can save lives" (Pereira 2005, 6). Thus, in Brazil the autocrats' choice to use law and courts in their "control" measures, such as carrying out political trials of enemies instead of naked repression (as in Argentina) may have given them some legitimacy but at the cost of a certain loss of control over the outcome of individual trials.

For instance, in Brazil the courts could repeal or at least reduce the length of sentences decided in military tribunals. Military courts usually accepted the charges made by military prosecutors: 88.48% of the time in the Superior Military Tribunal. But "when cases went to the civilian *Supremo Tribunal Federal* (STF) in appeals, they were handled by the civilian federal prosecutor's office and the STF accepted the arguments of the civilian federal prosecutor in 66.66% of the cases. Interestingly, only civilians in military courts could appeal their cases to the civilian courts. Military personnel, unlike civilians, did not have the right to appeal their cases to the STF (Pereira 2005, 76).[10] Moreover, as Pereira notes, the courts actually mitigated the severity of repression, being more lenient in the harshest early moments in the aftermath of the coup. "For example, at the time of the 1964 coup, the military purged its own ranks of participants in

[10] A remarkable feature of the Brazilian political trials is their relatively high acquittal rate. "One source indicates that the acquittal rate at the level of the regional military courts was 48 percent. In Pereira's sample of 257 cases involving 2,109 defendants he reveals an acquittal rate that is even higher: 54% in the regional military courts (Pereira 2005, 77).

the legalist movement that had prevented a military coup in 1961, but over 90% of the 38 defendants accused of participating in the 1961 movement were acquitted" (Pereira 2005, 82).

II.2 Constitutional Authoritarianism

The Dominican Republic during the "Era of Trujillo," the time during which Rafael L. Trujillo ruled the Dominican Republic (1930-1961), is an interesting example of an authoritarian regime in which the constitution did not limit the behavior of the autocrat despite the fact there might be coincidence between the constitutional text and the regime's behavior. When an authoritarian government produces a constitution and laws but there are no institutional limits on power (i.e. no *constitutionalism*), we have an instance of *constitutional authoritarianism*. Trujillo was president from 1930 to 1938 and from 1942 to 1952, but he remained "the Supreme Leader of the Dominican Party" and in fact he and his family controlled Dominican politics until his assassination in 1961. Trujillo's rule was a bloody authoritarian period in Dominican history; it was also a time marked by personality cult. However, he had a notable "respect" for legal form and constitutional technicalities that lead him on several occasions to amend the constitution in order for it to fit his intended actions (Espinal 1997). Thus, under this legalistic dictator one can observe that the actions of the government match what the constitution specifies, but one could hardly claim that the constitution constrained Trujillo's behavior

Trujillo's constitution did not constrain power; its "legalistic" use arguably was aimed at providing some legitimacy to the regime. A similar legitimizing role can be found in certain decisions of the Argentine Supreme Court regarding the relationship between law and power, the legitimacy and legality of military interventions, and the acts of military regimes. These cases involved the question of whether a military coup interrupts legal continuity and whether the new military government has the legitimacy and authority to enact valid laws.[11] After the coup of

[11] For a similar line of cases in Pakistan, see Mahmud 1993, 1994.

September 4, 1930 in which General José Félix Uriburu deposed President Hipólito Yrigoyen, the Supreme Court legitimized the *de facto* regime on the grounds of the necessity to protect the country, recognizing that the provisional government "possesses the military capacity to secure the nation and its citizens and has publicly declared that it will defend the laws of the country and the supremacy of its constitution."[12] A similar decision, that actually cites the previous one as a precedent, was issued by the Supreme Court on June 7, 1943 after the coup that ended the government of President Ramón Castillo, establishing a military dictatorship.[13] The Argentine Supreme Court, thus, shed some legitimacy on autocratic governments recognizing their capacity to enact valid laws based on the necessity to protect the country and the *de facto* government's capacity to do so.

As we noted before, within the same authoritarian country some institutions may be instances of authoritarian constitutionalism (i.e. institutional constraints on power) and also of constitutional authoritarianism (i.e. the use of the constitutional text and interpretation for authoritarian ends). Let us present an example of this phenomenon from Mexico. Since constitutional term-limits played a constraining role on the executive, we therefore included this as an instance of authoritarian constitutionalism. In contrast, by and large the Mexican Supreme Court did not limit the government during the hegemonic party era but rather was instrumental for the government to achieve its ends.

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[12] See "Acordada sobre el reconocimiento del gobierno provisional de la nación", Septiembre 10, 1930, available at http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-acordada-sobre-reconocimiento-gobierno-provincial-nacion-fa30996876-1930-09-10/123456789-678-6990-3ots-eupmocsollaf Last accessed February 21, 2017.

[13] See "Acordada sobre el reconocimiento del gobierno surgido de la revolución del 4 de junio de 1943", Junio 7, 1943. Available at http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-acordada-sobre-reconocimiento-gobierno-surgido-revolucion-4-junio-1943-fa43996949-1943-06-07/123456789-949-6993-4ots-eupmocsollaf Last accessed February 21, 2017.

The Mexican Supreme Court's decisions were in several instances a legitimizing tool for the authoritarian government. For the Supreme Court the "Constitution" was not a legal document but rather, based on Carl Schmitt's ideas, a series of fundamental political decisions that underlie the juridical order made by the actual political forces, ultimately the President of the Republic and the governing party. Therefore, the Supreme Court could not undermine the political will embodied in the Constitution. It could, at most, mechanically apply the laws and regulations that were subordinated to it (Cossío and Raigosa 1996, 47). And this is what the Supreme Court did: case after case the court consistently held that it had no power at all to subvert or supplant the will of the legislature and least of all of the constitution-making power (Cossío 2002, 114). The Supreme Court actually stated in a self-effacing manner that it could not "interpret the law in any way that has any transcendental effects."[14]

The Mexican Supreme Court was not an institutional constraint on the authoritarian government[15] but it did play an important role within the hegemonic party system. Specifically, the Supreme Court was a helpful actor with regard to the actual governance of the authoritarian regime, contributing to cementing the power-sharing deal of the autocratic governing coalition. For instance, the Supreme Court contributed to cementing the so-called civil-military pact that was one of the pillars of stable hegemonic party rule: in exchange for loyalty to the hegemonic party the armed forces were given an important degree of autonomy with regard to the military's internal functioning, training and promotions, along with a high level of discretion regarding

[14] Apéndice al Semanario Judicial de la Federación 1917-1988, segunda parte, tesis 1337, p. 2165, apud. ibidem., p. 125

[15] The Supreme Court very rarely served as a check on lower judges, prosecutors, governors, executive officials in issues that were important for the regime. For instance, in one infamous decision, the Mexican Supreme Court decided that confessions extracted by prosecutors using physical force (i.e. torture) were acceptable as evidence in a trial if there were other pieces of evidence that corroborated the confession. Tesis de Jurisprudencia. Semanario Judicial de la Federación. Amparos Directos 151/90 y 251/90. Primera Sala, Octava Época, tomos VII-Enero y X-Septiembre, pp. 193 and 248.

expenditure (Serrano 1995, 433). The Supreme Court helped cement the civil-military pact in different ways. First, as a way of power-sharing, from 1940 to 1994 "the presence of at least one military officer serving as a Supreme Court justice was a constant" (Caballero 2010, 157-8). Second, through its jurisprudence, the Supreme Court defended a broad scope of military jurisdiction where military officers charged with crimes were tried (and usually absolved or leniently punished) by military courts. The Supreme Court also allowed civilians to be tried in military courts, despite Article 13 of the Mexican Constitution, in cases where public safety was considered to be at risk (such as massive strikes or guerrilla uprisings) (Ríos-Figueroa 2016, ch. 5).

The last point can be generalized, as the scholarship of institutions in authoritarian regimes has shown. In a nutshell, institutions in authoritarian regimes even if they do not constrain the government can play an important role in autocratic governance (see Lagacé and Gandhi 2015). One strand of this literature has focused on the role of political parties, legislatures, and elections in maintaining power and governing by solving information, credibility, coordination and monitoring problems (e.g. Gandhi 2008; Magaloni 2008; Svolik 2012). Another strand of this literature deals with the many relevant functions that institutions such as courts and judges play in authoritarian regimes, highlighting the role of a single salient court, such as the Supreme Court or the Constitutional Tribunal, or that of the Supreme Court and a subset of lower courts, and also institutions such as prosecutorial organs (e.g. Ginsburg and Moustafa 2008; Hilbink 2007; Rios-Figueroa and Aguilar 2018). These would be instances of constitutional authoritarianism: cases where constitutional institutions serve authoritarian goals but do not institutionally constrain the autocrats.

II.3 Abusive Constitutionalism

We add two examples of this category that are worth discussing, albeit briefly, because they should not be conflated with authoritarian constitutionalism or even with constitutional authoritarianism given that they take place under democracy: *abusive constitutionalism* and emergency powers. The former is the use of mechanisms of constitutional change by incumbents who want to stay in power and thus erode the democratic order, or "abusive constitutionalism" (Landau 2013). Landau discusses the case of Venezuela, a stable democracy for decades, where Hugo Chávez was elected president in 1998 but faced opposition from members of the decaying but traditional parties, who continued to control majorities in the national Congress, the Supreme Court, and state and local governments. In this context, using a mixture of shrewd political tactics and arguments resorting to "the people" as the ultimate constitution-maker, Chávez managed to elect a favorable constituent assembly which produced a constitution that allowed him and his movement to govern almost unconstrained (Landau 2013, 203-7). This abusive constitutionalism eventually led to the complete erosion of democracy in Venezuela, and it is present in other countries as well. But for our purposes in this paper, we underscore that this is a phenomenon that takes place under democracy and thus is not a case of authoritarian constitutionalism. It should be emphasized, however, that abusive constitutionalism weakens the institutional constraints on power and thus weakens democracy itself.

Emergency powers, and their abuse, have been pointed out as the Achilles' heel of Latin American constitutionalism (Loveman 1993). But they are a means of saving democracy from a threat, however well or ill designed (Ferejohn and Pasquino 2004), not a case of authoritarian constitutionalism. Colombia is a case in point. After a relatively brief period of military rule, Colombia returned to a "restricted democracy" in 1958 in which the two main parties agreed to alternate in the presidency and to share all positions of power equally for sixteen years (the *Frente Nacional*) but that also left wide portions of Colombian society underrepresented (Bejarano and

Pizarro 2005). The forgotten grassroots level was prey to a dynamic of an increasingly complex spiral of violence that had been developing for decades. To deal with threats, the declaration of a state of emergency became the institutionally preferred option used by Colombian governments until 1991. In fact, of the 42 years between 1949 and 1991, Colombia spent thirty five (83 percent of that time) under a "state of exception" (Uprimny 2006). Presidential declarations of a "state of exception", not only implied the delegation of legislative powers to the executive but also limited the scope of civil rights and expanded the military jurisdiction. The "tool" of the declaration of emergency proved very flexible given that the reasons for declaring a state of exception were not always a clear challenge to internal security, but rather some social protests such as student or labor movements (Perdomo 2012), and the Supreme Court did not generally restrict the government (e.g. Ariza, Cammaert, and Iturralde 1997; García Villegas and Uprimny 2005). In this case, constraints on power are weakened but to face a threat to democracy, thus our clarification that emergency powers are not an instance of authoritarian constitutionalism.[16]

III. Discussion

To finish, using the conceptual framework that we propose, we want to point at some areas of that require deeper discussion. The first is related to regime type. Our conceptual map rests on the possibility of unambiguously classifying dictatorships and democracies, which can be done most of the time, but of course there are some borderline cases and countries and periods within countries that fall in gray areas that are difficult to classify and where the phenomenon of authoritarian constitutionalism may be more consequential. Further analysis combining insights

[16] Colombia from 1946 to 1958 offers an interesting case for studying transitions to and from some of the categories proposed in our framework, exploring, among other things, the gradation between categories that we present (by necessity) in a binary fashion (see Castillo Sánchez 2017),

from the literature on so-called hybrid regimes (Levitsky and Way 2010; Schedler 2013) and constitutionalism is required.

The second issue is relative to the empirical assessment of whether authoritarian constitutionalism is present in a country or not. As is evident from our examples, the extent to which the law constrains under authoritarian regimes can vary depending on the issue-area (this of course is also the case in democracies). Why certain institutions are able to effectively constrain power in authoritarian contexts, while others are not, is a question that needs further research. In general, we can hypothesize that the more the issue-area unifies the diverse interests and values present in the authoritarian regimes' elite the less the regime allows institutions to constrain it: in Mexico or Chile the Supreme Court did not constrain the regimes but the non-reelection clause in Mexico and the Constitutional Tribunal in Chile did limit them. Nevertheless, more research is required on the determinants of the efficacy of institutional constraints in these settings. Whether constitutionalism is present in an authoritarian country may depend on a series of observable conditions, such as the number and type of issue-areas where institutional constraints are, the interests involved in those areas, the structure of the ruling network, and the like.

Thirdly, as briefly noted before, it is also important to study the regime dynamics since institutional limits under authoritarianism may strengthen the regime making it last longer, or weaken it facilitating the transition to democracy. In other words, some institutional constraints may be a source of stability for the authoritarian regime, such as the prohibition of executive reelection arguably was in Mexico, while others may undermine the regime, as the Constitutional Tribunal did in Chile. This does not imply that the former did not have normative advantages since by limiting power within the authoritarian regime may make it less prone to extreme abuses (a kind of moderate authoritarianism). Other paths to and from other cells within Table 1 also

raise interesting hypotesis. For instance, as mentioned above, a worrisome trend seems to be occurring in cases where abusive constitutionalism moves towards constitutional authoritarianism (as in the case of Venezuela) or authoritarian constitutionalism. What explains these dynamics that are also present arguably in Hungary, Poland, and within Latin America in Brazil or Nicaragua?

The final, perhaps deeper, issue is about the role that the law or the institutions are playing in constraining the authoritarian regime. How can we know for sure that they are playing a causal role in motivating a restricted behavior on behalf of authoritarian leaders? What other factors are necessary for such constraints to be effective? In Chile the autonomy and real power of each military branch within the armed forces seems to have been the engine behind the enforcement of the rules established in the Constitution of 1980 (Barros, 2002). In Mexico, in contrast, the hegemonic-party system of the PRI developed a mechanism of rotation of all positions of power that was behind the enforcement of the non-reelection clause established in Article 83. The definition and sources of the efficacy of constitutions (Pozas-Loyo 2012) is a pending topic not only in authoritarian regimes (Ginsburg and Huq 2016)

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