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Weaponized Legalism, Low Trust in the Judiciary, and Rule of Law Backsliding

Maria Popova, McGill University

Weaponized legalism is a legal regime where we observe the mobilization of law in bad faith to gain a power benefit and improve one's position in the political competition arena in the shortterm. Weaponized legalism contributes to undermining the rule of law and the legitimacy of judicial institutions. Judicial decisions are not perceived to be any different anymore from political decisions and judges become just another political actor which further undermines their legitimacy and the compliance with judicial rulings. The longer such strategies stay in place the more difficult it will become to reverse the process of democratic backsliding that we currently observe in the European context. It is therefore crucial to better understand what factors favour the shift towards weaponized legalism and to what extent European institutions and actors successfully contribute to breaking this path.

On Some Inconveniences of the Rule of Law

András Sajó, Central European University

This presentation deals with some internal weaknesses and some external conditions that enable the demise of the rule of law.

A

1. The rule of law (RoL) has a potential to sustain any norm bound political system including the unjust or unfair status quo. This undermines its legitimacy and pushes it into a cycle of more aggressive exceptionalism, ad hockery and at the end of the road its own self-annihilation.
2. Related to this, rule of law that stands for formal justice which becomes a barrier and impediment of material (substantive) justice (not a bad thing in itself) but once more socially delegitimizing.
3. As a practical tool of law-making and law enforcement, RoL is uncertain and to some extent contradictory.
4. The RoL consists of inherent elements, components which may undermine the very essence and efficacy of the RoL and the legal system.
5. The RoL is not only capable of sustaining an unfair status quo or state of affairs but it can be unfair, disrespectful and oppressive following its own logic, contributing to the demise of constitutional democracy.
6. The RoL is not sufficiently protected against its own demise by its own means.

B

Beyond the inherent contradictions and related weaknesses two non-legal, external elements merit particular interest in the study of the self-liquidation of the RoL.

1. Like constitutionalism in general, the existence and observance of the RoL is to a great extent a matter of mentality, tradition and culture. There is a spirit of the rule of law that must be shared by the actors of the law, and to some extent society, for the RoL to be meaningful and efficient. Without a shared commitment to legal decency judges

will become mere technicians accepting a mechanical, politically imposed interpretation of the law, partly because of existential conformism, partly because of resignation. That would be the end of the RoL even without the tricks of the rule by law.

2. Where authoritarian predispositions prevail in society power can/will be used without constraint. For the authoritarian mind a constrained power is not power at all. By authoritarian disposition I mean a veneration of the authority of a person, a collective identity, bordering religious fanaticism. In this conundrum the RoL is popularly contrary to political power: a power holder is not worthy of power if he will not use it in a constrained manner.

Autocratic Legacy, Institutional Change, Rule of Law and Judicial Independence in the Post-Soviet Space: The Case of Georgia

Nino Tsereteli, Democracy Reporting International

The paper will have three major parts. First, I will discuss the evolution of the formal framework governing judicial self-governance/judicial independence in Georgia. Second, I will elaborate on the informal side of the everyday operation of Georgian justice: the persistence of old informal networks, rules and practices or emergence of new ones in parallel to the development of formal institutions, and I will also discuss how the two types of institutions/practices (formal and informal) interact; In the third, final part, I will assess the effects of these developments on judicial behavior - on and off-the bench (including judges' ability to govern themselves and decisional independence of judges). The intention is to show two faces of Georgian judiciary and judges - the one on paper and the one in practice.

Centralized Judicial Review as a Challenge to Liberal Democracy alas “the Road to Hell is Paved with Good Intentions

Zdenek Kühn, Charles University

In my speech I will argue that dangerous trends of illiberal backsliding in the region of Eastern Europe were also enabled by the drive towards too strong constitutional tribunals. Empowering constitutional tribunals and centralizing judicial review of legislation often means disempowering or weakening the power of ordinary (general) courts.

The constitutional tribunals in the region claimed the exclusive powers over review of constitutionality of legislation. In the 1990s this trend has been approved by many Western observers because it also meant the fight against untrustworthy post-communist judges and problematic legal academia. The constitutional courts became champions of liberalism and the New Constitutionalism. Because they were endowed with very broad powers they had also potential to transform the entire legal system and push ordinary judges towards the ideals of the rule of law.

Yet the authoritarians and illiberal politicians noticed the opportunities which centralized judicial review provided for the illiberal "counter-revolution". Ordinary courts devoid of any political power, as known in the countries of Eastern Bloc by the 1980s, therefore could come back via this sort of "over-centralization" of constitutional courts. Because it is difficult to control the entire judiciary (unless we find ourselves in a purely totalitarian state) the new illiberal politics finds it tempting to take over the personnel of the constitutional tribunal – and grant even more power to the captured tribunal.

Consequently, abolishment of constitutional courts is not very likely in contemporary illiberal regimes. Today's authoritarians are more inventive in this regard than were the communist rulers before 1989. Indeed, they can also make good use of constitutional judiciary. Since the legalistic constitutional language has become deeply embedded in the political discourse over the past few decades, the nation's constitutional tribunal can justify why one should not adhere to the case law of multinational judicial tribunals, for example by referring to the constitutional identity of a legal system. The relationships between the European Court of Human Rights (or the Court of Justice of the EU), on the one hand, and the Polish Constitutional Tribunal, on the other, are a good example, as the Polish Tribunal tends to protect the national constitutional specificities (constitutional identity) against the requirements of the Strasburg case-law.

In any case, rejection of case-law of an international tribunal appears more elegant if supported by a ruling of the national constitutional court than if the same rejection comes from an executive authority of an authoritarian regime. The steps taken by the Polish Constitutional Tribunal since January 2017 are a certain variation, or rather a caricature, of the same. After the Law and Justice party took control of its personnel, the Polish tribunal has served basically as a vehicle for the ruling party against the opposition; it has been abolishing laws complicating the government's rule as "unconstitutional", etc.

Therefore, I will argue that a certain kind of decentralizing of judicial review is necessary to make the rule of law viable. I will provide examples from Czechia, Poland, Slovakia etc.

Is the Authoritarian Rule of Law an Oxymoron?

Jens Meierhenrich, London School of Economics

In this paper I explore authoritarian ways of seeing the rule of law. My goal is to disaggregate what we are liable to homogenize, to complexify what we tend to simplify. By tackling the idea of the authoritarian rule of law—and by turning this metaphor into a concept—I respond to a glaring lacuna in the existing literature. Although the literature on authoritarian legality is copious, it has struggled to make conceptual sense of the rule of law in relation to its "others." We have innumerable case studies of violent legalism, but our conceptual lenses for surveying the terrain beyond the rule of law are not fit for purpose. By exploring—and mapping—this conceptual terrain, I seek to advance the debate about the revitalization of the rule of law by agents domestic and international. My motivation is to explode the rule of/by law binary. I

highlight the advantages of demarcating a "gray zone" between rule *of* law and rule *by* law. The paper is organized into three parts. Part I engages critically with the debate about rule by law. In Part II, I introduce another "other" of the rule of law—the underdeveloped idea of the authoritarian rule of law. I incorporate into my conceptualization of the authoritarian rule of law insights from Ernst Fraenkel's institutional theory of Nazi dictatorship. To facilitate comparative historical research, I slot, in Part III, my systematized concept into a new typology of legal orders. To showcase the utility of my conceptual innovation I offer illustrations from cases. Part IV concludes and considers implications.

Authoritarian Rule of Law: Design, Discourse, and the Everyday

Jothi Rajah, American Bar Foundation

On 8 May 2019, the Parliament of Singapore passed the controversial Protection from Online Falsehoods and Manipulation Act (POFMA). Popularly referred to as the "fake news law", POFMA might be read as legislation designed to update the state's control of the public sphere through a policing of messages on the internet and social media platforms. Critics speculated that POFMA was timed to chill critique of the state in anticipation of a general election. That general election was held on 10 July 2020, and in the flurry of about thirty-five POFMA orders and directives issued from November 2019 to July 2020, all but five were directed at opposition politicians, civil society, and critics.

Through sociolegal methodologies, this paper focuses on the design, discourse, and everyday features of POFMA to illustrate the reconfiguration of the profoundly liberal concept 'rule of law' into the seeming oxymoron, authoritarian rule of law. Attending to the manner in which law and the postcolonial nation-state have been co-constituted through a socio-political fabric that includes colonial, Cold War, and postcolonial dynamics, I unpack the paradox of authoritarian rule of law: a regime that has engineered a near-monopoly of the domain of politics, and systematically undercut rule-of-law freedoms and institutions, has managed to be acclaimed as a rule-of-law exemplar. I make sense of this paradox by disentangling and scrutinizing key modalities and components of rule-of-law discourse including legislation, Westminster institutions and procedures, public discourse, authoritarian politics, judicial interpretation, and an enduring, repeatedly revitalized narrative of national vulnerability.

Autocratic Infralegalism

Oscar Vieira Vilhena, Getulio Vargas Foundation, School of Law at Sao Paolo

Three decades after the enactment of the most democratic of our constitutions, Brazilian citizens elected Jair Bolsonaro as president, a populist politician with authoritarian traits, whose discourse had been historically hostile to democratic values. The election of Bolsonaro has imposed an enormous challenge on our consensual constitutional democracy. This research intended to assess to what extent the consensual system and, more specifically, the legislature and the judiciary have been capable of halting Bolsonaro's agenda during the first three and a half years of his administration.

Our research indicates that, during this period, Bolsonaro's performance in the legislature was much weaker than that of previous presidents. However, Bolsonaro's difficulty in obtaining support in parliament has not prevented him from circumventing the system of checks and balances and advancing numerous goals on his illiberal agenda through a method we called "authoritarian infra-legalism". The authoritarian infra-legalism employs bureaucratic prerogatives of the chief of executive to advance an illiberal agenda, without modifying laws or approving constitutional amendments. It combines the issuing of infra-legal acts (such as decrees), with modifications in the bureaucratic structure (through actions of omissions) and illegal informal orders or threats. Through this method, Bolsonaro acted outside the limits of protection of consensual mechanisms, such as negotiation with the legislature. To the extent that those actions largely occur outside the legislative sphere, the onus of controlling the Bolsonaro administration falls heavily on the Judiciary, especially the Supreme Court.

Two Models of Everyday Resistance to the Erosion of the Rule of Law

Mark Tushnet, Harvard University

Quite frequently ordinary people subvert directives emanating from higher ups in their organizations, when those directives conflict with their practice- and tradition-derived understandings of what they should do. Labor unionists "work to rule," complying to the letter with directives whose strict implementation interferes with accomplishing their managers' economic goals. Peasants and line bureaucrats have the "weapons of the weak," which include working at a pace too slow to accomplish what their superiors want but just fast enough to make discipline impossible within the stated rules, and concealing from superiors useful information whose disclosure is not strictly mandated but that would be quite useful as superiors attempt to manage their operations.

This paper examines what judicial officials' "weapons of the weak" are and how they too can "work to rule" if they are faced with demands that they believe are inconsistent with the rule of law as they understand it. An important qualification is that these weapons are available only to judges and other officials who indeed believe that the demands they face are incompatible with the rule of law—which is not the entire class of judicial officials. And, in the end, hierarchical superiors inevitably have the sheer power, which they may come to believe must be used, to bring their bureaucratic inferiors to heel. Everyday resistance, though, may put the day of reckoning off for long enough to allow ither forms of more directly political resistance to be effective.

Revisiting the Origins of Positive Judicial Independence: Incentives, Ideas, and Integrity

Lisa Hilbink, University of Minnesota

What equips and enables judges to defend the rule of law when it comes under pressure from powerful actors, private or public? I address this question through a reflection, from the current moment, on judicial behavior in Chile and Spain under both dictatorship and

democracy, emphasizing the importance of professional identities and commitments to "positive" (i.e., behavioral) judicial independence.

Political Intervention as Institutional Logic: The Dual State Reconsidered

Csaba Győry, ELTE University/Institute of Legal Studies

Based on an ongoing qualitative empirical project about the everyday life of judges and prosecutors in Hungary, the paper attempts, using Fraenkel's theory of the dual state, to conceptualize the nature and logic of political intervention into judicial proceedings, as well as techniques of resistance. Mainstream accounts on the rule of law erosion mostly concentrate on the larger constitutional frame, or implicitly presuppose crude and direct forms of intervention. Meanwhile, insight from empirical works on the subject from other countries (for example Hendley, 2009; Popova, 2012), while offering much-needed fine-tuned accounts, are not necessarily directly applicable to the Hungarian case. Yet understanding of the everyday logics and strategies of intervention is necessary not only to assess the progress of the rule of law erosion, but also developing strategies to counter it.

Informal Institutional Elements and the Failure of Building a Constitutional State in Hungary

András Jakab, University of Salzburg

Institutions are made up of the interplay of three components: (i) formal rules, (ii) actual practices, and (iii) narratives (the last two are referred to jointly as informal institutional elements). Institutionbuilding concerning the rule of law and democracy has been a moderately successful feat in postsocialist EU MSs like Hungary and Poland. To put it more pessimistically, it has partially failed since the end of socialism, in particular when it comes to actual practices and narratives. Lawyers have the tendency to not pay enough attention to the informal elements (practices and narratives) in this failure, even though they have been much more important than formal legal norms. Inherited cultural patterns from socialism (and even from the times before) help to explain much more what has happened and why. The nature of such regimes cannot be understood based on their formal legal rules, as the typical modus operandi is exactly the biased application of laws. We can observe a growing gap between written laws and legal reality: the normativity of formal legal norms is slowly deteriorating in these regimes (especially in politically sensitive legal areas) and informal extra-legal practices are becoming increasingly stronger, often (at least partially) contrary to existing laws. The forms are still there, but slowly they are being hollowed out. Captured institutions (such as constitutional courts and the prosecutorial services) are independent on paper, but in fact they act along the wishes of the central government. All this is possible because of the inherited legal and political culture of these countries that serve as a breeding ground for such developments.

Variable Geometry of Legal Legitimacy: The Polish Constitutional Court and the 'Populism' Revolution

Hanna Debska, Jagellonian University Cracow
Thomas Warczok, University of Warsaw

Studies of contemporary populism usually focus on either the ideological layer of this phenomenon or on its social causes. In contrast, this study turns to *populism in action* with a focused analysis of the Polish Constitutional Court (CC), which was the first institution *taken over* by the populist and authoritarian party *Law and Justice* (Prawo i Sprawiedliwosc – PiS), the current ruling party in Poland. The detailed examination of the Polish CC, in both synchronic and diachronic dimensions and centering on the logic behind the selection of judges by respective political parties, provides a broader comparative perspective on what contemporary right-wing populism is in practice.

By examining the changing forms of legitimization and the legitimizing effects of the Polish CC (from its first term, established prior to the fall of state socialism in 1989, to the contemporary term, marked by PiS' rule), hidden relations are uncovered between politics, law, and other expert institutions - under the conditions of liberal democracy and its authoritarian populist questioning. To investigate CC social space we conduct our study by using Pierre Bourdieu's approach and Geometric data analysis (multiple correspondence analysis - MCA). MCA of the CC space reveals an outline of the logic of the populist ruling, especially in the key context of the indirect forms of its legitimacy.

Revolution of the Everyday - Transformation of the Norms. Transformative Failure - Deep Structures of Backsliding

Zoltán Fleck, ELTE University

The industry of seeking the causes of democratic backsliding in some CCE countries activated different conceptual apparatuses, but these are mostly simplistic versions of structure/agency theories and historical/cultural determinism. Acknowledging the different temporality of institutions and everyday norms, new doors open to grasping cultural changes. Post-communist transformations can be rethought by the help of new categories as *worldmaking*, *imagination*, *symbolic revolution*. Pathdependence as general explanation seems as abortive as the pure institutionalism.