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CHAPTER

Autocratic Legalism

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Abstract

Though autocracy is often defined by arbitrary and unrestrained rule, many autocrats deliberately enshrine their power in law. A vast and growing body of research among scholars of political science and socio-legal history has examined these themes, showing the myriad ways in which laws can form the backbone of authoritarianism—not only stabilizing autocratic control but also enabling repressive practices. This chapter examines contemporary debates on autocratic legalism, focusing on research by scholars from political science and socio-legal traditions. After examining the form, function, and implications of using law as a weapon of political control, including various episodes of autocratic legalism across different periods of time and place, it explores themes of legalism and legitimacy. It concludes by considering points of overlap and divergence among different analytical approaches and offers suggestions for future research.

Keywords: authoritarianism, legalism, democratic backsliding, institutions, courts

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Introduction

Autocrats around the world are increasingly entrenching their power in law. For many illiberal leaders, it is not enough to merely have power; it also must be codified. Such thinking is reflected in the proliferation of new laws that center power in the hands of presidents, in constitutional amendments that extend term limits indefinitely, and in legislation that increases barriers to or outright bans democratic dissent. Even in established democracies, a growing number of attempts to either annul or overturn democratic elections has alarmed defenders of democracy and threatened the foundations of liberal constitutional order. These tactics have become particularly pernicious in hybrid regimes that have emerged since the end of the Cold War, a context wherein the tools of liberal constitutional order have been turned back onto themselves.

To understand these trends, authoritarian law has been scrutinized from many angles and referred to by many names, including "rule by law" (Ginsburg and Moustafa 2008), "authoritarian rule of law" (Whiting 2017), and "autocratic lawfare" (Gloppen 2018). Most such works fall under the banner of "autocratic legalism," a term first coined by Javier Corrales (2015) to describe the "use, abuse, and non-use" of law to consolidate control. Autocratic legalism has been broadly defined as legal tactics used by autocratic leaders to entrench power and sideline opponents in the name of the law. This is not "rule of law" as defined in the classic democratic sense, whereby laws are used to restrict the arbitrary exercise of power, but rather "rule by law," a system wherein laws are tools or weapons of the powerful, enabling them not only to enact their agendas but also to protect their interests and attack their opponents (Ginsburg and Moustafa 2008). In the latter context, law is just one weapon among many in the autocrat's arsenal. Law does not constrain authority, but rather is capable of enabling its worst excesses.

In this chapter, I examine contemporary debates on autocratic legalism, focusing on research by scholars from political science and socio-legal traditions. After examining the form, function, and implications of using law as a weapon of political control, including various episodes of autocratic legalism across different periods of time and place, I explore themes of legalism and legitimacy. I conclude by considering points of overlap and divergence among different analytical approaches and offer suggestions for future research.

Autocratic Legalism

Judith Shklar famously defined legalism as the "ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules" (Shklar 1964, 1). Though her definition was not specific to regime type, her conception of legalism concerns a normative worldview; mainly, a political system that is ordered by the belief that adherence to the law is an ethical one. Shklar's seminal framework highlights the interplay between law, morality, and legitimacy, mainly the idea that laws should be followed because it is the right thing to do.

How does this notion of legalism extend to the autocratic context, a setting wherein rules are largely determined not by popular mandate, but rather by arbitrary authority? Scheppele defines autocratic legalism as the deliberate creation of new laws "in service of an illiberal agenda" (Scheppele 2018, 548). To date, scholars have focused on laws designed to aggrandize executive authority, specifically statutes that empower the president while disempowering other branches of government (Corrales 2015). Such law may comprise both civil and criminal jurisdiction, including constitutional amendments, executive fiat, free speech, and revision to the penal code. The challenge for citizens living in these systems (as well as for scholars studying them) is that the undemocratic content of law may not be explicit; to the contrary, the illiberal implications of these statutes may be deeply buried beneath technical codes and obfuscating language. Furthermore, and perhaps more vexingly, many of these laws have been enacted in a constitutional manner, meaning that they have been formally enacted according to the constitution. This makes it more difficult for opponents of authoritarian law to challenge these measures because they were technically enacted through legally legitimate procedures (Bermeo 2016; Chua 2019; Lacey 2019).

This conception of autocratic legalism has in large part been developed in reaction to the experiences of post-Third Wave regimes, specifically patterns of legal executive aggrandizement that surfaced across diverse parts of the globe at the same time in the late twentieth and early twenty-first centuries, sometimes in a seemingly copy-cat fashion (Pozas-Loyo and Ríos-Figueroa 2022; Scheppele 2018). These studies are often focused on developments in Eastern Europe and Latin America where law has been routinely weaponized by populist demagogues who were democratically elected but have used their position of power to stifle their democratic opponents (Levitsky and Ziblatt 2019; Kelemen 2020). The presidency of Hugo Chávez in Venezuela (1999–2013) is particularly illustrative in this regard: not only did he create new laws

to formally expand his power, but he also creatively reinterpreted existing laws to serve his illiberal agenda, and furthermore ignored laws that would have otherwise undermined his aims (Corrales 2015). Leaders such as Chávez have ironically used their electoral mandates to undermine the very same legal constitutional systems that first brought them to power (Levitsky and Ziblatt 2019).

Though analytically rooted in a particular moment in history, twenty-first-century notions of autocratic legalism still provide a broad template for understanding the myriad ways in which autocrats use, abuse, and misuse laws in service of their objectives across time and place. Indeed, examples of using law for illiberal ends abound from the twentieth century. Consider the "legal" coups and subsequent imposition of martial law in places such as Pakistan, Rhodesia, and Uganda in the late twentieth century, wherein constitutions were abolished and rewritten following the unconstitutional overthrow of popularly elected governments (Hassan 1984). Or consider the "legal" discrimination waged under the Third Reich which not only criminalized the existence of minority groups but also made genocidal extermination a legally sanctioned process (Wilkerson 2020). Patterns of legal persecution in the Third Reich were actually in part inspired by the "legal" subjugation of black Americans in the American South, especially blood quantum laws determining legal rights of racial minorities (Mickey 2015). The common current across these diverse examples is that many oppressive, discriminatory, and predatory behaviors have been defended, justified, and executed in the language of the law. That is, there is nothing inherently democratic or protective about law as an institution.

The Form and Function of Autocratic Law

The research on autocratic legalism highlighted above is related to a separate body of work on autocratic institutions among political scientists that examines the form and function of laws as tools of autocratic survival and control (Ginsburg and Moustafa 2008; Moustafa 2007; Albertus and Menaldo 2012; Truex 2014; Ginsburg and Simpser 2013). This work shows that most (if not all) autocracies rely on law to a certain extent, even in contexts that are weakly institutionalized. That is, no autocratic regime is truly lawless. But laws in these contexts help reinforce autocratic authority in a variety of ways.

Law as a Tool of Regime Coordination

To understand this approach, it is useful to revisit how power is conceptualized in an autocratic regime. A popular dictum holds that no autocrat governs alone; even a strongman dictator must delegate some authority to subordinates (Myerson 2008; Gandhi and Przeworski 2007). In regimes that are more institutionalized, power is often shared in a legislative body (Myerson 2008; Gandhi 2008; Meng 2020). In parliamentary regimes, laws are often written, debated, and officially approved by legislators acting on behalf of the autocrat. Lawmaking is thus a critical part of day-to-day governance. By institutionalizing this process across various government actors and agencies, lawmaking in autocratic regimes can create multiple stakeholders in the legal system, each of whom plays a role in making and enforcing the law and in ensuring that the system functions. Law in such a system is not necessarily about protecting the rights of citizens or restraining the authority of the executive, but rather about maintaining and stabilizing the system itself. That is, laws are "right" because they perpetuate the status quo.

By contrast, in personalist or military regimes, where might make right, laws are often simply a formal expression of the autocrat's whims or preferences. The use of executive fiat, for example, perpetuates a system of "rules" that are often binding for the ruled rather than the ruler, and rules are followed not because they are seen as fair or just, but rather because not doing so is tantamount to defying the autocrat's authority (which might entail punitive consequences). These orders may reveal the preferences of the top leadership, but such a system is often not truly institutionalized; law is only as good as the dictator's word.

These works tend to adopt a functionalist approach to the study of autocratic institutions. Specifically, scholars argue that laws, constitutions, and courts are all devices that help coordinate elite behavior and defuse conflict within autocratic regimes (Gandhi and Przeworski 2007; Gandhi 2008; Meng 2020). In certain contexts, such institutions can serve as contracts between ruler and supporters, establishing rules of political behavior by which both sides will be held in check (Myerson 2008; Chwe 2013).

To date, autocratic institutionalists have largely focused on the function of bureaucracies, legislatures, cabinets, and parties (Arriola 2009; Arriola, Devaro, and Meng 2021; Hassan 2017; Hassan 2020; Hassan, Mattingly, and Nugent 2022; Woldense and Kroeger 2024). Constitutions have also been shown to serve as remarkably durable contracts outlining how power will be shared between different factions or constituencies (Hassan 2015; Albertus and Menaldo 2012; Ginsburg and Simpser 2013). Similar inferences have been drawn regarding courts as sites of dispute resolution and regime legitimation, wherein autocrats can effectively institutionalize the process of punishment (Myerson 2008; Wang 2014; Moustafa 2007; Shen-Bayh 2018; Shen-Bayh 2022).

Law as Window-Dressing for Political Violence

In addition to providing an institutional framework for regulating political relations, law can also be used to conceal or justify violence by the state. In particular, by invoking the language of the law in the persecution of their political rivals, autocrats can effectively cloak their violent practices in more palatable terms (Ginsburg and Moustafa 2008): political opponents are rebranded as illegitimate criminals; ethnic and sexual minorities are recast as moral deviants. In this way, law can make oppressive behaviors seem right or just (Massoud 2013). Rajah (2011) refers to this phenomenon as "urbane authoritarianism," wherein autocrats shy away from overt coercion in favor of more subversive, insidious tactics of control through the criminalization of undesirable behaviors. Law here offers a form of cover by "[encoding] and [concealing] ideology and relations of power" (Rajah 2011, 946). Note that weaponizing laws in these ways means paying lip service to due process without embracing it in practice. However, using law as window-dressing can be a double-edged sword for autocrats. In particular, it may make conventional forms of extrajudicial violence more counterproductive because committing overt acts of violence punctures the legalistic image that autocrats are attempting to cultivate.

Law has long been used to conceal the true nature of repression, or else justify it in legal terms. In fact, rational-legal ideals—broadly defined as the use of legal norms and regulations in order to justify the regime in place—have been a source of popular legitimation in a variety of party and military autocracies since the mid-twentieth century (V-Dem). However, is such legitimacy even possible in contexts where rulers govern capriciously? Debates about the legitimacy of political regimes often center in part upon their respect for rule of law, but rule of law is often considered an oxymoron in autocratic contexts (see Grauvogel and von Soest's chapter on legitimacy and legitimization strategies in this volume). In particular, the idea that law is meant to be used to hold arbitrary power accountable seems antithetical to the definition of arbitrary, authoritarian rule (Gerschewski 2018; Ginsburg and Moustafa 2008). A conceptual challenge in these debates is that norms of political-legal accountability are deeply intertwined with conventional definitions of democracy, specifically the notion that law can and should be used as a tool for ensuring due process.

Criminal law has also long been used to justify the denial of rights to undesirable or troublesome groups. This logic is a common undercurrent of political trials across the centuries (Kirchheimer 1961; Christenson 1986; Solomon 1996; Ríos-Figueroa and Aguilar 2018), proceedings wherein autocrats transformed courts into sites of political persecution and turned the machinery of criminal justice against threats to their survival. The process by which this occurs involves various government agencies and the coordination of multiple actors and systems: Attorneys general and legislators make legislation that control the bounds of

acceptable behavior, which are then used by the police to arrest or sanction errant individuals, who are later prosecuted by the state in the courts. By conducting these proceedings according to formal laws and procedures, autocrats can effectively institutionalize the process of punishment; that is, transforming persecution into prosecution (Shen-Bayh 2022).

While the basic routine of political trials has remained remarkably consistent across time and place (most political trials follow the same sequence of indictment, prosecution, and punishment), the content of these proceedings, especially the crimes being prosecuted, has been more variable. For example, in a variety of military and civilian dictatorships in Latin America and sub-Saharan Africa during the Cold War, crimes of treason and subversion were levied against political opponents to transform political persecution into legal prosecution (Pereira 2005; Shen-Bayh 2022). These proceedings leverage the proceedings of a judicial ritual in order to institutionalize the process of punishment and help stabilize autocratic rule (Shen-Bayh 2018). But whereas crimes against the sovereign (or state) were once commonplace (Kirchheimer 1961; Myerson 2008), towards the latter half of the twentieth and in the early twenty-first centuries, economic, moral, and even petty misdemeanors have been more frequently invoked. Anti-corruption campaigns are especially visible forms of legal persecution that have been deployed in contexts as diverse as China, Latin America, the Middle East, and sub-Saharan Africa, wherein crimes of corruption have helped purge political opponents from the government and ruling party (Ding and Javed 2020).[1]

The timing and targets of these cases are often significant, as when the former prime minister of Pakistan Nawaz Sharif and his daughter were both found guilty of corruption and sentenced to ten years in prison in 2018—less than three weeks before the national elections (Constable 2018). A corruption trial also helped bring down former rising star of the Chinese Communist Party Bo Xilai, whose conviction came months before a historic party congress. Crimes of sodomy have been used to sideline political opponents in more culturally conservative societies. In Malaysia, for example, the current prime minister (as of 2023), Anwar Ibrahim, faced numerous criminal prosecutions and convictions over the course of his decades-long career when he was still a leader of the opposition. On more than one occasion, he was tried and convicted of corruption and sodomy—cases that conspicuously overlapped with key election cycles. Similar tactics have been levied against opposition leaders in Uganda, where the passage of an "anti-gay" bill in 2023 prohibited same-sex relations upon penalty of life in prison (for more information on opposition politics, see Gandhi, this volume; Northam and Athumani 2023).

Conceptual and Empirical Challenges: Bridging Socio-Legal and Political Science Approaches?

Research on autocratic legalism has profoundly deepened our understanding of how laws can be weaponized in the service of illiberal interests. Importantly, this research has convincingly argued that laws are not inherently liberal institutions that are "corrupted" by would-be dictators; rather, they are mere tools that can be used by democrats and autocrats alike in support of their respective agendas. In taking this approach, existing research has done a remarkably good job of bridging the gap that often exists between scholarship on democratic and on autocratic regimes, one that has characterized a significant body of work on both legal and judicial institutions. Moustafa (2014) notes that this kind of intellectual divide limits our ability as scholars to identify trends both within and across regime type, such as authoritarian tendencies in democratic contexts and vice versa. These trends are apparent not only in weakly institutionalized democracies, but even in established advanced democracies such as the United States (Haggard and Kaufman 2021; Grumbach 2023; Staton, Reenock, and Holsinger 2022).

This literature also does important work conceptualizing gradual change rather than sudden ruptures. As Bermeo notes, "de-democratization today tends to be incremental rather than sudden … troubled

democracies are now more likely to erode rather than to shatter—to decline piece by piece instead of falling to one blow" (Bermeo 2016, 14). The subtleties of this are often crucial to capture. In particular, when dealing with themes of window-dressing, or efforts to deliberately obfuscate unpalatable practices behind closed doors, scholars must read between the lines and be finely attuned to subtle rather than drastic changes on the ground, including legal ones.

Yet the subtleties of autocratic legalism pose a potential measurement challenge for positivist scholars. Because changes are often gradual, incremental, and piecemeal, it can be difficult to identify not only the beginning but also the end of a transition. This makes the measurement of legalist changes potentially fraught with error, especially when trying to compare autocratization trends across different contexts.

Even measuring formal legislative changes is not necessarily straightforward. While constitutional amendments tend to be relatively visible, leaders may be able to obfuscate their practices in dense legal language, or else bury significant developments in hundreds of pages of difficult-to-read legislation. Such measures can be an effective way of transforming society in plain sight while lay audiences are none the wiser. This underscores another important empirical issue in the study of autocratic legalism: by the time these trends have been identified or diagnosed, it may already be too late. In other words, the changes may be formally entrenched.

Part of the issue is that among scholars of autocratic legalism, more attention has been paid to top-down measures rather than bottom-up responses. In particular, the main actor in these models tends to be the executive, and the main site of action is the legislature or parliament: "loosening the bonds of constitutional constraint on executive power through legal reform is the first sign of the autocratic legalist" (Scheppele 2018, 549). However, such models have tended to overlook or downplay actions occurring beyond the executive and legislative branches. Even courts tend to be treated as a secondary site of autocratic legalism, and a reactive one at that.

As the literature has evolved, scholars have increasingly turned their attention toward everyday people living in these societies and their methods of coping and survival under legalist autocratic regimes (Chua 2019). Building from these findings, we should continue expanding our analytical inquiry to other agents of the state, as well as other sites of legal contention, to better understand strategies of legal mobilization in response to autocratic legalist trends.

Autocratic legalism is typically defined by its end goal—mainly, the consolidation of power—but research tends to focus on processes over outcomes, especially among scholars in the socio-legal tradition (Feeley 1979). There is practical reason for this: attempting to conceptualize and measure an ongoing, seemingly endless phenomenon is fundamentally difficult. As Scheppele notes, "we are identifying a trend as it is emerging, and so we are evaluating many of these regimes *in media res*, while they are still developing. While we can therefore see how these regimes start, we do not yet have a detailed map of how these experiments end" (Scheppele 2018, 556). Whether leaders are ultimately successful in their illiberal objectives is thus yet to be seen. From a research perspective, outcomes have thus become secondary to the analysis and the focus instead is on the measures currently underway.[2]

However, by taking this analytical approach, the findings of socio-legalists are somewhat divorced from those of political scientists who study autocratic institutions. Whereas the former focus on processes over outcomes, the latter group tends to focus on outcomes rather than processes, often with a functionalist understanding of the law. But these legal strategies are not limited to managing the expectations of other elites; autocrats can also use laws to make concessions to the broader population. Consider how constitutional referenda are often employed by autocrats as a way of demonstrating or cultivating popular support for their rule (Albertus and Menaldo 2012). Laws can also be used to signal favoritism to certain sectors of society by making such favoritism official. For example, so-called anti-gay bills that discriminate

against sexual minority groups have been used to galvanize popular support among conservative constituencies around the world, including Africa, Eastern Europe, and North America (Grossman 2015; Dionne and Dulani 2013; Wilkinson 2014; Encarnación 2020). Laws have also been used to reward certain constituencies, such as the media censorship laws in Latin America that were used to win sympathy from Catholic groups (Esberg 2020). Laws here may be largely ceremonial, but they nonetheless provide a means to codify the favorable treatment of (or discrimination against) certain sectors of society (Choi, Poertner, and Sambanis 2022).

In these works, functionalists tend to interpret the meaning of institutions by how they are used. As such, these types of analysis assume that institutions are relatively established in their usage, or have at least matured into their final form. By contrast, socio-legal scholars have tended to focus on the process of institutional transformation, wherein institutions are either still emerging or evolving and may ultimately never stop changing. While this analytical divide is not insurmountable, it is important to acknowledge the differences in these approaches because they have distinct implications for our understanding of the meaning of law in authoritarian contexts. In oversimplified terms, for the functionalists, law is the end; for the socio-legalists, law is more of a means to an end. To be clear: these literatures still have much to teach each other, and there are insights to be gained from both. But more deliberate crossover between the two literatures would help deepen understanding of these themes.

Even as the literature on autocratic legalism acknowledges that such trends have insidious and deleterious effects on democratic systems, a pervasive idea in this scholarship (especially among autocratic institutionalists) is the idea that law is an inherently less violent, less totalitarian form of power; that legal repression is less destructive than physical repression. But this conception of law (and institutions more broadly) as a nonviolent medium overlooks the violence of the law itself. In autocracies, especially, the enforcement of the autocrat's law is an intrinsically violent act, wherein violations thereof entail threats of physical sanction. As Robert Cover writes, "law is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line" (Cover 1986).

Directions for Future Research

If legal repression is assumed to be less violent than conventional repression, it is arguably the case that autocratic legalism has had a profound, transformative effect on the way people speak, behave, and even think. That is, autocratic legalism has the power to change human behavior, whether that entails compelling obedience or provoking resistance. Recent research reveals the power of looking at how living in such systems conditions individual behavior. Letsa and Morse (2023) show how partisanship conditions individual perceptions of autocratic legalism in Africa; that regime partisans not only support autocratic legalism, but can also be persuaded to accept the outcomes of cases that non-partisans would characterize as political persecution.

While it is true that autocratic legalists of the twenty-first century have in many places limited the ability of people to resist these trends, especially through legally legitimate channels, that does not mean that everyday people are unable to mount an effective response (Chua 2019). This is especially the case for civil society activists, whose efforts to resist autocratization trends can have a profound influence on their future political careers (Weghorst 2022; Davis 2023). Building on these findings, future work should continue to scrutinize how autocratic legalism affects individual behavior and changes perceptions of autocratic rule, especially everyday people who learn to adapt and exist within these systems (Letsa and Wilfahrt 2018), as well as whether opposition actors also seek legal means to challenge powerbrokers (and to what effect).

As the literature evolves, scholars should also continue to scrutinize the long-run effectiveness of autocratic legalism, especially its window-dressing function. In particular, many scholars have argued that autocratic

legalism helps conceal unpalatable practices. But in many instances, it is unclear whether such tactics actually conceal anything (Kitagawa and Bell 2022). For example, with respect to political trials, pro-democracy groups have frequently condemned such cases as flagrant abuses of the criminal justice system for partisan ends and harbor no illusions that due process will be granted to the accused. In fact, "persecution as prosecution" was a phrase coined by the human rights community, and has become a popular rallying cry whenever such cases come to court, which suggests that political trials have done little to quell criticism among outside observers. Opposition supporters likewise seem unconvinced by the legitimacy of these proceedings, especially when the target of prosecution is a high-profile opponent of the regime (Letsa and Morse 2023). Such cases have been characterized as witch hunts, not fair trials. Ultimately, if audiences do not believe that judicial institutions are being used properly, judicializing punishment can garner more negative attention to repressive practices. The longer such proceedings take to unfold, the more opportunities for both domestic and foreign critics to scrutinize (and potentially find fault with) the conduct of courts.

Finally, as discussed above, contemporary debates on autocratic legalism are largely responding to a particular historical moment. Indeed, there are many references to the "newness" of these phenomena in recent scholarship (Scheppele 2018; Guriev and Treisman 2019; Guriev and Treisman 2022). To be sure, there are unique pathologies of modern autocratic governance that are rooted in the twenty-first century, but there are also echoes throughout history that deserve further scrutiny. The invocation of rational-legal ideals as the basis of legitimacy is not new (see Kokkonen et al.'s chapter on succession in this volume). We need more comparative historical analysis of these trends. By turning towards the past, we are better able to understand the present.

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Notes

1 “Iran Ex-Prosecutor Sentenced to 135 Lashes for Corruption.” BBC, November 2, 2016. https://www.bbc.com/news/world-middle-east-37851724.

2 “It is the overreaching aspiration and the legalistic tools of the trade that turn the leaders I consider here into legalistic autocrats, not their relative success or failure in the end” (Scheppele 2018, 556).