AN INTRODUCTION TO ABUSIVE LEGALISM

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“For my friends, anything. For my enemies, the law.”¹

LAW IN SERVICE OF AUTHORITARIANISM

Under the current international order, the three pillars of rule of law, democracy, and human rights have assumed particular importance.² Despite persistent disagreement about what they require,³ or even their universality, they are frequently invoked by governments and non-governmental actors, and are viewed as markers of a regime’s legitimacy at home and abroad.

This orthodoxy poses a problem for authoritarians and would-be authoritarians seeking to acquire and maintain political power. With the end of the Cold War, the scope for coups and “self-coups” has diminished.⁴ Other tools in the authoritarian arsenal – overt human

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1 Attributed to former Peruvian president Óscar Benavides.

2 See, e.g., Mattias Kumm, *Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law*, 14 INT’L J. CONST. L. 697 (2016); but see Neil Walker, *The Return of Constituent Power: A Reply to Mattias Kumm*, 14 INT’L J. CONST. L. 906 (2016); Mattias Kumm, *Constituent Power, Boundaries and Identity: On the Justificatory Depth of Constitutionalism – A Rejoinder to Neil Walker*, 14 INT’L J. CONST. L. 914 (2016).

3 See, e.g., Christopher May, *The Rule of Law as the Grundnorm of the New Constitutionalism*, in *NEW CONSTITUTIONALISM AND WORLD ORDER* 63 (Stephen Gill & A. Claire Cutler eds., 2014).

4 Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCR. 5, 6–7 (2016).

rights abuses, constitutional changes to protect incumbent power, or wholesale departures from legality – are also becoming more conspicuous, costly (especially in terms of reputation), and unwieldy.

I hypothesise that some autocrats have responded to growing domestic and international scrutiny of authoritarian tactics by turning to sub-constitutional public law, or to private law.⁵ By using “ordinary” law in ways that seem consistent with formal and procedural guarantees associated with the rule of law, they can nonetheless frustrate such guarantees and reinforce their own position, while also avoiding drawing unfavourable attention to their consolidation of power. I refer to this phenomenon as “abusive legalism.”⁶

I argue that abusive legalism has the potential to be a much more potent tool for maintaining political incumbency, particularly in the hands of semi-authoritarian regimes, than overtly illiberal or anti-democratic conduct, for two reasons. First, because it uses (or abuses) “ordinary” law rather than constitutional law, abusive legalism is less likely to draw adverse scrutiny from international observers, or from domestic civil society. Second, abusive legalism can be used to encourage clientelism and undermine the ability to engage in private ordering. It therefore has the potential to create far more pervasive

⁵ See Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1680 (2015); Sujit Choudhry, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon and David Landau*, 15 INT’L J. CONST. L. 826, 827 (2017).

⁶ See generally Martin Krygier, *The Rule of Law: An Abuser’s Guide*, in ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 129 (András Sajó ed., 2006); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013) (on the language of “abuse”).

restrictions on individual liberty than extra-legal repression or overt constitutional change.⁷

This project has three main objectives:

- (1) To explain abusive legalism and offer a causal explanation for its emergence.⁸ In that connection, I will consider how authoritarian regimes have responded to rule of law promotion and critically evaluate rule of law promotion programmes. I will also test this theoretical framework, with reference to Hong Kong and Singapore;⁹
- (2) To create a taxonomy of specific abusive legalist tactics, so that such tactics can be better explained and understood; and
- (3) To develop a normative critique of abusive legalism based on a relatively modest conception of the rule of law. Existing normative critiques of authoritarianism have largely focused on democracy and human rights, rather than on departures from the rule of law, or view rule of law through a distinctly liberal democratic lens. In light of the prevalence of professed commitments to the rule of law, a normative critique based on rule of law violations will be more difficult for authoritarians to answer than one based on human rights violations of anti-democratic conduct.

⁷ See page 24, *infra*.

⁸ See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 131–32 (2005).

⁹ See page 30, *infra*.

SITUATING ABUSIVE LEGALISM

This Part lays out the theoretical framework of abusive legalism, as well as how it relates to existing literature on the rule of law, electoral authoritarianism, authoritarian constitutionalism, and populist regimes.

The Language of “Abuse”

The language of “abuse” in connection with the rule of law can bear several meanings: one can “abuse” rule of law by deriding it, by doing harm to it, by misusing it, or by invoking it to lend legitimacy to other nefarious practices.¹⁰

For the purposes of this project, I am concerned with a particular subset of “abuse”: practices that Krygier would describe as harming, or misusing, the rule of law. Such practices involve not merely the invocation of law or rule of law, but the *application* of law. They differ from the invocation of “rule of law” to cloak wholly arbitrary conduct; in the latter situation, there cannot be said to be “legalism” at all.¹¹

Although the term “abusive legalism” presupposes the presence and exercise of law, that exercise is also improper or defective in some way. I argue that abusive legalist practices are ultimately inconsistent with the rule of law, either because on closer examination they are lacking in certain formal or procedural attributes of legality, or because they frustrate the underlying purpose of having the rule of law in the first place.

¹⁰ Krygier, *supra* note 6, at 135–36.

¹¹ *Id.* at 138 (noting that in such situations rule of law is “not misused, for it is not used at all”).

Distant Antecedents of Abusive Legalism

The idea that laws and legal procedures might be used – or abused – to serve partisan political ends is not novel. Previous academic work includes (for instance) studies of the legal systems of Nazi Germany and East Germany.¹² However, many such studies have been descriptive historical accounts, that say relatively little about how such practices might be organised into a more generalisable framework. In addition, accounts of abusive legalist practices from an era predating globalisation will necessarily have much less to say about how such practices evolve in response to criticisms based on international norms.

*Abusive Legalism, Electoral Authoritarianism, and Authoritarian
Constitutionalism*

The idea that authoritarian regimes seek to exploit the legitimacy conferred by appearing to uphold democracy, human rights, and the rule of law is not new.¹³ The literature on electoral authoritarianism, for

¹² See, e.g., ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (E.A. Shills trans., 2d ed. 2017); INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1992); DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS (Christian Joerges & Navraj Singh Ghaleigh eds., 2003); MICHAEL STOLLEIS, *A HISTORY OF PUBLIC LAW IN GERMANY 1914–1945* (Thomas Dunlap trans., 2004); INGA MARKOVITS, *JUSTICE IN LURITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY* (2010).

¹³ For present purposes, I propose to adopt a relatively loose, colloquial definition of the term: rule of law is “legitimate” in that governmental conduct seen to be consistent with the rule of law is viewed as more normatively desirable (or, at the very least, insulated from criticism) by domestic and international actors. Although this is a relatively loose definition of “legitimacy,” the concept is only relevant to this project insofar as it explains *why* a regime might choose to engage

instance, describes the ways in which authoritarians have sought to do violence to, or to misuse, democracy.

The central insight behind electoral authoritarianism is that regimes should be arranged on a spectrum ranging from liberal democracies to politically closed authoritarian regimes.¹⁴ “Electoral authoritarian” or “competitive authoritarian” regimes exist in the middle of this spectrum.¹⁵ In such regimes, incumbents manipulate formal democratic institutions to give themselves a systematic political advantage, yet cannot abolish these formal institutions or reduce them to “mere façades.”¹⁶ The extent and methods of manipulation may vary widely among electoral authoritarian regimes,¹⁷ but one common thread unites them: a fundamental tension between incumbents’ interest in remaining in power, and the need to retain legitimacy by retaining the formal trappings of periodic elections.¹⁸ Similar themes also emerge in more recent studies of populist regimes, such as Hungary under Orbán and Turkey under Erdoğan.¹⁹

There is also a growing body of work on authoritarian

in abusive legalism. As I am more concerned with explaining *how* abusive legalism operates and interacts with other phenomena, engaging in the debate about what makes a political regime legitimate is outside the scope of this project.

14 See, e.g., Larry Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCR. 21 (2002).

15 See also SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* ch. 11 (2015); Sujit Choudhry, “*He Had a Mandate*”; *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1 (2009) (on “dominant-party democracies”).

16 See, e.g., Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCR. 51 (2002).

17 See, e.g., Andreas Schedler, *The Menu of Manipulation*, 13 J. DEMOCR. 36 (2002).

18 Levitsky & Way, *supra* note 16, at 59; Schedler, *supra* note 17, at 36–37.

19 JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 6 (2016).

constitutionalism that addresses similar phenomena in the context of human rights. In particular, comparative constitutional scholars have grappled with *why* autocrats might wish to profess protection for substantive rights that they have no intention of guaranteeing in practice.²⁰ One possible answer is that the formal trappings of rights protection have legitimating effects. Law and Versteeg conjecture that civilian electoral authoritarian regimes, which (unlike theocratic or monarchic regimes) cannot invoke traditional or charismatic authority, instead turn to professing rights commitments as a way to improve domestic rational-legal legitimacy.²¹

Although electoral authoritarianism and authoritarian constitutionalism have become more prevalent, that very prevalence creates limits. In particular, as such practices become better understood, they are less likely to pass unnoticed. The growing interest in such phenomena amongst academics, NGOs, and (inter-) governmental organisations may herald a shift towards less detectable methods to retain autocratic power.

Are Abusive Legalists More “Sincere”?

One possible point of distinction between abusive legalism on the one hand and instances of electoral authoritarianism and authoritarian constitutionalism on the other is the extent to which

²⁰ See, e.g., CONSTITUTIONS IN AUTHORITARIAN REGIMES ch. 1 (Tom Ginsburg & Alberto Simpser eds., 2013).

²¹ See David S. Law & Mila Versteeg, *Constitutional Variation Among Strains of Authoritarianism*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 165 (Tom Ginsburg & Alberto Simpser eds., 2013).

practitioners of these respective strategies genuinely believe in the underlying norm, rather than engaging in cynical exploitation of the norm.

There is a superficial attraction to this argument. As noted elsewhere in this paper, professions of respect for – and adherence to – the rule of law are more widespread than they are for human rights and democracy.

Nonetheless, I contend that the argument that abusive legalists are more likely to believe that their conduct is consistent with the rule of law is neither warranted nor as important as might be supposed. First, one has to ascertain *whose* beliefs are relevant; in a modern administrative state, there may be dozens of actors whose beliefs as to what they are doing might be said to matter. Second, even if one can pin down whose beliefs ought to be examined, it is likely that any particular set of abusive legalist (or, for that matter, electoral authoritarian or authoritarian constitutionalist) practices will be animated by a combination of motivations. Third, in the absence of evidence such as cabinet records or interviews with former officials, it is unlikely that anyone can reach a clear conclusion as to the genuineness of such professed beliefs. The notion that autocratic legalists genuinely believe in the “rule of law” is therefore unverifiable, and does not provide a sound basis to distinguish autocratic legalism from other authoritarian practices.

Abusive Legalism and “Autocratic Legalism”

More recent work has adopted terminology reminiscent of abusive legalism. Kim Lane Scheppele and Javier Corrales have both used the term “autocratic legalism” to describe a series of tactics used by electoral authoritarian regimes,²² although they define the term in different ways. Scheppele defines autocratic legalism as the use of electoral mandates and constitutional or legal changes in service of an illiberal agenda;²³ Corrales instead refers to autocratic legalism as “the use, abuse, and non-use... of the law in service of the executive branch.”²⁴

I argue that both of these definitions fall wide of the mark in describing abusive legalism. Scheppele’s definition continues to focus largely on constitutional changes, as evidenced by her concern with how autocratic legalism undermines constitutionalism.²⁵ As a result, her account has much less to say about other tools that “hide in the pluralism of legitimate legal forms,” but that are also arguably inconsistent with a formal or procedural account of the rule of law.²⁶

Corrales’ definition is also deficient in two ways. First, in referring to “the use, abuse, and non-use of the rule of law” in service of

22 Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCR. 37 (2015); Kim Lane Scheppele, *Populist Constitutionalism? (6): Kim Lane Scheppele on Autocratic Legalism*, Constitutionalism and Politics (Nov. 16, 2017), <https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/>.

23 Scheppele, *supra* note 22.

24 Corrales, *supra* note 22, at 38.

25 See also Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (Or How to Build a Constitutional ‘Democratorship’ in Plain Sight)*, 7 U.C. IRVINE L. REV. (forthcoming) (focusing on “constitutional worst practices”).

26 Scheppele, *supra* note 22.

the executive, Corrales conflates “law” (or instruments purporting to be “law”) with “the rule of law,” without further explanation. Second, the taxonomy of “use, abuse, and non-use” is too broad to provide a useful framework for analysis of abusive legalist tactics.

Abusive Legalism and “Stealth Authoritarianism”

Although the terminology differs, “stealth authoritarianism” overlaps considerably with abusive legalism. In his article coining the term, Ozan Varol argued that regimes may adopt “stealth authoritarianism” rather than “transparently authoritarian” measures as a reaction to democracy-promotion programmes.²⁷

I depart from Varol’s account in three respects. First, Varol does not distinguish between rule-of-law-promotion programmes and democracy-promotion initiatives.²⁸ One possible reason for this is that such programmes can be – and, in the case of the United States, have been – tightly linked.²⁹ Nonetheless, I argue that rule of law promotion should be disentangled from democracy promotion as an impetus for abusive legalism. Authoritarian practices merit concern not merely because they may be anti-democratic or illiberal, because they are inconsistent even with the formal and procedural attributes of the rule of law.

Second, and in a related vein, Varol focuses on the anti-

²⁷ Varol, *supra* note 5, at 1718–41; *see also* Steven Heydemann, *Upgrading Authoritarianism in the Arab World* (Brookings Institution), Oct. 2007.

²⁸ *See, e.g.*, Varol, *supra* note 5, at 1676 (referring to “the implementation of democratic laws, constitutions, and legal institutions”).

²⁹ *Id.* at 1725–27.

democratic aspects of stealth authoritarianism. Although undermining democratic norms and civil and political rights are important objectives for would-be authoritarians, focusing on these two areas may conceal other ways in which political incumbents can undermine opposition. In particular, it obscures the extent to which the state can interpose itself into various spheres of private life in ways that compel dependence on the state.

Third, Varol's account considers discrete tactics of stealth authoritarianism.³⁰ I aim to categorise instances of abusive legalism within a more systematic framework.

Abuse and Measurements

The common patterns of "abuse" in abusive legalism, electoral authoritarianism, and authoritarian constitutionalism are also linked to the role of measurements and international rankings in global governance. Such rankings are frequently "incoherently defined, anchored in confused and untested theories, measured idiosyncratically, and subject to manipulation by both the raters and the rated."³¹ Jack Snyder and Alexander Cooley point to the failure of ratings systems to give a coherent account of what attribute is being rated, as well as to the

30 *Id.* at 1686–87 (namely [1] judicial review as a means of consolidating power; [2] use of defamation law to induce self-censorship; [3] electoral laws as a means of disenfranchisement; [4] use of non-political crimes against political opponents; [5] use of internationally backed institutions against dissidents; and [6] the abuse of democratic and rule-of-law rhetoric).

31 Jack Snyder & Alexander Cooley, *Conclusion – Rating the Ratings Craze: From Consumer Choice to Public Policy Outcomes*, in *RANKING THE WORLD: GRADING STATES AS A TOOL OF GLOBAL GOVERNANCE* (Alexander Cooley & Jack Snyder eds., 2015).

use of rankings as a substitute for public policy judgments, as particularly troubling developments.³² This project aims to add to the existing critical examination of governance rankings by examining the extent to which shortcomings in rule of law benchmarks have created conditions in which abusive legalism can flourish.³³

ABUSIVE LEGALISM AND THE RULE OF LAW

Abusive legalism entails the use of sub-constitutional, “ordinary” law in ways that appear to be consistent with formal and procedural aspects of rule of law, but frustrate the underlying objectives of having rule of law in the first place. This part therefore briefly outlines the relationship between abusive legalism and the rule of law.

Why Focus on Rule of Law?

Although abusive legalism frequently serves illiberal or anti-democratic ends, I intend to focus primarily on the relationship between abusive legalism and the rule of law, for two reasons. First, rule of law promotion is big business. A plethora of bilateral and multinational donors fund rule of law promotion programmes;³⁴ in 2006 the World Bank alone spent US\$4.6 billion funding “governance and rule of law programs.”³⁵ Despite this, there has been – until relatively recently –

³² *Id.*

³³ See Scheppele, *supra* note 25.

³⁴ STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW 6–9 (2011).

³⁵ *Id.* at 131–32.

little critical reflection regarding *what* “rule of law promotion” ought to be promoting,³⁶ or whether such promotion has been effective.³⁷

Second, existing normative critiques of authoritarian practices have largely focused on democracy and human rights, rather than on departures from the rule of law. To the extent that such critiques refer to the rule of law, they imbue it with liberal democratic content.³⁸ Even authoritarian regimes overtly hostile to democracy and human rights as standards of governance are much slower to express opposition to the rule of law.³⁹ Criticisms of abusive legalism that focus less on substantive compliance with democracy and human rights will therefore be much more difficult for authoritarians to answer.

³⁶ See *id.* at xiii–xiv.

³⁷ See, e.g., Michael Zurn et al., *Introduction: Rule of Law Dynamics In an Era of International and Transnational Governance*, in *RULE OF LAW DYNAMICS IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 1, 2 (Michael Zurn et al. eds., 2012) (citing numerous expressions of scepticism); HUMPHREYS, *supra* note 34; *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., 2010).

³⁸ See, e.g., *Eroding Checks and Balances: Rule of Law and Human Rights Under Attack in Poland* (Human Rights Watch), Oct. 2017 1–3 (only two out of seven problem areas relate strictly to rule of law).

³⁹ See, e.g., BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 2–3 (2004); Landau, *supra* note 6, at 247–48.

The Literature on “Rule of Law”

There are long-running and fundamental disagreements about what the “rule of law” is, to the extent that Waldron has argued that it is an “essentially contested concept.”⁴⁰ This project aims to bridge the gap between theoretical discussions of the rule of law, and empirical work on measuring the rule of law and detecting instances in which it has been abused.⁴¹

There has been limited theoretical discussion of how conceptions of the rule of law can be applied to the modern administrative state.⁴² In his discussion of rule of law and public administration, Waldron notes that existing analyses of the rule of law have a distinct private law bent.⁴³ Nonetheless, he suggests, “it is possible to construct a moderate understanding of the rule of law that takes seriously the mission of the modern administrative state.”⁴⁴ Such an understanding, Waldron argues, would start from Lon Fuller’s principles of the “inner morality of law”: that “laws must be general, prospective, public, clear, consistent, practicable, and stable.”⁴⁵ It should also avoid ideological assumptions,

40 Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 L. & PHIL. 137 (2002).

41 See, e.g. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 1–3 (2016) (on the disconnect between theoretical and empirical literature).

42 But see Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, SSRN Scholarly Paper ID 3050722 (Social Science Research Network), Oct. 10, 2017.

43 Jeremy Waldron, *The Rule of Law in Public Law*, in *THE CAMBRIDGE COMPANION TO PUBLIC LAW* 56, 56 (Mark Elliott & David Feldman eds., 2015).

44 *Id.* at 71.

45 *Id.* at 62; LON L. FULLER, *THE MORALITY OF LAW* ch. 2 (2d ed. 1969).

such as robust protections for property rights and a relative paucity of commercial regulation.⁴⁶

Conversely, empirical and policy literature on rule of law promotion typically fails to articulate a coherent notion of the rule of law. Waldron offers, as an illustrative example, the conflation of “rule of law” with private property rights and hostility to business regulation.⁴⁷ The main reason rule of law promoters offer for this conflation is one external to the criteria of legality: it makes a jurisdiction attractive to foreign investment.⁴⁸ This lack of clarity can extend even to ideas that might be thought to be self-evidently part of the rule of law: after examining the EU Commission’s reports into the judicial independence of Central and Eastern European countries prior to EU accession, Daniel Smilov concluded that the Commission had no coherent theory of judicial independence.⁴⁹

A major consequence of the failure to frame the rule of law with adequate clarity is that rule of law promoters frequently resort to “checklists,”⁵⁰ of highly eclectic character. The World Bank’s quantification of rule of law, for instance, is created from a melange of

46 Waldron, *supra* note 43, at 60–61.

47 *Id.* at 60–62.

48 *Id.* at 61.

49 Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, in *SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENT FOR THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS* 313 (Wojciech Sadurski et al. eds., 2006).

50 *Id.* at 326; Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 *GOVERNANCE* 559 (2013); Krygier, *supra* note 6, at 141–43.

criteria ranging from intellectual property protection to “access to water for agriculture.”⁵¹

Such checklists have the effect of conflating the existence of the rule of law with the existence of certain specific norms or institutions. They also lead to a focus on how such norms or institutions operate in isolation, rather than how they function as *systems*.⁵² As Varol and Scheppele have separately observed, a hallmark of authoritarian constitutional regimes is that they frequently adopt measures that appear to have analogues in jurisdictions with unimpeachable liberal credentials.⁵³ Yet the context in which such measures operate – and the intended results – differ considerably.

One might expect observers and critics of electoral authoritarianism and authoritarian constitutionalism to articulate clearer conceptions of the rule of law. However, this theoretical discussion has been largely absent from current writing in the field. Jothie Rajah’s study of Singapore, for instance, purports to be a study of “how the ‘rule of law’ is dismantled.”⁵⁴ Yet her discussion of *what* is being “dismantled” is limited to a relatively superficial distinction between “thick” and “thin” conceptions.⁵⁵ In a similar vein, Javier Corrales’ discussion of “autocratic legalism” in Venezuela refers to “use,” “abuse,” and “non-use”

51 GOWDER, *supra* note 41, at 2.

52 Scheppele, *supra* note 50.

53 Varol, *supra* note 5, at 1734; Scheppele, *supra* note 50, at 561; *see also Hungary: Democracy Under Threat* (FIDH), Nov. 2016.

54 JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 10 (Revised ed. 2012).

55 *Id.* at 37–42, 53.

of the law to serve autocratic ends – yet says relatively little about what “normal” rule of law might look like.⁵⁶

One common distinction drawn in such literature is that between “rule of law” and “rule *by* law.”⁵⁷ The latter is typically described as a form of instrumental use of legal authority to serve political ends.⁵⁸ However, as a descriptive device, “rule by law” is less than illuminating. Insofar as “rule by law” is being used as an allegation that the legal system in question does not protect certain substantive rights, as Rajah uses it,⁵⁹ it faces two objections: it presupposes a “thick” conception of the rule of law that encompasses certain substantive rights; and it assumes that a system of rules and legal procedures, no matter how illiberal in content, cannot in some way serve the interests of the governed.⁶⁰ If, however, “rule by law” is being used to refer to selective application of the law, then it is difficult to see how the term can encompass *departures* from law (in the form of refusal to apply the law uniformly).

A Working Definition of “Rule of Law”?

For the purposes of this project, I do not intend to adopt a canonical definition of the rule of law – for the reasons outlined above, such an enterprise may well be impossible. Instead, I propose to adopt a

⁵⁶ Corrales, *supra* note 22.

⁵⁷ RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008); Waldron, *supra* note 43, at 69; RAJAH, *supra* note 54, at 3–4.

⁵⁸ Waldron, *supra* note 43, at 69; RAJAH, *supra* note 54, at 3–4.

⁵⁹ RAJAH, *supra* note 54, at 4.

⁶⁰ See, e.g., Waldron, *supra* note 43, at 70–71.

conception of the rule of law that focuses on formal and procedural elements that are necessary (but may not be sufficient) for the rule of law to exist. I do so for two reasons. First, as noted above, existing critiques of authoritarianism have largely addressed democracy and human rights, either alone or with rule of law playing a secondary role. Viewing authoritarian acts through the lens of abusive legalism sheds light on a separate facet of authoritarian conduct that existing critiques tend to downplay. Second, demonstrating that abusive legalism is inconsistent with even a relatively modest conception of the rule of law will show that it cannot be consistent with a “thicker” definition either.

My starting point will be Fuller’s “desiderata” of legality: (1) generality; (2) promulgation; (3) avoidance of retroactive rules; (4) clarity; (5) avoidance of contradictions; (6) avoidance of rules demanding the impossible; (7) constancy through time; and (8) congruence between official action and the declared rule.⁶¹

These criteria may appear to be rather modest; one might wonder whether such a conception of rule of law would be sufficiently appealing to warrant defending, let alone provide a basis to critique abusive legalist conduct. However, I argue that a relatively meagre framing of rule of law nonetheless has normative force. In so doing I adopt Krygier’s account of the value of the rule of law in contrast to arbitrary conduct: to lessen the reasonable fear of state oppression, and to provide “stable, reliable, mutually comprehensible cues for social orientation and co-ordination.”⁶² The latter idea in particular – that the

⁶¹ FULLER, *supra* note 45, ch. 2.

⁶² Krygier, *supra* note 6, at 133.

virtue of the rule of law is that it facilitates private ordering and recognises individuals as autonomous agents – has a long tradition in legal theory, with Raz and Hayek being two of its best-known proponents.⁶³ Violations of the rule of law (whether through abusive legalism or otherwise) do harm by creating uncertainty, frustrating individual expectations, or both.⁶⁴

THE FUNCTIONS OF ABUSIVE LEGALISM

As noted above, abusive legalism represents one solution to the puzzle of how to simultaneously retain political power and the appearance of respecting the rule of law. This Part discusses in further detail some of the functions of abusive legalism.

Keeping Up Appearances

Abusive legalism is about keeping up appearances: how can one maintain the *appearance* of a liberal, democratic, rule-of-law state but frustrate the *substantive* fulfilment, or underlying objectives, of these norms of governance?

This desire to maintain formal characteristics associated with international norms of governance creates internal tensions within an authoritarian regime. The most obvious form of tension is that between maintaining the *appearance* of a particular governance standard (such as

⁶³ See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 220 (1979); F.A. HAYEK, *THE ROAD TO SERFDOM* 75–76 (Routledge Classics ed. 2001); HENRY HART ET AL., *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 183 (1995) (“private ordering is the primary process of social adjustment”).

⁶⁴ RAZ, *supra* note 63, at 221–22.

rule of law) and undercutting its *substantive* fulfilment or underlying objectives. On the one hand, the political imperative to remain in power means that authoritarian rulers have an incentive to adopt repressive measures that may be entirely inconsistent with democracy, human rights, or the rule of law (or a combination of the three). On the other, the costs of open authoritarianism, or of significant and systematic departure from the written constitution, may be too high.⁶⁵ Such costs may take the form of domestic or international opprobrium, or a diminution in the governing elite's ability to communicate and coordinate.⁶⁶

However, tensions occur not merely “vertically” within one norm of governance, but “horizontally” between different norms. For example, meaningful democratic contestation presupposes the ability to exercise civil and political rights, such as the freedom of expression.⁶⁷ Thus, an authoritarian who wishes to maintain the appearance of democracy must also profess to protect (for instance) freedom of expression. This creates a problem: a ruler may extend such protections to everyone – thereby introducing the political uncertainty she hoped to avoid in the first place. Alternatively she could withhold such protections from everyone – an obvious departure from the *de jure* protections that would draw domestic and international censure. A

⁶⁵ See, e.g., MÜLLER, *supra* note 19, at 50; Levitsky & Way, *supra* note 16, at 55; Adam Przeworski, *Ruling Against Rules*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 21 (Tom Ginsburg & Alberto Simpser eds., 2013) (noting pithily that “Ruling against rules has its costs”).

⁶⁶ Przeworski, *supra* note 65, at 21 (writing about the Polish Constitution of 1952, which bore no relation to *de facto* political arrangements).

⁶⁷ See, e.g., ISSACHAROFF, *supra* note 15, at 243.

more feasible solution is to apply the law selectively, and to conceal the ways in which it is applied selectively. Put another way, the pressure to keep up the appearance of civil and political rights leads directly to abusive legalism.

Removing Rallying Points

A related function of abusive legalism, but one that bears mentioning separately, is that it operates in a way that makes it more difficult to marshal domestic or international opposition. In the Hungarian context, for example, a lowering of the judicial retirement age – that just happened to open the opportunity to pack the courts – seems less open to immediate objection than an overt purge or a constitutional change to methods of judicial appointment.⁶⁸ By disguising sites of constitutional contestation as arguments about (for instance) retirement ages, abusive legalism makes it much more difficult to identify what is wrong with a particular measure, let alone muster domestic or international opposition to it.

Abusive Legalism and the Dual State

The conflict between keeping up the appearance of a rule-of-law state and maintaining political power is not a new one.⁶⁹ Nor is the idea that authoritarians might benefit from maintaining a system of law *in general*. Typical reasons given for the latter are the ability to give

⁶⁸ See Scheppele, *supra* note 22.

⁶⁹ See, e.g., NICCOLO MACHIAVELLI, THE PRINCE 41–42 (Harvey C. Mansfield trans., 2d ed. 1998).

credible commitments to regime supporters and outside creditors,⁷⁰ and the idea that maintaining a system of law will facilitate national prosperity.⁷¹ However, the general desirability of maintaining a system of law comes into conflict with pressures to deviate from legality in particular cases, or classes of cases.

One time-honoured solution is to adopt a “dual state” regime. First formulated by German lawyer Ernst Fraenkel to describe the legal system of Nazi Germany,⁷² the “dual state” metaphor has subsequently been applied to a host of other authoritarian and semi-authoritarian regimes.⁷³ At heart, the dual state contains two components. In the “normative state,” the administrative bureaucracy and judiciary apply, and are bound by, legal norms. By contrast, the “prerogative state” is not subject to any legal restraint.⁷⁴ Crucially, the prerogative state determines which side of the dividing line any particular matter falls under.⁷⁵

At first glance, the “dual state” may seem like an elegant solution: a presumption that legality reigns in all spheres of life, subject to an overriding power to determine whether any particular case will be

70 Roger B. Myerson, *The Autocrat’s Credibility Problem and Foundations of the Constitutional State*, 102 AM. POL. SCI. REV. 125 (2008); Hilton L. Root, *Tying the King’s Hands Credible Commitments and Royal Fiscal Policy during the Old Regime*, 1 RATIONALITY & SOC’Y 240 (1989).

71 See, e.g., *Developing the Rule of Law for Prosperity*, Great Britain China Centre, <http://www.gbcc.org.uk/what-we-do/developing-the-rule-of-law-for-prosperity>.

72 FRAENKEL, *supra* note 12.

73 See, e.g., Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015) (apartheid South Africa); RAJAH, *supra* note 54, ch. 1 (Singapore); EVA PILS, *CHINA’S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE* (2014) (mainland China).

74 FRAENKEL, *supra* note 12, at 57; Tushnet, *supra* note 73, at 438.

75 FRAENKEL, *supra* note 12, at 57.

decided based on political expediency rather than ordinary law. However, the dual state is subject to what Mark Tushnet describes as the “Niemöller problem.”⁷⁶ The dividing line between the normative state and prerogative state is drawn by the latter, and the latter is not bound by any principles governing how that line shall be drawn. As a result, no individual should assume that conduct currently regulated by the normative state will continue to be so regulated. Rather, they should assume that *all* conduct, in *all* spheres of activity, will be subject to the whims of the prerogative state. The “dual state” thus collapses into a single prerogative state, undermining the benefits of maintaining the normative state.

Abusive legalism presents a way to mitigate the Niemöller problem. By obfuscating individual (or even systematic) departures from legality, the applicability, or even the existence, of the prerogative state is obscured from citizens and outsiders – who are in turn less likely to assume that they will be targeted by arbitrary state action.

There is, however, a second way in which abusive legalism can mitigate the Niemöller problem. Tushnet’s account presupposes that dissidents will be confronted by the arbitrary state, rather than the normative state. Rather, it is possible to devise a system in which exemptions act as the default, with the full force of the “ordinary” normative state being reserved for the political opposition.

⁷⁶ Tushnet, *supra* note 73, at 439–40.

Beyond the Dual State: Undermining Private Ordering

A hallmark of contemporary populist and authoritarian regimes is the use of mass clientelism to acquire and maintain popular support.⁷⁷ The creation and maintenance of patronage networks can be seen as tying client to patron in two ways: by encouraging a form of reciprocity, or by instilling a fear in the client that the flow of benefits will cease.⁷⁸

One way in which abusive legalism might function is to encourage widespread clientelism. A regime can create a legal and regulatory environment that is extremely difficult (if not impossible) to comply with in practice,⁷⁹ thereby requiring a clientelist relationship with the government in order to engage in daily life.⁸⁰ Anyone seeking to engage in that endeavour would have to obtain a waiver (tacit or otherwise) from the political incumbent – one that could be denied or withheld at any time as a form of retaliation: “For my friends, everything. For my enemies, the law.”⁸¹ Framing acts such as political purges as campaigns to enforce innocuous-sounding legislation (for instance, cracking down on corruption or tax evasion) means they are less likely to draw adverse scrutiny.

The cultivation of clientelism through abusive legalism has far-reaching consequences. By creating a legal framework which is

⁷⁷ MÜLLER, *supra* note 19, at 46.

⁷⁸ Susan C. Stokes, *Political Clientelism*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE (Robert E. Goodin ed., 2011).

⁷⁹ Recall that the ability of a law to be obeyed is one of Fuller’s eight desiderata. See FULLER, *supra* note 45, ch. 2.

⁸⁰ See MÜLLER, *supra* note 19, at 46 (on mass clientelism by populist regimes).

⁸¹ Attributed to former Peruvian President Óscar Benavides. See Varol, *supra* note 5.

impossible to comply with, a political incumbent can demand that subjects petition for waivers *ex ante*, or threaten the full force of the law *ex post*, in exchange for political fealty. In both cases, all private ordering becomes contingent on an indulgence from the political incumbent.

THE MECHANICS OF ABUSIVE LEGALISM

Actors in Abusive Legalism

An account of abusive legalism must examine the interaction between three sets of actors: foreign actors (including foreign states, transnational bodies, and international NGOs) engaged in rule of law promotion, domestic rule of law advocates (such as bar associations, academics, and domestic NGOs), and authoritarian regimes. Similar interactions have been extensively discussed in the context of human rights compliance.⁸² However, as yet, there has been relatively little discussion of such interactions in relation to rule of law promotion. By focusing on how international “standards” of rule of law are “received and translated at the national level” by both receptive and hostile domestic actors,⁸³ I aim to complement existing critical examinations of rule of law promotion, which have largely focused on the deficiencies in

82 See generally THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999); THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE (Thomas Risse et al. eds., 2013).

83 Randy Peerenboom et al., *Conclusion: From Rule of Law Promotion to Rule of Law Dynamics*, in RULE OF LAW DYNAMICS: IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE 305, 322–23 (Michael Zurn et al. eds.).

such initiatives rather than how these defects have shaped recipient responses.⁸⁴

Considering how abusive legalism might be targeted toward domestic audiences, as well as international audiences, may also help paint a more complex picture than previous discussions of rule of law promotion.⁸⁵ The tactics of abusive legalism might vary depending on audiences: an authoritarian regime might invoke international norms in response to pressure from foreign actors, but resort to nationalist denunciations of foreign “meddling” before a domestic audience. The effectiveness of such tactics might also vary, depending on the target. Abusive legalist measures that might satisfy an external observer, for instance, might not pass muster domestically.

A Cycle of Abusive Legalism

How might abusive legalism function in practice? The “spiral model” of human rights compliance may offer useful insights. It suggests that states that do not comply with human rights norms are socialised to such norms through processes of (1) instrumental adaptation; (2) argumentation; and (3) habitualisation.⁸⁶ These processes involve interactions between the authoritarian regime itself, transnational groups, and domestic opposition. At the conclusion of their study revisiting the spiral model, Risse and Sikkink note that “liberalizing” or “democratizing” countries are more vulnerable to

⁸⁴ See *id.* at 305.

⁸⁵ Cf. HUMPHREYS, *supra* note 34, at 232 (portraying “civil society” as largely passive recipients).

⁸⁶ THE PERSISTENT POWER OF HUMAN RIGHTS, *supra* note 82, at 5–6.

domestic and international demands for human rights change than consolidated autocracies or consolidated democracies.⁸⁷ I argue that a similar claim may be made in respect of rule of law: a combination of internal and external pressure, and the interactions between domestic and foreign actors pursuing rule of law-related advocacy, are most likely to succeed in inducing an electoral authoritarian regime to respect (or give the appearance of respecting) the rule of law.

Drawing in part on the spiral model, I hypothesise that abusive legalism arises in response to a combination of domestic and international pressures in a three-step process:

- (1) International NGOs (INGOs) and foreign governments receive information from domestic actors about domestic repression, either as part of regular rule of law promotion programming or as a result of lobbying. On the basis of that information, INGOs and foreign governments accuse a regime of rule of law violations;
- (2) Domestic civil society activists in turn incorporate international rule of law checklists or rankings into domestic political discourse;
- (3) The regime accused of rule of law violations actively shapes its conduct in response to international and domestic complaints, in order to maintain both political control and domestic and international legitimacy.

The three steps may then repeat themselves in further cycles of abuse and exposure.

⁸⁷ *Id.* at 288.

A Taxonomy of Abusive Legalist Tactics

Thus far I have said relatively little about specific acts, or types of acts, that might be considered to be abusive legalism. A tentative taxonomy of abusive legalist conduct might consist of the following categories:

- (1) **Abusive emulation:** the adoption, combination, or use of legal norms or institutions from other jurisdictions with a recognised track record on rule of law, but doing so in perverse ways;
- (2) **Partisan application:** the application of existing law in a politically partisan manner;
- (3) **Obfuscation:** the concealment of the true purpose of certain legislative or administrative measures;
- (4) **Outsourcing:** the use or co-optation of ostensibly private parties to engage in repressive acts; and
- (5) **Institutional capture:** the co-optation of public institutions for partisan political ends.

RESEARCH METHODOLOGY

This Part sets out my proposed dissertation structure and case studies. It also considers some limitations to my research methods, as well as ways in which I intend to address them.

Structure

Creating the Conditions for Abusive Legalism

This Part will consider the conditions that have given rise to abusive legalism, before moving on to describe mechanisms of abusive legalism. As part of this exercise, I will set out a theoretical framework of “abusive legalism.”⁸⁸

I hypothesise that abusive legalism has arisen as a response to the growing emphasis on “rule of law” by both transnational actors (in the form of rule of law promotion programmes), and by domestic political constituencies. I further posit that abusive legalism exploits three major weaknesses in rule of law advocacy by domestic and international actors: (1) internal incoherence in conceptions of rule of law;⁸⁹ (2) the absence of a clear conception of the end goal of rule of law advocacy;⁹⁰ and (3) a focus on individual norms and institutions as “hallmarks” of the rule of law, rather than on a systemic view of how such norms and institutions interact.⁹¹

After laying out the background to abusive legalism, I will then turn to consider how the interactions between governments, domestic actors, and international actors promotes abusive legalism, and offer a preliminary taxonomy of specific methods of abusive legalism.

⁸⁸ See Krygier, *supra* note 6 (on “abuse” of the rule of law).

⁸⁹ See, e.g., Frank Schimmelfennig, *A Comparison of the Rule of Law Promotion Policies of Major Western Powers*, in *RULE OF LAW DYNAMICS IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 111 (Michael Zürn et al. eds.); Smilov, *supra* note 49.

⁹⁰ Wojciech Sadurski, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 9 (Adam Czarnota et al. eds., 2005) (referring to the demand in Central and Eastern Europe for “normal constitutional rule-of-law,” based on the “[real or imagined] state of affairs in Western Europe or North America”).

⁹¹ Scheppele, *supra* note 50.

Abusive Legalism: Case Studies

In this part I intend to test my theoretical framework empirically by examining the relationships in electoral authoritarian regimes between domestic and international demands for rule of law compliance and political incumbents' desire for legitimacy. I intend to examine Hong Kong and Singapore in depth as case studies. Each jurisdiction is (1) a civilian electoral authoritarian or competitive authoritarian regime (2) that is heavily reliant on "rule of law" as a source of domestic and international legitimacy.

Why select two superficially similar East Asian jurisdictions – both common-law jurisdictions, at that – for examination? Both jurisdictions represent extreme examples of regimes that tout the rule of law as a source of domestic and international legitimacy. In public statements, Hong Kong and Singapore officials routinely emphasise the vital importance of maintaining the rule of law. Hong Kong's then-Secretary for Justice has described it as a "key factor" in the city's success;⁹² Singaporean Prime Minister Lee Hsien-loong characterised the rule of law as a "vital national interest" and "key to Singapore's survival."⁹³ Both jurisdictions also proclaim their connections to universal rule of law principles, and to their common law heritage.⁹⁴

⁹² Rimsy Yuen, *The "One Country, Two Systems" Policy and the Rule of Law in the Hong Kong SAR: The Past 20 Years and the Future* (2017).

⁹³ *Upholding Rule of Law Key to Singapore's Survival: PM Lee*, Channel News Asia (Apr. 1, 2017), <http://www.channelnewsasia.com/news/singapore/upholding-rule-of-law-key-to-singapore-s-survival-pm-lee-8709316>.

⁹⁴ See, e.g., *Home*, Hong Kong Department of Justice, <http://www.doj.gov.hk/eng/index.html>; *The Rule of Law and the Singapore Constitution*, Singapore Supreme Court,

More significantly, Hong Kong and Singapore both perform well on rule-of-law indices despite having illiberal, or electoral authoritarian, tendencies. In the World Justice Project's Rule of Law Index 2016, Singapore and Hong Kong were the highest-placed electoral authoritarian jurisdictions (placing 9th and 16th respectively).⁹⁵ Both jurisdictions have also consistently ranked highly in World Bank rule of law assessments.⁹⁶ Hong Kong and Singaporean officials alike have been keen to draw attention to these rankings.⁹⁷

I intend to confine the temporal scope of this project by adopting a cutoff point of 1990. That year represents an approximate starting point for the current wave of rule of law promotion;⁹⁸ it is therefore a useful starting point from which to examine whether abusive legalism has developed in the way in which I hypothesise.

Hong Kong: "Liberal" Rule of Law Without Democracy

Hong Kong provides an extreme example of a regime that seeks to rely on rule of law to improve its domestic and international legitimacy. In the absence of full electoral democracy, the Hong Kong

<https://www.supremecourt.gov.sg/news/events/magna/the-rule-of-law-and-the-singapore-constitution>.

95 *Rule of Law Index 2016*, World Justice Project, <http://data.worldjusticeproject.org/>.

96 *WGI 2017 Interactive*, World Bank, <http://info.worldbank.org/governance/wgi/#reports>.

97 See, e.g., Rimsy Yuen, Speech by the Secretary for Justice at the Ceremonial Opening of the Legal Year 2016 (2016); RAJAH, *supra* note 54, ch. 8.

98 See, e.g., Thomas Carothers, *Steps Toward Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 327 (Thomas Carothers ed., 2010) (noting developments over "the past twenty years"); Robert Janse, *A Turn to Legal Pluralism in Rule of Law Promotion?*, *ERASMUS L. REV.* 181, 182 (2013) (identifying the late 1980s as the start of the "renaissance" of rule of law promotion).

government frequently touts its compliance with the rule of law, both as a means of justifying its rule domestically and as a way to attract foreign investment.⁹⁹ Non-government actors within Hong Kong, as well as international observers, have shared this preoccupation: the rule of law is a key rallying point for civil society, and is regularly mentioned in reports by foreign governments and NGOs.¹⁰⁰

This emphasis on the rule of law stands in contrast with the political realities of Chinese rule. Even prior to 1997, political jockeying by London and Beijing over the city's legal and constitutional arrangements after the transition of sovereignty raised serious questions about commitment to the rule of law.¹⁰¹ Subsequent events would vindicate these concerns. Protests in 2003 (against proposed national security legislation) and 2014 (against Beijing's refusal to allow Hong Kongers to choose their Chief Executive by universal suffrage) have led Beijing and its agents to become increasingly hostile to political dissent in the territory.¹⁰² Some of this has manifested in outright illegality by

⁹⁹ See, e.g., Yuen, *supra* note 97; Yuen, *supra* note 92.

¹⁰⁰ See, e.g., *Six-Monthly Report on Hong Kong: January to June 2017* (UK Foreign & Commonwealth Office); *Report on a European Parliament Recommendation to the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on Hong Kong, 20 Years After Handover - A8-0382/2017*, European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0382&format=XML&language=EN>; Benjamin Haas, *Hong Kong Human Rights Situation "Worst Since Handover to China,"* GUARDIAN, Jan. 12, 2017, <https://www.theguardian.com/world/2017/jan/12/hong-kong-human-rights-situation-worst-since-handover-to-china>.

¹⁰¹ See, e.g., John McDermott, *The Rule of Law in Hong Kong After 1997*, 19 LOY. L.A. INT'L & COMP. L.J. 263 (1997).

¹⁰² See, e.g., Carole J. Petersen & Alvin Y.H. Cheung, *Academic Freedom and Critical Speech in Hong Kong: China's Response to Occupy Central and the Future of "One Country, Two Systems,"* 42 N.C. J. INT'L L. 1 (2016); Alvin Y.H. Cheung, *Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public*

Chinese state actors, such as the abduction of the management of a Hong Kong-based bookstore that sold gossip books about the Chinese leadership.¹⁰³ However, there are also signs that Hong Kong's legal and administrative institutions are being used to target democratic politicians and activists. Examples range from refusal to allow protest movements and pro-democracy political parties to register as corporations, to the politically selective prosecutions of protesters.¹⁰⁴

Singapore: Rule of Law in an Illiberal "Democracy"

As is the case with Hong Kong, Singapore touts its performance in rule of law and governance ranking tables as a major attraction.¹⁰⁵ As with Hong Kong, part of Singapore's claim to legal legitimacy abroad lies in its claim to be rooted in "common law" and British institutional structures.¹⁰⁶ Yet its government is also a sophisticated practitioner of electoral authoritarianism, using tactics ranging from favourable electoral arrangements and access to state funds, to control of access to media and restriction of the ability to organise protests.¹⁰⁷ Singapore's legal system is also notoriously illiberal, with severe restrictions on (*inter*

International Law, 40 BROOK. J. INT'L L. 465 (2015); *Writing on the Wall: Disappeared Booksellers and Free Expression in Hong Kong* (PEN America), Nov. 5, 2016.

103 *Writing on the Wall: Disappeared Booksellers and Free Expression in Hong Kong*, *supra* note 102.

104 See, e.g., *Hong Kong: Nine Arrested in Authorities' Retaliatory Campaign Against Pro-Democracy Activists*, Amnesty International, <https://www.amnesty.org/en/latest/news/2017/04/hong-kong-authorities-retaliatory-campaign-against-pro-democracy-activists/>.

105 RAJAH, *supra* note 54, at 2.

106 *Id.* at 5–6.

107 See, e.g., Netina Tan, *Manipulating Electoral Laws in Singapore*, 32 ELECTORAL STUD. 632 (2013).

alia) freedom of speech and assembly.¹⁰⁸ These characteristics have prompted Jothie Rajah to point to an apparent paradox: “A regime that has systematically undercut ‘rule of law’ freedoms has managed to be acclaimed as a ‘rule of law’ state.”¹⁰⁹

One possible response to Rajah is to say that there is no paradox at all: that it is possible, as it was in Raz’s hypothetical authoritarian polity, to have rule of law (at least if conceived of in formal and procedural terms) without any commitment to rights or democracy. Rajah herself appears to acknowledge this possibility, noting that authoritarianism is not inherently incompatible with the rule of law.¹¹⁰ Nonetheless, she maintains that the “rule of law” should be seen as including substantive commitments to political liberalism.¹¹¹ The idea that abusive practices in democracy, human rights, and rule of law are mutually reinforcing provides a better solution to this puzzle. Paying lip service to liberalism and human rights while undercutting them in practice, as Singapore does,¹¹² necessitates other moves, such as executive interference in the judiciary.¹¹³ These latter tactics are open to criticism on purely formal or procedural grounds.

Detecting and Countering Abusive Legalism

Electoral authoritarian regimes resort to abusive legalism in order to increase their perceived legitimacy, both domestically and

¹⁰⁸ See, e.g., Tushnet, *supra* note 73, at 400–410.

¹⁰⁹ RAJAH, *supra* note 54, at 3.

¹¹⁰ See *id.* at 8.

¹¹¹ *Id.* at 53.

¹¹² *Id.* at 52.

¹¹³ *Id.* at 46–47.

internationally. However, such a strategy carries the risk that a regime's professed commitment to the rule of law can be turned against it. In this part I will consider whether abusive legalist practices can create weaknesses that would undermine, rather than increase, regime legitimacy. I will also consider how to detect and counter mechanisms of abusive legalism more effectively. I intend to conclude by considering the extent to which the theoretical framework of abusive legalism can be applied to other jurisdictions.

Potential Issues

Specific Phenomena Under Study

I have yet to decide upon the specific instances of abusive legalism which I will examine in this project. At this stage, I intend to draw on one major example of each category of abusive legalism from my preliminary taxonomy above. Based on my review of publicly available information (including news archives, official statements, and court judgments), I believe there will be at least one example of each type of abusive legalism in both jurisdictions to draw upon.

Establishing Causation

Showing a causal link between pressure from foreign governments, international NGOs, and domestic civil society on the one hand and abusive legalist practices on the other is one of the most difficult methodological problems with this project. As noted above, in

the absence of detailed evidence of deliberations within the government under examination, it will be difficult (if not impossible) to pinpoint the motivations behind any particular measure.

I intend to address the question of causation by considering the plausibility of alternative explanations for conduct that might otherwise be viewed as abusive legalism. Although this will not definitively establish a causal link, such a process of elimination is likely to provide the most satisfactory explanation possible on the basis of publicly available evidence.

Generalisability

A consequence of examining only Hong Kong and Singapore is that it is unclear whether my findings can be applied beyond the context of common-law jurisdictions in general, or common-law jurisdictions in East Asia in particular. I acknowledge that the specific methods of abusive legalism that this project will examine may not necessarily exist in civil law jurisdictions, or even in other common law jurisdictions. Nonetheless, I consider it helpful to test the framework of abusive legalism against both jurisdictions, and leave open the possibility of future work to consider its applicability elsewhere.