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The Constitutional Legitimation of Authoritarian Regimes – A Comparative Analysis of Apartheid South Africa and Communist Hungary

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Abstract

This paper studies the use of constitutional legitimation strategies in authoritarian regimes. The introduction analyses constitutional democracy through David Beetham's concept of legitimate authority. Beetham considers that an authority is legitimate if three conditions are gathered: the existence of a written rule, a spread feeling of fairness and the explicit consent to the creation of legitimate authority. I argue that a transposition in the field of constitutional democracy gives rise to the concept of constitutional legitimation – namely the use of constitutional instruments to support the existence of a democratic fiction in a given society. Conceptually, I argue that constitutional legitimation strategies can be equally used by authoritarian regimes to compensate the lack of legitimacy of their policies.

The following sections are dedicated to the case studies of apartheid South Africa and communist Hungary. The two authoritarian systems differed in almost everything, but they seemed to give an equal importance to constitutional legitimation. The comparative work focuses on three aspects. Section two studies how the constitutional design of the two authoritarian constitutions ensured a control of the electoral outcome. Section three focuses on how a specific constitutional design gave the authoritarian rulers a total control on the political institutions. It challenges the notion that authoritarian constitutions are barely more than shame constitutions. Section four looks at constitutional legitimation and the creation of channel of subordination. More precisely, it looks at the role of the judiciary (South Africa) and social organizations (Hungary) in the legitimation of the authoritarian policies.

Keywords

Authoritarian Constitutions – Constitutional Legitimation – Apartheid South Africa – Communist Hungary

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"The unexamined past is a dangerous commodity that sooner or later encroaches on the present"[1]

Introduction – Constitutional Legitimation as a Fiction

A fiction is construction of human brain. It imposes itself as social practice because a belief in its existence is shared by a large group of individuals. If a fiction is socially accepted, individuals can go beyond their state of nature. They can impose decision to a group of individuals without relying on their natural capacities but thanks to the existence of the fiction. Fictions change the relation of a group to authority. In a state of nature, an individual can use his or her *power* over the others. The most powerful – often the strongest – will win and will impose a decision to the members of the group. In a state of fiction, it is not necessarily the most powerful who will lead a group, but the individual who can claim to have a *legitimate authority* over the others. Fictions also change the scope of influence of authority. The scientific community considers that power alone can have an impact on a group of maximum 150 individuals. However, legitimate authority allows an individual or group of individuals to rule over a group of hundreds, thousands or millions of individuals. It is what political systems are all about: a shared belief that a person or a group of persons can rule over a country.

The source of the legitimate authority evolved throughout the history of humankind. For millennials, legitimate authority came from another fiction, religion. Kings and emperor could rule over kingdom and empires because they were the only legitimate authority according the gods first and god after. Progressively, the population of a given territory replaced the gods. Another model imposed itself worldwide: the source of legitimate authority shifted from above to beyond, modern democracy appeared. Rulers could not pretend to rule over a population because of their religious prestige, but because of their representativeness. In modern democratic states, rulers are the temporary bearers of exceptional powers. Modern democracy seems to be quite successful at the moment. But what makes democracy a more efficient fiction than theocracy or authoritarianism?

David Beetham explains that a power is legitimate – and so that legitimate authority emerges – when three conditions are gathered:

> Power can be said to be legitimate where it does not breach established rules; where its acquisition and exercise are normatively validated in terms of socially accepted beliefs about rightful authorization and due performance; and where it is confirmed through appropriate acts of recognition and acknowledgment.[2]

The first condition for the recognition of legitimate authority is the existence of a written rule. A written rule allows the rulers to refer to the origin of their power in a text. At the same time, a written rule provides certainty and security to the subordinates on the decision taken by the rulers. The second condition is the necessity of fairness, or what David Beetham refers as being the "socially accepted beliefs". Fairness can clash with a written rule and can overtake a written rule. If the subordinates consider that a rule is unfair, and even if this rule is written, they will contest the legitimacy of the rulers' authority to act in the name of the written rule. The third condition is the explicit consent to the creation of legitimate authority. Because legitimate authority is not the product of the state of nature but is a human fiction, a renewal of the subordinates' consent is necessary. Even if legitimate rulers act in the name of a fair and written rule, the subordinates must have the opportunity to challenge their position of power.[3]

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[1] Rudolf L Tökés, *Hungary's Negotiated Revolution : Economic Reform, Social Change, and Political Succession, 1957-1990* (Cambridge University Press 1996) 117.

[2] David Beetham, *The Legitimation of Power* (2nd Edition., Palgrave Macmillan 2013) xiv.

Written rule, fairness and explicit consent are, according to Beetham, cumulative conditions for the creation of legitimate authority. If these three components are present, then power is legitimate, and the legitimate authority of the rulers emerge. By justifying their action on legitimate authority instead of natural power, rulers can claim obedience and cooperation from a larger group of subordinates. If one these three conditions is missing, the authority of the rulers can be contested.

The transposition of David Beetham's analysis of legitimate authority to the field of constitutional studies gives rise to the concept of *constitutional legitimation*. Constitutional legitimation consists in the use of constitutional instruments to support the existence of a fiction of democracy in a given society.

Long lasting constitutional democracies rely heavily on the mechanisms of acceptation developed by David Beetham. One can even consider that written rule, fairness and explicit consent are the conditions of existence of constitutional democracies. A constitution is the written rule which frames the power of the rulers and whose general content is known by both the institutions and the population.[4] The same constitution pursues an objective of fairness and is supposed to act in accordance with the population's general interest. Several constitutional mechanisms such as the unity of the constituent power or the delegation of power reinforced the shared belief that a constitution is fair and is an incontestable instrument. The organization of regular elections represents the last aspect of constitutional legitimation. Any constitution foresees general principles on elections and political rights. The organisation of periodical elections, in application of the constitutional rules, renews the explicit consent of the subordinates to the creation of legitimate authority. Thanks to the process of constitutional legitimation, constitutional democracies are the perfect case study of legitimate authorities. Rulers can use the constitution, and they often do, to legitimate their decisions over large groups of individuals.

Constitutional legitimation acts on the legitimation of a political regime at two moments: during the adoption of the constitution and during the implementation of the constitution. That makes it an even more powerful source of legitimate authority. With the adoption of the constitution, political leaders create an originating consent of the group of individuals in the existence of the political regime.[5] The group of individuals is giving a possibility to explicitly agree on the type of political regime either thanks to a democratic participation in the constitution-making process or thanks to a referendum. Originating consent does not suffice to justify a lasting legitimate authority. Constitutional legitimation also comes into play during the implementation of the constitution. The implementation of constitutional instruments such as elections or checks and balances, adds a diffuse support to the original consent of the groups of individuals. Thanks to the diffuse support, the regime becomes self-justificatory.[6] Constitutional legitimation solves the issue of the lack of explicit consent of future generations to the existence of the political regime. If future generations want to contest the authority of the rulers, they either play by the rules, and reform the system, or they reject the rules and provoke a revolution. And even in the latter case, revolutionaries must propose an alternative to the former system which respects the basic principles of legitimate authority. It is indeed unlikely that a regime change evolves does not end up in a new mechanism of constitutional legitimation.

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[3] David Beetham explains in the details these conditions ibid 16–25.

[4] The United Kingdom and New Zealand are the only exception to the existence of a written constitution. Nevertheless, these countries' democratic systems are based on a series of written rules which fulfill the same objective of constitutional legitimation.

[5] The concept of originating support is from J. Rawls and S. Freeman based on Locke John Rawls and Samuel Richard Freeman, *Lectures on the History of Political Philosophy* (Belknap Press of Harvard University Press 2007) 124.

[6] The concept of diffuse support is from Easton who differentiates between vertical diffuse support (the support of the population for the constitutional order) and the horizontal diffuse support (the support of the institutions for the constitutional order). See his analysis in David Easton, 'A Re-Assessment of the Concept of Political Support' (1975) 5 British Journal of Political Science 435, 444–453.

Even if constitutional democracies are the best case-study for constitutional legitimation, they do not have the monopoly of constitutions. Authoritarian regimes seem to give importance to constitutions too. There is currently no authoritarian regime across the world which evolve outside a constitutional framework. This trend was true in past authoritarian regimes such as Hungary and South-Africa. In Hungary, communism evolved within the framework of the 1949 Constitution. In South-Africa, it was not one but two constitutions which framed the apartheid regime. Could it be that these authoritarian regimes followed the same objective of constitutional legitimation than constitutional democracies?

In the introduction of the edited volume *Constitutions in authoritarian regimes*, Tom Ginsburg and Alberto Simpser ask the following question: "If authoritarian rulers are above the law, why and how can constitutions make a difference?".[7] Communism and apartheid, as political philosophies, did not need a constitution to be effective. The communist theory of state considered that any constitution was a legacy of the bourgeois and capitalist state.[8] Apartheid was a state policy of the South African state before the adoption of a constitutional framework.[9] Yet in Hungary, the communist adopted a constitution in 1949, and in South Africa, the National Party adopted a first constitution in 1956 and a second constitution in 1983. Why did communist Hungary and South Africa apartheid need a constitution is the first place? Several reasons can explain this choice. Even in an authoritarian setting, a constitution can serve as a binding statement of a people's aspiration for themselves as a nation".[10] In that case the constitution would be an instrument of propaganda as another, but instead of promoting liberal democracies, it would endorse the key political principles of the authoritarian regimes. Adam Przeworski explains that, in Poland, the constitution-making process set in the marble the communist's accession to power.[11] That was certainly true for Hungary. As the preamble stated, the 1949 Constitution embodies "the fundamental changes effected in the economic and social structure of our country".[12] In South Africa, the preamble of the 1983 Constitution referred to the segregationist policies of the regime.[13] Anchoring communist or segregationist values in the construction created a precommitment for future generations.[14] Thanks to the rigidity and the aspirational feature of the constitution, Hungarian and South African authoritarian rulers could anchor political choices in the long-run and could shape the political system of the country for generations.

If the why is conceivable, the question of the how remains a mystery. How can the implementation of the constitution make a difference for the practice of authoritarian powers? Hungarian and South African authoritarian rulers did not only adopt a constitution, they also organized periodical elections, and adopted constitutional amendments on a regular basis. Both operations have a political cost, even for authoritarian regimes. Amending the constitution can be an opportunity for minority groups within the authoritarian rulers to contest the choices of the dominant political line. Despite this risk, the Hungarian communist constitution was amended three times between 1972 and 1987, whereas the South African constitution was amended almost every year from 1983 to 1989. Organizing periodical elections might can encourage political opposition to take up actions against the regime or to denounce an ongoing democratic farce. Yet, in Hungary, communist rulers organized parliamentary elections and local elections every four years. In apartheid South Africa, the parliament and local councils were renewed nine times between 1961 and 1989.

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[7] Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 2.

[8] The relation between the advent of the proletarian revolution and the continuity of the State changed from Marx to Stalin, cf K Stoyanovitch, *La Philosophie Du Droit En URSS (1917-1953)* (LGDJ 1965) 150–200.

[9] Apartheid was based on an "imprecise racial classification" and a "laissez-faire segregation", cf George M Fredrickson, *White Supremacy: A Comparative Study of American and South African History* (Oxford University Press 1981) 269.

[10] Walter F Murphy, 'Constitutions, Constitutionalism, and Democracy' in Douglas Greenberg, Stanley N Katz and Steven C Wheatley, *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press 1993) 8.

[11] Adam Przeworski, 'Ruling Against Rules' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in authoritarian regimes* (Cambridge University Press 2014) 28–32.

[12] Ferenc Horkay Hörcher and Thomas Lorman (eds), 'Appendix XIII: The Constitution of the Hungarian People's Republic (1949)', *A history of the Hungarian constitution : law, government and political culture in central Europe* (IB Tauris 2018) 312.

[13] Even if the reference to segregationism was less explicit, the Constitution aimed at providing for 'elected and responsible forms of governments which is best suited to the traditions, history and circumstances of our land' Republic of South Africa Constitution Act 1983 (Preamble).

[14] Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (1988).

This paper is an attempt to systemize the use of constitutional legitimation in the authoritarian settings of South Africa and Hungary. As already said, constitutional legitimation compensates a lack of legitimacy (or create legitimacy) thanks to a combination of three mechanisms: written rule, periodical elections and general interest. In South African and Hungarian authoritarianisms, the written rule was present and periodical elections were organised. Only the last aspect was lacking but it was sufficient, as Davide Beetham explains, to consider these regimes as illegitimate. This paper argues that the implementation of the written rule and the organization of periodical elections were an attempt to compensate the lack of legitimate authority. In the context of authoritarian regimes, constitutional legitimation becomes a quest for legitimate power: authoritarian rulers use constitutional instruments to overcome their illegitimate power and to convince their subordinates that they have the authority to act in the name of the *intérêt général*.

This paper explores how authoritarian rulers use constitutional legitimation in three directions: the control of the electoral outcome (section 1), the control of the legislative making-process (section 2) and the creation of channels of subordination (section 3). The systematic comparison of South African and Hungarian authoritarianisms brought an additional understanding on the use of constitutional legitimation by authoritarian rulers.

Section 1 – Constitutional Legitimation and the Control of the Electoral outcome

In Hungary and South Africa, authoritarian rulers did not access to power after an unconstitutional change of government; they run and won elections. In South Africa, the National Party won a short majority of the seats after the 1948 parliamentary elections (but not a majority of the votes). In Hungary, after the elections of 1947, the communists did not manage to secure an absolute majority. The communists governed for two years in a broad parliamentary coalition.[15] In 1949, after criminalizing the opposition forces and dissolving its political partners in a sham coalition,[16] the communists controlled 97,1% of the parliamentary seats.[17]

The arrival of apartheid rulers and communist rulers created a paradoxical situation. Elections were still organized on a periodical basis, but the authoritarian rulers were ensured of winning a majority of the parliamentary seats. The victory of the authoritarian rulers was not a result of fraud or manipulation of the electoral results as it can be the case in other dictatorships. Hungarian and South African rulers accepted to play the game of elections because they were the one drafting the rules: the constitutional system was designed to guarantee an electoral victory of the authoritarian party.

The two authoritarian constitutions pursued the same objective but followed a different strategy. The 1949 Hungarian Constitution set up non-pluralist universal elections. In communist Hungary, any

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[15] The coalition contained the communists (20,22%), the smallholders (16,5%), the socio-democrats (16,30%) and the National Peasants (8,31%). In total, the coalition obtained more than 65% of the Parliament Andrew Felkay, *Hungary and the USSR, 1956-1988 : Kádár's Political Leadership* (Greenwood Press 1989).

[16] Balázs Fekete, 'Law I of 1946 and Law XX of 1949: Continuity or Discontinuity in Traditional Hungarian Constitutionalism?' in Ferenc Horkay Hörcher and Thomas Lorman (eds), *A history of the Hungarian constitution : law, government and political culture in central Europe* (IB Tauris 2018) 195–196.

[17] '1949 Hungarian Parliamentary Election', , *Wikipedia* (2019) https://en.wikipedia.org/w/index.php?title=1949_Hungarian_parliamentary_election&oldid=876711828 accessed 30 May 2019.

Hungarian citizens had a right to vote (universal) but could cast his/her vote only for the communist party (non-pluralist). In South Africa, the electoral system was based on pluralistic segregated elections. Under apartheid, only a minority of South African citizens could vote (segregated) but they were free to choose their political party (pluralistic). The elections ended up in the formation of spurious majorities which were latter used by the authoritarian rulers as a legitimization of their policies.

Hungary: Non-Pluralist Universal Elections

In Hungary, elections were a political farce since only communist candidates could compete for electoral seats after getting the explicit authorisation of the communist party. Despite this grotesque flaw, constitutional drafters put some efforts in designing a proper electoral system. In the original wording of the 1949 Constitution, Hungary was a People's Republic (article 1, 1949 Co. as of 1949) embodied in a sovereign parliament (article 10, 1949 Co. as of 1949). Equal vote and secrecy of the ballot were present in the 1949 Constitution since its adoption (article 62, 1949 Co. as of 1949) and confirmed throughout the constitutional amendments (article 71(1), 1949 Co. as of 1988).[18] Only the principle of universal suffrage and direct vote were later introduced.

Universal suffrage was a principle incompatible with the proletarian revolution and the installation of communism. Universal suffrage signifies that "all human beings have the right to vote and to stand for elections".[19] Communism theory stands against this principle since it divided the population in two groups: the unified and homogenous working-class and the non-workers, assimilated to the enemies of the proletarian revolution. The original wording of the 1949 Constitution followed this division and excluded all "enemies of the working people" from the right to vote (article 64, 1949 Co. as of 1949). It was only after a series of constitutional amendments that universal suffrage was implemented. The various amendments of the 1949 Constitution slowly changed the logic of exclusion and brought the regulation of franchise closer to international standards. The constitutional amendment of 1972 opted for a formula similar to the standards cases of exclusion of the franchise and limited the cases of exclusion to the cases prescribed by law (article 72(1), 1949 Co. as of 1972).[20] From this date, the regime of exclusion became less and less severe. Progressively, the legislation excluded from the limitation of franchise the cases of severe mental disability, court decision or prison sentence,[21] as well as police surveillance.[22] Throughout time, communist authorities gave up the orthodox vision of restrictive suffrage and accepted the universality of the vote.

The principle of direct vote became a reality of the Hungarian only after an amendment of the 1949 Constitution. According to international standards, direct suffrage includes two cumulative components: the direct election of at least one of the chambers of the parliament and the organization of direct elections at the local level.[23] The direct election of the communist Parliament was a constitutional principle since the adoption of the 1949 Constitution (article 62(1), 1949 Co. as of 1949) and was confirmed by the constitutional amendments (article 20(1), 1949 Co. as of 1988). The direct elections of local councillors became a constitutional principle only in 1972. Before that, the local councillors were elected on a joint slate cast. The electoral law of 1967 corrected partially this contradiction and introduced individual election districts.[24] The constitutional amendment of 1972 amended the Constitution and confirmed the uniformization of the modality of vote between members of parliament and local councillors.[25] This uniformization remained unchanged until the beginning of the democratic transition (article 71(1), 1949 Co. as of 1988).

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[18] Even if, in practice, the secrecy of the ballot must be nuanced because of the close monitoring of the secret police.

[19] Venice Commission, 'Code of Good Practice in Electoral Matters' (2018) CDL-AD(2002)023rev2-cor 5.

[20] '1972. Évi I. Törvény' <https://hu.wikisource.org/wiki/1972._%C3%A9vi_I._t%C3%B6rv%C3%A9ny> accessed 23 May 2019.

[21] Gyula Fonyó, 'Chapter II - Elections: Law, System and Procedure' in Géza Kilényi and Vanda Lamm (eds), *Parliamentarism and government in a one-Party system* (Akad Kiadó 1988) 35.

[22] '1983. Évi III. Törvény' <http://www.jogiportal.hu/index.php?id=xvc9n7c243p3kdyp9&state=19891030&menu=view> accessed 28 May 2019.

[23] Venice Commission (n 19) 22.

At the dawn of the democratic transition, the Hungarian constitutional system gave some guarantees for the organization of elections in terms of universality of the vote and direct suffrage as well as equality and secrecy of the ballot. Yet under communism, freedom of suffrage never became a reality. According to international standards, freedom of suffrage implies electoral competition and the freedom to choose a political programme over another, [26] two features of the vote strictly incompatible with the political monopoly of the Hungarian Socialist Workers Party (HSWP). The free formulation of the voters' opinion was hampered in two ways. First, the Constitution foresaw an indirect electoral monopoly of the communist party. The organ in charge of the nomination of the candidates and their dismissal was the People's Patriotic Front (article 71(3), 1949 Co. as of 1988), an organism directly controlled by the communist rulers. Second, the communist party was never keen in admitting a diversity of opinion within its ranks. For a long time, voters could only vote for one candidate per district. The only possibility of contestation was the abstention. Progressively, the Constitution generalized the nomination of multiple candidates in single-member constituencies. Multiple nomination did not lessen the control of the HSWP as the results to the latest communist elections illustrated.[27]

The communist electoral system was a paradoxical case: why was it so important for the HSWP to guarantee in the constitution key aspects of the vote whilst forbidding the emergence of any political opposition? As David Beetham explains, legitimate authority emerges when individuals are given the possibility to renew their confidence in their leaders, ideally via elections.[28] One could conclude that the organization of elections was key for the communist rulers because it reinforced their political capital in the absence of a strong and cementing ideology. The lack of diffuse ideology forced the communist party to look for another legitimation mechanism. The electoral game was perfect for that. Indeed, the more people played the game, the more legitimate the party would feel legitimate to implement its policies.[29] In communist Hungary, elections did not aim at changing the political game, they served as a legitimation mechanism for the authoritarian rulers.

South Africa: Pluralist Segregated Suffrage

The adoption of the 1983 Constitution was an unprecedent change in South Africa electoral history. The suffrage remained restricted since the Black population – which represented the majority of the South

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[24] The new electoral law of 1967 was adopted after the proposition of J. Kadar formulated during the 9th Congress of the HSWP from November 28 to December 3, 1966 Andrew Felkay, *Hungary and the USSR, 1956-1988 : Kádár's Political Leadership* (Greenwood Press 1989) 186.

[25] '1972. Évi I. Törvény' (n 20).

[26] Freedom of suffrage includes "(the) free formulation of the elector's opinion, and free expression of this opinion, i.e. freedom of voting procedure and accurate assessment of the result" Venice Commission (n 19) 18.

[27] The HSWP won 98,8% of the votes in the single-member constituencies. '1985 Hungarian Parliamentary Election', *Wikipedia* (2019) https://en.wikipedia.org/w/index.php?title=1985_Hungarian_parliamentary_election&oldid=902977331 accessed 10 July 2019.

[28] Beetham (n 2) xiv.

[29] The communist rulers could claim a turnout regularly superior to 90%. The first free and fair elections of 1990 had a turnout of 65% whereas the last one organized under communist rule had a turnout of 93,5%'1985 Hungarian Parliamentary Election',*Wikipedia,* (2019) https://en.wikipedia.org/w/index.php?title=1985_Hungarian_parliamentary_election&oldid= 876712052 accessed 18 March 2019; '1990 Hungarian Parliamentary Election', *Wikipedia* (2019) https://en.wikipedia.org/w/index.php?title=1990_Hungarian_parliamentary_election&oldid=902977423 accessed 12 August 2019.

African population – obtained political rights only in 1993. Yet for the first time, the 1983 Constitution granted political rights to the Coloured and the Indian populations and the country moved away from a white-only ballot. The NP argued that the adoption of a new constitution was a proof of democratization of South African institutions. They especially insisted on the unprecedent political representation of non-white population groups. Numerically speaking, this argumentation was valid: the abandon of the white-only ballot decreased the percentage of representation of the white population in Parliament. The Parliament grew to 308 members (as opposed to the 177 members of the previous constitution), white representation decreased from 100% to 58% of the seats whereas non-white representation increased from 0% to 42% of the seats.[30] In the new political system of the 1983 Constitution, the loss of representation for the white minority was genuine.

Contrary to the communist ballot in Hungary, the white vote under Apartheid was pluralistic. The National Party had to share the 58% of the white representation with other white political parties such as the Conservative Party (more nationalist) and the Progressive Federal Party (more central). The political cost of organizing elections under the new electoral system was then much greater than in communist Hungary since the NP could lose the control of the Parliament. A closer reading at the constitutional text reveals that the design of the electoral system hampered any political alternative.

Under apartheid, the 1983 Constitution transplanted the logic “separate but equal” to the elections. The Parliament was divided in three houses: a White House, the House of Assembly, a Coloured House, the House of Representatives and an Indian House, the House of Delegates. The constitution did not explicitly foresee racial political representation. Sections 41, 42 and 43 described the composition of the houses but on pure procedural grounds. The reference to segregationist political representation only appeared in the definition section of the constitution.[31] The vote reflected community preferences, and not national preferences. National representation, apartheid rulers argued, was not a matter of majority or minority. National representation was a matter of equality and homogeneity because the population groups had an equal access to legislative representation.

If access to political responsibilities was guaranteed to population groups, the composition of the different houses largely favoured the White minority. The number of representatives in the Houses reflected the size of the population groups. With the exclusion of the Black population from the right to vote, the White population was the second most important population group of the country.[32] The House of Assembly was then the most important of the three houses with 178 White members. The composition of the other houses followed a strict numerical logic. Since the Coloured population was twice less numerous than the white one, the House of Representatives had 85 Coloured members. And since the House of Delegate was four times more than the white one, the House of Delegates had 45 Indian members. Under the 1983 Constitution, the political weight of the white population remained highly disproportionate.

The 1983 Constitution coupled the racial criteria of representation with territorial representation. Each province sent to each house a number of members of Parliament proportional to its racial composition after a subtraction of the Native population. Cape of Good Hope – which was, according to the 1960 census, the most coloured province –[33] provided the majority of the House of Representatives (article 42, 1983 Co. as of 1988). Transvaal contained, proportionally, the highest number of white population and provided the majority of the House of Assembly's members (article 41, 1983 Co. as of 1988). Finally, the Natal province, where the majority of Indian leaved, provided for a majority of the House of Delegates' members (article 43, 1983 Co. as of 1988).

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[30] Newell M. Stultz, ‘Interpreting Constitutional Change in South Africa’ (1984) 22 The Journal of Modern African Studies 353, 368.

[31] Section 100(i)(x) defines population groups as the “White persons, the Coloured persons or the Indians, and in relation to (a) a House, the population group of which the members of the House in question are members”.

[32] According to the 1960 census, the Whites represented 19,3% of the population, the Coloured 9,4% and the Indians 3%, ‘Demographics of South Africa’, *Wikipedia* (2018) https://en.wikipedia.org/w/index.php?title=Demographics_of_South_Africa&oldid=831183769 accessed 3 April 2018.

[33] Census 1960 ‘Demographics of South Africa’, *Wikipedia* (2018) https://en.wikipedia.org/w/index.php?title=Demographics_of_South_Africa&oldid=831183769 accessed 3 April 2018.

This territorial criterion was a fantastic gerrymandering tool in the hands of the NP. The gerrymandering strategy was the result of subtle constitutional twist. The 1983 Constitution created a specific delimitation commission (article 48, 1983 Co. as of 1988). It also foresaw a transparent rule for the calculation of the quota of district representation (article 49(2), 1983 Co. as of 1988), and enacted a list of specific criteria to respect in the redefinition of the electoral districts (article 49(3), 1983 Co. as of 1988). Yet these safeguards only gave the appearance of independence and impartiality. The delimitation criteria allowed the NP to redefine electoral districts in accordance with its electoral ambition. The delimitation commission could decrease the quota of district representation down to 30% for every electoral division within an area of 25000 square kilometres or more. The ruling party could redraft strategic districts and could have one of its members elected by one third less than the required votes. The quota could even decrease to 45% in application of specific criteria such as the density of population but also more flexible ones such as the community or diversity of interests and, no surprise, physical features. Finally, the delimitation commission was not independent since it was composed of judges from the Supreme Court all appointed by the State President.[34]

The 1983 Constitution did not only confirm the political supremacy of the white minority, it also created a division among the non-white political forces. The 1983 Constitution impeached the formation of transracial and national coalitions because of the territorial and racial representations. The non-White houses faced three divisions: a division between the political agenda of the different population groups, a more general opposition between Coloured's interests and Indian's interests and a lack of solidarity of the two groups vis-à-vis the Black population.[35] During the first terms of the tricameral parliament, mutual mistrust prevailed among the non-white political groups. [36] Some political groups also collaborated extensively with the NP and opposed numerous time the Progressive Federal Party which was the only White non-segregationist party. Instead of aggregating the non-White political forces, the tricameral Parliament managed to split them on the basis of racial and political interests.

The NP claimed that the 1983 Constitution would democratize South African institutions and would foster the representation of non-white populations. Nothing of that appears from the electoral rules of the Constitution. The Black majority remained excluded from the political game, the weight of non-White political representation never overpassed the White political representation in Parliament, and the 1983 Constitution disunited the non-White political groups in their fights against apartheid. Some contemporary authors and believed in a better democratic future for the country.[37] The United Nations was not fool and refused to give any legitimacy to an instrument which only aimed at "dividing the unity of the oppressed people of South Africa and fomenting internal conflict".[38] The NP claimed that the

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[34] On the independence of the judiciary, see in this chapter, Section III, §3.2.

[35] The Coloured parties were divided between the Labour Party, the Freedom Party and the People's Congress Party. The Labour Party had a clear anti-apartheid program and became later a leading movement in recognition of political rights for the Natives. The Freedom Party defended a Coloured nationalism. The People's Congress Party, created only four months before the elections, had an anti-native and anti-communist agenda, and subscribed to an exclusion of the Natives from political responsibilities. The Indian groups were facing similar divisions Behrens Gerd, 'The Other Two Houses - the First Five Years of the Houses of Representatives and Delegates' (Faculty of Social Sciences and Humanities 1989) 23–39 and 44 (for the Native parties), 55-65 (for the Indian parties).

[36] According to the same author: "When asked to choose a national leader of their liking, only 1,9 percent of the Coloured and a negligible proportion of Indians named an African. While almost one in three Coloured and more than half of the Indian respondents expected a bright future under a white-dominated government, only roughly 5,5 percent of both groups held the same evaluation in case of a government dominated by Africans", ibid 18.

[37] Dion A Basson, 'Representation in South African Constitutional Law' (1984) 101 South African Law Journal 142, 142; Newell M. Stultz (n 30) 356.

[38] Resolution 554 (1984) 1984 [S/RES/554 (1984)] 3.

1983 Constitution would democratize South African institutions and would foster the representation of non-white populations. In fact, the objective of the constitutional drafters was constitutional legitimation. The NP, as did the HSWP in Hungary, drafted a constitutional system in order to legitimize an illegitimate political power.

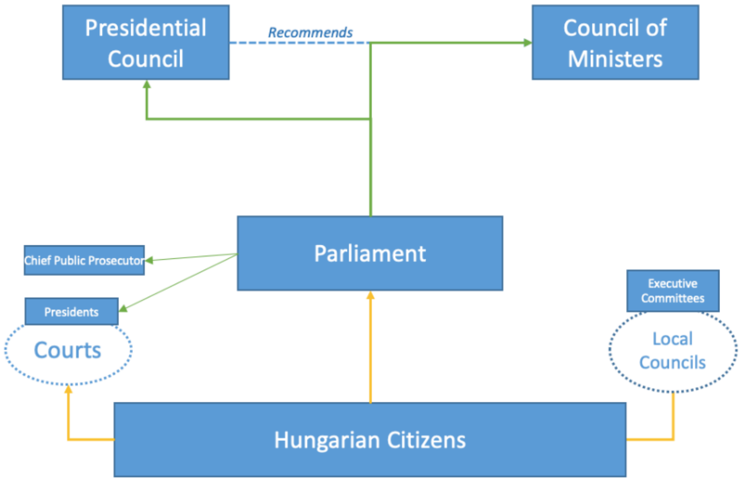
Section 2 – Constitutional Legitimation and the Control of the Institutions

In both Hungary and South Africa, the constitutions foresaw a specific constitutional design which gave the authoritarian rulers a total control on the political institutions. Sham, or the 'ability to deceive', is a feature often attached to constitutions in authoritarian regimes: the constitution would portray a false reality of the institutional and political realities of the country.[39] The reality of the Hungarian and South African constitutional systems was much complex than this. The institutional design of both authoritarian constitutions could not be characterized only by their 'ability to deceive'. Authoritarian rulers pay a lot of attention to respect the institutional framework of the constitution, and even if some cases, to respect it by the book. They used the institutional design to justify their concentration of powers.

Hungary: The Two Operative Governments

As figure 1 summarizes, a first reading of the 1949 Constitution as of 1949 let appear an institutional structure which is not without recalling classic parliamentary regimes:

Figure 1:The Institutional Design of the 1949 Constitution



The Hungarian citizens elected a mono-cameral Parliament every four years which exercised "all the rights deriving from the sovereignty of the people and determines the organization, direction, and conditions of government" (article 19, 1949 Co. as of 1988). The executive power was a bicephalous structure with a Presidential Council acting like a collegial head of state, and a Council of Ministers which was the governmental body. Both the Presidential Council and the Council of Ministers were responsible before the Parliament which appointed them and could dismissed them at any moment

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[39] Murphy (n 10) 8.

(articles 29-40, 1949 Co. as of 1988). The Parliament also retained the exclusive power of appointing the Presidents of the Supreme Court and the High Courts (article 39, 1949 Co. as of 1949), the Chief Public Prosecutor (article 52, 1949 Co. as 1949) and a Constitutional Council (article 21(3), 1949 Co. as of 1988).[40]

According to a strict reading of the Constitution, the Parliament had the exclusive authority to create legislation, determine the state budget and decide the national economic plan. A more thorough analysis reveals that the true legislative actor of the 1949 Constitution was the Presidential Council. The Presidential Council capture the legislative power thanks to the scare number of regular parliamentary sessions foreseen in the Constitution. According to the 1949 Constitution, the Parliament had to meet "in regular sessions not less than twice a year" (article 22(1), 1949 Co. as of 1988). When the Parliament was not in session, the legislative power was delegated to the Presidential Council (article 30(5), 1949 Co. as of 1988) which was the same organ to decide on the convocation of the regular sessions (article 30(1)(b), 1949 Co. as of 1988). The central place of the Presidential Council led to a generalization of legislation by decrees, leaving the Parliament with a residual power on the approval of the budget and an exclusive power over constitutional matters only.[41] After the constitutional amendment of 1972, the Presidential Council could declare a serious threat to the security of the State and could established a Defence Council (article 31, 1949 Co. as of 1988). The Presidential Council also elected all the professional judges including the High Court Presidents previously elected by the Parliament (article 48 (3), 1949 Co. as of 1988). With these additional powers, the Presidential Council's powers seemed to overlook all the institutions, from the legislative to the judiciary powers.[42]

The reality of the Hungarian constitutional system did not match with the reality of political power. The communist institutional system was a schizophrenic system in which two realities coexisted. There was the reality of the text as just described and there was the reality of the practice of power as decided by the party programme. This double reality was materialized in what Richard Sakwa calls "two operative governments": a constitutional government coexisting with a party government.[43] The two operative governments was a constitutional convention until the constitutional amendment of 1972.[44] After the amendment, the 1949 Constitution explicitly referred to the HSWP as the leading force of the society (article 3, 1949 Co. as of 1988). However, as I will argue now, the 1949 Constitution was not only a sham. Communist rulers integrate it in their practice of power.

To understand how the implementation of the 1949 constitution made a difference of the HSWP, it is necessary to shed the light on the internal organization of the authoritarian party. The HSWP was organized around the principle of democratic centralism. Democratic centralism was an organizational principle based on "electiveness of all bodies of State authority from the lowest to the highest, the accountability of these bodies to the people, and the obligation of lower bodies to observe the decisions of higher ones".[45] The Party Congress was at the top of the decision-making process. It was the representative organs of the HSWP's member and was supposedly the proof of the democratic nature of the party. The Party Congress gathered 1200 communist delegates, either elected by the communist counties of the country or appointed because of their responsibilities in the party. Its main task was the adoption of the general programme of policies at an absolute majority.

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[40] The constitutional council was created by the constitutional amendment of 1983; The Constitutional Council was not a constitutional court but an organ of the Parliament. Thanks to the general power of constitutional check of the Parliament, constitutional council could control any legislation, quasi-legislation and even rulings of the Supreme Court. Despite a broad power of investigation, the Constitutional Council only had a power of recommendation and the ultimate organ of decision was the Parliament. '1983. Évi II. Törvény' https://hu.wikisource.org/wiki/1983._%C3%A9vi_II._t%C3%B6rv%C3%A9ny accessed 12 March 2019.

[41] Géza Kilényi, 'Chapter III - Parliament' in Géza Kilényi and Vanda Lamm (eds), *Parliamentarism and government in a one-party system* (Akad Kiadó 1988) 61.

[42] Albert Takács, 'Chapter IV - The Constitutional Status of the Presidential Council of the Hungarian People's Republic' in Géza Kilényi and Vanda Lamm (eds), *Parliamentarism and government in a one-party system* (Akad Kiadó 1988) 137–141.

[43] Richard Sakwa, *Soviet Politics : An Introduction* (Routledge 1989) 140.

[44] Adam Przeworski explains that almost all the countries under the influence of the USSR changed their constitution to explicity recognised the leading role of the communist party in the national politics, see Przeworski (n 11) 26–27.

[45] AM Prokhorov, *Great Soviet Encyclopedia*, vol 31 (Third edition, Macmillan 1982) 3.

The Party Congress also elected a Central Committee of around 120 members. The membership of the Central committee was heterogeneous and ranged ranging from the First secretary of the Central Committee to various ministers, directors of social organizations or skilled workers.[46] The Central Committee was the main legislative body of the Party in charge of the implementation of the party programme. It was not a permanent body. To ensure a continuity between its sessions, the Central Committee elected a Politburo, a body of thirteen members which could be assimilated to the executive organ of the HSWP. The Central Committee also elected a set of secretaries gathered in a Secretariat. Each secretary was responsible for monitoring key areas of the HSWP activities. The Secretariat was also the main organ in charge of the appointment of the numerous party positions. The most prominent secretary was the First Secretary of the Central Committee who was de facto the leader of the party and the leader of the country.

The internal organization of the HSWP was highly centralised, far from the perspective offered by democratic centralism. The structure of the HSWP consisted in several channels of command between the various organs[47] as well as a system of complex feedback loops.[48] The composition of the Central Committee, the Secretariat and the Politburo often overlapped. Before Kadar's dismissal in 1988, the Politburo contained five secretaries of the Central Committee out of thirteen members. Moreover, the Secretary General concentrated most of the powers. For example, even if the Central Committee was supposed to elect the Politburo, its election was often decided behind closed doors by the Secretary General. After the election of the Politburo election, the same Secretary General acted as its informal chair. Instead of a diffused and democratic decision-making process, the HSWP machinery created a monopolistic system with a First Secretary controlling the executive and the legislative strings of the party.

Despite the concentration of powers in the hand of the Secretary General, the other party organs had a specific role in the supervision of the State institutions. The communist constitutional system, via the reference made in article 3, consisted in an overlap of responsibilities between State functions and party functions. The Central Committee decided on the appointment of the key State functions but not only. The HSWP made sure that the key State functions were included in the decision-making process of the Party. For example, the President of the Presidential Council and the President of the Council of Ministers were members of both the Central Committee and the Politburo. The Central Committee included also five of the deputy presidents of the Council of Ministers as well as the major ministers.[49]

This overlap between State and party functions created two specific bureaucratic chains which were essential to safeguard the communist constitutional system. The first bureaucratic chain was a legislative block composed of the Parliament, the Central Committee and the Presidential Council. The key actor of the legislative block was the Central Committee which decided not only on the internal strategy of the party but also on the policies for the whole country. The Presidential Council acted as a monitoring agent for the count of the Central Committee. Thanks to its control over the legislative agenda, the Presidential Council could make sure that the decision of the Central Committee would be translated into a legislation. The second bureaucratic chain was an executive block composed of the Politburo and the Council of Ministers. The Politburo did not only monitor the implementation of the Central Committee's decisions. The Politburo also monitored the execution of the legislation within the Ministers and had an extensive control over the social organizations.

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[46] See the detail of the organization of the Central Committee in Mária Csanádi, *Party States and Their Legacies in Post-Communist Transformation* (Edward Elgar 1997) 336–339.

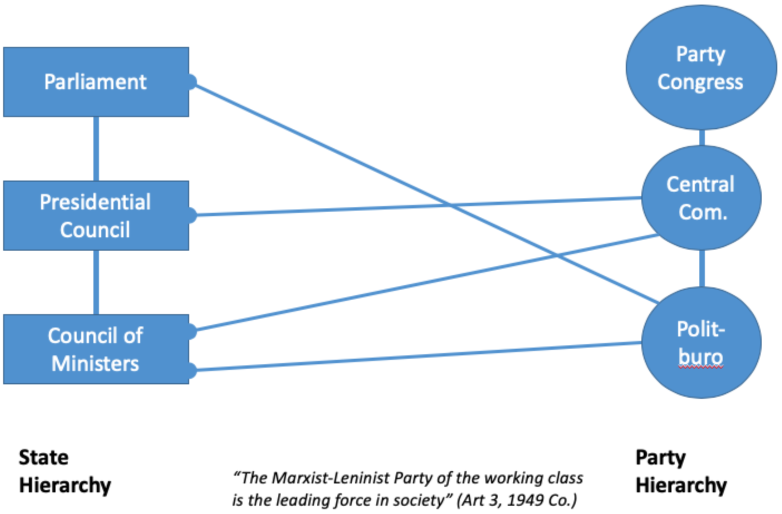
[47] Maria Csanádi identified 5 'interlinking threads' namely the cadre authority, the system of topic responsibilities, the area responsibilities and the party discipline ibid 28.

[48] ibid 28–37.

[49] ibid 336–339.

Figure 2 summarizes the relation between the HSWP bodies and the State institutions.[50]

Figure 2: The communist theory of the two operative governments



Under Hungarian communism, the HWSP dominated the legislative process. The party controlled both the composition of the institutions and the content of the Constitution. Neither the Parliament nor any other institutions were a place for political opposition. Yet, the implementation of the 1949 Constitution was a useful instrument for preserving the legitimacy of the regime. Foreseeing institutional relations detached from the control of the party was essential in the process of constitutional legitimation.[51] An independent institutional framework gave the appearance of "institutional stability, existence of a constitution, respect of legalism and reinforce the place of law in the relation between the State and the citizens".[52] The respect of legalism was only superficial since the HSWP was not bound by legal constraints. If the HSWP realized that its Party decision would clash with the Constitution or a prior legislation, it only had to amend the legislation. However, giving an appearance of legalism to authoritarian decisions gave a semblance of legitimacy to the authority of the communist rulers.

South Africa: Authoritarian Constitutional Design

The 1983 Constitution organized methodically the confiscation of powers and the supremacy of the NP on the political institutions. The NP's strategy was twofold: a concentration of powers in the hands of the State President and an election of the latter decided by the majoritarian party in the White house.

Figure 3 presents an overview of the process of election and dismissal of the State President.

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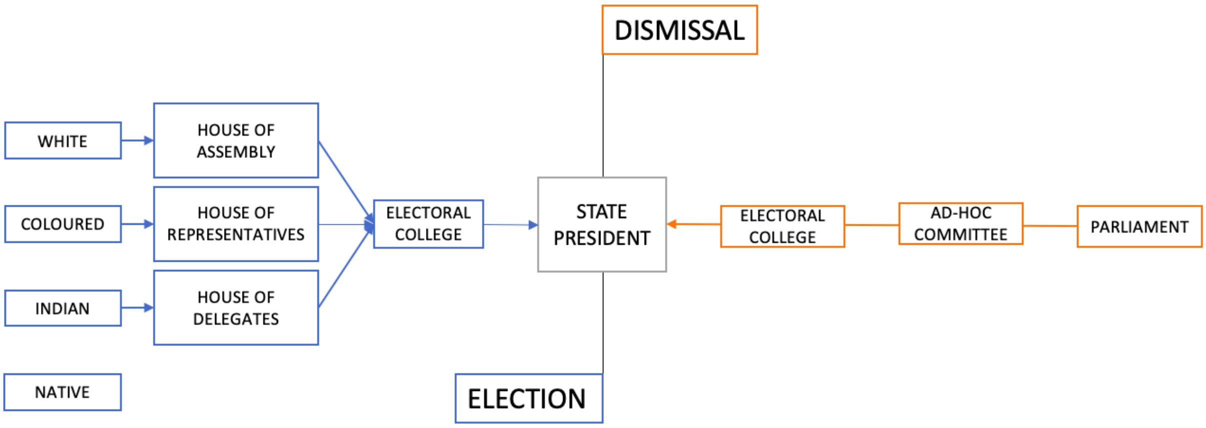
[50] Figure 2 is a simplification of the work of Maria Csanádi, see ibid 8.

[51] Ginsburg and Simsper arrived to the same conclusion on the role of constitution in an authoritarian regime 'Introduction - Ginsburg and Simpser' 3.

[52] '(le strutture tradizionali dello stato) vengono mantenute in vita dando l'apparenza della stabilità delle istituzioni, dell'esistenza di una costituzione, della vigenza del principio di legalità e quindi della certezza del diritto nei rapporti fra stato e cittadino' Giuseppe De Vergottini, *Diritto Costituzionale Comparato* (2a ed, CEDAM 1987) 810.

Figure 3: Election and Dismissal of the State President under the 1983 Constitution



Following the adoption of the 1983 Constitution, two sets of elections were organized to decide on the composition of the House of Assembly and the House of Delegates. The White house, the House of Representatives kept the same composition than before the adoption of the new constitution. The NP argued that, since the House of Representatives pre-existed to the adoption of the new constitution, new elections were not necessary. In other contexts, this point would be a detail, but in the authoritarian South African context, it was a keystone of NP's strategy of capture of power. Reconducting the House of Representatives allowed the NP to secure an overwhelming majority in the White house (131 seats out of 178), despite a huge loss of its representation in the new tri-cameral Parliament (from 74% to 43% of the seats).

The NP did lose the absolute majority in Parliament, but it did not affect is control on the election of the State President. Under the 1983 Constitution, the State President was not elected according to the majority in Parliament but according to a simple majority of an electoral college representing the three Houses. The composition of the new electoral college reflected a domination of the white population group over the two others. Out of the 88 delegates, 50 members emanated from the House of Assembly, 25 from the House of Representatives and 13 from the House of Delegates. With the continuity of the House of Representatives, the NP delegates occupied 37 the 88 seats which was by far the most important group of the electoral college. The simple majority rule foreseen in the Constitution achieved to transform the white domination of the electoral college into an absolute control of the NP. In September 1984, P. W. Botha, the then-NP State President, was reconducted on the sole basis of the NP votes.[53]

The apartheid State President was elected by the book, with a strict application of a constitutional framework. His election was a striking dilution of representativeness. The first level of dilution was the exclusion of the Black majority – more than seventeen million citizens – from the voting rolls. The second level was the dilution of the remaining voters into three houses: 178 white representatives for 4 747 000 white citizens, 85 members for 2 872 000 Coloured citizens, and 45 members for 869 000 Indian citizens.[54] The third level was the electoral college: out of 308 members of Parliament, only 88 were involved in the designation of the State President. The last element was the simple majority rule.

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[53] According to the following ratio: x= NP seats in the electoral college, 103 = NP seats in the House of Assembly, 50 = House of Assembly seats in the electoral college, 178 = total number of seats in the House of Assembly; x = 103*50/178.

[54] 'Population of South Africa by Population Group' <https://www.nda.agric.za/docs/abstract04/Population.pdf> accessed 13 August 2019.

Eventually, a majority of 30 votes was sufficient to elect the State President who was the most powerful institution of the 1983 Constitution.

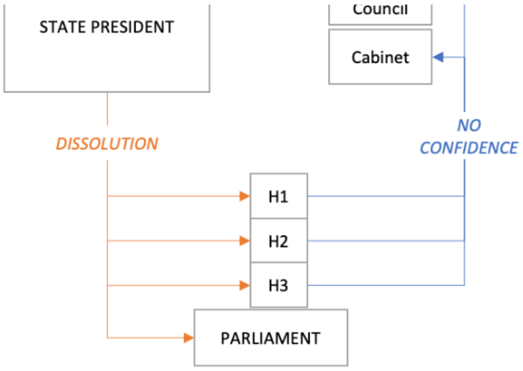
The dilution of representativeness was striking but one could always argue that no constitutional system is truly representative. In parliamentary regimes, the head of government represents only the majority in the lower house, whereas in presidential or semi-presidential regimes the head of State is barely elected by an absolute majority of the voters.

Yet despite the lack of representativeness, democratic constitutional systems rely on a principle of political accountability. This political accountability is the result of a mirror effect attached to the process of nomination of the executive. An indirectly elected head of government is more likely to change in case of new parliamentary majority; and a directly elected head of state must ensure his or her re-election during a presidential campaign. In both cases, the executive power faces the sanction of the vote, that is what make the political system (imperfectly) democratic. With regards to the political accountability of the head of the executive, the Apartheid constitutional system was in no case democratic.

As figure 3 shows, the procedure of dismissal of the State President did not mirror the procedure of election. Despite being indirectly elected by the Parliament, the State President could be dismissed only through a complex four-stage procedure (article 9(2), 1983 Co. as of 1988). The State President's mandate was not contingent on a shift of parliamentary majority, even after a shift of majority in the House of Assembly.[55] The 1983 Constitution limited the dismissal to grounds of misconduct of inability to perform the presidential duties. The launching of the procedure could only come from a common decision of the three houses. This common decision would led to the creation of an ad-hoc committee in charge of producing a report on the validity of the grounds for dismissal. The Speaker of Parliament decided on the creation of such ad-hoc committee, even if this figure was appointed by the same electoral college that the State President (article 58(1), 1983 Co. as of 1988). Based on the committee's report, the final decision was left to the same electoral college which elected the State President.[56] The State President could theoretically be dismissed but the procedure was too complex and to politically biased to be effective.

A strict procedure of removal of the State President is not per se a proof of an authoritarian regime. Presidential regimes do foresee a strict procedure of impeachment and compensate this quasi-immovability of the President with a rigid separation of powers. Yet, as Figure 4 illustrates, the Apartheid constitutional system was characterized by a soft separation of powers with a procedure of dissolution largely favourable to the State President.

Figure 4: Dissolution and motion of non-confidence under the 1983 Constitution



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[55] Newell M. Stultz (n 24) 376.

[56] Gretchen Caarpenter, 'Republic of South Africa Constitution Act 11° of 1983 - Notes and Comments' (1983) 9 South African Yearbook of International Law 98.

The State President could dissolve the Parliament either in its totality or each House individually without further justification (article 39, 1983 Co. as of 1988). This possibility became an obligation if one of the House voted a motion of no-confidence against the governmental bodies or if it rejected the budget. The power of dissolution of the State President created a phenomenon of 'structural coalition' between the Parliament and the executive: no parliamentary opposition could emerge because of the threat of a dissolution floating over a rebel house.[57] Moreover, the State President was the only authority competent to decide the polling day for new parliamentary elections. The maximum was set up to 180 days following the dissolution of either the Parliament or the House. Therefore, if the State President decided to dissolve the Parliament, he could get rid of a legislative body for almost half a year and could remain the only one left with regulatory power (article 47, 1983 Co. as of 1988).

The State President had tremendous legislative powers. He was the only one in charge of the legislation dealing with the Native population. The Parliament did not have a word to say in this domain (article 93, 1983 Co. as of 1988). The State President could also intervene in the everyday business of the Parliament. Under the 1983 Constitution, the logic of the tri-parliamentary representation applied to the legislative process. If the legislation aimed at regulating the South African population as a whole – for example in external relations, the Parliament was competent. If the legislation aimed at regulating one specific group, the corresponding house was competent (articles 14 and 15, 1983 Co. as of 1988). This distinction conferred an exclusive legislative right to the Houses on matters related to the population group they represented.

The drafters of the 1983 constitution argued that the distinction between own and general affairs was a matter of self-determination. In fact, it was just a way for the NP to keep on controlling non-white affairs thanks to the power of regulation of the State President. A closer look at the list of domains considered as own affairs seriously watered-down the argument of self-determination. The exclusive competence of the Houses on own affairs did not include key elements of self-determination such as justice, information or school syllabus,[58] and no law dealing with own affairs could levy taxes. The decision to give additional financial credit to implement an own affair policy remained a general affair matter under the approval of the whole Parliament. Moreover, the State President remained the final decider on own affair legislation. He decided on the budget allocated to own affairs and had to agree on a qualification of an area in an own affair (article 16(1), 1983 Co. as of 1988). The Houses only had an advisory role through their respective chairmen and they could not initiate any modification of the status of an affair (article 17(2)(a), 1983 Co. as of 1988). If the Houses decided nevertheless to legislate without the State President's assessment, the latter could refuse to assent any bill which would not deal with own affair matters (article 31(2), 1983 Co. as of 1988). Finally, the State President could intervene in the legislative process dealing with general affairs. In case of disagreement of the Houses on a general affair, the State President could circumvent the competence of the Parliament to rule over general affairs. He could redirect the legislative competence to a House of his convenience (article 30, 1983 Co. as of 1988) which was likely to be the House of Assembly.

The State President had extensive appointment powers. As Figure XX shows, he decided on every key institutional position, in even bigger proportions than in presidential regimes.

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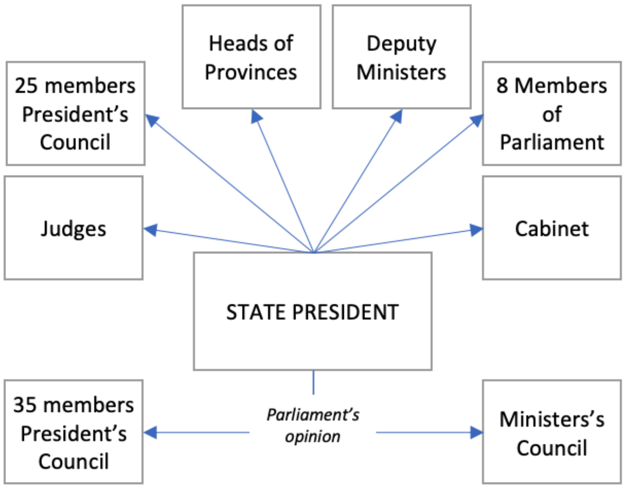
[57] Gerd (n 29) 79.

[58] The houses could rule on social welfare, education, art, culture and recreation, health matters, community development, local government, agriculture, water supply, appointment of marriage officers, elections of members of Parliament, finance of the own affairs, staff administration and auxiliary services. Schedule 1 list was a limited one, which could be amended only by a reinforced constitutional amendment procedure.

Figure 5: The powers of appointment of the State President under the 1983 Constitution



The State President appointed all the judges of the Supreme Court system.[59] He appointed the chief executive officers and the deputy chief executive officers of the provinces (Schedule 2, Part I, 1983 Co. as of 1988). These appointments gave the NP the control over the sub-state affairs and negated the role of provincial assemblies on policy-making. The State President could arbitrarily appoint eight members of Parliament in each House.[60] He appointed on his own the Cabinet, the governmental body in charge of general affairs (article 20, 1983 Co. as of 1988). He could dismiss each minister of the Ministers' Council, three governmental bodies in charge of each population group, and could replace them with a deputy minister he had previously appointed (article 27, 1983 Co. as of 1988). The only institution which seemed to have some autonomy from the State President was the President's Council, but this institution was mostly symbolic.[61]

In Hungary, the party doctrine played a major role in the design of authoritarianism. In South Africa, authoritarianism was a consequence of constitutional drafting. The 1983 Constitution created a strict authoritarian system behind an appearance of democratization of public life. The NP, thanks to a complex appointment mechanism, could elect a State President without seeking for a majority in Parliament. Once elected, the State President imposed himself as a true dictator. He could dissolve the Parliament and intervene in the legislative affairs. He could not be dismissed by a vote of no confidence. He controlled the appointment at key positions and dismissed on a whim the persons he appointed. The 1983 Constitution was key in the legitimation of apartheid policies. The apartheid rulers could hide their illegitimate capture of power and their abuses of power behind the veil of constitutionality.

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[59] This appointment procedure played a central role in the development of a collaborationist judiciary. This aspect is analyzed in the next section.

[60] Four members of the House of Assembly (article 41(1)(b), 1983 Co. as of 1988), two members of the House of Representatives (article 42(1)(b), 1983 Co. as of 1988), two members of the House of Delegates (article 43(1)(b), 1983 Co. as of 1988).

[61] The president only appointed a minority of 25 members out of 60. The remaining 35 members were elected in each House with a majority of them emanating from the House of Representative (article 70, 1983 Co. as of 1988). The President Council has been qualified as "the grazing ground for political has-beens rewarded for loyal service, or a hitching post for others waiting for vacancies to occur elsewhere" Gretchen Caarpenter, 'Republic of South Africa Constitution Act 11° of 1983 - Notes and Comments' (1983) 9 South African Yearbook of International Law 101.

Section 3 – Constitutional Legitimation and the Creation of Channels of Subordination

The first two sections dealt with the creation of a spurious majority and the concentration of powers at the institutional level. This section takes a vertical approach and a top-down perspective to understand how constitutional instruments aimed at submitting the social order to the authoritarian rule. As opposed to totalitarian regimes, Hungary and South Africa could not rely on a diffuse ideology to legitimate their decisions. Being in control of the electoral outcome or of the legislative process was not sufficient to ensure that the society would bend the knee. Authoritarian rulers had to create channels of subordination which would go beyond the central power. This section focuses on two types of channels of subordination: the creation of a collaborationist judiciary in South Africa and the control of social organizations in communist Hungary.

South Africa: Collaborationist Judiciary

Chapter VII of the 1983 Constitution on judicial authority offered a succinct presentation of the apartheid judicial system. Rather classically, Chapter VII divided the judiciary between a Supreme Court at the head of the justice system (article 68(1), 1983 Co. as of 1988) and a Minister of justice at the head of its administration (article 69, 1983 Co. as of 1988). The true nature of the apartheid judicial system was reflected in the reference to the Supreme Court Act No. 59 of 1959, the founding article of the apartheid collaborationist judiciary.[62]

The Supreme Court Act foresaw a justice system centralized around a Supreme Court and organized according to the different territorial sub-levels of the South African State.[63] The Supreme Court Act never explicitly referred to the segregationist policies of the regime nor did it give any guidelines to the judges to decide according to racial criteria. The creation of a collaborationist judiciary was subtler than that.

The first aspect of the collaborationist judiciary was the process of nomination of judges. As briefly mentioned in the previous section, all the judges, from the local divisions to the Supreme Court, were appointed by the State President. The State President was free to reshape the jurisdictional landscape of the country[64] and to appoint judges as he "may from time to time determine".[65] He was also the only authority to decide on their removal on any grounds and with the only limit of addressing the Houses first.[66] Political appointment of the judges does not make the justice system dependent on the executive power. As the Venice Commission acknowledges, even in older democracies "the executive power has sometimes a decisive influence on judicial appointment".[67] Yet, political appointment must be balanced by "legal culture and traditions" of an independent judiciary, which was not what the apartheid system pursued.

The specific role assigned to the Supreme Court in the regulation of own and general affairs reinforces the presumption of a lack of culture of independent judiciary. Under the 1983 Constitution, any division of the Supreme Court could check the validity of a new law according to the previous legislative corpus (article 34, 1983 Co. as of 1988). This control contributed to maintain most of the repressive legislations and to shape the new legal corpus accordingly. The courts were also in charge of controlling that the activities of the houses respected the division between own and general affairs as decided by the State

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[62] House of Assembly and Senate of the Union of South Africa, Act to Consolidate and Amend the Laws Relating to the Supreme Court of South Africa and to Provide for Matters Incidental Thereto No. 59 1959.

[63] Articles 2,3, 4, 6, 7, 12, 13, 20, 21 and 24 ibid.

[64] Article 6(4) ibid.

[65] Article 3 ibid.

[66] Article 10(7) ibid.

[67] Venice Commission, 'Report on the Independence of the Judicial System, Part I: The Independence of Judges' (2010) CDL-AD(2010)004 7.

President (article 18, 1983 Co. as of 1988). Decisions of the latter were, however, automatically integrated to the constitutional corpus. They could not be challenged on constitutional grounds (article 18(2), 1983 Co. as of 1988). Thanks to these quasi-constitutional review mechanisms, courts were both the guardians of the apartheid legal system and the protectors of the State President's regulatory power.

The last element on the subordination of the judiciary system relates to the judgements of lower courts judges in application of apartheid policies. Proving a channel of subordination in the judicial field demands to look different aspects of the justice system. First, were the judges competent to contest the application of apartheid policies by the State administration? Second, if they were competent, did they adopt a legal reasoning favourable to the apartheid State?

Were the judges competent to contest the application of apartheid policies by the State administration? A contemporary commentator qualified any judge of the apartheid system as an "impotent spectator of administrative action".[68] He explained that the apartheid legal system contained some clauses which excluded the competence of judges to contest the decision of an administrative authority. This statement was true for the most symbolic apartheid legislations. For example, a judge could not control the validity of a censorship decision[69] nor could he verify the unlawful character of a political organization.[70] However, if administrative justice was muzzled, it was not the case for criminal justice. Judges were perhaps impotent spectators of administrative action, but they were not impotent spectators of the implementation of apartheid criminal legislations. Only a judge could decide on the application of the sentence and they took such decisions on a regular basis.[71]

Apartheid legislations were characterized by a high level of vagueness and generalisation. This feature left an important margin of interpretation to the judges in the application of the sanction. In theory then, judges could decide against apartheid policies, for example by applying the lowest possible sanction to an apartheid crime. However, as David Dyzenhaus explains, South African judges developed a specific legal reasoning which led to follow a plain fact approach to the application of apartheid legislations. Judges considered that their role was not "to make law in accordance with their convictions about what morality requires, but to apply the law as it, on a particular conception of fact, exist".[72] This 'particular conception of fact' at that time was racial segregation. This context, coupled with the complete dependence of the judges on the State President's good will, led judges to even go further than the text of the apartheid legislation. In many judgements, they decided that "official differentiation between the races not specifically authorized by statute is valid unless it involves some tangible inequality".[73]

A collaborationist judiciary was an essential wheel of the legitimation of the apartheid State because it left opened the possibility of a trial. At first, trials and authoritarianism seemed to be opposite notions. Trials were indeed a key element in the contestation of the apartheid policies. It was the meeting point between racial legislations and the victims of these legislations, a point which could have led to legal changes.[74] Why did apartheid rulers take such a risk? The reason is that the apartheid justice system contributed to legitimize the decision of the apartheid rulers. Apartheid rulers could argue that the separate but equal doctrine was approved by an independent justice system. As written elsewhere, "for law to be effective in enforcing an evil or unjust system, its claim to be at least partially just or to possess at least a partial internal logic of justice must be true".[75] Justice was an essential label for legitimising an evil system such as the apartheid one.

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[68] Raymond Wacks, 'Judges and Injustice' (1984) 101 South African Law Journal 266, 279.

[69] Article 38 House of Assembly and Senate of the Union of South Africa, Publication Act No. 42 1974.

[70] Articles 28(7) and 29 House of Assembly and Senate of the Union of South Africa, Internal Security Act No. 74 1982.

[71] See for example the regular reports on judicial activity in, Pej Brooks, 'Current Legal Developments - South Africa' (1973) 1 Comparative and International Law Journal of Southern Africa 129.

[72] David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon Press; Oxford University Press 1991) 55.

[73] ibid 63.

[74] On the role of the trial in legal changes, see Pierre Bourdieu, 'La force du droit [Eléments pour une sociologie du champ juridique]: Eléments pour une sociologie du champ juridique' (1986) 64 Actes de la recherche en sciences sociales 3, 3.

Hungary: the subordination of civil society thanks to control on social organizations

In Hungary, the justice system played a central role in the creation of channels of subordination. Under a socialist state, the objective of law differed from the ideal of justice. The law does not empower the population, it aims at strengthening and developing the communist social older, at building the communist society of the future, and at erasing in the population's mindset any trace of capitalism.[76] Judges were de facto central players in the fulfilment of communism and prosecutors had the constitutional mandate of prosecuting "all actions detrimental to, or endangering, the social order, security or independence of the Hungarian People's Republic".[77] Despite the obvious collaboration of judges in communist Hungary, I have decided to analyse how the Hungarian communist state created channels of subordination through the control of social organizations.

Social organizations aimed at replacing the structures of the bourgeois State with structures coordinated by the communist party. They were the result of a compromise between the disappearance of the State at the advent of the proletarian revolution and the necessity to preserve some of its vital functions for the organization of society. The 1949 Constitution presented the social organizations as a realization of the workers themselves, in the continuity of the overthrow of the bourgeois State, and as a fulfilment of freedom of association. As the original version of the text stated in its article 56:

1) In order to develop the social, economic and cultural activities of the workers, the Hungarian People's Republic constitutionally guarantees to the right of organization.
2) In fulfilling its tasks, the Hungarian People's Republic bases itself on the organizations of the class-conscious workers. In order to the defend the people's democracy, promote participation in socialist construction, widen the scope of cultural and educational work, implement the rights of the people and develop international solidarity, the workers establish trade unions, democratic organizations of women and young people as well as other mass organization and put into practice the close co-operation and democratic unity of the industrial, agricultural and intellectual workers. The leading force in such political and social activities is the working class, led by its advance guard and supported by the democratic unity of the whole people.

This article raises the question of the existence of a civil society in a post-totalitarian state such as communist Hungary. Social organizations encompassed any aspect of social life, from working places to leisure activities. The network was divided between political organizations namely the HSWP, the People's Patriotic Front, the trade unions and the Young Communist League, and a large number of non-political organizations such as Hungarian Red Cross, economic cooperatives, social, cultural and sport associations, professional representatives organs other than trade unions (bar of lawyers), and social organizations established by public administrative organs (Hungarian Football Association, traffic safety councils…).[78] The objective of the communist rulers was to create a hyper-politicised society: every Hungarian citizen was encouraged to take an active role in one of these social organizations.

Civil society is not only characterized by a vivid range of activities but also by a strict independence from the government. In Hungary, the objective of the social organizations was to prove one's fidelity to communist values, not to favour the development of autonomous thinking. The politicization of Hungarian society did not coincide with a political empowerment of the civil society. Social organizations were rather direct channels of subordination of civil society to the party's policies.

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[75] Edwin Cameron, 'Submission on the Role of the Judiciary under Apartheid' (1998) 115 South African Law Journal 436, 437.

[76] Stoyanovitch (n 3) 181.

[77] Article 42(3) Horkay Hörcher and Lorman (n 7).

[78] István Zsuffa, 'Chapter VII - The Role of Social Organizations in the Governmental Mechanism' in Géza Kilényi and Vanda Lamm (eds), *Parliamentarism and government in a one-party system* (Akad Kiadó 1988) 201–202.

Such a subordination to the HSWP did not appear clearly in the Constitution. The latter only referred indirectly to an "advance guard" leading the working class in its political and social activities. The Constitution granted a constitutional recognition to the HSWP (article 3, 1949 Co. as of 1988) and the Patriotic People's Front (article 4(2), 1949 Co. as of 1988). However, the text remained unclear regarding the place of social organizations in the State hierarchy as well as the exact role of the communist party in their management. It is only with having in mind the logic of the two operative governments that one can grasp the reality of the subordination.

The control of the HSWP over the social organizations was both top-down and bottom-up. On the one hand, the Council of Ministers was a relay between the HSWP's decisions and their implementation among the different spheres of Hungarian civil society. The HSWP used the decree power of the Council of Ministers (article 35(2), 1949 Co. as of 1988). A new policy on sport, for example, was decided at the Central Committee, transmitted to the Council of Ministers which would enact a decree applicable to sport federations. To ensure the correct transmission of the Central Committee's directives, governmental and party's positions overlapped. The President and the vice-Presidents of the Council of Ministers had a permanent seat in the Central Committee. The Secretaries of the HSWP had portfolios which overlapped with those of the ministers. There was a department of industry and a minister of industry, a department of economic policy and a minister of economic policy, as well as a department of party and mass organizations which was the true decider of the social organizations' lines. On the other hand, some social organizations had a clear political purpose.[79] The Patriotic People's Front controlled the election, the Young Communist League contributed to broaden the political influence of the party, trade unions participated in the elaboration of national policies.[80] Every social organizations had in their ranks a member of the HSWP, even the non-political which supposedly "engaged in joint activities to meet specific needs and to allow the unfolding and the realization of citizen's abilities with other duties".[81]

The web of social organizations over every aspect of civil society had two consequences. It created a channel of subordination and it legitimized the action of the authoritarian rulers outside the limited circles of the communist party. Paradoxically, social organizations were a recognition of the diversity of the Hungarian society. The communist authorities were forced to acknowledge that, despite the advent of the proletarian revolution, Hungarian civil society was not only made of a working class. Diversity did not mean tolerance of political opposition, quite on the contrary. Social organizations played a central role in the annihilation of political opposition and in the preservation of goulash communism.

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Hungarian and South African authoritarianism had their own specificities, but they share a specific constitutional mindset: the constitution must serve the confiscation of power. I have analysed this objective in three directions. First why the organization of periodical elections mattered to authoritarian rulers despite they refusal of sharing political power. Second how the constitution contributed to the concentration of powers. Finally, how the constitution organized the legitimisation of authoritarian decisions at the sub-state level. These characteristics contributed to building a specific authoritarian constitutional identity.

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[79] 'Chapter VI - Ministries and State Organs with National Competence' in Géza Kilényi and Vanda Lamm (eds), *Parliamentarism and government in a one-party system* (Akad Kiadó 1988) 190–197.

[80] For example, the National Council of Trade Unions (SZOT) was in permanent contact with the Council of Ministers, ibid 211.

[81] ibid 202.