

Revolutionary Constitutions and their Constitutionalism: The Internalization of Fear as Process and the Performance of Crisis in the Service of Stability

Remarks delivered at the International Scientific Conference ‘Legal Imaginaries of Crisis and Fear’ 9 November 2024, Sofia Bulgaria

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Dear Participants:

I am delighted to have been invited to this conference to share with such a distinguished groups some preliminary thought about the relationship of revolution and constitution, and about the emotive element that binds them both in an interesting dialectics.

Revolutionary Constitutionalism

Revolutions are born out of fear. At one end of the spectrums of fear are the threats to idealized order. These may be understood or rationalized as a foundational set of popular liberties which are threatened by the thrust of innovation of those who exercise the power of *gubernaculum*.¹ For others it may be a fear springing from the exercise of *gubernaculum* in ways that threaten social solidarity—of a religion, ethnicity or way of life.² At the other end of the fear spectrum, revolution may be rationalized within notions of threat to the loss of an opportunity to move forward progress of radical change that is either inevitable (in accordance with the premises of the revolutionary movement) or necessary to preserve or move a society closer to its inevitable ideal.³ These are to the two ends of a spectrum that circles in on itself and in which the ends join. The resulting revolutionary phenomenology—the cognitive realization of itself through the application of the idea of itself to a contemporary context⁴—provides both meaning and the dialectics of its own performance which gives it shape and direction.⁵

Constitutions—and proto-constitutional documents from before the 18th century when constitutions assumed their current form—undertake two specific objectives of principal interest for the

¹ Larry Catá Backer, ‘Reifying Law— Government, Law and the Rule of Law in Governance Systems,’ (2008) 26 Penn State International Law Review 521-563.

² Larry Catá Backer, ‘Theocratic Constitutionalism: An Introduction to a New Legal Ordering,’ (2006) 16(1) Indiana Journal of Global Legal Studies 85-172.

³ Maximilien Francois Marie Isidore Joseph de Robespierre, ‘Discours applaudi de Robespierre sur les grands principes moraux du gouvernement français, lors de la séance du 17 pluviôse an II (5 février 1794), in Archives Parlementaires de la Révolution Française Année 1962 84 pp. 330-337; available [https://www.persee.fr/doc/arcpa_0000-0000_1962_num_84_1_34787_t1_0330_0000_5], ast accessed 21 October 2024.

⁴ Judith N. Shklar, ‘Hegel’s Phenomenology: Paths to Revolution,’ in Klaus Beyme (ed) Theory and Politics / Theorie und Politik: Festschrift zum 70. Geburtstag für Carl Joachim Friedrich (Den Haag: Martinus Nijhof, 1971), pp. 162-184.

⁵ P. L. Geschiere and H.G: Schulte Nordholt, ‘The Phenomenology of Revolution,’ (1969) 19(3) CrossCurrents 319-337.

discussion that follows.⁶ First they are meant to institutionalize and fulfill the promise of the (successful) revolutionary effort. Constitutions serve as the memorialization of the revolutionary ideals now institutionalized and made perpetual by the magic of text and the will of the community to apply that text going forward in time. Second, and perhaps less often remembered, constitutions are meant to internalize the active element of revolutionary passion—its dialectics, processes, and impulses. The systems themselves, which institutionalize the revolutionary ideals, also internalize revolutionary methods. In this sense constitutions provide a space for revolutionary mimesis⁷ within rather than outside, of the perimeters of constitutional stability. They preserve the revolution precisely by transposing the revolutionary performance from outside the constitutional state (and thus a threat to it) to become a method, a performance of the revolutionary trajectories now in the service of constitutional stability, or at least solidity. Its purpose is no longer to overturn or challenge the constitutional system but to affirm it and bring it closer to “perfection.” It is in this sense that terror, in all of its forms, becomes an essential element of the constitutional form.⁸

It ought to follow that revolutionary constitutions are not an end point of revolutionary dialectic. They are merely the instrument through which what was once “outside” could be confronted, overturned and replaced, and can now serve the revolutionary impulse “inside” the revolution’s manifestation as the ideology in power. It is in this sense that constitutional commentators sometimes suggest the absence of a constitutional crisis precisely because the central purpose of the post-revolutionary constitution is in fact to internalize the revolutionary dialectics “within the boundaries of law and the Constitution.”⁹ The dialectics of revolution are turned inward; they become the process of a legalized politics and the discipline of an administrative apparatus which is meant to decant revolutionary practice into techno-bureaucratic expression as law or policy. Constitutions redirect and rationalize the revolutionary dialectics from out of which they emerge. In this sense, constitutions do not resolve the impulses, the perceptions and premises from out of which the emotive explosions of revolution can be ignited, stoked, and directed. At the same time, both the revolutionary dialectics that produced a successful revolutionary transformation and its internalization, may be translated and transposed as a model to serve contextually distinct environments.¹⁰

⁶ Larry Catá Backer, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems,’ (2008-2009) 113 Dickinson Law Review 671-732 (“Once a belief in the power of states to construct themselves by reference to the characteristics of their own unique populations, a well-behaved constitutionalism was thought necessarily limited to matters of transposing contextual characteristics into a document that required interpretation true to the underlying belief systems from out of which it was created.” Ibid., 731).

⁷ D. Robert CeChaine, ‘Magic, mimesis, and revolutionary praxis: Illuminating Walter Benjamin’s rhetoric of redemption,’ (2000) 64(3) Western Journal of Communications 285-307; Deborah Jenson, *Trauma and its representations: the social life of mimesis in post-revolutionary France* (Baltimore: Johns Hopkins University Press, 2001). See generally Erich Auerbach and Edward Said, *Mimesis: The Representation of Reality in Western Literature* (Princeton University Press, 1953).

⁸ Robespierre, *supra*; Mao Zedong, *On the People’s Democratic Dictatorship* (June 30 1949 “in Commemoration of the 28th Anniversary of the Communist Party of China, available [https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm], last accessed 30 October 2024); in more benign form, Brett Samuels, ‘Biden corrects himself after saying Trump should be locked up,’ *The Hill* (22 October 2024); available [https://thehill.com/homenews/administration/4948023-biden-warns-trump-political-persecution/], last accessed 30 October 2024.

⁹ Jack M. Balkin, *The Cycles of Constitutional Time* (OUP, 2020) (Chapter 4 on Constitutional Crisis).

¹⁰ Consider Fei Chen, ‘Translating and transplanting revolution: the circulation of discourses on the American Revolution between China and Japan,’ (2023) 34(1) *Journal of the Royal Asiatic Society* 129-153.

These are the issues that I believe are worth considering from this admittedly unorthodox starting point. To that end, and at greater leisure in the essay from which these remarks are drawn, considers a number of points. First a brief sketch of an emotive semiotics of institutionalized constitutional structure. Second, a deeper analysis of the signification of preambular and extraconstitutional text as memory and as an intensification of direction with respect to constitutional framing and interpretation through the lens of the American revolutionary experience. Third, a consideration of that experience in the context of the Marxist-Leninist and liberation movements in China and Cuba, producing related but distinct ordering frameworks. Fourth, a consideration of these three distinct expressions of constitutional fear-threat structures within memories of the triumph of a revolutionary moment of separation, in the context of a revolutionary experience which is effectively detached in part from those undergoing revolutionary crisis. The contribution ends with an examination of the effects of what unites and separates these experiences as a phenomenology of dynamic mimetic dialectics, that is, of the re-experiencing over time of the revolutionary process as both the system of governance and the protection of that system from its own revolutionary impulses. The focus will be on the way that the emotive context fuels fear and directs crisis in very different constitutional contexts—a revolution to preserve traditional values; a communist revolution within a multi-state imperial power; a revolution with a long fuse grounded in anti-colonialism and anti-imperialism; and an ethno-religious defensive rebellion within a larger imperial post-modern project.

The Constitutional State of Revolutionary Fear

Fear has returned to the constitutional state.¹¹ Or rather, a state of dread for the constitutional state, one “forced to it,—forced by dread causes.”¹² Forced, or compelled in the Sophoclean sense, by the very nature of the constitutional state; the liberal constitution as the textual expression of a constant state of fear.¹³ The etymology of fear speaks to its connection to risk—the fear that comes with an event, process, choice or condition that may portend calamity, sudden danger or attack. It is the fear of things going wrong or of never having been gotten right. Its psychology is now well captured by the resurrection of the more ancient use of the term in the form of the fear spell of gaming: the projection of the image of an object’s worst fear that causes the object to flee,¹⁴ constitutionally speaking. Though it doesn’t last long, its terror, the fear of the actualization of the manifestation of fear, lingers; always. What is cast once, can be cast again, and again. “‘constitution of fear’ is not a one-off occurrence. Quite the contrary. It crowns the politics of resentment. It becomes its manifesto.”¹⁵ And it serves as an object lesson; there is indeed

¹¹ Tomasz Tadeusz Koncewicz, A Constitution of fear, Verfassongsblog (16 November 2017); available [], last accessed 15 September 2024 (“The new brand of constitutionalism on the rise in Poland is defined by a „constitution of fear”. Fear is the leitmotif of the constitution-making process defined by suspicion, exclusion, drive for retribution and settling the scores.” Ibid.).

¹² Sophocles, *Electra* (R.C. Jebb (trans) (410 BC)) available [http://classics.mit.edu/Sophocles/electra.html] last accessed 30 September 2024.

¹³ Frederick Schauer, ‘The Constitution of Fear’ (1995) 353 *Constitutional Commentary* 203-206.

¹⁴ Fear, DND 5th Edition Community Wiki, available [https://dnd5e.wikidot.com/spell:fear] last accessed 29 September 2024.

¹⁵ Koncewicz, A Constitution of fear, *supra*.

something worth fearing; in contemporary times the Soviet Union serves as the constitutional scary story par excellence—both for liberal democracy and Marxist-Leninist systems;¹⁶ for those with longer memories, the Kaiserreich.¹⁷

At the start of the 21st century fear, the dread of what might be, was manifested in its old monsters. At their core were questions that generated interest within the debates about the viability and essential character of liberal democracy at least with respect to its interactions with organized (and perhaps disorganized) religion.¹⁸ Today that fear has taken a more foundational turn. It is a fear of *constitutional entropy* in its sense of a gradual (or perhaps precipitous) decline into disorder.¹⁹ One encounters, in modern form, the insights of Abd al Rachman ibn Khaldun respecting the inevitability of the dissipation of group solidarity (‘assabiyah) across time.²⁰ In its modern forms it has touched on all constituted systems,²¹ and states.²²

Does a crisis of the contemporary constitutional state follow? We appear to be in the age of constitutional crisis. The intelligentsia has been curating the notion in interesting ways,²³ and in its more elaborate forms, from its academic leading forces.²⁴ And not just the state is reconceived in the imaginaries of crisis.²⁵ The lifeworld of that crisis requires the cultivation of fear, and especially the fear that the inhabitants of the structures built through constitutional text are ready to leave the building.²⁶ Fear is the soil in which constitutional crisis can be cultured, nourished, and eventually harvested. That

¹⁶ Robert Sharlet, *Soviet Constitutional Crisis* (NY: Routledge 2016); Kunal Sharma, ‘What China Learned from the Collapse of the USSR,’ *The Diplomat* (& Dec. 2021); available [<https://thediplomat.com/2021/12/what-china-learned-from-the-collapse-of-the-ussr/>], last accessed 21 September 2024.

¹⁷ Mark Hewitson, ‘The Kaiserreich in Question: Constitutional Crisis in Germany Before the First World War,’ (2001) 73 *The Journal of Modern History*

¹⁸ Larry Catá Backer, ‘The Crisis of Secular Liberalism and the Constitutional State in Comparative Perspective: Religion, Rule of Law, and Democratic Organization of Religion Privileging States,’ (2015) 48 *Cornell International Law Journal* 51-104

¹⁹ Cf., Alexander V. Mantzaris & George-Rafael Domenikos, ‘Exploring the entropic nature of political polarization through its formulation as an isolated thermodynamic system,’ (2013) 13 *Nature Portfolio* 4419; available [<https://doi.org/10.1038/s41598-023-31585-w>] last accessed 21 September 2024; .

²⁰ Abd al Rachman ibn Khaldun, *The Muquaddimah: An Introduction to History* (Franz Rosenthal (trans) NJ Dawood (ed); Princeton University Press, 2015 (1377)).

²¹ Parag Khanna, ‘The Coming Entropy of Our World Order: How Do We Reconcile an Increasingly Fractured Order With an Increasingly Planetary Reality?,’ *Noema* (7 May 2024), available [<https://www.noemamag.com/the-coming-entropy-of-our-world-order/>], last accessed 20 September 2024; Robert D. Kaplan, ‘The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet,’ *The Atlantic* (February 1994), pp. 44-76; available [<https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/>], last accessed 20 September 2024.

²² Armin von Bogdandy and Pál Sonnevend, *Constitutional Crisis in the European Constitutional Area* (Oxford: Hart, 2015);

²³ Jack M. Balkin, ‘Constitutional Crisis and Constitutional Rot,’ (2017) 77 *Maryland Law Review* 147 (constitutional crisis defined as the point where “the Constitution is about to fail in its central task” *ibid*); Keith E. Whittington, ‘Yet Another Constitutional Crisis?,’ (2001) 43 *William & Mary Law Review* 2093 (distinguishing between crises of operation and of fidelity);

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²⁵ W. Michael Reisman, ‘The Constitutional Crisis of the United Nations,’ (1993) 87(1) *American Journal of International Law* 83-100.

²⁶ Louis M. Seidman and Mark V. Tushnet, *Remnants of Belief* (OUP, 1996).

cultivation is also an essential element of the dialectic of constitutional systems, especially that between the theory of the constitutional object and the fulfillment of its intent (assuming a consensus around the meaning of that notion) in fact. “It is a longstanding theme of critical literature on American politics that the system of government of the United States is an eighteenth century edifice which has serious difficulties in coming to grips with the challenges of the twentieth century.”²⁷

The word crisis is itself richly semiotic. Beyond its fairly straightforward contemporary usage crisis points to its richer etymological sub-text.²⁸ Its origins are embedded in judgment of a specific kind—of the determination in the decisive point of the course of disease at which change must come, for better or worse. More literally crisis signifies a point of judgment (from its Proto-Indo-European root *krei), a point that separates what was possible before and what was likely after. Fear may be found at that point of separation. Crisis, then, objectifies a course of events at specific temporal points, which it then signifies (going back/going forward/going sideways/going up or down), and which then imbues that signification with meaning (success/failure/good/bad). The essence of crisis is also entropic in the sense that the indeterminacy of systemic rules as a function of its application inevitably opens systems (this generates the constancy of fear) to points of signification that may change the character of a system from what was (conceived or experienced) to what will be.²⁹

Constitutional crisis, and its imaginaries of fear, add a particular quality to this semiosis. Crisis is the interpretation (judgement) of the signification (the principles and assumptions embedded in the constitution) of an object (the constitution itself). When one speaks to the imaginaries of constitutional crisis, then, one speaks to the semiotics of instability, of a deviation, from the expectations and trajectories that are supposed to affirm that the system is working “correctly.” One also speaks to the temporalities of that crisis—one that changes character from the moment of constitutional inception through the moment of constitutional disintegration. In this sense, then, what is permanent is a state of constitutional crisis;³⁰ what Mao Zedong described as continuous revolution,³¹ in contradistinction to Leon Trotsky’s more objective based concept of permanent revolution,³² reformulated for consumption beyond the narrow lens of Marxist-Leninist theory. What is mutable is the constitution itself as a function of the dread around which crisis is manifested and response produced.

Constitutions, however, are more likely studied as rational expressions of political calculus aligned in time, space, and place. One understands reason here in its more ancient sense—as an explanation or justification adapting action (constitution) to ends (government), but also in its

²⁷ Philip Cerny, ‘Political Entropy and American decline (1989) 18(1) Millenium: Journal of International Studies 47-63, 47.

²⁸ Etymology Online, crisis, available [<https://www.etymonline.com/search?q=crisis>] last accessed 30 September 2024.

²⁹ Cf., Ted Sichelman, ‘Quantifying Legal Entropy,’ (2021) 9 Frontiers in Physics [<https://doi.org/10.3389/fphy.2021.665054>] last accessed 23 September 2024.

³⁰ Arthur S. Miller, ‘Constitutional Law: Crisis Government Becomes the Norm,’ (1978) 39 Ohio State Law Journal

³¹ Stuart R. Schram, ‘Mao Tse-tung and the Theory of the Permanent Revolution, 1958–69,’ (1971) 46 The China Quarterly 221-244.

³² Nikolai Bukharin, ‘The Theory of Permanent Revolution,’ (1925) 5(10) Communist Review reprinted in Marxists.org website; available [<https://www.marxists.org/archive/bukharin/works/1924/permanent-revolution/index.htm>] last accessed 23 September 2024.

contemporary sense as an understanding with universal validity.³³ That rationality has been parsed in a variety of different ways, each perhaps a better reflection of their starting point than of the constitutional end point. One might speak to constitutions as contracts for the organization of a political collective as property in the hands of their members.³⁴ Conversely, one might invert this ordering premise to speak to constitutions as contracts for the organization of social relations against the apparatus of government.³⁵ One can speak to the constitution of sovereignty, or of the sovereign constitution, as if these objects were either inevitable or immutable. And hovering over all of this is what has become the constitutional incantation *par excellence* in this century—one that performs a sort of dialectics between rule of law in and as its own constitution.³⁶

To speak of constitutional rationality, then, is to engage in the process of constitutional rationalization in the sense of justification. The former implies an innate quality of constitutions; the later an effort to invest that quality in constitutions. Both express the impulse toward perfection—in the sense of the Christian doctrine of justification,³⁷ but to different ends. That rationalization—our constitutions—express, perform, signify and fulfill the premises of the political-economic model to which it gives expression, a phenomenological expression in acts of faith in the perfection rationalized within that political-economic model. In this sense, constitutional rationality has its own psychology—as a phenomenon of the mind. One does not speak of psychology as a science but rather as an application of the philosophy of solidarity—of the construction of orthodoxy and deviance, and of the development of structures for the privileging of the one and the suppression (or cure) of the other. Psychology in this sense is the rationalization of a phenomenology of orthodoxy built on the mimetics of behaviors that are themselves not just dialectical (and thus intersubjective) but also managed within strictly its bell curves.³⁸ What is natural about constitutions, then, from this perspective are its bell curves which are themselves the manifestation of its ordering premises in the actions and structures that reaffirm their value.

Constitutions, observed from their rear-ends, are well positioned to be presumed rational expressions of the unstoppable urge of humans toward the rational—especially when it comes to their highest order social relations;³⁹ a rational phenomenology in the style of Husserl.⁴⁰ But constitutions are not ordinarily “made” in an antiseptic political laboratory; constitutions are not conceived and drafted in

³³ Etymology Online reason, available [<https://www.etymonline.com/search?q=reason>] last accessed 29 September 2024.

³⁴ John O. McGinnis, ‘The Original Constitution and Its Decline: A Public Choice Perspective’ (1997) 21 *Harvard Journal Law & Public Policy* 195-209; Douglas C. North and Barry R. Weingast, ‘Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England’ (1989) 49 *Journal of Economic History* 803-837..

³⁵ Mark F. Grady and Michael T. McGuire, ‘The Nature of Constitutions’ (1999) 1 *Journal of Bioeconomics* 227-240.

³⁶ Randall Peerenboom, *China’s Long March Toward Rule of Law* (CUP, 2002).

³⁷ Romans 3:23-25.

³⁸ For a revealing but controversial exposure, see Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (NY: Free Press, 1994).

³⁹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans), Cambridge: Polity Press, 1996).

⁴⁰ Konstantinos Kavoulakos, ‘On Jürgen Habermas’s *Between Facts and Norms*,’ (1999) 096 *Radical Philosophy* 33-41; available [<https://www.radicalphilosophy.com/article/constitutional-state-and-democracy>] last accessed 19 September 2024) (“Thus, beside the ‘instrumental rationalization’ of the systems, we have a ‘communicative rationalization’ of the so-called ‘lifeworld’ (Lebenswelt) – that is, the world-images, moral beliefs, and fundamental institutions that govern social life.” *Ibid.*, p. 33)

themselves; constitutions are not fabricated dispassionately as a product of rational thought detached from the context in which they appear—much as one might want to theorize that possibility. Since the seventeenth century, certainly, many constitutional orders have emerged from out of the womb of conflict.⁴¹ They are born from fear and crisis in the passion of circumstances that made it possible to constitute a nation, a state, and its apparatus, and also to tear it apart⁴²—anger, vindication, joy, and faith in a shared future must be cultivated, and so cultivated, they must be transposed into the normative and institutional text around which the state is organized. And the object of that fear—either from the perspective of preservation or of forward movement to align with the times, is the fundamental mythos of the constitutional order itself, the purpose of which is to avoid the externalization of revolutionary dialectic. That mythos, it has been argued by some, is itself both the container of the revolutionary impulse, and the basis on which that constitutional containment can be shattered by reference to a failure of mythos in the experience of the times.⁴³ Of course efforts to shatter mythos in the name of preservation are as old, and as often failed, as the story of the modern constitution itself, whatever its popularity among the scholarly and policy aristocracy whose plaything mythos and the management of dialectical phenomenology might be.

The term “emotion” is understood in its classical sense—as a moving, or stirring or agitation, “from Old French *emouvoir* “stir up” (12c.), from Latin *emovere* “move out, remove, agitate.”⁴⁴ The agitator, of course, is fear and crisis. The agitation implies mental rather than physical movement—a state of agitation, and it adds a psychological layer to the psychology of constitutional rationality. It also implies a movement that is not necessarily tied to a direction or form—emotion stirs up feeling; and emotion may in turn be stirred up in the process of constitutional conception, gestation, and birth. And it continues to stir during the course of the “life” of a constitutional order until that order is overturned and the process begins again. Between the inception of revolutionary agitation and abandonment of the state of the things against which agitation is directed lies preservation of the object of agitation—or at least the idealization of that object as an aspirational end point. In Freudian terms emotion may be understood as the manifestation of the id to the superego of the rationalization that produces the ego of the constitutional text. In Jungian terms, perhaps, one dives into the subconscious of collective solidarity which is as solid as the life of the generations called on (trained to) its orthodoxies and invested in its fears. And its drivers—fear of and as crisis.

Fear and crisis define the heart of the constitutional compulsion that both defines the constitution as object and that signifies its structures and processes: compulsion; challenge; agitation; reform/protection; orthodoxy; heresy; abandonment—rinse and repeat. It would follow that constitutional emotion, its agitation, is distilled so that it might survive the moment of its realization. as the foundational premises, the way of looking at the world and the course of events that led to constitutional emergence, that are then elaborated in constitutional text, or in text that inform constitutional frameworks. Those fundamental premises are not lost in the process of constitutional

⁴¹ Chris Thornhill, ‘Constitutional Law and Cultures of Violence,’ (2024) 49(2) Historical Social Research / Historische Sozialforschung 34–64.

⁴² Michael F. Conklin, *The Constitutional Origins of the American Civil War* (CUP, 2019).

⁴³ Aziz Rana, *The Constitutional Bind: How Americans Came to Idolize a Document that Fails Them* (University of Chicago Press, 2024).

⁴⁴ Etymology Online, ‘emotion’ available [<https://www.etymonline.com/word/emotion>], last accessed 30 September 2024.

crafting, neither are the emotional states in which they are forged. Transposition and preservation provide the ground on which constitutions are developed and their normative structures cultivated.

It is the existence and profundity of the emotional state of constitution (fear and crisis), and its response (preservation through iterative mimetic repetition of action within its structures), perhaps more than the calculus of rational governance, that propels a people to statehood, and statehood to take its particular form, and compels mutation (even in the face of unchanging text) of that state as one generation gives way to another. The state of emotion must be maintained, honored, and performed, if it is to carry the state forward from the moment of its emergence, through the long period of time when the founding generation, and their emotional imaginaries are long dead, and the context in which that emotion was felt and understood become incomprehensible outside of its time.

It is to the preservation of that emotional explosion, and its alignment with core constitutional text, that constitutions devote time and effort, usually in their preambular texts, and sometimes in extraconstitutional documents with quasi-constitutional significance. If powerful enough, the emotive semiotics of constitutional explosion can affect not just its political community but those of other political communities looking for a way to rationalize and direct their own collective political emotion. This relational framing suggests a semiotics of constitutional emotion; and a connection between the semiotics of constitutive emotion and constitutional text—as norm and form.⁴⁵ This semiotics is built on constitutional emotion as an object (the preambular materials), as the signification of the quality of “objectivity” (the text of these objects as an ordering system), and as a signified object that elaborates a way of understanding and applying the signified object (the constitutional text itself).

Where does that lead one? This contribution examines powerful instances of emotive semiotics shaping collective constitutional meaning making through a semiotic lens. The focus will be on the way that emotive context shapes constitutional form—in a revolution to preserve traditional values; in a communist revolution within a multi-state imperial power; and in a revolution with a long fuse grounded in anti-colonialism and anti-imperialism. To those ends the essay first looks to a powerful instance of emotive semiotics, the U.S. Declaration of Independence (1776), and its reflection in the subtextual mimetic dialectics of threat and crisis and resolution in the U.S. federal Constitution (1789). It then considers its value as a template for the constitutionalization of separation in the 21st century through the lens of the preambular texts of the Chinese (1982) and Cuban (2019) constitutions. Lastly, its transnationalization—yet another revolutionary instance, but this time at a meta-constitutional level, is considered in the context of the Kosovo Declaration of Independence (2008). All of these emotive revolutionary impulses are then transposed into and as the constitutional settlement within which the revolutionary is to be distilled, tamed, and contained within their respective ideological cages.

Each of these serve as dialectical templates and templates of the constitutional structures within which the revolutionary emotive dialectics are to be caged. Each express anger driven clusters of emotion as the triggering form of dialectic (anger grounded in one state of idealized social relations and their expectations against another state that is antagonistic, threatening or irreconcilable with the generative

⁴⁵ Charles Sanders Peirce, “Two Letters to Lady Welby,” in Jan M. Broekman and Larry Catá Backer (Eds.) *Signs in Law—A Source Book (The Semiotics of Law in Legal Education III)* (Dordrecht Springer, 2015), pp. 95-116.

state) but from very different starting and ending points. For the United States, the starting point was the protection of traditional forms of popular solidarity and independence—and grounded in fear, crisis and its resolution, and originating in and manifested through popular action (even if elite directed) to resist the revolutionary consequences of the emerging system of an imperial sovereign Parliamentary system.⁴⁶ For Cuba and China, variations on liberation from foreign domination and toward an embrace of a radically different framing of the perception of politics and its social relations. For Kosovo, the emerging form (at least for subaltern states) is embedded in a hierarchically constituted set of principles of transnational constitutionalism⁴⁷—also grounded in fear, crisis and resolution, but enveloped in a network of expectation and approval from more power and transnational actors.⁴⁸

When put together, one can begin to see the way in which constitutional fear, producing crisis and resolution is built into the structures of what emerges with the resolution of crisis. The American Declaration of Independence serves as both the genesis of the resulting (eventually) American federal constitution. But at the same time, that product is built on the structuring of elements designed to anticipate and contain mimetic appearances of similar crises. The framework for that is in the ideological foundational principles. These appear in the U.S. Declaration of Independence both as abstract principles and as their fulfillment (in the negative) through the evidentiary list of the factual indictment of British betrayal. China, Cuba, and Kosovo follow similar path dependent trajectories. In each of these cases the revolutionary pathway served as the template around which a constitutional order was conceived and framed. For the Americans that produced a system of fractured power that would contain the threat of re-creating the late 18th Century British drift toward a Westminster system. For the Chinese and Cubans that produced a system dependent on the guidance and leadership of the revolutionary vanguard of social forces now organized as a Communist Party, presiding over an administrative apparatus that was to serve as the institutional structures for the confrontation of dialectical contradictions propelling these states toward revolutionary perfection. For Kosovo, that produced a sovereign enterprise that reflected the vision of a multi-cultural and secular Europe in which sovereignty was deeply embedded within webs of multi-lateral and supra-national governance, but also in which those webs would protect Kosovo from its older master.

The circle is now complete. Constitutional revolution, in the sense elaborated here, is a reflection not merely of ideological crisis, but more fundamentally of the crisis of reason⁴⁹—which can be rationalized into a system—which has been modernity's principal contradiction.⁵⁰ Constitutionalism posits a constitutional starting point from the moment of constitutional conception. Yet that ignores two

⁴⁶ Its Irish analogue, grounded in similar acts of resistance, though some more ancient, took more than a century longer to successfully manifest itself in a new constitutional order. See Larry Catá Backer, 'Some Thoughts on the American Declaration of Independence and its Irish/European Connections at Century's End,' (2000) 8(1) *Tulsa Journal of Comparative & International Law* 87-98.

⁴⁷ Christian Joerges, Inger-Johanne Sand, and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (London: Bloomsbury, 2004); Nicholas Tsagourias, *Transnational Constitutionalism: International and European Perspectives* (CUP, 2009).

⁴⁸ Larry Catá Backer, 'God(s) Over Constitution:

⁴⁹ Discussed from the perspective of phenomenology in Brainard, Marcus, *Belief and its Neutralization: Husserl's System of Phenomenology in Ideas I* (State University of New York Press, 2002), p. 7.

⁵⁰ Mao Zedong, *On Contradiction*.

fundamentally important elements of the constitutional project. The first is the quite contextually embedded manifested revolutionary emotion within which the dialectics of revolutionary action are framed. The second is that the constitutional “settlement” after the revolutionary moment reflects and diverts that revolutionary dialectics inward rather than marking a break from the dynamic dialectics that produced and fueled the revolution in the first place. In this sense the impassioned dialectics of the American Revolution has been domesticated in its constitution. These manifest both the enemy of revolutionary action—a unified power within a state apparatus—and designates the modalities of revolutionary action against it within the structures and operating systems of the constitution itself. The same can be said for the Chinese and Cuban constitutions. Each reflect the enemy of revolutionary action—the inward projection of foreign imperialism against a dissipated domestic state apparatus. Each designate the modalities of revolutionary actions within the apparatus imposed in the wake of the triumph of the revolutionary movements—Leninist vanguardism cabined by the core premises of a Marxist-Leninist political-economic order, manifested through structures of an administrative apparatus that manages and guides the masses toward the revolutionary objective grounded in the progressive dialectics of Leninist Marxism. Lastly, Kosovo reflects constitutional revolutionary post-modernity. It is a revolutionary understanding that has been experienced on the ground in Kosovo but managed from an international establishment that since 1918 has overseen first the constitution of Kosovo within an aggregated entity built from out of the detritus of the Austro-Hungarian Empire-Kingdom, and then reconstituted again from out of the fracturing of that 1918 aggregation. In both cases the revolution was fragmented—violence on the ground based on ethno-religious separatism, and in the constitution of the post-revolutionary state under the supervision of multilateral collectives of States substituting for the old imperial masters of the region. Its constitution reflects its dependence as well as its ethno-religious fragmentation, now continued within rather than against the reigning constitutional order.

Revolutionary Constitutions or The Revolutionary Internal Combustion of Constitutional Orders?

What does it mean when one speaks to constitutions of fear? This essay attempted one way of grasping the subject. To that end it shifted the constitutional gaze from the text of the constitution to its emotive framework, that is to the articulation of the fears and crisis that produced it. I suggested that the victory of a revolutionary dialectic rather than the production of a constitution is the starting point for the organization of the state under the principles through which its government is constituted and social solidarity is based. Its ending point is the incorporation of that revolutionary dialectic as and in the constitutional order that the revolutionary triumph made possible. In this sense, revolutions do not end—they just shift from being within the constitutional order or deployed to destroy that order in favor of another.

Two things become apparent in the process. The first is that constitutional formation is not a rational exercise detached from the messy and violent process of its origins. Indeed, constitutions are meant to reflect them. The second is that the nature of that reflection incorporates two distinct elements. The first is to transpose the crisis resolution into the structure of the text of the institutions created. The second is to develop a system that acknowledges that crisis is permanent and that seeks to embed in the constitutional document the strictures of resolution that preserve the core values that produced the initial crisis of separation. The object of the constitution, then, is both forward and backward looking. It

is an object that signifies the past and at the same time is meant to push that signification forward in time to the present (and the future) through its institutionalization of containment and mimesis, of the expectation of a cyclicity of fear-crisis and its resolution.

The interpretive referent, in all three examples—the urtext of American lawyer’s brief, the dialectical historical progressivism of the Chinese and Cuban variations, and the managerial progressivism of multilateral fear-crisis dialectics—acquire their meaning through the ideological basis from which a collective can perceive threat, manifest fear, engage in conflict and seek a resolution. The constitutional form, then, institutionalizes threat, crisis, and resolution within the originating framework that made the constitutional structuring possible. It provides the vessel within which a contained mimesis can be performed from one stage of historical development to another. The rest is a soothing propaganda—the notions of rationality and closure. The imaginaries of constitutions, instead, may be better approached as the engine within which the combustions of human nature may be utilized to propel the collective in whatever direction forward is defined within its ideological framework through the utilization of endlessly iterative replication of the original fear-threat-crisis-resolution arc. Constitutions, in this sense, are the stage within which origin stories are replayed, and in the replaying the origin story is reaffirmed and fulfilled in temporally relevant ways.

The lesson might then become clear. The object of revolutionary constitutionalism—the fundamental basis of constitutional design and perception since the late 18th century (though with antecedents well before then), is to preserve a revolutionary settlement of a political-economic order by cultivating revolutionary dialectics (rather than suppressing them) within revolutionary structures, now memorialized in a constitutional document. The object is redirection—from the utilization of revolutionary dialectics against a post-revolutionary apparatus now in power to an instrument for the preservation and affirmation of that post-revolutionary apparatus. It becomes a mimetic device denatured and now serving an apparatus. Stability is not forever; it retains its power at least until the fundamental contradictions of this revolutionary constitutional order collapse the system. At some point, the revolutionary dialectics that produced the post-revolutionary order will themselves again target that ordering from the outside. What remains is the cyclicity of dialectic—fear, response-reconstruction—rather than the systems to which it furthers from one to another stage of human historical development.