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An interdisciplinary Working Group at the European University Institute

Populist Constitutionalism? (6): Kim Lane Scheppele on Autocratic Legalism

16th November 2017

Kim Lane Scheppele (<https://blogs.eui.eu/constitutionalism-politics-working-group/author/kim-lane-scheppele/>)



The Turkish Constitutional Court. credits: Habertürk

The final contribution in our series on populism and constitutionalism comes from **Kim Lane Scheppele**, Laurance S. Rockefeller Professor of Sociology and International Affairs at Princeton University, who discusses the ways in which modern autocrats in Hungary, Turkey, and elsewhere hide inside the language of constitutionalism whilst dismantling constitutional orders. Professor Scheppele will be the keynote speaker of our workshop on populist constitutionalism on November 20 ([info & sign up here \(https://www.eui.eu/events/detail?eventid=142277\)](https://www.eui.eu/events/detail?eventid=142277)). See our previous contributions by Paul Blokker (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-4-populist-threat-democratic-constitutionalism/>), Gábor Halmai (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-3-populist-constitutionalism-oxymoron/>), Théo Fournier (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-2-defining-populist-rhetoric/>), and Julian Scholtes (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-1-populism-constituent-power/>), and Bojan Bugarić (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-5-whence-populists-rise-east-lessons-democratisation-constitutional-theory/>).

Autocratic Legalism

by **Kim Lane Scheppele**, Laurance S. Rockefeller Professor of Sociology and International Affairs, Princeton University

In the middle of 1989, Francis Fukuyama famously pronounced “the end of history.” It was an exaggeration even then, but it has become a cautionary tale now. As he wrote, one state after another in Eastern Europe was throwing off its Soviet past and hurtling toward a liberal

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constitutional and democratic future. Following two “waves” of prior democratization in Southern Europe and Latin America, the changes in Eastern Europe heralded a world in which liberal constitutionalized democracies became the international norm. **As one newly liberated people after another became able to chart their own futures, they seemed to converge on a common model of governance: Liberal. Democratic. Constitutional.**

Of course, we all knew then — and we know better now — that history never stops. At any given historical moment, it is all too easy to imagine that we stand at the end of a grand narrative that has led to us. But if the “end of history” were ever plausible, we are no longer in that moment.

Today, around the world, constitutional democracy is taking a hit from charismatic leaders who promise to not to play by the old rules. But such hits have been long foretold. In one constitutional democracy after another, citizens have grown increasingly discontent with their political institutions. This discontent is particularly pronounced in countries that were clobbered by the global financial crisis of 2008. But while the Great Recession made matters worse, the number of countries that could call themselves democracies in good standing was already dropping before the economic crisis hit. Democratic malaise may have economic correlates, but the causes go beyond economics. Something bigger is going wrong with constitutional democracy.

One particular dynamic within the phenomenon of democratic decline that has so far attracted little attention: the systematic disabling of checks and balances in constitutional orders by a new generation of elected but autocratic leaders. While there is an ongoing debate about the predicates and even the existence of democratic decline, not all democracies fail because they are weakened by exogenous change. **Some constitutional democracies are deliberately hijacked by clever new autocrats who undermine constitutionalism by claiming the legitimacy of a democratic mandate to rewrite the constitutional rules.**

Buried in the well-known story of democratic decline, then, is a less well understood tale of constitutional malice. New autocrats win elections and then launch legal reforms that remove the checks on executive power, limit the political opposition, abolish media pluralism, crush civil society institutions and eliminate the independence of the crucial accountability institutions. Because they push their illiberal measures with electoral backing and because they use constitutional or legal methods to accomplish their goals, **the new autocrats can hide in the pluralism of legitimate legal forms.**

Constitutional democracy is indeed a pluralistic practice. There is wide but justifiable variation in the institutions and substantive rules that one can find among constitutional-democratic states. Within those legitimate variations, some configurations of these institutions and rules prove toxic – and the new autocrats are discovering how to use apparently badly intersecting constitutional practices for unconstitutional ends. Sometimes, autocratic legalists scan the horizon for the worst practices from good states and adopt them. Because the practices are from good states, **autocrats can claim double standards if they are criticized.** Practices like gerrymandering, proroguing parliaments, engaging in indiscriminate surveillance of populations and entrusting judicial appointments to political officials create worries in good states but can kill off constitutionalism in autocratic states. When electoral mandates and constitutional/legal changes are used in the service of an illiberal agenda, I call this phenomenon “autocratic legalism.”

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Hungary, Russia, Venezuela, Turkey and Poland provide the leading cautionary examples of autocratic legalism. In these states, Viktor Orbán, Vladimir Putin, Hugo Chávez, Recep Tayyip Erdoğan and Jaroslav Kaczynski came to power through elections and then used fundamental legal change to entrench themselves. Watching these men come to power and entrench themselves is like watching the same movie over and over.

Let me provide some examples of how constitutionally destructive tools are developed by autocratic legalists and then passed on. Hungarian Prime Minister Orbán learned from his Turkish counterpart Erdoğan how to capture the Constitutional Court and confuse critics by increasing the number of judges on the Constitutional Court while simultaneously expanding the Court's jurisdiction to handle many more (politically insignificant) cases. Adding more judges to a court could be viewed as supporting it (by enabling the court to handle the heavier caseload) or as destroying it (through court packing). In both Turkey and Hungary, **expanding the jurisdiction of the court served as cover for adding to the court judges who then approved all of the government's later consolidations of power.** After Orbán neutralized the Hungarian Constitutional Court, he then captured the ordinary judiciary by lowering the judicial retirement age, removing most of the court leaders in a civil service judiciary in which the oldest judges held the most crucial positions and replacing them with judges more to his liking.

The identical program was in turn adopted by Egyptian leader Mohamed Morsi one year later.

Orbán and Morsi had a cover: Given how many countries had raised the retirement age in recent years, it was hard to articulate legally what was wrong (or different) about lowering the retirement age unless one simply attributed bad intent to the leaders. These two experiments in judicial capture might have been coincidental occurrences; perhaps autocratic minds just think alike. But high-level ministerial meetings between the key officials of these governments (for example, reciprocal visits of justice ministers just before the tactic was used in the second country) suggest that the ideas were deliberately discussed and transferred. There are many more examples like this, in which a legal change evades criticism, damages constitutionalism and then migrates.

To understand why this is happening, we might first ask: Why are the new autocrats winning elections? Autocratic legalism occurs not because citizens fail but because elites do. When autocratic leaders win elections, it is often because voters were removing prior corrupt elites in a context when voters had few reasonable choices. The new autocrats emerged as candidates as the result of conflicts between old elites or breakdowns in party systems. Traditional parties have been losing support and the elites who once ran them fail to agree on solutions because a momentous political shift is occurring in which **the left/right political spectrum is being replaced by a global/local political spectrum.**

The local side of the spectrum emphasizes the exclusiveness of community, importance of loyalty and distinctive values; the global side emphasizes global interconnectedness, cosmopolitanism and universal values. The shift to a new political order opens fissures in the political space through which harmful choices are offered to publics. (Think of Donald Trump in the US and Brexit in the UK, both choices that resulted from civil wars in the center-right parties of each country, conflicts that occurred when the nationalists and the globalists parted company.) I argue that "populism" is not the prime mover in the rise of autocratic legalism, but the inability of elites to adapt to the new political order is.

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"The purpose of the present paper is threefold. First, my ambition is to improve the analytical framework that is used to assess the legitimacy of the European Court of Human Rights. The Court's authority can neither be established nor refuted by a single master-argument. Instead,... [See more](#)



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How do the new autocrats consolidate their power? The new autocrats speak the language of democracy and use the tools of constitutionalism. They tout their electoral mandates and use the law to entrench themselves. Their methods include capturing judiciaries, rigging elections, reducing parliaments to rubber stamps, denigrating expertise, destroying independent accountability institutions, and entrenching illiberal constitutional forms. But because they hide behind constitutionalism and democracy, the damage they do is hard to see before it is too late.

How do the new legal tools circulate? There is no "Illiberals International" to pass on worst practices; instead tactics seem to be transferred in bilateral meetings between states. Allied states (like Hungary and Poland or Venezuela and Ecuador) share more of their ideas than do ideologically dissimilar states. But the new autocrats are generally ideological pragmatists who borrow (and pass on) techniques outside their ideological circles if those techniques will help other autocrats consolidate power.

Why have international observers and transnational organizations been slow to react?

Constitutional assessment typically occurs through a focus on one institution and/or rule at a time and the new autocrats have found ways to befuddle the system through combinations of acceptable forms that have toxic interaction effects when linked. Unless the critics start to see constitutional capture as a systemic phenomenon, they will miss what is happening until it is too late.

What can be done to restore liberalism in illiberal states? If citizens reject autocratic legalism, they can be empowered to overcome it. The new autocrats can be un-entrenched if transnational institutions, NGOs and liberal states provide support for citizens in these constitutionally captured states to restore properly democratic and constitutional institutions. We should use the normative standard of a "self-sustaining democracy" to assess when an autocrat is endangering a constitutional order and also when citizenries have been adequately empowered to take back their constitutional systems again.

« Populist Constitutionalism? (5): Whence the Populists Rise in the East? Lessons for Democratisation and Constitutional Theory (<https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-5-whence-populists-rise-east-lessons-democratisation-constitutional-theory/>) »

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